Stewart, Chapleau, Garrow

THE

GENERAL RULES, AND ORDERS,

OF THE

COURTS OF LAW, AND EQUITY,

OF

THE PROVINCE OF ONTARIO.

PASSED

PRIOR TO THE ONTARIO JUDICATURE ACT, 1881,

AND

NOW REMAINING IN FORCE.

WITH NOTES

BY

GEORGE SMITH HOLMESTED,

(Registrar of the Chancery Division, H. C. J.)

VOL. I.

THE CHANCERY ORDERS.

U. W. O. LAW

J. J. GORMULLY.

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OTTAWA.

PREFACE.

THE changes in civil procedure effected by *The Judicature Act* have had the effect of practically abrogating many of the General Orders and Rules of the former Courts of Law and Equity; at the same time, a great many of those Rules and Orders are still in operation under the new system of practice inaugurated by that Act.

It thus becomes of importance to the practitioner, to ascertain which of the Rules and Orders of the former Courts are still in force; and the object of this work, is to assist him in arriving at a conclusion on that important question.

The first volume contains the Chancery Orders, which appear to be still operative, and in the notes to these Orders will be found references to a great number of Canadian and English cases bearing on their construction, and illustrating the practice under them, together with appropriate references to the changes made in the practice, since the original promulgation of the Orders.

The second volume will contain the Rules of the Courts of Queen's Bench, Common Pleas, and Court of Appeal, together with the additional Rules of the Supreme Court of Ontario, passed since *The Judicature Act* took effect.

Mr. Walter Barwick, a gentleman in extensive practice, has obligingly read the proof sheets of this volume as it passed through the press, and has made some valuable suggestions, which I have gladly availed myself of, and through his vigilance I have also been enabled to correct some few errors which might otherwise have passed unobserved.

U. W. O. LAW

The generous approval which my professional brethren have bestowed on my former literary efforts, leads me to hope that this work, on which much labour has been expended during the past two years, may be found to be of such practical value, as to merit, and receive their approbation.

G. S. H.

OSGOODE HALL,

4th January, 1884.

Stewart, Chrysler & Gormally,
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ADDENDA ET CORRIGENDA.

Page 7, line 15 from top, after 44 L. T. add "N. S."
" 7, " 6 from bottom, after 48 L. T. add "N. S."
" 26, " 19 from top, after 46 L. T. add "N. S."
" 27, " 18 from bottom, " 48 L. T. add "N. S."
" 28, " 5 " " 45 L. T. add "N. S."
" 28, " 23 " " 1883, p. 145, add "*The Hope*, 49 L. T. N. S. 158."
" 40, " 1, for Eq. 30 read "Eq. 20."
" 44, " 9 from bottom, for *Re Bosworth, Howard* v. *Caston*, 45 L. T. 136, read "*Re Bosworth, Howard* v. *Easton*, 45 L. T. N. S. 136."
" 60, " 2 from bottom, for Leggos's read "Leggo's."
" 65, " 3 " top, *Davis* v. *Wickson*, 18 C. L. J. 166, add "but see *Fisken* v. *Chamberlain*, 9 P. R. 283."
" 66, " 15 from top, for 42 Vict., read "41 Vict."
" 70, " 10 from bottom, for 1 Chy. Ch. C. 282, read "1 Chy. Ch. R. 282."
" 85, " 3 from top, for *Rule C. C.* read "*Rule S. C.*"
" 89, " 14 from bottom, for 3rd Junn read "3rd June."
" 97, strike out 2nd side note from bottom, and add after *McLennan* v. *Heward*, 9 Gr. 178 "and see *Re Jones, Jones* v. *Searle*, 49 L. T. N. S. 91."
" 102, The case of *Sutton* v. *Sutton*, cited on this page is now reported 22 Ch. D. 511, and *Fearnside* v. *Flint*, also cited on this page is now reported 22 Ch. D. 579.
" 104, line 7 from top, after *Jones* add "v."
" 109, " 1, after *Skae* v. *Chapman*, 21 Gr. 549, add "*Munsie* v *Lindsay*, 19 C. L. J. 186; *Plumb* v. *Steinhoff*, 2 O. R. 614."
" 109, " 13 from top, for *Mill* v. *Mill* read "*Mill* v. *Hill*."
" 110, " 16 " for *Kirby* v. *Kirby* read "*Kerby* v. *Kerby*."
" 112, " 3 " after *supra* add "but see *Union Bank* v. *Ingram*, 16 Ch. D. 53."
" 113, " 13 from bottom, for *Thomson* read "*Thompson*."
" 114, " 8 from top, after 479 add "*Re Batt, Wright* v. *White*, 9 P. R. 447."
" 118, " 5 " after 3 App. R. 309, add "*Re Ross*, 29 Gr. 385. *Re Murray*, 29 Gr. 443."
at the end of 5th paragraph from top, after *Ib.* add "and see *Darling* v. *Darling*, 19 C. L. J. 329."
" 119, " 5 from top, after R. S. O. c. 107, s. 34, add "see now 46 Vict. c. 9, s. 1 (O.)"

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Page 120. In 4th paragraph, after *Re Metcalfe*, W. N. (79) 166, add "*Cotton* v. *Vansittart*, 9 U. C. L. J. N. S. 312."

" 124, bottom line, for "for bceoming" read "becoming."

" 125, 2nd side note, for "Party seeking to discharge" read "Party seeking to surcharge."

" 137, line 18 from bottom, for 2 C. L. T. 83, read "2 C. L. T. 88."

" 138, line 19 from top, after 3 Chy. Ch. R. 412, add "but see *McArthur* v. *Prettie*, 29 Gr. 500."

" 145. The case of *Sear* v. *Webb*, cited on this page, is now reported as, *Seear* v. *Webb*, 49 L. T. N. S. 94, 481, add after this case "but see *Re Rosier*, *Jones* v. *Bartholomew*, 49 L. T. N. S. 442."

" 151, line 10 from bottom, after 34 Beav. 175, add "and see R. S. O. c. 46, s. 51."

" 152, " 18 from bottom, for *Milts* v. *Northern Railway of Buenos Ayres*, read "*Mills*" v. *Northern Railway*, &c.

" 156, *Ord.* 281, 3rd line, for "so consider" read "to consider."

" 157, line 15 from top, after words "constituted receiver" add "as against third parties."

" 158, " 15 from top, after See *post Ord.* 588, add "a Receiver and his sureties are liable for all moneys which he may have received, whether before, or after, perfecting his security: *Smart* v. *Flood*, 49 L. T. N. S. 467."

" 159, " 7 from top, after "Supreme Court" add "under."

" 160, " 9 " after *Thomas* v. *Cross*, 2 Dr. & S. 422, add "where a trust fund is being administered by the Court, notice to the trustee of an incumbrance, will not give the incumbrancer priority over a prior incumbrancer who has not given notice, but who has obtained a stop order. *Pinnock* v *Bailey*, 48 L. T. N. S. 811."

" 172, " 6 from bottom, for 2 C. L. T. 83, read "2 C. L. T. 88."

" 173, at the end of 3rd paragraph after *Keim* v. *Yeagley*, 6 P. R. 60, add "and see *Edwards* v. *Pearson*, 3 C. L. T. 504."

" 175, line 10 from bottom, for 2 C. L. T. 83 read "2 C. L. T. 88."

" 189, In note to *Ord.* 373 for *Ord.* 926 read "*Ord.* 626."

" 194, line 18 from bottom, after R. S. O. c. 174, s. 465, ss. 2, add "(now 46 Vict. c. 18, s. 495)."

" 196, at the end of first paragraph add "but see *Boswell* v. *Coaks*, 23 Ch. D. 302; 48 L. T. N. S. 929.

" 199, at the end of the second paragraph of the note to *Ord.* 387, after *Beaty* v. *Radenhurst*, 3 Chy. Ch. R. 344 add "*Rodgers* v. *Rodgers*, 13 Gr. 143."

" 200, at the end of first paragraph add "49 L. T. N. S. 29."

" 202, line 5 from bottom, after 26 Gr. 74, add "*Collins* v. *Stinson*, 48 L. T. N. S. 828."

" 206, " 16 from top, after 43 L. T. N. S. 111, add "*Smith* v. *Land and House Property Corporation*, 49 L. T. N. S. 532."

Page 207, line 18 from top, after *Horner* v. *Williams*, Jo. & Ca. 274, add "*Re Perriam, Perriam, Perriam*, 76 L. T. 149."

" 215, lines 13 and 14 from top for 7 Gr. 42 read " 7 Gr. 142."

" 223, line 10 from bottom, after *Rumohr* v. *Marx*, 19 C. L. J. 10, add "but see *Webster* v. *Leys*, 3 C. L. T. 504."

" 227, " 17 from bottom, after *Sutton* add "22 Ch. D. 511."

" 233, last line of note to *Ord.* 431, add at beginning of the line the word "with."

" 238, line 12 from top, after 12 Gr. 429 add "*Faulds* v. *Harper*, 2 O. R 405."

" 248, " 20 " after 301 add "*McIntyre* v. *Thompson*, 19 C. L. J. 393."

" 248, " 4 from bottom, after 19 C. L. J. 54, add "3 O. R. 210."

" 250, " 1, for *Carrol* read "*Carroll.*"

" 11 from bottom, for stiputated read "stipulated."

" 252, " 15 from top, after *Sutton* v. *Sutton*, add "22 Ch. D. 511."

" 16 " after *Fearnside* v. *Flint*, add "22 Ch. D. 579."

" 11 from bottom, after 46 L. T. N. S. 321, add "*Fletcher* v. *Rolden*, 1 O. R. 155."

" 254 " 3 from bottom, after 2 O. R. 89, add "this case was reversed in appeal: see 19 C. L. J. 348, but its reversal does not appear to affect the proposition in support of which it is cited."

" 259, " 11 from top, for "one day is given" read "one day may be given."

" 264, " 7 from bottom, after *Seton*, 1044 add "or a sale may be ordered, *Bartlett* v. *Rees*, 12 L. R. Eq. 396."

" 272, last line of third paragraph, after *Letts* v. *Hutchins*, 13 L. R. Eq. 176, add "not even though notice of payment had been given before action: *Re Alcock*, *Prescott* v. *Phipps*, 49 L. T. N. S. 240."

" 277, line 12 from top, before 242 add "L. J."

" 278, " 17 from bottom, after 10 L. R. add "Eq."

" 279, " 6 " for 45 L. T. N. S. 404 read "45 L. T. N. S. 464."

" 284, " 12 from top, after *Meyers* v. *Meyers*, 20 Gr. 185, add "*Willis* v. *Willis*, 20 Gr. 396; *Re Ross*, 29 Gr. 385."

" 364, " 15 from bottom, after 50 L. J. Chy. 317 add "and see *Killins* v. *Killins*, 29 Gr. 472."

" 6 from bottom after 48 L. T. N. S. 476 add "*McEwan* v. *Crombie*, 49 L. T. N. S. 499.

" 371, " 5 from top, for *Re Arnott*, *Chatterton* v. *Arnott*, read "*Re Arnott*, *Chatterton* v. *Chatterton*."

" 373, at the end of third paragraph add "The seven days' notice required by this *Order* are to be computed exclusive of the first, and inclusive of the last, day: *Rule S. C.* 456, *Webster* v. *Leys*, 3 C. L. 504."

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Stewart, Chrysler & Gormally,
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CONSOLIDATED

GENERAL ORDERS

OF THE

COURT OF CHANCERY,

23RD JUNE, 1868.

PRELIMINARY.

The Judges of the Court of Chancery for Upper Canada, do hereby, in pursuance and execution of all powers and authorities enabling them in that behalf, order and direct in manner following:—

1. From and after the first day of July, 1868, all the General Orders of this Court which have been at any time heretofore made, shall be abrogated; and in lieu thereof, the Orders hereinafter expressed shall constitute the General Orders of the Court.

All former Orders abrogated.

The 12th section of *The Judicature Act* provides that the jurisdiction of the High Court of Justice, and Court of Appeal, shall be exercised, so far as regards procedure and practice, in the manner provided by *The Judicature Act*, or by such *Rules* as may be made pursuant thereto; "and where no special provision is contained in this Act, or in any such Rules or Orders of Court with reference thereto, it shall be exercised, as nearly as may be, in the same manner as the same might have been exercised by the respective Courts if this Act had not been passed:" and the 52nd section is as follows: "Save as by this Act, or by any Rules of Court, may be otherwise provided, all forms and methods (as nearly as may be) of procedure which, at the commencement of this Act, were in force *in any of the Courts* whose jurisdiction is by this Act vested in the said High Court under or by virtue of any law, general order, or rule whatsoever, and which are not inconsistent with this Act, or with any Rules of Court—*may continue to be used and practised in the said*

Orders, how far in force under *Judicature Act*.

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High Court of Justice, in such and the like cases, and for such and the like purposes, as those to which they would have been applicable in the respective Courts of which the jurisdiction is so vested, if this Act had not passed."

And at the heading of the *Rules* of the Supreme Court appended, to *The Judicature Act* is the following: "*Note.*—Where no other provision is made by the Act, or these Rules, the present procedure and practice remain in force."

It is, therefore, subject to these provisions that any *Orders* of the Court of Chancery now continue in force. In judging as to the extent of their operation, it will be necessary to consider the scope of each *Order*. Some will be found applicable to all the Divisions of the High Court, others again will be found to apply exclusively to the Chancery Division. Where it is found that *Orders* in Chancery and Common Law Rules, which are not affected by *The Judicature Act*, conflict, it might be supposed that it was the intention of *The Judicature Act* that the former should govern the practice in the Chancery Division, and the latter the practice in the other Divisions. But it will be seen that the words of section 52 are, "may continue to be used and practised in the said High Court of Justice," which seems to exclude the idea that one practice is to be limited to one part of the Court, and another, to the rest of it. In *Newbiggen-by-the Sea Gas Co.* v. *Armstrong*, 13 Chy. D. 310, it was held that where this conflict existed, that practice is to prevail in all the Divisions of the High Court, which the Court may consider most convenient. And until this question of convenience is judicially determined, it would seem that the suitor in any Division may adopt whichever of the two conflicting practices he may think best.

Chy. Orders whether applicable to Q. B. and C. P. Divisions.

Orders having a merely local application are those regulating the duties of particular officers, or the sittings of, or order of business in, the Court; but most of the other *Orders* which are still in force would now seem to have a general application to all the Divisions of the High Court.

Abrogation not to affect practice or usage, prevailing, unless inconsistent with these *Ords.*

2. The abrogation hereinbefore made shall not affect any practice of the Court or any practice or usage of, in, or connected with, any of the offices of the Court, or the officers thereof, which originated in, or was sanctioned by, any of the Orders hereby abrogated, except so far as the same may be inconsistent with anything hereinafter contained. (*Eng. Con. Ord. Prelim. r. 5.*)

Abrogation of former *Ords.*, not to revive *Ord.* abrogated thereby.

3. Where any of the Orders hereby abrogated, were intended to abolish any office, writ, practice, matter,

fee, or thing, such abrogation shall not have the effect of reviving the same. (*Eng. Con. Ord. Prelim. r. 6.*)

Construction of Orders.

4. Every Order or part of an Order hereinafter contained which is a repetition, without variation, of an Order or part of an Order hereby abrogated, shall receive the same construction as was put on the abrogated Order, or part of an Order, and shall operate, not as a new Order, but in the same manner, whether as to the time of operation or otherwise, as the abrogated Order or part of an Order would have operated if this consolidation had not been effected. (*Eng. Con. Ord. Prelim. r. 7.*)

5. Every Order, or part of an Order, hereinafter contained, which is a repetition, with variations, of an Order, or part of an Order, hereby abrogated, shall receive the same construction as was put on the abrogated Order, or part of an Order, and shall operate not as a new Order, but in the same manner, whether as to the time of operation, or otherwise, as such abrogated Order or part of an Order would have operated if this consolidation had not been effected, except so far as such variation indicates a contrary intention. And where the variation is of such a character as to be reasonably attributable, not to a variation of intention, but simply to a design to harmonize the style or language of the several Orders hereinafter incorporated, such variation shall not be deemed to indicate any such contrary intention. (*Eng. Con. Ord. Prelim. r. 8.*)

Certain proceedings abolished.

6. The following writs, pleadings, and proceedings are abolished :—

Subpœnas to appear and answer ;
Subpœnas to rejoin ;
Attachments with proclamations ;
Commissions of rebellion ;
Bills of revivor ;

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Original bills in the nature of bills of revivor;
Supplemental bills;
Original bills in the nature of supplemental bills;
Bills of revivor and supplement;
Bills in the nature of bills of review;
Bills to impeach decrees on the ground of fraud;
Bills to suspend the operation of decrees;
Bills to carry decrees into operation;
Pleas;
Appearance either by the defendant, or by the plaintiff on his behalf;
Exceptions to bills, answers, or other proceedings for scandal or impertinence;
Rules to produce witnesses;
Rules to pass publication;
Orders *nisi*;
Applications to be examined *pro interesse suo;*
Setting down a cause on an objection for want of parties merely.

It shall not be necessary, in order to enforce any order or decree to obtain any order for, or sue out a warrant to, the Sergeant-at-arms.

Interpretation of words.

7. In these Orders, and in all Orders to be passed hereafter, the following words shall have the meanings hereby assigned to them, besides their ordinary meanings, unless there is something in the subject or context repugnant to such construction, viz:

1. Words importing the singular number include the plural number; and words importing the plural number include the singular number.
2. Words importing the masculine gender include females.
3. The word "person" or "party" includes a body politic or corporate.
4. The word "bill" includes information.
5. The word "plaintiff" includes informant.

6. The word "affidavit" includes affirmation.
7. The word "legacy" includes an annuity and a specific, as well as a pecuniary, legacy.
8. The word "legatee" includes a person interested in a legacy.
9. The expression "residuary legatee" includes a person interested in the residue.
10. The word "order" includes decree and decretal order.
11. The word "Master" includes Accountant, and Local Master.
12. The word "month" means calendar month.

II. OFFICERS OF THE COURT.

REGISTRAR.

Orders to be drawn and settled by Registrar.

8. All orders made in open Court, or to be issued on precipe for foreclosure, sale, or redemption, or for a sale instead of foreclosure on the application of an incumbrancer, are to be drawn up, settled, and passed by the Registrar.

Settling minutes.

This *Order* formerly applied to all decrees and orders (see *ante*, *Ord.* 7) made in Chancery, in open Court, and also to all decrees and decretal orders, issued by the Registrar on *præcipe*. Decrees are now called Judgments, and are governed by the *Rules* of the Supreme Court. Under those *Rules* the officer entering the judgment is to see that it is in proper form; and in special cases the Judge pronouncing the judgment may direct its terms to be settled by one of the Judgment Clerks. See *Rule S. C.*, 416; *Breckenridge* v. *Ontario L. & D. Co.*, 19 C. L. J. 140.

Whenever a judgment is referred to one of the Judgment Clerks to settle, the practice laid down by this and the next four *Orders* will be followed. And in this note the word "Registrar" must be understood to include Judgment Clerk.

When a judgment is pronounced, or an order made, by the Court, a note is taken by the Registrar or other officer attending the Court for the purpose, and a similar note is indorsed by counsel on the briefs; and from these notes the draft or minute of the judgment, or order, is prepared.

When the judgment is pronounced on circuit, and it is referred to the Judgment Clerk to settle the terms thereof, the officer attending

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the trial should forward to the Judgment Clerk a return showing the date, and place, of the trial, the parties who appeared by counsel, or in person, a short note of the nature of the evidence (if any) adduced, and of any consents given, and of the judgment pronounced.—(See Holmested's Manual Pr., pp. 22, 23.)

Appointment to settle. The party desiring to enter the judgment, or issue an order, usually in practice prepares a draft, and attends the Registrar for an appointment to settle it. The Registrar will, however, if required, himself prepare the draft of any order, and when it is ready will issue the appointment to settle it, if he shall deem one necessary. (See *post Ord.* 12.)

On the return of the appointment, the parties notified are to attend and make any objections they may have to the draft, which are disposed of by the Registrar, who then marks the draft settled, and adds his initials. The minutes having been settled, the judgment, or order, is then engrossed, and having been compared with the draft and passed, it is then signed or marked by the Registrar for entry.

Appointment to pass. Where the Registrar thinks it necessary he may give an appointment to pass; *e. g.*, when any blanks have been left in the draft; or the terms of the order, or judgment, are complicated, and there is any danger of error in transcribing the draft, &c., &c. The passing of the judgment, or order, is merely the act of comparing the engrossment with the draft and seeing that it agrees with it, and signing and marking it for entry.

Registrar may make alterations. The Registrar in drawing up, or settling any order, may introduce such alterations as from his experience he believes the Court will sanction; and these alterations are binding on the parties. See *Davenport* v. *Stafford*, 8 Beav. 503; *Hargrave* v. *Hargrave*, 3 M. & G. 348; Seton 1546.

Where questions of difficulty arise, the Registrar may require the matter to be mentioned to the Court.

Varying minutes **Motion to vary minutes.**—After the draft or minutes have been settled by the Registrar, but not before, any party dissatisfied may move to vary the minutes; and the Registrar should be previously informed of the application: *Prince* v. *Howard*, 14 Beav. 208; *Hood* v. *Cooper*, 26 Beav. 373; *Tennant* v. *Trenchard*, 4 L. R. Chy. 537, 545; *British Dynamite Co.* v. *Krebs*, 25 W. R. 846; and such application may be made at any time before the judgment, or order, is passed and entered; 1 Turn. and Ven. 319; Danl. Pr. 875; Seton 1546. The notice of motion should be served on all parties interested, and state the alteration desired.

The Court may refuse to permit any question to be argued on a motion to vary the minutes, except what was the actual order made, unless both parties consent to an addition being made, or when it cannot be ascertained what order was pronounced; in which cases

the Court may allow the case to be re-argued. (See Seton 1546.) The Court has however, on a motion to vary minutes, varied the decree: *Johnson* v. *School Trustees*, 26 Gr. 204.

Any variation made by the Court is embodied in the draft, and except where the costs of the motion are ordered to be paid, no further order need be drawn up by any party. Costs of motion.

If there is fair ground for the application, and there has been no improper opposition, the costs are usually made costs in the cause, and the judgment, or order, may be post dated so as to include the costs of the day. (See Seton 1546.)

Where, after judgment was pronounced, a mistake was discovered in the statement of claim, on a subsequent application to amend the statement of claim, the judgment was directed to be post dated as of a day subsequent to the amendment: *Winkley* v. *Winkley*, 44 L. T. 572.

Under the former practice, if the suit abated after decree pronounced, or between hearing and l gment, the decree might be passed and entered notwithstanding the abatement of the suit. Seton 1547: *Beamish* v. *Pomeroy*, 1 Chy. Ch. R. 32. Abatement.

Under *Order* 456, an incumbrancer made a party in the Master's office in a foreclosure suit, entitled to, and desiring, a sale of the mortgaged premises, might on paying into Court $80, and applying to the Registrar before the Master's report was settled, obtain an order on *præcipe* for a sale in lieu of a foreclosure. Under the new procedure such orders are still made. (See *Ord.* 456 *post.*) Judgment for sale in lieu of foreclosure.

9. After an order is passed and signed by the Registrar, the same is to be entered by the Entering Clerk and issued by the Registrar to the party entitled thereto. Entry of Orders.

This *Order* in terms applied to all orders and decrees which are passed and signed by the Registrar. See, however, *Ord.* 195, which provides that no order (except decrees, decretal orders, or final orders, for foreclosure, or sale), obtained *ex parte* and not being of a special nature, is to be entered, unless the entry thereof shall be directed by the Court or a Judge.

Before an order requiring entry can be enforced by attachment for disobedience, it must be entered, and such entry should have been made before the expiry of the time limited by the order for doing the act thereby ordered to be done: *Ballard* v. *Tomlinson*, 48 L. T. 515.

Proceedings under a judgment, or order, requiring entry before it has been entered are irregular and voidable: *Tolson* v. *Jervis*, 8 Beav. 366; *Drummond* v. *Anderson*, 3 Gr. 150. Although in the case of injunctions and restraining orders, parties are bound by notice

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of the restraining order, however received, from the time when it is pronounced: Seton, 174.

Time for entry.

By English Gen. Ord. of 4th December, 1691, all orders pronounced in Michaelmas or Hilary Terms, or the vacations following, were to be entered before the first day of the ensuing Michaelmas Term; and all orders pronounced in Easter or Trinity Terms, or the following vacations, were to be entered before the first day of the ensuing Term. This order is considered to be still in force in England. (See Seton 1547.) Whether it is binding here seems doubtful. (See, however, *R. S. O.* c. 40, s. 34; *J. A.* s. 18.)

Entry *nunc pro tunc.*

Orders may be made to enter judgments, or orders *nunc pro tunc*: *Donne* v. *Lewis*, 11 Ves. 601; *Lawrence* v. *Richmond*, 1 J. & W. 241. See, however, *Drummond* v. *Anderson*, 3 Gr. 150.

Varying judgment.

After a judgment, or order, has been passed and entered, it can, as a general rule, only be varied on appeal or rehearing, except in cases of clerical mistakes, or errors, arising from any accidental slip or omission, which may be corrected on motion without appeal. *Rule S.C.*, 338. See *Pepper* v. *Pepper*, W. N. 1868, 104; *Re Robinson* W. N. 1873, 28; *Andrews* v. *Bohannon*, W. N. 1869, 80; *Teil* v. *Barlow*, 3 D. J. & S. 426; *Mason* v. *Seney*, 2 Chy. Ch. R. 30; *Moffatt* v. *Hyde*, 6 U. C. L. J. 94; *Simmers* v. *Erb*, 21 Gr. 289; or where the judgment has been obtained by default: see *Kline* v. *Kline*, 3 Chy. Ch. R. 79; or on *præcipe*: *Nelles* v. *Vandyke*, 17 Gr. 14, in which cases also they may be corrected, or varied on motion.

Time for bespeaking Orders.

10. Every order is to be bespoken, and the briefs and other documents required for preparing the same are to be left with the Registrar, within seven days after the order is pronounced or finally disposed of by the Court. (1st April, 1867; Ord. 5.) (*Eng. Con. Ord. 1, r. 21.*)

A party not producing his briefs when required, was ordered to do so within a limited time, and in default the order was to be drawn up without them; *Yeatman* v. *Read*, 14 W. R. 123.

A solicitor who has been discharged by his client before the passing and entry of an order, will not be allowed to withhold papers on which he claims to hold a lien, so as to prevent the drawing up or entry of the order: *Simmonds* v. *G. E. Ry. Co.*, 3 L. R. Chy. 797; *Clifford* v. *Turrill*, 2 D. &. S. 1.

Consequence of default.

11. In case an order is not bespoken, or the briefs and other documents are not left, within the time prescribed by Order 10, the order is not to be drawn up

without leave being obtained on an application in Chambers. (1st April, 1867; Ord. 6.) (*Eng. Con. Ord. 1, r. 22.*)

In practice this *Order* has not been very strictly followed. The time allowed by *Ord.* 10 is somewhat short, especially when the judgment or order is pronounced on circuit. But where any party objects to the order being drawn up after the time prescribed has elapsed, effect must be given to the *Order*.

After the lapse of four years, notice of the application to issue the order was required to be given to all parties: *Re Forrester, Messnier* v. *Forrester*, 1 Chy. Ch. R. 29.

Notice to settle or pass, not to be given except by direction of Registrar.

12. No notice to settle minutes, or pass an order, is to be given unless by direction of the Registrar. (6th Feb. 1865; Ord. 22.)

The Registrar may dispense with notice of settling or passing if he think fit; but except where the order is simple, notice is usually required to be given; the minutes must be first prepared, and left with the Registrar, and an appointment obtained from him. (See *Ord.* 596, and *Ord.* 8, *ante.*)

An appointment served one day for the next is sufficient: *Re Christmas*, 19 Beav. 519.

According to the former practice in Chancery, when the decree was passed by the Registrar it was necessary, in the next place, to enter it in the books in the Registrar's office; passing and entering the decree were essentially requisite to its perfect completion, and necessarily antecedent to any subsequent proceedings being had thereon. See *Ord.* 9, *ante.* Where the decree had been drawn up and not entered, orders allowing the entry to be made *nunc pro tunc*, even after a considerable lapse of time, have been granted: *Lawrence* v. *Richmond*, 1 J. & W. 241; *Donne* v. *Lewis*, 11 Ves. 601. But where the decree had not been drawn up, and the defendant would be prejudiced, the order was refused: *Drummond* v. *Anderson*, 3 Gr. 150.

Procedure where party makes default.

13. Where a notice is given to settle minutes, or to pass an order, and the party served attends thereon, but the party giving the notice does not attend, or is not prepared to proceed, the Registrar may proceed *ex parte* to settle the minutes, or pass the order, or may in his discretion order the party giving the notice to pay to the other the costs of his attendance; or if a party served asks for delay, the Registrar may grant

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the delay on such terms as he thinks reasonable as to payment of costs or otherwise. (6th Feb., 1865; Ord. 23.) (*Eng. Con. Ord.* 1, *r.* 38.)

This *Order* is now in force as qualified by *Ord.* 596 *post*, which requires an appointment to be given by the Registrar for settling minutes, and such appointment is not to be issued until the minutes are prepared and left with the Registrar.

Ord. 14-16.

Orders 14-16 conferred upon the Accountant the powers of the Master in Ordinary. They were rescinded by *Ord.* 559, and subsequently revived by *Ord.* 598, they are now obsolete.

Ord. 17-22.

Orders 17-22 related to the duties of the Judge's Secretary, and were rescinded by *Ord.* 559.

CLERK OF RECORDS AND WRITS.

Clerk of Records and Writs, duties of.

23. The Clerk of Records and Writs is to perform the duties heretofore performed by the Registrar and his Clerks in relation to the several matters hereinafter mentioned, that is to say:

1. Receiving, filing, and custody of, pleadings, reports, depositions, affidavits, and other papers and proceedings, and making entries thereof in the proper books.
2. Amending bills.
3. Entering consents, and notes *pro confesso*.
4. Setting down causes.
5. Certifying proceedings.
6. Examining and authenticating office copies of pleadings and other proceedings.
7. Preparing and issuing writs, commissions, and orders of course.
8. Preparing certificates for registration, procuring the Registrar's signature thereto, and issuing the same.
9. Attending on the opening of commissions.
10. Attending with records and exhibits on the Judges of the Court, or elsewhere.
11. Inrollment of decrees or orders.

12. The care and custody of all documents ordered to be deposited for safe keeping, or produced under any order of Court.
13. The care and custody of the books kept under the Act for Quieting Titles, and making the necessary entries therein.
14. Preparing certificates of the filing of petitions, procuring the Registrar's signature thereto, and issuing the same.
15. Transmitting petitions to the proper Referee.
16. Entering and issuing certificates of title and conveyances, granted under the Act.

Powers of Dep. Registrars.

By *Order* 35 every Deputy Registrar was given all such powers and authorities in relation to suits in which the bill was filed in his office, as belongs to the Clerk of Records and Writs. Notwithstanding this *Order*, however, certain duties were discharged exclusively by the Clerk of Records and Writs in reference to all suits, no matter where the bill was filed; *e. g.*, All causes to be heard in Toronto, either at the sittings for examination of witnesses and hearing of causes, or at the weekly sittings of the Court, were entered with the Clerk of Records and Writs. So also the issue of commissions to take evidence, and attending the opening thereof, the inrollment of decrees and orders, the issuing of orders of course for the delivery and taxation of solicitors' bills of costs, were duties discharged by the Clerk of Records and Writs alone, and not by any of the Deputy Registrars.

Deputy Clerks of the Crown and Local Registrars, powers of.

By *Rule S. C.*, 417 the Deputy Clerks of the Crown, and Local Registrars, of the High Court of Justice have now the powers and duties of the former Deputy Registrars in Chancery.

Clause 2, authorizing amending of bills, is now obsolete, except as to causes pending when *The Judicature Act* came in force; but the Clerk of Records and Writs, Deputy Registrars, Deputy Clerks of the Crown, and Local Registrars are now, under the new procedure, the proper officers to amend writs and pleadings issued from, or filed in, their offices.

Clause 3 as far as it relates to entering notes *pro confesso*, and clause 11, except as to causes pending when *The Judicature Act* came in force, are now obsolete..

Ord rs of course.

Orders of course, referred to in clause 7, are those orders which according to the practice of the Court may be obtained without an actual motion therefor. The most common orders of this kind are:

1. Orders for security for costs, where the writ or other proceeding

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by which an action is commenced discloses on its face, that the plaintiff or person asking any relief, (see *J. A.* s. 91)is resident out of the jurisdiction. *Rule S. C.* 431, Holmested's Manual Pr. 222.

2. *Orders to produce*, under *Rules S. C.* 222, 513.

3. *Orders for the appointment* of guardians to infants when necessary. See Holmested's Manual Pr. 55; *Ord.* 610; *Rule S. C.* 36.

4. *Orders to continue proceedings* where the death or marriage of parties, or the transmission of interest *pendente lite*, renders it necessary for other persons to be made parties to the action.

5. *Orders for sheriffs to return writs.*

6. *Orders for leave to plaintiff, or defendant, to change his solicitor,* or solicitor and agent,—or to prosecute, or defend, in person, instead of by a solicitor,—or to enable one of several plaintiffs to appoint a solicitor for the purpose of making an application separate from his co-plaintiff,—or to enable a solicitor of a plaintiff, or defendant, to change his agent.

7. *Orders for the delivery and taxation, or for taxation alone, of solicitors' bills of costs*, on the application of a client. Orders for delivery and taxation are still issuable in the Chancery Division, by the Clerk of Records and Writs. But Deputy Registrars, Deputy Clerks of the Crown, and Local Registrars, have now power to issue orders of course on *præcipe* for taxation of bills of costs already delivered, on the application of the client within a month from the delivery thereof, or on the application of the solicitor at any time after such month. See *Rule S. C.* 444, Holmested's Manual Pr. 185, 186. Although orders of course for delivery and taxation, are issuable by the Clerk of Records and Writs,—under *Rule S. C.* 444, orders of course for taxation alone, are to be issued by the Registrar.

For other orders issuable as of course, see Daniel's Pr., 5th ed., 2002-2012.

All orders of course are to be drawn up on *præcipe*. See *Ord.* 25.

Certificates of officers as to proceedings in their offices are conclusive; and affidavits cannot be read to contradict them: *Beavan* v. *Burgess*, 10 Jur. 63; *Foley* v. *Griffith*, 2 Moll. 318.

Solicitors' and agents' book.

24. The Clerk of Records and Writs is to keep in his office a book to be called "The Solicitors' and Agents' Book," in which each solicitor residing elsewhere than in the City of Toronto is to specify the name of an agent being a solicitor of this Court, and having an office in the City of Toronto, upon whom pleadings, writs, notices, orders, appointments, warrants, and other documents and communications may be served. (3rd June, 1853; Ord. 42, s. 1.)

See *post Ord.* 42, as to consequences of not complying with this *Order*.

25. All orders of course are to be drawn up by the Clerk of Records and Writs upon *præcipe*. (3rd June, 1853; Ord. 43, s. 9.)

Orders of course to be drawn on *præcipe*.

The order is not only to be drawn up by the Clerk of Records and Writs but is also to be issued by him. See *Ord.* 595.

The allegations in the *præcipe* upon which an order of course is issued must be true, and no material facts must be suppressed; otherwise the order may be set aside, although on the merits it might have been properly issued: Daul Pr., 5th ed., 1436; *Brignall* v. *Whitehead*, 30 Beav. 229; 8 Jur. N. S. 183; and see Re *Howland*, 4 Chy. Ch. R. 6.

In *De Feuchères* v. *Dawes*, 11 Beav. 46, it was said by Lord Langdale that Lord Cottenham established the rule that when an *ex parte* injunction is obtained on a suppression of material facts, it will be dissolved on that ground alone, although it might appear on the application to dissolve that there were ample merits to sustain it, and this rule, it would seem, is applicable to all orders of course: *Richards* v. *Scarborough*, 17 Beav. 83.

26. On Thursday in each week the Clerk of Records and Writs is to make out and transmit to the Registrar a list of all causes and matters set down for hearing during the ensuing week.

Cause list.

The list of causes here referred to is posted up at Osgoode Hall, outside the Court Room, and the cases are taken by the Court in the order in which they appear upon the list.

Orders 27-28; required the Clerk of Records and Writs to pay into Court, the fees received by him on account of "The Suitors' Fee Fund," these fees were afterwards abolished by 41 Vict., c. 8, s. 5 (0), and these *Orders* are therefore now effete.

Ord, 27-28.

29. The Clerk of Records and Writs is to perform such other duties as the Court by General Order, or otherwise, may from time to time direct.

Clerk of Records and Writs to perform other duties.

See *Ord.* 632, which provides that bonds by committees in lunacy matters are to be filed with the Clerk of Records and Writs.

30. All affidavits and papers filed with the Registrar, or in Chambers, are to be transmitted to the office of the Clerk of Records and Writs the same day.

Affidavits, &c., filed with Registrar to be transmitted to Clerk of R. and W.

All affidavits and papers filed with the Registrar, Assistant Regis-

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trar, or Judgment Clerks, in actions pending in the Chancery Division are transmitted to the Clerk of Records and Writs, and are preserved in his office.

Ord. 31.

Order 31 imposed on the Registrar's Clerk the duty of Ledger Clerk to the Suitors' Account. This *Order* was rescinded by *Ord.* 558.

ENTERING CLERK.

Entering Clerk.

32. The Entering Clerk is to note in the margin of the book the day of entering a decree or order, and is at the foot of the decree or order to note the same date, and the book in which the entry has been made and the pages of such book. (10th Sept., 1866 ; Order 6.)

As so entry of judgments see *Rules S. C.* 325-327.

DEPUTY REGISTRARS.

Deputy Registrars.

Solicitors and Agents' book.

33. Every Deputy Registrar is to keep in his office a book to be called "The Solicitors' and Agents' Book," in which each solicitor residing elsewhere than in the County in which such Deputy Registrar's office may be, is to specify the name of an Agent, being a solicitor of this Court, and having an office in the City or Town where the office of such Deputy Registrar is situated, upon whom all writs, pleadings, notices, orders, warrants, and other documents, and written communications in relation to proceedings conducted in the office of the Local Master, or Deputy Registrar of such County, may be served. (3rd June, 1853; Ord. 44, s. 6.)

This *Order* applies not only to the Deputy Registrars, but also to the Local Registrars. See *Ord.* 43, as to consequences of non-compliance with this *Order.*

The Common Law Rules did not require the Deputy Clerks of the Crown to keep such books. See rules Q. B. & C. P., Nos. 136 and 137 *post.* See, however, C. L. P. Act, sec. 57, which appears to have contemplated the appointment of agents in the outer counties in particular suits. It is possible this *Order* is now also binding on the Deputy Clerks of the Crown.

34. Local Masters, and Deputy Registrars, respectively, are to perform the duties of their several offices in the same manner, and under the same regulations, as the like duties are performed by the Master, and by

the Clerk of Records and Writs, respectively; and all orders, rules, and regulations, in force respecting the Master, and Clerk of Records and Writs, respectively, and respecting the regulation of their respective offices, are to be in force and applicable to the Local Masters, and Deputy Registrars, respectively, in relation to such duties as they are hereby required to perform; and the like sums and fees payable to the Master, and Clerk of Record and Writs, respectively, are to be payable to the Local Masters, and Deputy Registrars, respectively, in relation to similar matters; (3rd June, 1853; Ord. 44, s. 1.)

Rules and regulations relating to Master in Ordinary, and Clerk of R. & W., to apply to Local Masters and Dep. Registrars.

Local Masters, and Deputy Registrars, under the former practice in Chancery, were not at liberty to practise themselves in Chancery, nor were they even at liberty to practice in partnership with solicitors practising in Chancery, although they might not actually share in the emoluments arising from such business: *McLean* v. *Cross*, 3 Chy. Ch. R. 432. Since the merging of the three Superior Courts into one, it is doubtful whether a Master can practice at all, even though he confine his practice to the Queen's Bench and Common Pleas Divisions of the High Court; as under the new system he is just as much an officer of those Divisions as he is of the Chancery Division; but see *Rule S. C.* 422, from which it may be inferred, that it was not the intention of *The Judicature Act* to deprive them of the right of practising.

Whether Local Masters may practice—*quære*.

The fees now payable to Deputy Registrars, Deputy Clerks of the Crown, and Local Registrars, are regulated by the old Common Law Tariff, and where there was no similar proceeding in the Queen's Bench and Common Pleas they are entitled to fees payable for similar proceedings under the Chancery Tariff: *Rule S. C.* 432; but as to officers paid by fees, see *McGannon* v. *Clarke*, 19 C. L. J. 236; and in cases within the former Equity jurisdiction of County Courts, the Lower Scale Tariff of the Court of Chancery is still applicable. See *Rule S. C.* 515, and *Ord.* 563 *post*.

Fees.

The Deputy Registrars are paid by fees, and are entitled to receive all fees payable under the tariff, in cash; fees payable under any Statute not expressly requiring them to be paid in cash, must be paid in stamps.

35. Where a bill is filed with a Deputy Registrar, the Local Master, and Deputy Registrar, respectively, in the County where such bill has been filed, are to

Duties of Master and Dep. Registrar, where bill filed with Dep. Registrar.

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have all such powers and authorities in relation to such suit as belong to the Master, and Clerk of Records and Writs, respectively. (3rd June, 1853; Ord. 44, s. 3.)

The principle of this *Order* is still applicable in all the Divisions, but for Deputy Registrar must now be understood the officer by whom the writ of summons is issued, whether he is Deputy Registrar, Deputy Clerk of the Crown, or Local Registrar.

Where a reference to a Master is required in any action, the plaintiff is *prima facie* entitled to have it directed to the Master resident in the county where the writ issued, *Macara* v. *Gwynne*, 3 Gr. 310. The reference may, however, be changed on a special application; *e. g.*, where the Master to whom the cause was referred had given a professional opinion as to some of the matters arising in the cause: *Bigelow* v. *Bigelow*, 6 P. R. 124; or had been professionally employed by one of the parties in other matters: *Boyd* v. *Simpson*, before Spragge, C., 19 June, 1878. (See Reg. Lib.)

Masters to have certain powers in Chambers.

36. In addition to the powers and authorities conferred upon Local Masters by Order 35, the Local Master in the County where the bill has been filed, may hear and dispose of all applications in the progress of such suit, for the following purposes, viz:—

1. To appoint guardians *ad litem* for infants.
2. For time to answer or demur.
3. For leave to amend before replication.
4. To postpone the examination of witnesses, or to allow further time for the production of evidence.
5. For security for costs. (3rd June, 1853; Ord. 44, s. 4.)

Powers under Judicature Act.

By *Rule S. C.* 422, the powers of the Local Masters who do not practise as barristers or solicitors, or take out their certificates to practise, are much enlarged; and since the 1st January, 1882, they have been, with certain exceptions, entitled to exercise the like jurisdiction as to Chamber applications in actions brought in the Chancery Division in their respective counties, as is exercised by the Master in Chambers. (See Holmested's Manual Pr. 213, 214.)

Guardians *ad litem*.

The practice as to the appointment of guardians *ad litem* to infants was considerably modified by a subsequent *Order* of the Court of Chancery (see *Ord.* 610), and has been still further altered by the *Judicature Rules*. (See *Rules S. C.* 36, 37.) A special application to appoint a guardian to an infant in an action in the Chancery Division

is no longer necessary, except when made on the part of the infant, or when it is desired that some other person than the *Official Guardian* shall be appointed; See *Ord.* 610 *post*; Holmested's Manual Pr. 55; or when the application is made to a Master to whom a cause is referred. (See note to *Ord.* 587 *post.*)

Orders of course to be issued by Dep. Registrar.

37. All orders which are drawn up by the Clerk of Records and Writs without the special direction of the Court may be drawn up by the Deputy Registrar with whom the bill is filed. (3rd June, 1853; Ord. 44, s. 5.)

The orders of course are also to be issued by the Deputy Registrar: *Ord.* 595. The Deputy Clerks of the Crown, and the Local Registrars, have now the like powers, *Rule, S. C.* 417. As to orders issuable by the Clerks of Records and Writs. (See *ante, Ord.* 23).

Ord. 38.

Order 38 provided for the issue, by Deputy Registrars, of decrees on *præcipe* for foreclosure, sale, or redemption, where the suit is between the original mortgagee and mortgagor only, and for the entry of sueh decrees in a book, to be approved of by the Court, and kept for that purpose by the Deputy Registrar, and is now superseded by *Rules S. C.* 78, 325, 327, 328, 520.

Ord. 39.

Order 39 provided for returns by the Deputy Registrars, of fees received by them for "The Suitors Fee Fund Account." These fees having been abolished by 41 Vict., c. 8, s. 5 (0), the *Order* is now effete.

III. SOLICITORS, AND PARTIES ACTING IN PERSON, AND SERVICE ON THEM RESPECTIVELY.

Endorsement of name, and address of solicitor on proceedings.

40. Upon every writ sued out, and upon every bill, demurrer, answer or other pleading or proceeding, there shall be endorsed the name or firm and place of business of the solicitor and solicitors by whom such writ has been sued out, or such pleading or other proceeding has been filed; and when such solicitors are agents only, then there shall be further endorsed thereon the name or firm, and place of business of the principal solicitor. (3rd June, 1853; Ord. 43, s. 2.)

Provisions of Rules, S. C. as to.

The provisions of this *Order* are covered by *Rules S. C.* 18, 19, as to proceedings commenced by writ of summons; and as to executions by *Rule S. C.* 348, but as to proceedings commenced by notice of motion, or petition, it would appear that the provisions of this and the following *Order* would apply in all the Divisions of the High

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Court. *Rule S. C.* 467 requires that there shall be appended to, or endorsed on, every affidavit a note showing on whose behalf it is filed.

The endorsement of the place of business required by *Order* 40, is only necessary on the first writ sued out, or proceeding filed: *Redman* v. *Brownscombe*, 6 P. R. 83, and an objection to the want of the endorsement, must be supported by proof that it is the first proceeding filed, or sued out, which has been served on the party taking the objection: *Ganson* v. *Finch*, 3 Chy. Ch. R. 296; but the name of the party or solicitor (and of the principal solicitor when the proceeding is taken by an agent) must be endorsed on every proceeding issued, or filed: *Coates* v. *Edmonson*, 2 Chy. Ch. R. 439. The omission of the endorsement does not make the proceeding void, but entitles the opposite party to a stay of proceedings until it is supplied: *Price* v. *Webb*, 2 Ha. 511; a demand of a copy of a pleading was held a waiver of the objection that it was not endorsed as required by this *Order*: *Bennett* v. *O'Meara*, 2 Chy. Ch. R. 167.

Endorsement of place of business dispensed with in subsequent proceedings.

41. Where the name and place of business of a solicitor have been endorsed upon any pleading or proceeding filed, it shall not be necessary to endorse such place of business, on any pleading or proceeding in the same cause or matter subsequently filed, or subsequently served, on any person who was served with the former proceeding. (10th Sept., 1866; Ord. 32.)

This *Order* appears to be still in force and to apply to all the Divisions of the High Court. It will be observed that it dispenses with the endorsement of the place of business, on subsequent proceedings, but not with the name or firm of the solicitor, or solicitors, and of the principal, as required by *Ord.* 40. The endorsement of the name is necessary on every proceeding sued out, or filed: *Coates* v. *Edmonson*, 2 Chy. Ch. R. 439.

Service upon solicitor or agent.

42. Where the pleadings in any cause have been filed in the office of the Clerk of Records and Writs, or in the office of any Deputy Registrar, all notices, appointments, warrants, and other documents, and written communications, in relation to matters transacted in Court, or Chambers, or in the office of the Master, Registrar, or Clerk of Records and Writs, which do not require personal service upon the party to be affected thereby, are to be served upon the solicitor when residing in the City of Toronto; and when the

solicitor to be served resides elsewhere than in the City of Toronto, then such notices, appointments, warrants, and other documents, and written communications aforesaid, may be served either upon such solicitor, or upon his Toronto agent named in the "Solicitors and Agents' Book;" unless the Court, or a Judge thereof, or a Master, before whom any such proceeding is had, shall give any direction as to the solicitor upon whom any such notice, appointment, warrant, or other document or written communication is to be served. If any solicitor neglect to cause such entry to be made in the "Solicitors and Agents' Book," as is required by Order 24, the posting up a copy of any such notice, appointment, warrant, or other document, or written communication, for the solicitor so neglecting as aforesaid, in the office of the Clerk of Records and Writs, is to be deemed sufficient service, unless the Court direct otherwise. (29th June, 1861.)

Service, where solicitor neglects to enter name of agent.

This *Order* only applies to the service of documents, which do not require personal service, in relation to matters transacted at Toronto in Court, or Chambers, or in the office of the Master in Ordinary of the Supreme Court, or the Registrar, or Clerk of Records and Writs of the Chancery Division. Formerly, where the document related to matters pending, or business transacted, in any local office, the service could be effected according to the provision of *Ord.* 43 on the local agent if any, or if there were none, then by posting up the copy in the local office: see *Hayes* v. *Shier*, 6 P. R. 41; but it has been held that now service should be affected even in such cases, on the Toronto agent: *Omnium* v. *Ellis*, 2 C. L. T. 216; but the effect of *Ord.* 43 does not appear to have been considered in that case.

A solicitor cannot, as agent for one principal, serve himself as agent for another principal: *Horseman* v. *Coulson*, 6 P. R. 263. *Ontario Bank* v. *Fisher*, 4 P. R. 22.

Service of solicitor on record, good, though he have ceased to act.

Until an order has been made and served, changing the solicitor of any party to an action, or authorizing such party to sue, or defend, in person, service on the solicitor originally named is sufficient, even though such solicitor have ceased to act for such party; *Wright* v. *King*, 9 Beav. 161; and see *Newton* v. *Thomson*, 16 Jur. 1008. Where a solicitor had absconded, a notice of motion left at his unoccupied place of business was held properly served: *Newton* v. *Thompson*, 22 L. J. Ch. 10: and see *Re Templeman*, 20 Beav. 574; *Re Wisewold*, 16 Beav. 357; *Re Catlin*, 18 Beav. 508; *Re Dufaur*, 16

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Beavl» .1 : *R Thomson*, 20 Beav. 545 ; *Wilson* v. *Emmett*, 19 Beav. 232 , *Ex parte Belton*, 25 Beav. 368 *Re Walton*, 4 K. & J. 78.

Country agent, when to be served.

43. All writs, pleadings, notices, orders, warrants, and other documents, and written communications, which do not require personal service upon the party to be affected thereby, may be served upon his solicitor residing in the county where such proceedings are conducted, or, where such solicitor does not reside in the county where such proceedings are conducted then upon the agent named in the "Solicitors and Agents' Book," provided for by Order 33. And if any such solicitor neglect to cause such entry to be made in the "Solicitors and Agents' Book," the posting up a copy of any such writ, pleading, notice, order, warrant, or other document, or written communication, for the solicitor so neglecting as aforesaid, in the office of such Deputy Registrar, is to be deemed sufficient service. (3rd June, 1853; Ord. 44, s. 6.)

See note to preceding *Order*.

Indorsement of name and address of parties acting in person.

44. Every party suing or defending in person is to cause to be indorsed or written upon every writ which he sues out, and upon every bill, demurrer, answer, or other pleading, or proceeding, his name and place of residence, and also (when his place of residence is more than three miles from the office where such pleading or other proceeding is filed) another proper place, to be called his address for service, not more than three miles from the said office where writs, notices, orders, warrants, and other documents, proceedings, and written communications, may be left for him. (3rd June, 1853; Ord. 43, s. 3.)

This *Order* appears to be still in force and to apply to all the Divisions of the High Court, save as regards a plaintiff suing out a writ of summons in person, which is provided for by *Rule S C.* 19 ; and a defendant appearing in person to a writ of summons, which is provided for by *Rules S. C.* 53, 54. *Rules S. C.* 19 and 53, require that the address for service shall be within two miles of the office whence the writ issued. (See note to *Ord.* 40 *ante*).

This *Order* it will be observed is not qualified as *Ord.* 40 is by *Ord.* 41, which dispenses with the indorsement of the place of busi-

ness of a solicitor on subsequent proceedings. Under this *Order* the place of residence (and address for service, when necessary), of a party suing, or defending, in person, must be endorsed on every writ sued out, or proceeding filed, by such party.

Consequence of omission of endorsement.

45. Where a party sues or defends in person, and no address for service of such party is written or printed pursuant to the directions of Order 44, or where a party has ceased to have a solicitor, all writs, notices, orders, summonses, warrants, and other documents, proceedings, and written communications, not requiring personal service upon the party to be affected thereby, shall, unless the Court shall otherwise direct, be deemed to be sufficiently served upon such party, by posting up a copy thereof in the office of the Clerk of Records and Writs, or Deputy Registrar, where the bill is filed. But if an address for service is written or printed as aforesaid, then all such writs, notices, orders, summonses, warrants and other documents, proceedings, and written communications, shall be deemed sufficiently served upon such party if left for him at such address for service.

This *Order* appears to be in force, but it would now require to be read as referring to the office whence the writ of summons issued, instead of "where the bill is filed." The omission of a defendant's address, or address for service when necessary, in an appearance by a defendant in person, is expressly provided for by *Rule S. C.* 54. The case of a party ceasing to have a solicitor is not expressly provided for by the *Rules* of the Supreme Court, the provisions of this *Order* would therefore, in such a case, appear to be applicable in all the Divisions of the High Court.

Ord. 46.

Order 46 required notice of filing an answer, demurrer, or replication to be served on the opposite party. It is now superseded by the *Rules S. C.*, which require the pleading itself to be served: see Holmested's Manual Pr. 92.

Solicitor's acceptance of service.

47. Where an acceptance of service of any bill, order, or other proceeding, and an undertaking to answer or appear thereto are given by a solicitor, such acceptance and undertaking are to be equivalent to personal service upon the party for whom the same

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are given, within the meaning of the Order requiring personal service, and an affidavit of personal service is in such case dispensed with. (30th Sept., 1866; Ord. 33.)

Rules of S. C. as to acceptance of service.

This *Order* appears to be still in force. Provision is expressly made by *Rules S. C.* 33, 71, for the acceptance of service of writs of summons: Holmested's Manual Pr. 52; as to other proceedings, of which service is accepted and an undertaking given to appear, the provisions of this *Order* would now seem to apply in all the Divisions of the High Court.

Solicitor's acceptance need not be verified.

48. Admissions and acceptances of the service of a bill, order, notice of motion or other paper, upon the opposite solicitor, need not be verified by affidavit. (3rd June, 1853; Ord. 40, s. 1.)

See *Rules* S. C. 33, 71, as to acceptance of service of writs of summons.

Under *Rule, S. C.* 71, acceptances of service of writs of summons, and undertakings to appear, require to be verified by affidavit, and to that extent it would seem this *Order* is abrogated, but as to all other acceptances and admissions of service the *Order* would seem to be still in force as to all actions, in the Chancery Division, and possibly also, in the other Divisions, of the High Court.

Change of solicitor.

49. A party suing or defending by a solicitor, shall not be at liberty to change his solicitor in any cause or matter without an order of the Court for that purpose, which may be obtained on *præcipe*; and until such order is obtained and served, and notice thereof given to the Clerk of Records and Writs, or Deputy Registrar with whom the pleadings are filed, the former solicitor shall be considered the solicitor of the party.

This *Order* is still in force. An order was also necessary to change the attorney at law. (See Rule 4, T. T. 1856 *post.*) But at law the order could only be obtained on motion. It is presumed that the practice of obtaining the order as of course on *præcipe* will now apply in all the Divisions.

Order to change solicitor when necessary.

Order to Change Solicitor.—An order to change the solicitor is necessary, not only where the client desires to discharge his solicitor in an action, but also where the solicitor discharges himself: See *Griffiths* v. *Griffiths*, 2 Hare 587; 7 Jur. 573. But no order is necessary to enable the client to appoint a new solicitor, in place of one

deceased: *Whalley* v. *Whalley*, 22 L. J. Chy. 632; *Alchin* v. *Buffalo & L. H. R'y Co.*, 2 Chy. Ch. R. 45. In the latter case, however, notice should be given of the appointment of the new solicitor to the officer with whom the pleadings are filed, and also to the opposite party. Braith Pr. 564, 565; *Bank of Montreal* v. *Harrison*, 4 P. R. 331.

Until an order to change the solicitor is obtained and served, service on the solicitor on the record is good, even though he has ceased to act, and though a new one has been appointed: *Davidson* v. *Leslie*, 9 Beav. 104; *Wright* v. *King*, *ib.* 161.

Payment of costs not a condition precedent.

Under the former practice at law, the attorney could not be changed by the client, unless his costs were first paid: *Witt* v. *Ames*, 11 W. R. 751; but in Chancery the rule was otherwise: *Meyers* v. *Robertson*, 1 Gr. 439. This is one of those matters in which the rules of Equity, and the rules of the Common Law differed, and therefore under *J. A.* s. 17, ss. 10, the rule of Equity is now to prevail. Orders to change solicitor will now be granted in all the Divisions of the High Court of Justice, without any provision as to the payment of costs: See *Grant* v. *Holland*, 3 C. P. D. 180.

Where there is a joint retainer, an order to change the solicitor on the application of some or one of the clients only, is irregular: *Re Norwich and Norfolk Building Society*, 22 W. R. 856; *Wedderburn* v. *Wedderburn*, 17 Beav. 158.

Material facts must be disclosed.

All material facts must be disclosed on the application for an order of course, otherwise it will be irregular and may be set aside; *e. g.*, the existence of a special retainer for a term of years unexpired: *Richards* v. *Scarborough Market Co.*, 17 Beav. 83; or the fact of the solicitor being mortgagee of the client's share in the fund in question: *Jenkins* v. *Bryant*, 3 Drew 70. Where, however, a solicitor in applying for an order to change a solicitor, relying on his client's statement that she was unmarried, so represented her, which statement turned out to be untrue, the Court though setting aside the order refused to direct the solicitor to pay the costs, emphatically declaring that the Court never had "made a man pay costs for believing the word of a woman:" *Thomas* v. *Finlayson*, 19 W. R. 255.

Where special circumstances are disclosed in the *præcipe* for an order of course, the officer may refuse to issue the order and may require a special application to be made.

Setting aside order.

After an order of course to change the solicitor has been issued, if the latter object to the order, he should not apply on *præcipe* for an order to re-appoint himself, but should move on petition to set aside the order: *Topping* v. *Searson*, 2 H. & M. 205.

Subpœna to appoint a new solicitor when necessary.

Where the solicitor dies and his client neglects to name a new solicitor he may be served with a *subpœna* to appoint a new solicitor. For form of *subpœna* (see Danl's Forms, 3rd ed., No. 2129; Braith Pr. 264.) If after the service of the *subpœna* he still neglects to appoint a solicitor, he is liable to attachment, or leave may be given to pro-

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ceed without further notice to such party: *Gibson* v. *Ingo*, 2 Phil. 402; Smith Pr., 7th ed., 126.

Application by one of several plaintiffs.

Where one of several plaintiffs desires to make an application in the action separately from his co-plaintiffs, he must obtain an order of course giving him leave to appoint a solicitor for that express purpose: Danl Pr., 5th ed., 1724.

Party acting in person desiring to appoint a solicitor.

Where a party sues or defends by a solicitor, and afterwards desires to sue or defend in person, an order giving him leave to do so must be obtained: Danl Pr., 5th ed., 1724. But when a party sues or defends in person and afterwards appoints a solicitor, no order is necessary, *ib.* 1725, but notice should be given to the officer with whom the pleadings are filed, and also to the opposite party.

Proceedings taken by a new solicitor without an order when one is necessary, or by a suitor in person when he has a solicitor on the record, are irregular and will be set aside: *Rathburn* v. *Hughes*, 3 Chy. Ch. R. 160; *Yeatman* v. *Snow*, 42 L. T. 502.

Order to change, when a discharge of solicitor by client.

An order to change solicitor is *prima facie* a discharge of the former solicitor by the client: *Webster* v. *Le Hunt*, 9 W. R. 804. But it is not a discharge of the solicitor by the client where it is taken out in consequence of the prior refusal of the solicitor to act, and a solicitor will be considered to have discharged himself, on the bankruptcy of himself, or the firm of which he is a partner: *Re Moss*, 2 L. R. Eq. 345; or by being arrested or detained in custody: *Re Williams*, 3 D. F. & J. 104; 28 Beav. 465; *Scott* v. *Fleming*, 9 Jur. 1085; but not merely by being in embarrassed circumstances: *Re Smith*, 9 W. R. 396. So also a firm of solicitors will be deemed to have discharged the client, where the firm is dissolved; and no arrangement can be made by the solicitors for the transfer of the client's business to one of their number without his consent amounting to a new retainer: *Cholmondeley* v. *Clinton*, 19 Ves. 261; *Griffiths* v. *Griffiths*, 2 Hare 587; *Slater* v. *Stoddard*, 6 P. R. 299; *Alchin* v. *Buffalo & L. H. R'y Co.*, 2 Chy. Ch. R. 45.

Where order unnecessary.

Where any new party is brought into an action by order to continue proceedings by reason of the death of, or transfer of interest by, any of the parties; such new party is not obliged to employ the solicitor by whom the deceased person, or transferror was represented, but he may without order employ a new solicitor, but notice of such new solicitor being so employed must be given to the officer with whom the pleadings are filed, and also to the opposite party: Danl Pr., 5th ed., 1725; *Simmonds* v. *Great Eastern R'y Co.*, 3 L. R. Chy. 797; but the assignee of the plaintiff in a creditor's suit cannot appoint a new solicitor except on special application: *Topping* v. *Searson*, 2 H. & M. 205.

Lien of solicitor.

Where the solicitor is changed by the client, the original solicitor is still entitled to a lien on any fund recovered in the cause, and is entitled to be paid his costs next after the costs of the solicitor by

whom the suit is concluded: *Clark* v. *Eccles*, 3 Chy. Ch. R. 324.

Solicitor restrained from acting for opposite party when.

Where a solicitor is discharged by the dissolution of a firm of which he is a member, he is not at liberty to act for the opposite party: *Cholmondeley* v. *Clinton*, 19 Ves. 261; *Law Times*, June 3, 1882, p. 82: but when he is discharged by his client he cannot be restrained from acting for the opposite party, nor the latter from employing him: *Little* v. *Kingswood & Parkfield Colliery Co.*, 20 Ch. D. 733; 47 L. T. 323; 52 L. J. Ch. 66; but the solicitor may be restrained by injunction from divulging the secrets of his former client to the opposite party, either in the same transaction, or any other flowing thereout, or connected therewith: *Ib.*, and see *Davies* v. *Clough*, 8 Sim. 262, 267: *Grissell* v. *Peto*, 9 Bing. 1; *Johnson* v. *Marriott*, 2 Cr. & M. 183.

Lien on books and papers.

Lien of Solicitor on Books and Papers.—A solicitor has a lien on the books and papers of his client, which have come to him in the course of business in his professional capacity. This lien, however, is a mere right to retain the documents until his costs are paid, and cannot be actively enforced: *Bozon* v. *Bolland*, 4 My. & Cr. 354. In the absence of any agreement to the contrary, the lien is general, and attaches for all costs due from the client, and is not confined to the costs incurred in the particular business in which the documents came into the solicitor's hands: *Re Faithful*, 6 L. R. Eq. 325; *Bozon* v. *Bolland*, *supra*; *Richards* v. *Platel*, Cr. & Ph. 82; *Worrall* v. *Johnson*, 2 Jac. & W. 214, *Ex parte Sterling*, 16 Ves. 257; *Friswell* v. *King*, 15 Sim. 191; *Colmer* v. *Ede*, 19 W. R. 318; *Re Messenger*, 3 Ch. D. 317.

The solicitor cannot acquire any greater right of detainer, than the client had himself, and the lien is therefore subject to the rights and equities of those claiming by title paramount to that of the client: *Francis* v. *Francis*, 5 D. M. G. 108; *Stedman* v. *Webb*, 4 My. & Cr. 346; *Clutton* v. *Pardon*, T. & R. 304; *Molesworth* v. *Robbins*, 2 J. & Lat. 358; *Pelly* v. *Wathen*, 1 D. M. G. 16; 7 Hare 351; *Blunden* v. *Desart*, 2 Dr. & W. 405; *Bell* v. *Taylor*, 8 Sim. 216; *Baker* v. *Henderson*, 4 Sim. 27; *Warburton* v. *Edge*, 9 Sim. 508; *Re Mosely*, 15 W. R. 975; *Young* v. *English*, 7 Beav. 10; *Stennett* v. *Aruyn*, 2 Chy. Ch. R. 218; *Re Union Cement and Brick Co., Ex parte, Pulbrook*, 4 L. R. Chy. 627; and where the client would be bound to produce the documents in evidence on the demand of third parties, the solicitor cannot refuse to produce them on the ground of his lien: *Hope* v. *Liddell*, 7 D. M. G. 331; 20 Beav. 438; *Fowler* v. *Fowler*, 44 L. T. 799, 50 L. J. Ch. 686.

But third parties whose rights are acquired under the client subsequent to the creation of the lien, have no greater rights than the client himself had at the time they acquired title: *Gill* v. *Gamble*, 13 Gr. 169; 2 Chy. Ch. R. 135. The solicitor, however, cannot

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claim a lien, against such third parties, for costs incurred by him subsequently to their acquiring their rights: *Blunden* v. *Desart*, 2 Dr. & W. 405.

Taking security, effect on lien.

The lien is superseded by the solicitor taking security for his costs: *Cowell* v. *Simpson*, 16 Ves. 275, but only to the extent of the security: *Watson* v. *Lyon*, 7 D. M. G. 288, and ceases altogether on payment, and the solicitor cannot then retain documents on the ground that a third party claims an interest in them: *Re Emma Mine, Ex parte Turner*, 24 W. R. 54. The lien may also be lost by the solicitor assigning his bill of costs to a third party: *Reesor* v. *Ella*, 7 P. R. 371.

Although ordinarily the documents cannot be taken out of the solicitor's hands until the lien is satisfied, the client is nevertheless entitled to inspect them: *Lockett* v. *Cary*, 10 Jur., N. S. 144; and where the circumstances are pressing, an order may be made for delivery of documents in a discharged solicitor's hands before payment of his bill, provided money is brought into Court sufficient to satisfy his demand: *Re South Essex Eq. Investment and Advance Co.*, 46 L. T. 280.

When a firm is changed by the introduction of a new partner, there is no lien on papers delivered to the new firm for costs due the old firm: *Re Forshaw*, 16 Sim. 121.

Toronto agents, as against their principals, have a general lien for their agency bills on papers placed in their hands by their principals; and the lien is not lost even though the relationship of principal and agent is dissolved by the agent: *Re Attorney*, 7 P. R. 311; *Re A. B. & C.*, 14 C. L. J. 142; *Re Cross*, 4 Chy. Ch. R. 11.

Difference between right of lien of solicitor who is discharg'd and one who discharges himself.

There is an important difference in the right of lien, of a solicitor in an action who discharges himself, and one who is discharged by his client.

When the solicitor discharges himself, he is bound to deliver up the papers in the action to the new solicitor, upon the latter undertaking to hold them subject to his lien for what, if anything, shall be found due on taxation of his bill; and to proceed with the cause with due diligence, and to redeliver the papers within ten days after he shall cease to have occasion for them, if the lien be not sooner satisfied: *Colegrave* v. *Manley*, T. & R. 400; *Heslop* v. *Metcalf*, 3 My. & Cr. 183; *Wilson* v. *Emmett*, 19 Beav. 233; *Cane* v. *Martin*, 2 Beav. 584; *Robins* v. *Goldingham*, 13 L. R. Eq. 440; *Ley* v. *Brown*, 1 Chy. Ch. R. 179; *Merrewether* v. *Mellish*, 13 Ves. 161; *Mayne* v. *Hawkey*, 3 Sw. 93; *Webster* v. *Le Hunt*, 9 W. R. 804; *Commerell* v. *Poynton*, 1 Sw. 1. The solicitor cannot in such a case require the client to undertake to proceed to a taxation of his bills: *Moir* v. *Mudie*, 1 S. & S. 282. And if he refuse to deliver up the papers to the new solicitor, on his undertaking as above mentioned, he may be ordered to pay the costs of an application to compel him

to do so: *Robins* v. *Goldingham*, *supra*. A solicitor who declines to proceed with an action until his costs are paid, in effect discharges himself: *Ib.*, and see *Re Lewis*, Law Times, 1 April, 1882, p. 387. And so the dissolution of the firm of solicitors engaged by the client, or the arrest or detention in custody, or bankruptcy of the solicitor, works a discharge of the client by the solicitor, *vide supra*. But where the client dies, or his interest is transferred by assignment or otherwise, and an order is made to continue the proceedings in the name of some new party who names a new solicitor, in such cases the solicitor is deemed to be discharged by the client: see *Re Moss*, 2 L. R. Eq. 345.

Discharge by client.

When the solicitor is discharged by the client he cannot generally be ordered to deliver up the papers, until his lien has been satisfied: *Re Faithful*, 6 L. R. Eq. 325; *Griffiths* v. *Griffiths*, 2 Hare, 587; *Bozon* v. *Bolland*, 4 My. & Cr. 354, unless it appear that there is strong ground for believing that there is nothing due the solicitor: *Re Bevan & Whitting*, 33 Beav. 439. Nor is the solicitor in such a case bound even to produce the papers for the purpose of the cause, until his bill is paid: *Lord* v. *Wormleighton*, Jac. 580; *Redfearn* v. *Sowerby*, 1 Sw. 84; *Robins* v. *Goldingham*, 13 L. R. Eq. 440. But where the discharged solicitor neglects to deliver his bill of costs within the proper time, he may be ordered to deliver up the papers subject to his lien thereon: *Cooper* v. *Hewson*, 2 Y. & C. C. C. 515.

And where the action is one for administration in which the rights of third parties are concerned, the solicitor, though discharged by his client, may be compelled to deliver up the papers necessary for the prosecution of the action, on the usual terms: *Re Boughton*, *Boughton* v. *Boughton*, 48 L. T. 413; *Belaney* v. *Ffrench*, L. R. 8 Chy. 918; 29 L. T. N. S. 706.

Lien on fund.

Lien on Fund.—A solicitor has not only a general lien on his client's papers for all costs due to him, but he has also a particular lien for the costs of proceedings to recover a fund, upon the fund recovered, or ordered to be paid: *Lann* v. *Church*, 4 Mad. 391, and if the fund actually reaches the solicitor's hand he is entitled then to retain it until his costs, not only of the action in which the fund is recovered, but all other costs are paid, that is so far as his client's interest in the fund extends: *Davidson* v. *Douglas*, 15 Gr. 354; *Hall* v. *Laver*, 1 Hare, 571.

The solicitor may give notice to the opposite party not to pay the money until his costs are satisfied: *Cowell* v. *Simpson*, 16 Ves. 275; and see *Sympson* v. *Prothero*, 5 W. R. 814. And this lien is not lost by the discharge of the solicitor by the client, or by the act of God, pending the suit; thus where the plaintiff assigned his interest in the suit, and the assignee named a new solicitor, the first solicitor was held entitled to a lien on the fund ultimately recovered and to

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payment of his costs thereout, next after those of the solicitor by whom the suit was concluded: *Clark* v. *Eccles*, 3 Chy. Ch. R. 324; and see *Kellett* v. *Kelly*, 5 Ir. Eq. R. 34; *Bozon* v. *Bolland*, 4 My. & Cr. 354; *Cormack* v. *Beisly*, 3 D. & J. 157.

Where the solicitor declines to act he has no lien upon a fund in Court: *Cresswell* v. *Byron*, 14 Ves. 271.

No lien where solicitor refuses to act.

The lien on a fund may be actively enforced: *Bozon* v. *Bolland*, 4 My. & Cr. 354. The solicitor may obtain a stop order: *Hobson* v. *Shearwood*, 8 Beav. 486; or an order for payment of his costs out of any money in Court payable to his client, or applicable to the payment of the costs: *Wardell* v. *Trenouth*, 8 P. R. 142. But a solicitor can have no higher claim against a fund by virtue of his lien than that of his client; and if the client would not be entitled to payment of his costs out of the fund neither will his solicitor; although it may have been recovered by means of proceedings taken by him: *Francis* v. *Francis*, 5 D. M. G. 108.

Lien may be actively enforced.

Client cannot defeat lien.

The client cannot assign the fund in Court so as to defeat the solicitor's lien, even to a purchaser for value, without express notice: *Haymes* v. *Cooper*, 33 L. J., N. S. Chy. 488. Neither can the client release the adverse party from the payment of costs ordered to be paid, so as to defeat his solicitor's lien: *Ex parte Bryant*, 1 Mad. 42. But the lien may be defeated by a *bona fide* compromise by the parties to the action: *McVie* v. *Hope*, Law Times, 23rd June, 1883, p. 145; but a collusive compromise will not have that effect: *Beames Costs*, 312, 313; *Langle* v. *Fetterly*, 5 U. C. R. 628; *Griggs* v. *Meyers*, 6 U. C. R. 532; *Connors* v. *Squires*, 2 P. R. 149; and see *Plant* v. *Stone*, 9 U. C. R. 458; *Ex parte Morrison*, 4 L. R. Q. B. 153; *Ex parte Games*, 3 H. & C. 294; *Brown* v. *Conant*, 2 P. R. 208; *Smith* v. *Thompson*, 5 P. R. 166; *Morgan* v. *Holland*, 7 P. R. 74; *Barrett* v. *Barrett*, 18 C. L. J. 56. But when in a suit for foreclosure the plaintiff and defendant compromised the suit, the plaintiff paying the defendant $200 in consideration of his releasing his equity of redemption, the defendant's solicitor was held to have no lien on the $200: *Brownscomb* v. *Tully, re Fairbairn*, 3 Chy. Ch. R. 71. An agent of a solicitor has a lien on a fund recovered, and payment by the client to the agent in order to obtain his papers, is a good payment as against the principal solicitor: *Re Cross*, 4 Chy. Ch. R. 11; but the lien of the agent is no greater than that of the principal solicitor, and if the latter have no claim upon the fund as against his client, the agent may be compelled to pay it over upon a summary application on behalf of the client: *Re Edwards*, 45 L. T. 578.

Where money is standing to the separate account of the party to a cause, he may apply for payment out by a new solicitor, without an order changing the solicitor: *Waddilove* v. *Taylor*, 17 L. J. Ch. 384. But where the new solicitor delivered the cheque to the client

before the lien of the former solicitor was satisfied, he was ordered to pay him the amount of his lien : *McPhatter* v. *Blue*, 15 C. L. J. 162.

Effect of Lien on right of set-off between parties.—The lien of a solicitor cannot prevent a set-off of costs between the parties in the same action : *Pringle* v. *Gloag*, 10 Chy. D. 676 ; *Cameron* v. *Campbell*, 12 U. C. Q. B. 159 ; *Brigham* v. *Smith*, 17 Gr. 512 ; but see *Webb* v. *McArthur*, 4 Chy. Ch. R. 63. But where a special lien was given by one of the parties to his solicitor, the right of set-off to the extent of the special lien thus created was held to be defeated : *Ross* v. *McLay*, 7 P. R. 97. And the right of lien will also prevent a set-off of costs incurred in different actions, though between the same parties and in relation to the same subject matter : *Re Harrald*, 48 L. T. 352. As to the right of the taxing officer to set-off costs see *Rule S. C.* 436 : *Barker* v. *Hemming*, 5. Q. B. D. 609 ; *Cuthbert* v. *Commercial Travellers' Association*, 7 P. R. 255. Effect of lien on right off set-off.

No Lien on Estate recovered.—In Ontario a solicitor is not entitled to any lien on an estate recovered through his instrumentality : *Shaw* v. *Neale*, 6 H. L. C. 581 ; but see *Morgan* v. *Holland*, 7 P. R. 74. In England since 23 & 24 Vict. cap. 127, sec. 28 (Impl.), he has a lien on all property recovered by him for his client. No lien on estate recovered.

Orders 50, 51, provided for transmitting to the other Courts a certificate of every order striking a solicitor off the rolls, and also for striking off the Rolls of the Court of Chancery, any solicitor, certified to have been struck off the Rolls of Attorneys. These *Orders* are now obsolete, and an order striking a solicitor off the rolls applies to all the Divisions of the High Court. (See *Re Martyn* and *Re Solicitor*, 1 Charley's Notes of Cases, p. 66, and see *Judicature Act*, s. 74). Ord. 50-51.

52. Where a case appears justifying or requiring by the practice hitherto, an order against a solicitor that he be struck off the Roll of Solicitors, unless he shall, before a time therein limited, show unto the Court good cause to the contrary, it shall be competent for the Court, in lieu thereof, to issue an order calling upon the solicitor to answer the matters appearing on affidavit or otherwise. Striking solicitor off roll.

Instead of an order to shew cause being obtained, it would seem that under the present practice, the proper course is to serve notice of motion on the solicitor : see *Rule S. C.* 404, 405 ; the leave of the Court must be first obtained. See *Rule S. C.* 411, Holmested's Manual, Pr. 201.

In *Burton* v. *Earl of Chesterfield*, 9 Jur. 373, it was said that the motion could not be made, calling on an attorney to answer the

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affidavits and at the same time to show cause why he should not be struck off the rolls; and in that case the rule was confined to calling on him to answer the affidavits. In a later case, however, the rule *nisi* was granted in the double form: *Re Blake*, 3 E. & E. 34.

Where the motion is confined to calling on the solicitor to answer affidavits simply, and the Court is of opinion that his answer is insufficient, the practice at law has been to enlarge the motion to a future day, intimating to the attorney that he may be further heard on that day, why he should not be struck off: *Re Wright*, 12 C. B. N. S. 705: *Re H.* 31 L. T. N. S. 730.

In order to give the Court jurisdiction to entertain an application for a solicitor to answer matters contained in an affidavit, or to strike him off the rolls, it is not necessary that the misconduct of which he is accused should arise strictly between solicitor and client: *Re Aitken*, 4 B. & Ald. 47; *Re Attorney*, 39 U. C. Q. B. 171; *Re Knight*, 1 Bing. 91; *Re Blake*, 3 E. & E. 34; *Re Hill*, 3 L. R. Q. B. 543; *Re Chandler*, 22 Beav. 353; and see *Re Cutts*, 16 L. T. N. S. 715; *Re Keays*, 13 C. P. 282.

Where in the course of a cause, evidence of fraudulent conduct on the part of a solicitor is brought to light, the Court may *sua sponte* direct proceedings to be taken against the offending solicitor: *Goodwin* v. *Gosnell* 2 Coll. 457, 462; *Wheatley* v. *Bastow*, *Re Collins*, 7 D. M. G. 261, 588; *Re Toms*, 3 Chy. Ch. R. 204; *Re Currie*, 25 Gr. 338; *Re Solicitor*, 27 Gr. 77; *Thorndyke* v. *Hunt*, 5 Jur. N. S. 879.

A solicitor may be struck off the rolls for fraudulent conduct as a trustee: *Re Chandler*, *supra*, where the application was made by the *cestui que trust*; and see *Thorndyke* v. *Hunt*, *supra*; *Dolland* v. *Johnson*, 2 Jur. N. S. 633; or for fraudulently abusing the confidence of a client: *Re Martin*, 6 Beav. 337; *Re J. C. M. & J. M.* 24 W. R. 111; or for obtaining a client's money to discharge alleged liabilities of the client which did not exist: *Re H.* 31 L. T. N. S. 730; or for getting a false affidavit sworn, and without authority instructing counsel to consent to payment of money out of Court: *Wheatley* v. *Bastow*, 7 D. M. G. 261, 558; or for falsely representing an injunction to have been granted: *Kimpton* v. *Eve*, 2 V. & B. 352; or for making an interlineation in an affidavit after it had been sworn: *Erskine* v. *Adeane*, 18 Sol. Jour. 573, 10 C. L. J. 209; or for committing perjury, Seton 652; or for revealing the secrets of a client: *Re Cutts*, 16 L. T. N. S. 715; *Cholmondeley* v. *Clinton*, 19 Ves. 261.

Where the application is made on the ground of fraud, the fraud must be clearly proved; the Court will not infer an equivocal action to have been fraudulent: *Re Stewart*, 2 L. R. P. C. 88; *Re S——*, 14 C. P. 323.

Under *R. S. O.*, c. 140, s. 26, a solicitor may be struck off the rolls for default of payment of money received by him as a solicitor:

Anon, 12 C. L. J. 204. But where considerable sums had got into the hands of a solicitor who made default in payment, but the client issued execution upon the order directing payment, it was held that he had treated the claim as a debt, and a subsequent motion to strike the solicitor off the rolls for non-payment was therefore refused: *Re Fletcher*, 28 Gr. 413.

Repayment, pending a motion to strike off the rolls, of money fraudulently obtained, is no purgation of the offence: *Re H.*, 31 L. T. N. S. 730. But when a solicitor has been struck off, it is a condition precedent to restoration that he shall have made full restitution, or made the best efforts in his power thereto, and satisfy the Court as to the propriety of his conduct in the meantime: *Re Poole*, 4 L. R. C. P. 350; *Ex parte Pyke*, 6 B. & S. 703. And the Law Society must be notified of any application to restore to the rolls, a solicitor who has been struck off for misconduct: *Re Solicitor*, 19 C. L. J. 234.

In some cases the solicitor has been suspended from practice for a specified time, and not actually struck off: see *Erskine* v. *Adeane*, 18 Sol. Jour. 573; *Re Hill*, 3 L. R. Q. B. 543; *Re Blake*, 3 E. & E. 34; and see further as to proceedings against solicitors, Cordery's Law of Solicitors.

Order 53 provided that no suit should be dismissed for misjoinder of plaintiffs, and is now superseded by *Rule S. C.* 103. Ord. 53.

54. Wherever it appears to the Court that notwithstanding the conflict of interest in the co-plaintiffs, or the want of interest in some of the plaintiffs, or the existence of some ground of defence affecting some or one of the plaintiffs, the plaintiffs, or some or one of them, are, or is, entitled to relief, the Court may grant such relief, and may modify the decree according to the special circumstances of the case; and for that purpose is to direct such amendments, if any, as may be necessary; and at the hearing, before such amendments are made, may treat any one or more of the plaintiffs as if he or they were defendant, or defendants, in the suit, and the remaining or other plaintiffs was, or were, the only plaintiff or plaintiffs on the record. (3rd June, 1853; Ord. 31.) Misjoinder of parties.

It is doubtful whether this *Order* is any longer in force. *Rule S. C.* 90 seems to make express provision for the matter covered by it. That *Rule* is as follows: "Where an action has been commenced in

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the name of the wrong person as plaintiff; or when it is doubtful whether it has been commenced in the name of the right plaintiff or plaintiffs, the Court or a Judge, if satisfied that it has been so commenced through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, may order any other person or persons to be substituted or added as plaintiff or plaintiffs upon such terms as may seem just": and see *Rules S. C.* 103, 104, enabling the Court to add, or strike out, the names of parties as plaintiffs, or defendants: and see also *Emden* v. *Carte*, 17 Ch. D. 169; 44 L. T. 344; *Woodward* v. *Shields*, 32 C. P. 282.

Ord. 55.

Order 55 provided that 'where there is a misjoinder of plaintiffs, and the plaintiff who has an interest has died, leaving a plaintiff on the record without any interest, the Court may, at the hearing of the cause, order such an amendment of the record as may appear just, and proceed to a decision of the cause, if it shall see fit; and give such directions as to costs or otherwise as may appear just and expedient.' This *Order* appears to be now obsolete, and superseded by the provisions of *Rules S. C.* 103, 474.

Ord. 56.

Order 56 provided for the appointment by the Court, of a person to represent an estate of which there should be no legal personal representative.

R. S. O. c. 49, s. 9.

This *Order* is virtually superseded by *R. S. O.* c. 49, s. 9, (p. 596,) which applies to all the Divisions of the Supreme Court, and is as follows:—

Appointment of person to represent estate of a deceased person.

"Where in any suit or other proceeding it is made to appear that a deceased person who was interested in the matters in question has no legal personal representative, the Court or a Judge may either proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent such estate for all the purposes of the suit or other proceeding, on such notice to such person or persons, if any, as the Court thinks fit, either specially or by public advertisement; and notwithstanding that the estate in question may have a substantial interest in the matters; or that there may be active duties to perform by the person so appointed; or that he may represent interests adverse to the plaintiff; or that there may be embraced in the matter an administration of the estate whereof representation is sought; and the order so made, and any orders consequent thereon, shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly appointed legal personal representative of such person, and such legal personal representative had been a party to the suit or proceeding, and had duly appeared, and had submitted his rights and interests to the protection of the Court."

This section enables the Court to take one of two courses, either (1) to proceed without a representative of the personal estate of a

deceased person who may have been interested in the matters in question; or, (2) to appoint some person to represent such deceased person's personal estate for the purposes of the action.

Where the Court makes an order adopting either of these courses, the estate in question is bound and concluded by the proceedings as though it had been represented in the litigation by a duly appointed legal personal representative.

No authority to appoint any one to represent realty

Whenever, therefore it is necessary that the real estate of a deceased person should be represented in any action or proceeding, the Court has no power under this Statute, either to proceed in the absence of the real representative or to appoint any person to represent such estate, so as to bind it by the proceedings. But in any case in which the right of the heir-at-law, or next of kin, or of a class, shall depend upon the construction which the Court shall place upon any instrument, and it shall not be known, or shall be difficult to ascertain who is, or are, such heir-at-law, next of kin, or class, and the Court shall consider that, in order to save expense, or for some other reason, it will be convenient to have the question of construction determined before such heir, next of kin, or class, shall be ascertained, the Court may appoint a person to represent the heir, next of kin, or class, and the judgment of the Court is to be binding on the parties so represented: see *Rule S. C.* 99.

And in every action the Court may now under *Rule S. C.* 103, deal with the matter in controversy, so far as regards the rights and interests of the parties actually before it.

Application under statute, how made.

The application under the Statute is usually made by *ex parte* motion in Chambers, but the order may be made at the trial of the action: *Mendes* v. *Guedalla*, 10 W. R. 485; *Hewiston* v. *Todhunter*, 22 L. J. Ch. 76; *Re Peppitt*, 4 Ch. D. 230; or on a motion for judgment: *Gairdner* v. *Gairdner*, 1 O.R. 184, and see *Curtius* v. *Caledonian Fire and Life Ins. Co.*, 45 L. T. 662; or at a subsequent stage of the action where the party whose estate is to be represented, dies after the trial: *McCarthy* v. *Arbuckle*, 31 C. P. 48. Before the order is made notice is sometimes required to be given to the person, if any, who would be entitled to letters of administration: *Curtius* v. *Caledonian Fire & Life Ins. Co.*, *supra*.

Discretion of Court.

The Court has a wide discretion either to appoint a representative, or to proceed without any representation if it considers the estate in question sufficiently protected. See *Joint Discount Co.* v. *Brown*, 8 L. R. Eq. 380; *Tarratt* v. *Lloyd*, 2 Jur. N. S. 371; *Hewitson* v. *Todhunter*, 22 L. J. Ch. 76.

Cases when representative dispensed with.

Representation of the estate has been dispensed with, where the deceased person was in the same interest as the plaintiff: *Cox* v. *Taylor*, 22 L. J. Ch. 910; or where other persons of the same class were before the Court: *Abrey* v. *Newman*, 17 Jur. 153; and a representative of the estate of one of two executors who had died insol-

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vent, and to which representation could not be obtained was also dispensed with: *Moore* v. *Morris*, 13 L. R. Eq. 139; *Band* v. *Randle*, 2 W. R. 331; *Rogers* v. *Jones*, 1 Sm. & G. 17; and where the deceased person's interest was very small; *Montgomery v. Douglas*, 14 Gr. 268; and where his estate was insolvent and his next of kin refused to take out letters of administration and the estate appeared to have no substantial interest in the fund sought to be recovered by the plaintiff, representation was dispensed with: *Curtius* v. *Caledonian Fire and Life Ins. Co.*, 45 L. T. 662, and even where the deceased party was sole plaintiff and tenant for life, and an arrear of income remained due to him, an administration suit instituted by him, was on the application of the defendants, revived without any representative of the original plaintiff, whose executor had died without proving his will, but without prejudice to the right of the personal representative of the original plaintiff to intervene: *Hayward* v. *Pile*, 7 L. R. Chy. 634, but see *Bank of Montreal* v. *Wallace*, 1 Chy. Ch. R. 261.

Personal representatives when dispensed with.

Where a deceased person had by an instrument *inter vivos* made over his property to the defendant, who became bound to pay his grandchildren $400 each after the death of the settlor, the Court dispensed with a personal representative of the settlor, in a suit by one of the grand-children to enforce payment of the $400: *Mulholland* v. *Merriam*, 19 Gr. 288, *S. C.* 20 Gr. 152. Where the interest of the deceased person only amounted to $20 or $30, and no personal representative had been appointed, the Court dispensed with the presence of a personal representative: *Montgomery* v. *Douglas*, 14 Gr. 268.

Where an estate had been administered, and pending the suit for administration, the personal representative died, and all that remained to be done was for the Master to make his report, and it appeared that the estate was insolvent, an order was made appointing the solicitor of the deceased administratrix to represent the estate: *Re Tobin, Cook* v. *Tobin*, 6 P. R. 40. So also in an action by a mortgagee of a policy on the life of the mortgagor, who had died intestate and insolvent, and no administration had been taken out to his estate, the presence of a personal representative of the mortgagor was dispensed with; *Curtius* v. *Caledonian Fire Ins. Co.*, 45 L. T. 662; *Webster* v. *The British Empire Ins. Co.*, 43 L. T. 229; 15 Ch. D. 169.

Cases where statute applies.

The Statute has been held to apply though the deceased person was never a party to the action (*Ib.*), but see *Hughes* v. *Hughes*, 6 App. R. 373. It also applies to proceedings on a special case: *Swallow* v. *Binns*, 17 Jur. 29; and to proceedings by petition: *Re Ranking*, 6 L. R. Eq. 601-5; *Ex parte Cramer*, 9 Hare App. xlvii.; and see *Magnay* v. *Davidson*, *Ib.* lxxxii., but is generally applicable only where from any cause there is difficulty in obtaining representation of the estate: *Long* v. *Storie*, Kay App. xii; *Davies* v. *Boulcott*, 1 Dr. & Sm. 23; *Bliss* v. *Putnam*, 29 Beav. 20.

In an action to enforce a lien for an annuity charged upon real estate, it is not necessary to make the personal representative of a deceased person who was liable for its payment a party, unless an account of the personal estate of the deceased is asked: *Paine* v. *Chapman*, 7 Gr. 179, and see *Burns* v. *Canada Co.*, 7 Gr. 587. In an action against the heirs of a deceased purchaser to enforce a vendor's lien, the widow of the purchaser is a necessary party in respect of her dower: *Paine* v. *Chapman*, 7 Gr. 179.

Cases where statute does not apply.

Although the Statute enlarges the power of the Court beyond the scope of *Ord.* 56, it has been held not to authorize the appointment of a person to represent an estate which the action is brought to administer, nor in such an action can the Court dispense with the presence of a legal personal representative: *Hughes* v. *Hughes*, 6 App. R. 373, and see *Rowsell* v. *Morris* 17 L. R. Eq. 20; *Outram* v. *Wyckhoff*, 6 P. R. 150; *Leonard* v. *Clydesdale*, 6 P. R. 142; *Toronto Savings Bank* v. *Canada Life Assurance Co.*, 13 Gr. 171.

Consent of person appointed necessary.

A person cannot be appointed to represent an estate under the Statute without his consent: *Prince of Wales Co.* v. *Palmer*, 25 Beav. 605; *Hill* v. *Bonner*, 26 Beav. 372. The proper person to be appointed is the person who would be appointed administrator *ad litem*: *Dean of Ely* v. *Gayford*, 16 Beav. 561; where the deceased had left a will which was disputed, the person named as executor therein was appointed: *Hele* v. *Lord Bexley*, 15 Beav. 340.

Judgment against personal representative, how far binding on real representative.

Although a judgment in a suit to which the personal representative is a party is conclusive as regards the personal estate and those beneficially interested therein, whether as legatees or next of kin; it is only *prima facie* evidence of a liability of the estate as against those interested in the realty, whether as devisees, or heirs-at-law, and the latter are at liberty to rebut it: *Eccles* v. *Lowry*, 23 Gr. 167; *Lovell* v. *Gibson*, 19 Gr. 280; *Willis* v. *Willis*, 19 Gr. 573; *Harvey* v. *Wilde*, 14 L. R. Eq. 438; *Steel* v. *Lineberger*, 59 Penn. St. Rep. 308; *Story* v. *Fry*, 1 Y. & C. C. C. 603, and see *Anderson* v. *Paine*, 14 Gr. 110; and it is therefore only to this extent that an order under the Statute will bind those interested in the real estate. But the lands of a deceased person may be sold under execution against his personal representative, without making the persons interested in the realty parties; *R. S. O.* c. 66, ss. 35, 36, 40; and the persons interested in the realty are *prima facie* bound by the sale: *McEvoy* v. *Clune*, 21 Gr. 515. But where the claim for which the judgment is recovered is one that is not properly enforceable against the realty, the execution may be stayed in an action by heirs-at-law: *Anderson* v. *Paine*, 14 Gr. 110: and if a sale take place it may be successfully impeached by the heir-at-law: *Freed* v. *Orr*, 6 App. R. 690. Where the judgment against the personal representative is successfully impeached on the ground of fraud and collusion, the beneficiaries are entitled to set up the Statute of Limitations against the claim of

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the creditor which the personal representative had omitted or neglected to plead: *Jardine* v. *Wood*, 19 Gr. 617.

The Master in Chambers has power to entertain applications under the Statute for the appointment of a person to represent the estate of a deceased party: *Collver* v. *Swayzie*, 8 P. R. 42; Holmested's Manual Pr., p. 210.

Statute does not supersede jurisdiction of Surrogate Courts.

The Statute does not supersede the authority and jurisdiction of the Surrogate Courts as the sole tribunals authorized to grant letters probate of wills, or letters of administration. It merely enables the Court to proceed with an action so as to bind the personal estate of a deceased person even though no letters probate, or letters of administration, have been granted by the Surrogate Court. The representative authorized to be appointed by the Statute is not an administrator, but merely represents the estate for the purpose of the action in which the order is made, and he is not entitled to act as an administrator of the estate, except so far only as it is necessary for him to do so for the purposes of the action in which he is so appointed. It has not been usual to require any security to be given by a person appointed under the Statute to represent an estate, and he has no authority to receive any moneys belonging to the estate he is appointed to represent, except according to the express order of the Court in that behalf. The Court has refused to appoint a person to receive a sum of money payable out of Court to a deceased person, although the amount was small; *Rawlins* v. *McMahon*, 1 Drew 225; *Williams* v. *Allen*, 32 Beav. 650, and has refused to order payment to the representative, where one has been appointed in the suit: *Byam* v. *Sutton*, 19 Beav. 646.

An administrator *ad litem* may be appointed by the Surrogate Court: *R. S. O.* c 46, s. 54, and see s. 51, and a decree against him binds the general administrator *Davis* v. *Chanter*, 2 Ph. 545; *Croft* v. *Waterton*, 13 Sim. 653; *Ellice* v. *Goodson*, 2 Col. 4; *Williams* v. *Allen*, 32 Beav. 650; *Woodhouse* v. *Woodhouse*, 8 L. R. Eq. 514; *Collas* v. *Hesse*, 12 W. R. 565.

Court may proceed though some of the parties interested are not before it.

57. Where questions arise between parties, who are some only of those interested in the property respecting which the question arises; or where the property in question is comprised with other property in the same settlement, will, or other instrument, or is the property of an intestate, the Court may adjudicate on the questions arising between such parties, without making the other parties interested in the property respecting which the question arises, or interested under the settlement, will, or other instrument, par-

ties to the suit; and without requiring the whole trusts and purposes of the settlement, will, or instrument, or the whole estate of the intestate, to be executed or administered under the direction of the Court, and without taking the accounts of the trustees or other accounting parties, or ascertaining the particulars or amount of the property touching which the question or questions have arisen, or of the whole estate or assets; but where the Court is of opinion that the application is fraudulent, or collusive, or that for some other reason the application ought not to be entertained, it may refuse to make the order prayed. (3rd June, 1853; Ord. 29.) *(Imp. Act.* 15 & 16 Vict. c. 86 s. 51.)

The Court may under this *Order* execute one or more of several specific trusts embraced in an instrument without making all the persons interested in the other trusts embraced therein, parties: *Parnell* v. *Hingston*, 3 Sm. & G. 337. But some of the parties interested on both sides of the question involved must be before the Court: *Swallow* v. *Binns*, 9 Hare App. xlvii. The Court has refused to permit a plaintiff at the hearing to strike out the names of defendants whom he had improperly omited to serve with a subpœna to hear judgment, and proceed in their absence although such parties had merely a nominal interest: *Lanham* v. *Pirie*, 2 Jur. N. S. 1201, and see *Quantz* v. *Smelser*, 6 P. R. 228; but where at the hearing it was discovered that an order *pro confesso* against certain defendants had been vacated by a subsequent amendment, the Court pronounced a decree saving the rights of such defendants: *Waddle* v. *McGinty*, 15 Gr. 261. A decree for foreclosure could not be made under this *Order* as against some only of the parties interested in the equity of redemption: *Caddick* v. *Cook*, 32 Beav. 70. But where the parties interested in the equity of redemption are numerous, the Court may under *Ord.* 438 award judgment, and direct that parties so interested be made parties in the Master's Office, but such order can only be made, where one or more parties interested in the equity of redemption, are already parties to the action.

Action not to be defeated by misjoinder.

No action is now to be defeated by reason of the misjoinder of parties, and the Court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it: *Rule S. C.* 103. Where a defendant now wishes to raise an objection to the plaintiff's proceedings, on the ground of the non-joinder or misjoinder of parties, it can no longer be raised by

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demurrer, but must be raised on motion to add, or strike out, parties: *Werderman* v. *Societé Generale D'Electricité*, 19 Ch. D. 246; 45 L. T. 514; 18 C. L. J. 18, or the Court itself may *mero motu* make an order for that purpose: *Kino* v. *Rudkin*, 6 Ch. D. 160; *Rule S. C.* 103, *a.*

The *Order* applies to applications made under *The Trustees Relief Act*, 1850, and some out of several parties entitled to the equity of redemption were held entitled to apply under that Act for a reconveyance: *Re Sharpley's Trusts*, 1 W. R. 271. The *Order* also applies to parties to special cases: *Swallow* v. *Binns*, 9 Hare App. xlvii; *Re Brown*, 29 Beav. 401.

When the Court proceeds under this *Order* in the absence of any parties interested, the absent parties are not bound by the proceedings: *Doody* v. *Higgins*, 9 Hare App. xxxii.

No objection for want of parties when following Rules apply.

58. It shall not be competent to a defendant to take an objection for want of parties in any case to which the seven rules next hereinafter set forth apply. (3rd June, 1853; Ord. 6, s. 2.)

Under *Rule S. C.* 102, subject to *The Judicature Act* and *Rules* this *Order* is now in force in all the Divisions of the High Court of Justice. The object of this *Order* is to save unnecessary expense, and where unnecessary parties are made to the action, the Court will refuse to charge the estate with extra costs thereby occasioned: *Rodgers* v. *Rodgers*, 13 Gr. 457; *Bradley* v. *Wilson*, *Ib.* 645, and it would seem that the plaintiff may be ordered to pay such costs.

Persons not made parties, must be served with judgment.

Although in the several cases mentioned in the *Order* the action may be commenced and judgment obtained without making all persons interested parties to the action, yet the persons who but for this *Order*, would be necessary parties to the proceedings must under *Ord.* 60 *post*, be served with a copy of the judgment, unless the Court, or Master, dispense with the service, and it is not until "after such service," that they are bound by the proceedings. Whether persons upon whom service of the judgment is dispensed with, are bound by the proceedings as if they had been actually served, is not stated in the *Order*, and it is possible that they would not be so bound. See *Doody* v. *Higgins*, 9 Hare App. xxxii.

Persons from whom an account is sought, should be made parties.

Notwithstanding this *Order*, all persons from whom an account is sought, must be made parties in the first instance: *Latch* v. *Latch*, 10 L. R. Chy. 464; *Walker* v. *Seligmann*, 12 L. R. Eq. 152; *Rolph* v. *U. C. Building Society*, 11 Gr. 275, 278-9; *Hopper* v. *Harrison*, 28 Gr. 22; and the judgment cannot be varied under *Ord.* 60, at the instance of persons served with the judgment so as to direct the taking of accounts for which no foundation is laid in the pleadings: *Foster* v. *Foster*, 3 L. R. Chy. 330, at all events not without giving the party from whom an account is sought an

opportunity to adduce evidence to show that the account should not be ordered: and persons served with the judgment, have no greater right to call the original defendants to account, than they would have if such persons had been originally made co-defendants in the action; thus in an action by a remainderman for an account, it was held that a tenant for life served with the judgment could not claim an account of the income: *Whitney* v. *Smith*, 4 L. R. Chy. 513.

All persons in the same interest with the plaintiff, necessary to be made parties, except perhaps infants, should be made co-plaintiffs; where they are made defendants in consequence of their refusal to join as plaintiffs, they will be refused their costs; *Ling* v. *Smith*, 25 Gr. 246.

Rule 1.—A residuary legatee, or next of kin, may have a decree for the administration of the personal estate of a deceased person without serving the remaining residuary legatees or next of kin. (*Imp. Act*, 15 & 16 Vict. c. 86, s. 42, *r.* 1.)

Action by residuary legatee.

Where the action is brought by one of several residuary legatees, the plaintiff sufficiently represents all the residuary legatees, and the others are not entitled as of course to appear in the Master's Office, by a separate solicitor, and if they do, they may be refused their costs; to entitle them to costs some sufficient reason should be stated in the Master's report, for their being represented by a separate solicitor: *Gorham* v. *Gorham*, 17 Gr. 386.

Personal representative a necessary party to action for administration.

The legal personal representative is a necessary party to an action for general administration, and it is necessary to allege that the person named as the legal personal representative has proved the will or obtained letters of administration as the case may be: *Penny* v. *Watts*, 2 Ph. 149; *Re Marshall*, *Fowler* v. *Marshall*, 1 Chy. Ch. R. 29; *Kelly* v. *Ardell*, 11 Gr. 579; *Simons* v. *Millman*, 2 Sim. 241; *Lowry* v. *Fulton*, 9 Sim. 104; *Zimmerman* v. *O'Reilly*, 14 Gr. 646; *Groves* v. *Lane*, 16 Jur. 1061; *Cooke* v. *Gittings*, 21 Beav. 497; *Beardmore* v. *Gregory*, 2 H. & M. 491; *Cary* v. *Hills*, 15 L. R. Eq. 79; *Dowdeswell* v. *D.*, 9 Ch. D. 294; *Rowsell* v. *Morris*, 17 L. R. Eq. 20. But probate, or administration, obtained by the alleged personal representative *pendente lite* before the trial of the action, will be sufficient to bind the estate: *Bateman* v. *Margerison*, 6 Hare 496, and this was held even though the objection was taken by defendant in his answer: *Edinburgh Life Assurance Co.* v. *Allen*, 19 Gr. 593; and see *Stump* v. *Bradley*, 15 Gr. 30; *McDonald* v. *McDonald*, 14 Gr. 133, where probate not obtained until after judgment. Judgment for the general administration of a deceased person's estate cannot be granted against an executor *de son tort* where the legal personal representative is not a party: *Rowsell* v. *Morris*, 17 L. R.

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Eq. 30; *Outram* v. *Wyckoff*, 6 P. R. 150, but see *Re Lovett*, *Ambler* v. *Lindsay*, 3 Ch. D. 198; nor against one of several executors who have proved, even though the absent executor be out of the jurisdiction: *Re Freeborn*, *F.* v. *Carroll*, 6 P.R. 188; *Latch* v. *Latch*, 10. L.R. Chy. 464. All the executors who have proved, and all who have acted, even though they have not proved, are necessary parties: *Vickers* v. *Bell*, 4 D. J. & S. 274; *Hamp* v. *Robinson*, 3 D. J. &. S. 97; *Latch* v. *Latch*, *supra*; but an executor who has renounced, or who has neither proved nor acted, need not be made a party: *Forsyth* v. *Drake*, 1 Gr. 223; *Willis* v. *Walker*, 1 Vern. 90 (*n*) 2; *Stinson* v. *Stinson*, 2 Gr. 508: but where the plaintiff brought a suit for administration against one of three executors and trustees, alleging in the bill that the others had never acted, and the bill having been served by publication, on a hearing *pro confesso* the Court refused to make a decree in the absence of the other two executors and trustees as parties, or of proof of the facts alleged, accounting for their not being made parties: *Lane* v. *Young*, 17 Gr. 100. The renunciation of an executor under *R. S. O.* c. 46, s. 59, is peremptory and cannot be recalled on the death of the acting executor: *Allen* v. *Parke*, 17 C. P. 105: and after renunciation he cannot execute a power of sale given to him, *qua* executor: *Travers* v. *Gustin*, 20 Gr. 106; and see *Re Delaronde*, 19 Gr. 119. As to the acts which will render an executor liable, notwithstanding his renunciation of probate, see *Vannatto* v. *Mitchell*, 13 Gr. 665.

The representative of a deceased executor who fully accounted to the surviving executor, need not be made a party: *Webster* v. *Leys*, 28 Gr. 471.

An executor proving the will, after judgment has been obtained, against another executor who had previously proved, might formerly have been added as a party by a supplemental order: *Guthrie* v. *Walrond*, 22 W. R. 723; and it would seem he might under the present practice be brought before the Court under an order to continue proceedings, see *Rules S. C.* 374, 385. A general decree for administration was granted in a creditor's suit against an administrator *ad litem*, it being alleged in the bill that there was no personal estate, and the parties interested in the realty having allowed the bill to be taken *pro confesso* against them: *Dey* v. *Dey*, 2 Gr. 149, but see remarks of *Spragge*, *C.*, *Garrow* v. *McDonald*, 20 Gr. 130.

Action for protection of estate until probate.

An action for protecting the estate until probate cannot be joined with an action for administration; formerly a bill so framed was demurrable for want of parties: *Rawlings* v. *Lambert*, 1 J. & H. 458; *Overington* v. *Ward*, 34 Beav. 175, and see *Tempest v. Camoys*, 35 Beav. 201, and *Cole* v. *Glover*, 16 Gr. 392; but now any objection to an action on the ground of the absence of necessary parties, can not under *The Judicature Act* be taken by demurrer, but the question must be raised on motion to add the necessary parties;

Werdermann v. *Societé Generale D'Electricité*, 45 L. T. 514; 18 C. L. J. 18; 19 Ch. D. 246; *Young* v. *Robertson*, 2 O. R. 439.

Removal of assets may be restrained.

The removal of the assets out of the jurisdiction will be restrained by injunction even though the deceased's domicile was out of the Province: *Shaver* v. *Gray*, 18 Gr. 419.

Real representatives, when necessary parties.

Where the action relates to the realty as well as the personalty, unless the executor is also trustee, or devisee, of the realty, or of some part of it: *Stewart* v. *Hunter*, 14 Gr. 132, it is necessary to join the heir, or if the lands be devised, then the devisee, or one or more of the devisees (*Calvert*, 151, 153, *Ord.* 472 *post.*) But execution against the lands of a deceased person may be issued upon a judgment against his personal representative, although those interested in the realty are not parties to the action; *R. S. O.* c. 66, s. 40, and see *McEvoy* v. *Clune* 21 Gr. 515.

No action for administration lies by legatee, or next of kin, within a year of death.

No action can be brought by a legatee, or next of kin, against a personal representative before a year has elapsed from the death of the deceased testator, or intestate, 33 Geo. III. c. 8; *Slater* v. *Slater*, 3 Chy. Ch. R. 1; *Vivian* v. *Westbrooke*, 19 Gr. 461. But an action for the protection of the estate simply, may be brought by a legatee, or next of kin, against an executor *de son tort* before the lapse of the year: *Beardmore* v. *Gregory*, 2 H. & M. 491; but not for administration as well: *Rawlings* v. *Lambert*, 1 J. & H. 458; *Overington* v. *Ward*, 34 Beav. 175.

High Court can not appoint trustee in place of executor.

The High Court has no power to appoint an executor, in place of executors who have become incompetent to act through bodily infirmity, that can only be done by the Surrogate Court: nor will the High Court appoint a trustee in place of such executors; *Corrigal* v. *Henry*, 2 Gr. 310. But where an executor has become insolvent a Receiver will be appointed: *Harrold* v. *Wallis*, 9 Gr. 443, and see *Meacham* v. *Draper*, 2 Gr. 316.

When personal representative has distributed estate after advertising under statute, administration refused.

Where the personal representative has duly advertised for creditors under *R. S. O.* c. 107, s. 34, and has distributed the estate, that is an answer to a subsequent action against him for administration, by a legatee, see *Newton* v. *Sherry*, 1 C. P. D. 246; or by a creditor: *Clegg* v. *Rowland*, 3 L. R. Eq. 368, even though he have retained money in his hands to answer legacies, because from the time he sets apart moneys to answer legacies, he ceases to hold them as executors, but becomes then a trustee thereof for the legatees: *Ib*; *Cameron* v. *Campbell*, 27 Gr. 307; *Ballard* v. *Marsden*, 42 L. T. 763; *Galbraith* v. *Duncombe*, 28 Gr. 27, but see *Noble* v. *Brett*, 24 Beav. 499. But if he has notice of a creditor's claim, he is not discharged because it was not sent in: *Wood* v. *Wood*, *Markwell's Case*, 21 W. R. 135; *Re Land Credit Co. of Ireland*, W. N. (72) 210; and if the advertisement is insufficient he is not protected: *Wood* v. *Weightman*, 13 L. R. Eq. 434.

Account in Surrogate Court.

Where also there had been an accounting in the Surrogate Court by the personal representative and no objection made for eight years,

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the right to a further account in the High Court of Justice was held to be barred : *Bell* v. *Landon*, 18 C. L. J. 178.

Personal representative distributing estate without advertising under statute, remains liable to creditors.

Personal representatives distributing an estate without advertising under the Statute (*R. S. O.* c. 107, s. 34), or without the authority of the Court remain liable to a creditor, though they had no notice of his claim, *Knatchbull* v. *Fearnhead*, 3 My. & Cr. 126 , *Noble* v. *Brett*, 24 Beav. 499 ; *Jefferys* v. *Jefferys*, 19 W. R. 464 ; and also to legatees ; and where the executor has distributed under a mistaken construction of the will he is liable to the parties injured : *Hilliard* v. *Fulford*, 4 Ch. D. 389 ; *Boulton* v. *Peard*, 3 D. M. G. 608 ; *Doyle* v. *Blake*, 2 Sch. & L. 243 ; but he would have a right to recoup himself out of any further payments due to those who had been overpaid : *Dibbs* v. *Goren*, 11 Beav. 483 ; and would also seem entitled to call on them to refund the money overpaid them, but not any interest thereon : *Jervis* v. *Wolferstan*, 18 L. R. Eq. 18.

Infant not liable to account.

An infant executor is not liable to account for assets received by him whilst a minor : *Nash* v. *McKay*, 15 Gr. 247 ; *Hindmarsh* v. *Southgate*, 3 Russ. 324.

Payment of legacy, is admission of assets.

Payment of a legacy in full, is, *prima facie*, an admission of assets to pay all legacies in full, but it is open to explanation : *Coleman* v. *Whitehead*, 3 Gr. 227.

Administration refused when estate small.

Administration has been refused where the estate was sworn by the executors not to have exceeded $50 : *Foster* v. *Foster*, 19 Gr. 463 ; but see *Re Falconer*, 1 Chy. Ch. R. 273 ; and where the plaintiff's claim as legatee, only amounted to $28, notwithstanding it was alleged that there were other legacies for a considerable sum remaining unpaid, administration was refused, though the suit was unopposed : *Reynolds* v. *Coppin*, 19 Gr. 627.

Ord. applies to applications in Chambers for administration.

This *Order* applies to applications for administration on summary applications in Chambers, under *Ords.* 467 or 638. See *Rule* 8 *S.C.* 3, under which, these latter *Orders* are in force in all the Divisions of the High Court : but it is to be noted that rule 1 of this *Ord.* is confined to actions by a *residuary* legatee, or next of kin, and rule 2 is confined to actions by a legatee interested in a legacy charged upon real estate, and therefore neither of these rules extend to actions by specific legatees, or pecuniary legatees whose legacies are not charged on real estate ; but see *Ord.* 7 *ante*, as to meaning of words "legacy," "legatee," and "residuary legatee."

Legatee whose legacy is charged on realty, need not join other persons interested.

Rule 2.—A legatee interested in a legacy charged upon real estate; or a person interested in the proceeds of real estate directed to be sold, may have a decree for the administration of the estate of a deceased person, without serving any other legatee

or person interested in the proceeds of the estate. (*Imp. Act* 15 & 16 Vict. c. 86, s. 42, *r.* 2.)

See note to r 1.

Residuary devisee or heir, need not join co-devisees or co-heirs.

Rule 3.—A residuary devisee, or heir, may have the like decree, without serving any co-residuary devisee, or co-heir.

See note to r 1.

One of several *c.q.t.* need not join other *c.q.t.*

Rule 4.—One of several *cestuis que trust*, under a deed or instrument, may have a decree for the execution of the trusts of the deed or instrument, without serving any other of such *cestuis que trust*. (*Imp. Act*, 15 & 16 Vict. c. 86, s. 32, *r* 4.)

A new trustee may be appointed in an action by one of several *cestuis que trust*: *Jones* v *James*, 9 Hare, App. lxxx.

A suit by one of two *cestuis que trust* to recover an annuity charged upon land devised to the defendant, was held maintainable without making another *cestui que trust* interested in another annuity charged on the same land, a party: *Rees* v. *Engleback*, 12 L. R. Eq. 225.

But parties who claim adversely to the trust could not formerly be made parties to a suit for the execution of the trust: *Attorney-General* v. *Avon Corporation*, 3 D. G. J. & S. 637, where it is said that *Talbot* v. *Earl of Radnor*, 3 My. & K. 252, to the contrary had been constantly disapproved and never followed; but see now *Rules S. C.* 91, 92.

Persons from whom account required, must notwithstanding be parties.

All persons from whom an account is required must be made original parties to the action, see *ante* p. 38; thus a *cestui que trust* who has been party to a breach of trust, is a proper party: *Jesse* v. *Bennett*, 6 D. M. G. 609; and a stranger or a creditor, who has joined in the breach of trust may be joined: *Lund* v. *Blanshard*, 4 Hare 9; *Bank of Toronto* v. *Beaver and Toronto Mutual Fire Insurance Co.*, 26 Gr. 102; *Consett* v. *Bell*, 1 Y. & C., C. C. 569; *Stainton* v. *The Carron Co.*, 18 Beav. 146. But if a trustee commits a breach of trust, the person participating is not a necessary party to an action for the general administration of the trust estate: *Tiffany* v. *Thompson*, 9 Gr. 244.

Where a suit was brought by a remainderman for an account against trustees, the tenants for life who were served with the decree, were held not entitled to call the trustee to account as to the income: *Whitney* v. *Smith*, 4 L. R. Chy. 513.

Execution of trust in foreign country, may be decreed, when.

The Court will decree the execution of a trust of lands in a foreign country when the trustee is resident within the jurisdiction: *Smith* v. *Henderson*. 17 Gr. 6; and see *Re Robertson*, *R.* v. *R.* 22 Gr. 449.

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In suits for protection of property, all interested need not be joined

Rule 5.—In all cases of suits for the protection of property pending litigation, and in all cases in the nature of waste, one person may move on behalf of himself, and of all persons having the same interest. (*Imp. Act*, 15 & 16 Vict. c. 86, s. 42, *r.* 5.)

Sale by trustee restrained in suit by one of several *c.q.t.*

Where property was offered for sale by a trustee under depreciatory conditions of sale as to title, the sale was restrained in a suit instituted by one of several *cestuis que trust*: *Dance* v. *Goldingham*, 8 L. R. Chy. 902.

Where the action is necessary and proper, and has resulted in benefit to the co-owners, they may be compelled to bear their proportion of the expense of the action, according to the advantage they are shown respectively to have derived from the proceedings: *Gage* v. *Mulholland*, 16 Gr. 145.

Personal representative, or trustee, may have a decree for administration, or execution of trusts, without joining all *c.q.t.*

Rule 6.—An executor, administrator, or trustee, may obtain a decree against any one legatee, next of kin or *cestui que trust*, for the administration of the estate or the execution of the trusts. (*Imp. Act*, 15 & 16 Vict. c. 86, s. 42, *r.* 6.)

In action for administration by personal representative, special circumstances must be shown.

Where an action for administration is brought by the personal representative, some special circumstances requiring the intervention of the Court must be shown: *Cole* v. *Glover*, 16 Gr. 392, *Barry* v. *Barry*, 19 Gr. 458; *Grant* v. *Grant*, 18 C. L. J. 99. It seems that he has no right to institute an action merely to obtain an indemnity by passing his accounts: *White* v. *Cummins*, 3 Gr. 602; *Cole* v. *Glover*; 16 Gr. 392. As to whether a deficiency of assets to pay debts in full is alone a sufficient reason, seems doubtful: *Swetnam* v. *Swetnam*, 6 P. R. 149; *Re Ette*, 6 P. R. 159; *Re Shipman*, *Wallace* v. *Shipman*. 24 Gr. 177; *Marsh* v. *Marsh*, 7 P. R. 129: *Re Jack*, *Jack* v. *Jack*, 13 C. L. J. 358; *Re Bromley*, (Blake, V. C., 28th Jany., 1878;) and see further, *Ord.* 471 note. Where there were leaseholds it was held that the executor was entitled to bring an action in order to obtain indemnity against liability on the covenants in the lease: *Re Bosworth*, *Howard* v. *Caston*, 45 L. T. 136; *Dodson* v. *Sammell*, 1 Dr. & Sm. 575; 4 L. T. N. S. 44; but see *R. S. O.*, c. 107, s. 32. The absence of a legatee beyond the jurisdiction, whom the executors are unable to discover, was held to be a sufficient ground for the executors coming to the court: *Re Wade*, *Dee* v. *Wade*, 18 Gr. 485.

He may be ordered to pay costs.

Where the action is unnecessarily brought by the personal representative, he may be ordered to pay costs, or may be refused his costs: see cases cited *Ord.* 638, *post.*

An executor may begin an action before obtaining probate, but he must obtain probate before the trial: *Newton* v. *Metropolitan Railway Co.*, 1 Dr. & Sm. 583; or before a defence is filed that he is not executor: *Simons* v. *Milman*, 2 Sim. 241, ; (but see *Edinburgh Life Assurance Co.* v. *Allen*, *ante* p. 39 :) and the same rule applies to administrators: *Humphreys* v. *Humphreys*, 3 P. Wms. 350. Executor may begin suit before probate.

An executor cannot under this order bring an action against one of two co-executors who have proved, without making the other a party: *Latch* v. *Latch*, 10 L. R. Chy. 464. Executor cannot under this *Order* sue one of several co-executors.

An action may be brought by a trustee against his co-trustee to recover and secure the trust fund, without joining any of the *cestuis que trust* as parties: *Horsley* v. *Fawcett*, 11 Beav. 565; *Baynard* v *Wooley*, 20 Beav. 583; *May* v. *Selby*, 1 Y. & C. C. C. 235; *Peak* v. *Ledger*, 4 D. G. & S. 137; *Franco* v. *Franco*, 3 Ves. 75; and an action may be also brought by the trustee against one *cestuis que trust* to recover the trust fund without making the other *cestuis que trust* parties: *Bridget* v. *Hames*, 1 Coll. 72. But *c. q. t.* need not be joined.

An executor who advanced money to pay the price of certain land held by his testator as lessee with a right of purchase, was held entitled to enforce his claim against the land, for the advances so made, the personal estate being exhausted: *Lannin* v. *Jermyn*, 9 Gr. 160. Action by personal representatives to enforce claim against realty.

A personal representative who is a creditor of the estate may, where the personalty is exhausted, obtain judgment against a devisee for administration of the reality devised. To such an action the heir-at-law is a proper party; but where the devisee made no objection in his answer to his not being joined, and the plaintiff alleged by his bill that there were no lands descended, a decree was made in the absence of the heir, for the administration of the realty: *Tiffany* v. *Tiffany*, 9 Gr. 158.

Rule 7.—An assignee of a chose in action may institute a suit in respect thereof without making the assignor a party thereto. Assignee of *chose in action* may sue without joining assignor.

See *R. S. O.*, c. 116, s. 7. The assignee must take the beneficial interest in the claim assigned. He cannot sue in his own name alone, either under the statute, or under this *Order*, where the assignment is made merely to enable him to bring the action: *Wood* v. *McAlpine*, 1 App. R. 234; and see *National Provincial Bank of England* v. *Harle*, 44 L. T. N. S. 585, where the assignment is only by way of security, the assignor may sue in his own name notwithstanding the statute: *Hostrawser* v. *Robinson*, 23 C. P. 350; *Dawson* v. *Graham*, 41 Q. B. 532. A bond to secure alimony to a married woman was held not to be assignable so as to enable the assignee to sue in his own name: *Reiffenstein* v. *Hooper*, 36 Q. B. 295. Any Assignee must take beneficially. And absolutely. Bond to secure alimony is not assignable.

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Defences existing at date of assignment may be set up.

defence existing against the assignor at the date of the assignment, may be set up in an action by the assignee : *Exchange Bank* v. *Stinson*, 32 C. P. 158. Where the plaintiff has only a partial assignment, the assignor should be made a party ; but the defect when taken at the hearing was cured by the assignor appearing by counsel and submitting to be added as a party plaintiff, and bound by the proceedings : *Yates* v. *Great Western Ry. Co.*, 24 Gr. 495.

In cases covered by Ord. 58, Court may require persons to be joined as parties.

59. In all the above cases the Court, if it sees fit, may require any other person to be made a party to the suit, and may, if it sees fit, give the conduct of the suit to such person as it deems proper; and may make such order in any particular case as it deems just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matter in question. (3rd June, 1853; Ord 6, s. 2.) (*Imp. Act*, 15 & 16 Vict. c. 86, s. 42, *r.* 7.)

This *Order* is still in force : *Rule S. C.* 102, and see *Rules S. C.* 103, 104.

Persons who would be necessary parties except for *Ord.* 58, must be served with judgment.

60. In all the above cases the persons who, according to the practice of the Court, would be necessary parties to the suit, are to be served with an office-copy of the decree (unless the Court [*or* Master, see *Ord.* 587,] dispenses with such service) indorsed with the notice set forth in schedule A, hereunder written, and after such service, they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit ; and upon service of notice upon the plaintiff, they may attend the proceedings under the decree. Any party so served may apply to the Court to add to, vary, or set aside the decree, within fourteen days from the date of such service. (3rd June, 1853; Ord. 6, s. 2.)

This *Order*, subject to *The Judicature Act* and *Rules*, applies to actions in all the Divisions of the High Court : *Rule S. C.* 102.

Office copy to be served.

Office Copy to be Served.—An office copy of the judgment must be served. The copy of the judgment for service may be made an office copy, either by the Registrar, or Local Officer in whose office the judgment is entered, or by the Deputy Registrar, or Local Regis-

trar, or Deputy Clerk of the Crown, at the place where the reference is being prosecuted. See *Ord.* 547 *post*, and *Rule S. C.* 417. The office copy may be made, either by comparing the copy intended to be made an office copy, with the entry in the judgment book, or with another office copy.

Who to be Served.—All parties, who, but for *Ord.* 58, would have been necessary parties to the action, who have not been made parties, must be served with the judgment, unless service be dispensed with. Infants interested must be served : see *Ord.* 523 ; *Clarke* v. *Clarke*, 20 L. T. O. S. 88. *Rules S. C.* 36, 70, appear to apply only to the appointment of guardians *ad litem* to defendants who are originally made parties to an action. They do not seem to apply to the appointment of guardians to infants required to be served with an office copy of a judgment under *Ord.* 60. Service of the office copy of the judgment on the Official Guardian *ad litem* does not appear of itself sufficient to constitute him guardian *ad litem* for infant parties requiring to be served under *Ord.* 60. There must be an order taken out appointing him guardian in such cases. The Master has power to appoint a guardian *ad litem* to infants, and lunatics, where he deems it advisable while the proceedings are pending in his office ; *Ord.* 587. The procedure to obtain such appointment by the Master appears to be governed by *Ord.* 520—526. And it would seem that the order can only be made by the Master on notice ; but in the case of infants, the procedure for obtaining the order on *præcipe* under *Ord.* 610 would appear to be still in force. After the appointment of the guardian *ad litem*, he must be served with the order appointing him guardian, and the office copy of the judgment. The Official Guardian is usually appointed guardian.

All persons who (but for Ord. 58) would have been necessary parties to action, must be served.

Infants.

Lunatics.

Effect of Service.—The person served is not liable to account, nor can a motion for an injunction be made against him : *Walker* v. *Seligmann*, 12 L. R. Eq. 152 ; *Hopper* v. *Harrison*, 28 Gr. 22 ; *Rolph* v. *U. C. Building Society*, 11 Gr. 275, 278–9. See, however, *In re Rees*, *Rees* v. *George*, 15 Chy. D. 490. Neither can he require the defendant to account any farther than if he had been himself an original defendant in the action : *Whitney* v. *Smith*, 4 L. R. Chy. 513. A party served, however, may impeach in the Master's office an instrument set up in answer to his claim as a legatee, on the ground of fraud : *Darling* v. *Darling*, *Rossa's* claim, 15 C. L. J. 112.

Whether the party served attend the proceedings or not, he is bound by the proceedings. Unless he give notice to the plaintiff of his intention to attend the proceedings under the judgment, he is not entitled to service of notice of the proceedings in the Master's office : *English* v. *English*, 12 Gr. 441.

Parties who are served, are bound by proceedings.

Attending Proceedings.—A person served is entitled, on giving notice to the plaintiff, to attend the proceedings. A party so attend-

Parties served may on notice to plaintiff at-

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tend the proceedings.

ing, although entitled to notice of the future proceedings in the action, does not thereby become a party to the action : *English* v. *English*, 12 Gr. 441 ; *Walker* v. *Seligmann*, 12 L. R. Eq. 152.

Under *Ord.* 217 the Master has power, among other things, to give special directions as to the parties who are to attend on the several accounts and inquiries ; and see also *Rules S. C.* 114, 518. A person served under *Ord.* 60, and attending the proceedings without special leave, may be ordered to pay all the extra costs occasioned by his so attending, if it appear that his attendance was unnecessary : *Sharp* v. *Lush*, 10 Ch. D. 468 ; and see *Daubney* v. *Leake*, 1 L. R. Eq. 495.

Attending unnecessarily may be ordered to pay costs.

Persons not attending proceedings not entitled to notice.

Persons served with the judgment, and not attending the proceedings, are not entitled to service of the warrant to settle the report : *Green* v. *Measures*, W. N. (66) 122 ; nor of the notice of hearing on further directions : *Lee* v. *Sturrock*, W. N. (76) 226. If any relief is intended to be asked against them they are entitled to notice, even though they have not attended the proceedings before the Master : *Re Rees*, *Rees* v. *George*, 15 Chy. D. 490.

Parties served may move against judgment.

Motion to vary Judgment.—The motion to vary, or set aside, the judgment must be made on notice to the plaintiff. In the Chancery Division the motion should be set down to be heard on a Wednesday. In the other Divisions it may be brought on for hearing before a single Judge sitting in Court, on a Tuesday, or Friday, and need not be previously set down. Seven days' notice of the motion must still be given : see *Ord.* 418 *post* ; and in the Chancery Division the action should be set down seven clear days before the day named for hearing the motion : *Ord.* 418.

On the motion to vary the judgment by any person served with a copy, the Court will not direct the taking of accounts for which no foundation was laid in the pleadings or proceedings in the action, except perhaps on the terms of allowing the party from whom such account is sought, an opportunity to adduce evidence, to show why it should not be granted : *Foster* v. *Foster*, 3 L. R. Chy. 330 ; and see *Murgatroyd* v. *Caldwell*, 10 L. T. N. S. 410. Additional accounts and inquiries have been directed after the report, at the instance of a party subsequently served with the decree : *Reeve* v. *Reeve*, W. N. (71) 52. Under the former practice in Chancery, any person served with the decree might rehear the cause : *Ellison* v. *Thomas*, 1 D. J. & S. 18.

Where the question intended to be raised does not appear on the pleadings or previous proceedings in the action, it may be necessary to present a petition in the nature of a bill of review under the former Chancery practice. No petition for leave to file this petition is necessary : *Kidd* v. *Cheyne*, 18 Jur. 348 ; *Duggan* v. *McKay*, 1 Chy. Ch. R. 380 ; and see *Ord.* 330–334, *post*.

It would seem that a purchaser under a judgment pronounced in an action constituted under *Ord.* 58, is bound to see that it has been served on all necessary parties, so as to bind them by the proceedings, in the same way that a purchaser is bound to see that all necessary parties, are made parties to any other action in which a sale is directed by the Court. *Primâ facie*, only the persons who are actually named as parties to the record are bound, *Ord.* 60 forms an exception to this rule. See *Reeve* v. *Reeve*, W. N. (71) 52, and *Russell* v. *Romanes*, 3 App. R. 635.

Purchaser bound to see that all necessary parties are bound by the proceedings.

A purchaser, however, is not bound to enquire into the regularity of the proceedings antecedent to the judgment: *Gunn* v. *Doble*, 15 Gr. 655; *Shaw* v. *Crawford*, 4 App. R. 371. *Collins* v. *Denison*, 2 Chy. Ch. R., 465.

Dispensing with Service.—The Master, to whom an action is referred, as well as the Court, has power to dispense with the service of a copy of the judgment: see *Ord.* 587 *post*. Where the Master dispenses with service he must state the reasons therefor in his report. (*Ib.*)

Dispensing with service of judgment.

An advertisement may be published for persons who cannot be found to be served, as a condition of dispensing with service on them. See *post*, *Ord.* 223.

Advertisement.

Whether parties on whom service of the judgment is dispensed with, either by the Court, or Master, are nevertheless bound by the proceedings, is nowhere stated; it would seem that they are in the same position as parties in whose absence judgment is pronounced under *Ord.* 57 *ante*, and that they are not bound: see *Doody* v. *Higgins*, 9 Hare, App. xxxii; but see *Bunnett* v. *Foster*, 7 Beav. 540. Service on some of the next of kin, who were resident out of the jurisdiction was dispensed with: *English* v. *English*, 12 Gr. 441. An application to the Court to dispense with service may be made *ex parte*. (*Ib.*)

How far persons on whom service of judgment is dispensed with are bound *quære*.

Absence from the jurisdiction is not of itself sufficient reason for dispensing with service: *Chalmers* v. *Laurie*, 10 Hare, App. xxvii; *Maybery* v. *Brooking*, 7 D. M. & G. 673; *Strong* v. *Moore*, 22 L. J. Chy. 917. Parties not having an interest at the date of the judgment cannot be brought before the Court under this *Order*, *Colyer* v. *Colyer*, 11 W. R. 355. But see *Ord.* 244 *post*.

Absence from jurisdiction, not sufficient ground for dispensing with service.

61. In all suits concerning real or personal estate which is vested in trustees under a will, settlement, or otherwise, the trustees shall represent the persons beneficially interested under the trust, in the same manner and to the same extent as executors or administrators, in suits concerning personal estate, represent the persons beneficially interested in such personal estate;

Trustees represent their *c. q. t.* to same extent as personal representative, represents persons interested in personalty.

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and in such case it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit; but, on the hearing, the Court, if it think fit, may order such persons, or any of them, to he made parties. (3rd June, 1853; Ord; 6, r. 7.) (*Imp Act*, 15 & 16 Vict. c. 86, s. 42, *r.* 9.)

Rule *S. C.* 102 continues Ord, 61 in force.

Subject to *The Judicature Act* and *Rules S. C.* this *Order* is in force in all the Divisions of the High Court: *Rule S. C.* 102. Special provision as to the same matter, is also made by *Rule S. C.* 95, which is as follows: "Trustees, executors, and administrators, may sue, and be sued, on behalf of, or as representing, the property or estate of which they are trustees or representatives, without joining any of the parties beneficially interested in the trust or estate, and shall be considered as representing such parties in the action; but the Court or Judge may, at any stage of the proceedings, order any of such parties to be made parties to the action either in addition to, or in lieu of, the previously existing parties thereto."

The analogous English Ord. xvi, r. 8, is considered virtually to supersede 15 & 16 Vict. c. 86, s. 42, r. 9, from which *Ord.* 61 is taken: see remarks of *Jessel*, M. R.: *Bulley* v. *Bulley*, 8 Ch. D. 489.

Since Ord. 61 Court may proceed in all cases without *c. q. t.*

Prior to *Ord.* 61, in suits adverse to the *cestui que trust*, the latter was a necessary party, and the Court had no jurisdiction to pronounce a decree in his absence: see *Cleveland* v. *McDonald*, 1 Gr. 415; *Rogers* v. *Rogers*, 2 Gr. 137. Since the *Order*, however, the Court has jurisdiction in all cases in which the estate is vested in a trustee who is before the Court, to proceed in the absence of the *cestui que trust*, and even to decree a trust deed void in the absence of the beneficiaries: *King* v. *Keating*, 12 Gr. 29; *Thompson* v. *Dodd*, 26 Gr. 381. The question of the beneficiaries being parties, or not, is now entirely in the discretion of the Court, see *Jennings* v. *Jordan*, 6 App. Ca. 698; 45 L. T. N. S. 593; but this discretion has not always been uniformly exercised. In some cases it has been laid down that in the exercise of this discretion, wherever the suit is to set aside the trust, or is adverse to the rights of the beneficiaries, the Court should still require one or more of the beneficiaries to be made parties: *Read* v. *Prest* 1, K. & J. 183; *Baker* v. *Trainor*, 15 Gr. 252; and see *Thomas* v. *Torrance*, 1 Chy. Ch. R. 46, and *Clarke* v. *Cooke*, 23 Gr. 110.

In a suit by one of two creditors (both of whom claimed payment out of the trust estate in priority to other creditors), against the representatives of the deceased trustee, and one of several creditors who claimed that all creditors should be paid *pari passu*, it was held that all parties interested were sufficiently represented: *Wigle* v. *McLean*, 24 Gr. 237.

But trust estate must be vested in trustee.

In order that the Court may act under *Ord.* 61 it is necessary that the trust estate should be vested in the trustee, an

executor with a mere implied power of sale over the realty is not a trustee within the meaning of the *Order*: *Bolton* v. *Stannard*, 6 W. R. 570. *Rule S. C.* 95, however, is not so restricted in its terms, *Ord.* 61 provides that the trustee shall represent the *cestui que trust* to the same extent that executors in suits concerning personal estate, represent the persons beneficially interested, and it would seem that notwithstanding the general terms of *Rule S. C.* 95, that it is only where the trustee has the like absolute control over the trust estate which an executor has over personalty, that he can, in general, be said to sufficiently represent his *cestui que trust*: *Cox* v. *Barnard*, 5 Hare, 253. As to the extent to which the personal representative represents those interested in the realty: see *Eccles* v. *Lowry*, 23 Gr. 167, cited *ante* in note to *Ord.* 56.

It is difficult to harmonize all the decisions which have been pronounced under the corresponding section of the English Chancery Act 15 & 16 Vict. c. 86, s. 42:

Cases where *c.q.t.* required to be added.

Cases where cestui que trust required to be added.—In a suit for foreclosure, where the equity of redemption was vested in trustees under a settlement, some of the beneficiaries were required to be added: *Goldsmid* v. *Stonehewer* 9 Hare, App. xxxviii; *Cropper* v. *Mellersh*, 3 W. R. 202; (but see *contra Wilkins* v. *Reeves*, 3 W. R. 306; *Jennings* v. *Jordan*, 6 App. Ca. 698; 45 L. T. N. S. 593); but not where the trustees were also executors of the deceased mortgagor, and had the control of the whole estate out of which the mortgage debt could be paid: *Hanman* v. *Riley*, 9 Hare, App. xl.; *Sale* v. *Kitson*, 3 D. M. & G. 119; nor where the *cestuis que trust* were infants, but in such case, the Master was directed to inquire whether a sale or foreclosure, would be more for the benefit of the infants, and the decree directed him, if he thought fit, to add the infants as parties in his office. Where the interest of the trustee who was called on to account, was in conflict with that of his *cestui que trust* the latter was added: *Payne* v. *Parker*, 1 L.R. Chy. 327. Where the trustee disputed the rights of certain, of the *cestuis que trust* to share in the trust funds, he was held not sufficiently to represent those whose rights he disputed: *Liddell* v. *Deacon*, 20 Gr. 72. So, also, where the trustee had disclaimed: *Young* v. *Ward*, 10 Hare, App. lviii. In a redemption suit some of the beneficiaries entitled to the mortgage money were required to be added: *Stansfield* v. *Hobson*, 16 Beav. 189, but see *Mills* v. *Jennings*, 13 Ch. D. 639; *Jennings* v. *Jordan*, 6 App. Ca. 698; 45 L. T. N. S. 593, *contra*.

In a suit for administration, by a plaintiff claiming as a beneficiary under a will, but whose title was doubtful, one of the *cestuis que trust* was required to be added as a party before the hearing, in order to have an opportunity to argue the question of the plaintiff's title: *Day* v. *Radcliffe*, 24 W. R. 844. In a suit for sale of mortgaged property, where the legal estate was in the heirs, but the executrix

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had an implied power of sale, it was held that she did not sufficiently represent the *cestuis que trust*, as the estate was not "vested" in her: *Bolton* v. *Stannard*, 6 W. R. 570, but *secus* where the executor had an express power of sale: *Shaw* v. *Hardingham*, 2 W. R. 657. In a suit to execute the trusts of a will, where the trustee had only a power of sale on the death of tenants for life who were still living, the parties interested in remainder were ordered to be added: *Cox* v. *Barnard*, 5 Hare, 253; where the plaintiff claimed under an assignment, the validity of which was denied by the trustee, who set up that the heir of the assignor was entitled to the trust estate, the heir was required to be added: *Miller* v. *Ostrander*, 12 Gr. 349.

Cases where *c. q. t.* not required to be added.

Cases where cestui que trust, not required to be added.—In a redemption suit by a trustee: *Jennings* v. *Jordan*, 6 App. Ca. 698; 45 L. T. N. S. 593; *Mills* v. *Jennings*, 13 Ch. D. 639, but see *Stansfield* v. *Hobson*, 16 Beav. 189.

Mortgage cases.

In a redemption suit against trustees, where the estate was vested in them by a deed absolute in form, though intended as a mortgage, one of the trustees being also beneficially interested: *Kerr* v. *Murray* 6 Gr. 343, and see *O'Connell* v. *Charles*, 2 Gr. 489.

In a foreclosure suit by an executor of a deceased mortgagee: *Lawrence* v. *Humphries*, 11 Gr. 209: the heirs, or persons beneficially interested, required to convey, may be added in the Master's office (*Ib.*) But see *R. S. O.* c. 107, s. 15; *Dilk* v. *Douglas*, 26 Gr. 99, as to power of executor to convey.

In a foreclosure suit by a trustee of a mortgage made for the benefit of creditors: *Fraser* v. *Sutherland*, 2 Gr. 442, or for the benefit of a firm, where one of the partners was dead: *Stephens* v. *Simpson*, 12 Gr. 493; 15 Gr. 594.

In a foreclosure suit against a trustee: *Shaw* v. *Liddell*, 1 U.C.L.J. 57; *Wilkins* v. *Reeves*, 3 W.R. 305: *Hanman* v. *Riley*, 9 Hare, App. xl. *Sale* v. *Kitson*, 3 D. M. & G. 119; but see *Tudor* v. *Morris*, 22 L. J. Ch. 1051; *Cropper* v. *Mellersh*, 1 Jur. N. S. 299; *Dickson* v. *Draper*, 11 Gr. 362. In the latter case an inquiry was directed whether a sale or foreclosure would be more beneficial for the infant *cestuis que trust*, and they were directed to be made parties, if the Master should think fit to add them in his office.

Suits against trustees.

In a suit against a trustee to enforce a trust for benefit of creditors; *Bateman* v. *Margerison*, 6 Hare, 496; *Wood* v. *Brett*, 9 Gr. 78, and see *Pare* v. *Clegg*, 29 Beav. 589.

In a suit against executors and trustees to enforce a contract made by the testator in his lifetime: *Delisle* v. *McCaw*, 22 Gr. 254.

In a suit by a trustee against representatives of a deceased trustee to recover moneys misappropriated by the latter: *Re Cross-Harston* v. *Tenison*, 45 L.T. N. S. 777.

In a suit by one *cestui que trust* against executors and trustees, to recover trust property wrongfully alienated by one of them, the other

cestuis que trust were held to be unnecessary parties: *Ryckman* v. *Canada Life Assurance Co.*, 17 Gr. 550.

Action for partition.

In an action for partition, where the shares of some parties were vested in trustees: *Simpson* v. *Denny*, 10 Ch. D. 28; *Goodrich* v. *Marsh*, W. N. (78) 186, and in such a case it is not necessary to serve the *cestui que trust* with the judgment, or to prosecute any enquiry as to them before the Master. (*Ib.*)

Suit for construction of will.

If a suit for the construction of a will, and to determine whether or not there had been a forfeiture, the persons entitled under the gift over, being a class, one of whom was a party; but some of the others not being ascertained, the trustee being held sufficiently to represent those unascertained: *White* v. *Chitty*, 14 W. R. 366; and see now *Rule S. C.* 99.

Effect of representation of *c.q t.* by trustee.

Effect of representation.—Where the action is brought by, or against, a trustee without adding the *cestuis que trust* as parties, if the question in issue has been fairly tried, all parties represented by the trustee would, generally speaking, seem to be concluded by the judgment, but not otherwise: *Eccles* v. *Lowry*, 23 Gr. 167. Thus a decree made after replication filed, dismissing a bill brought by an official assignee, is, in the absence of fraud, conclusive against the creditors of the estate of which he is assignee: *Morrison* v. *Robinson*, 19 Gr. 480, and see *Jardine* v. *Wood*, 19 Gr. 617.

Where, however, a suit by trustees had failed for want of evidence, it was held that a subsequent suit might be maintained for the same purpose by the *cestui que trust* on the discovery of new evidence: *Peirce* v. *Brady*, 2 Jur. N. S. 772. See, however, *Commissioners, &c. of London* v. *Gillatly*, 24 W. R. 1059; *Morrison* v. *Robinson*, 19 Gr. 480.

Plaintiff having joint and several demand, need not join all persons liable.

62. Where the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable. (3rd June, 1853; Ord. 6, r. 8.) (*Eng. Con. Ord.* 7, *r.* 2.)

How far Ord. in force.

"All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And without any amendment, judgment may be given against such one or more of the defendants, as may be found to be liable, according to their respective liabilities." *Rule S. C.* 91.

"The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly, or severally, liable

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on any one *contract*, including parties to bills of exchange and promissory notes." *Rule S. C.* 93.

As neither of these *Rules* appear to affect the practice laid down by *Ord.* 62, so far as regards actions not founded on contract, it would seem to be still in force. See, however, *Lloyd* v. *Dimmack*, 7 Ch. D. 398.

Prior to this *Order* all parties jointly and severally liable to satisfy the plaintiff's demand, and all trustees implicated in a breach of trust were necessary parties to a suit in equity in respect thereof. This *Order* therefore constituted an exception to the general rule of practice as to parties.

Formerly where a suit was improperly constituted, and necessary parties were not before the Court, the objection could be taken by demurrer. But an objection for want of parties is no longer a ground of demurrer, but it may be raised by a motion in chambers to add the parties whose presence is considered necessary. See *Rules S. C.* 103, 104: *Werderman* v. *Societé Generale D'Electricité*, 19 Ch. D. 246; 45 L. T. 514; *Young* v. *Robertson*, 2 O. R. 434; *Scane* v. *Duckett*, 19 C. L. J. 139; or the defendant can in certain cases bring the parties before the Court so as to bind them by the proceedings, by serving them with notice: see *Rules S. C.*, 107, 108; or by making them parties to a counter claim: *Rule S. C.* 127, *J. A.* s. 16, ss. 4.

Notwithstanding the general terms of *Ord.* 62, the construction placed upon it somewhat narrowed its operation; and wherever under the former practice it did not apply, a motion in Chambers to add parties would seem proper; *e. g.*: -

Cases in which Ord. 62 did apply.

Order 62 was held to apply:—

1. To suits in respect of a liquidated sum, or a single breach of, trust, where a general account was not required: *Garrow* v. *McDonald*, 20 Gr. 122; *Kellaway* v. *Johnston*, 5 Beav. 319; *Perry* v. *Knott*, 5 Beav. 293. Some of the trustees guilty of the breach of trust might be proceeded against without joining the others: *McGachen* v. *Dew*, 15 Beav. 84, but see *Williams* v. *Allen*, 29 Beav. 292; 32 Beav. 650.

2. The *Order* also applies to suits against public trustees for misapplication of funds: *Attorney General* v. *Pierson*, 2 Coll. 581; *Attorney General* v. *Corporation of Leicester*, 7 Beav. 176.

3. Also to suits to recover from some of the members of a firm or their representatives, moneys misappropriated by any of the partners, and in such a case it was not necessary to join the partner or his representative by whom the misappropriation had been actually made: *Plumer* v. *Gregory*, 18 L. R. Eq. 621; *St. Aubyn* v. *Smart*, 3 L. R. Chy. 646.

4. So also in a suit to recover an annuity charged upon several parcels of land, it was held that the plaintiff might proceed against any one of the parcels, without making the owners of the other par-

cels parties, but leave was given to the defendant to apply to add the others for the purpose of obtaining contribution : *Miller* v. *Vickers*, 23 Gr. 218.

5. So also in a suit to recover upon a promissory note, it was held not to be necessary to join all of several makers : *Macintyre* v. *Connell*, 1 Sim. N. S. 241 ; and see *Rule S. C.* 93.

Order 62 was held not to apply :—

Cases in which Ord 62 did not apply.

1. Where a general account of a trust estate, or a general administration was sought ; *Garrow* v. *McDonald*, 20 Gr. 122 ; *Coppard* v. *Allen*, 2 D. J. & S. 173 ; *Devaynes* v. *Robinson*, 24 Beav. 86 ; *Biggs* v. *Penn*, 4 Ha. 472 ; 9 Jur. 368 ; *Shipton* v. *Rawlins*, 4 Ha. 619 ; *Hall* v. *Austin*, 2 Coll. 570 ; *Penny* v. *Penny*, 9 Ha. 39. In such cases all the trustees, or executors, were necessary parties.

2. Nor to a case where some of the *cestuis que trust* had participated in the breach of trust, and had received the trust fund, and were necessary parties to any account or inquiry which a defendant trustee would be entitled to as against them, by reason of his right to contribution, or indemnity ; but an administrator *ad litem* was held sufficiently to represent one of such *c. q. t.* who was dead : *Williams* v. *Allen*, 29 Beav. 292 ; 32 Beav. 650; *Jesse* v. *Bennett*, 6 D. M. & G. 609.

3. Neither did it apply where the plaintiff's demand was only joint : Danl. Pr., 5th ed. 285.

4. Nor to suits to repair a breach of trust, where the trust property, if recovered, would have to be administered by trustees whose duties had not ceased ; in such a case, all the trustees were necessary parties : *Devaynes* v. *Robinson*, 24 Beav., see note at p. 99 : *Fowler* v. *Reynal*, 2 D. & S. 749.

5. Nor to actions against sureties alone without joining the principal ; *Exchange Bank* v. *Springer*, 29 Gr. 270 ; and see *Merchants' Bank* v. *Sparks*, 28 Gr. 108. Where there was but one principal and one surety both were required to be joined : *Lloyd* v. *Smith*, 13 Sim. 457 ; *Seidler* v. *Sheppard*, 12 Gr. 456 ; *Pierson* v. *Barclay*, 2 D. G. & S. 746. But when there were several principals and several sureties, the plaintiff might proceed against one of each class without making the others parties : *Lloyd* v. *Smith*, *supra*. But in any action founded on contract, see now *Rule S. C.* 93, *supra* : *Lloyd* v. *Dimmack*, 7 Ch. D. 398.

6. Neither did the *Order* apply to suits to recover a debt due by a partnership, when one of the partners was dead. In such cases the surviving partner and the representatives of the deceased partner must both be joined : *Hills* v. *McRae*, 9 Hare 297 ; *Cox* v. *Stephens*, 2 N. R. 506 ; *Baxter* v. *Turnbull*, 2 Gr. 521. But a surviving partner may sue for the recovery of a debt due to the part-

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nership without making the representatives of a deceased partner parties. This was the rule both at law and in equity: *Bilton* v. *Blakeley*, 6 Gr. 575; *Stephens* v. *Simpson*, 12 Gr. 493; 15 Gr. 594; *Bolekow* v. *Foster*, 24 Gr. 333; 25 Gr. 576; (overruling on this point *Sykes* v. *Brockville & O. R'y. Co.*, 9 Gr. 9), and see *McClean* v. *Kinnaird*, 9 L. R. Chy. at p. 346.

7. When the plaintiff had framed his record against all the parties liable, he could not afterwards abandon his suit against any of them and proceed against the rest: *Fussell* v. *Elwin*, 7 Ha. 29; *London Gas Co.* v. *Spottiswoode*, 14 Beav. 264, but see now *Lloyd* v. *Dimsack*, 7 Ch. D. 398.

Officers of corporations not to be made defendants merely for discovery.

63. Where a bill is filed against a Corporation aggregate, no officer of the Corporation is to be made a defendant for discovery only; but any officer who might by the former practice have been made a defendant for the purpose of discovery, may be examined by the plaintiff in the same way as a party, after the answer of the Corporation is filed, or after the time for filing the same has expired. (20th Dec. 1865; Ord. 5.)

See note to *Ord.* 62.

Examination for discovery.

Prior to *The Judicature Act* provision had also been made at law for obtaining discovery by the examination of parties, or the officers of corporations. See *R. S. O.* c. 50, ss. 156 *et. seq.* 41 Vict. c. 8, s. 9, (O.) 42 Vict. c. 15, ss. 3, 7, (O.) Holmested's Manual Pr. 233.

The former practice at law, and in equity under *Ord.* 63, appears to be intended to remain in force under *The Judicature Act*, see *Rules S. C.* 220, 227.

Further provision is also made by the *Rules S. C.* for obtaining discovery by production:—

Officers of Corporation to make affidavit on production.

"Where the party required to produce documents is a corporation aggregate, the affidavit shall be made by one of the officers of the corporation." *Rule S. C.* 225.

"The deponent shall be subject to cross-examination, and his affidavit shall have the same effect (as nearly as may be) as the affidavit of the party, unless where the Court or Judge sees reason for holding otherwise." *Rule S. C.* 226.

"Persons who have ceased to be officers of a corporation may be examined in the same manner as existing officers." *Rule S. C.* 227.

Examination of officers of corporation

An engine driver, and paymaster, were held not to be officers liable to examination for discovery: *McLean* v. *G. W. R.* 7 P. R. 358: nor a "tie inspector" of a railway company: *Dalziel* v. *G. T. R. Co.*

6 P. R. 307. A local agent of a chartered bank was held liable to such examination: *Consolidated Bank* v. *Neilon*, 7 P. R. 251, and a sub-editor of a newspaper: *Maitland* v. *Globe Printing Co.* 19 C. L. J. 174.

Officers may be parties when charged with wrongful acts.

The *Order* applies to cases where the officers are made parties for "discovery only," but where the plaintiff charges the officers of a corporation with collusion, and conspiracy, to deprive plaintiff of his rights, or damages are claimed against them for wrongful acts, such officers may be properly made defendants notwithstanding this *Order*: *Cuthbert* v. *The Commercial Travellers' Association*, 24 Gr. 531; *Cline* v. *The Mountainview Cheese Factory* 20 Gr. 227; *Betts* v. *Neilson*, 3 L. R. Chy. 429; 5 L. R. H. L. I.

The examination may be had as soon as the statement of defence of the corporation has been filed, or the time for filing it has expired: *Davis* v. *Wickson*, 18 C. L. J. 166.

Where the officers of the company required to be examined are resident out of the jurisdiction, see 41 Vict. c. 8, s. 9, (O.); *Moffatt* v. *Prentice*, 6 P. R. 33.

As to whether an order is necessary to entitle the plaintiff to make the examination, see *post Ord.* 138, but see *Consolidated Bank* v. *Neilon*, *supra* where an order was made; that, however, was for an examination under *Ord.* 64, which is not so wide in its terms as this *Order*.

In a suit against a corporation aggregate, officers of corporation may be examined for discovery.

64. Where a bill is filed by a Corporation aggregate the defendant may, after filing his answer examine for discovery such officer of the Corporation as would under the former practice have been made a party defendant to a cross-bill filed for discovery.

Ord. 64 appears to be applicable to actions in the Chancery Division: the practice at law was regulated by *R. S. O.* c. 50, s. 156, and 42 Vict. c. 15, s. 7, (O.) The procedure under those Acts and under this *Order*, seems to be recognized as being still in force. See *Rules S. C.* 220, 227.

When examination may be had.

The time when the examination could be made, differed at law and in equity. In actions in the Chancery Division the practice on this point is still regulated by this *Order*, and in the other Divisions by *R. S. O.* c. 50, ss. 156, *et. seq.* and 42 Vict. c. 15 s. 7, (O.) Under *Ord.* 64, the examination may be made, as soon as the defendant has filed his defence, and under the statutes, when the cause is at issue. See Holmested's Manual, Pr. 234. As to whether the practice under *Ord.* 63 may be followed in the Queen's Bench, and Common Pleas Divisions, see note to *Ord.* 1, and *Newbiggen-by-the-sea Gas Co.* v. *Armstrong*, 13 Ch. D. 310; *Nurse* v. *Durnford*, *Ib.* 768; *LaGrange* v. *McAndrew*, 4 Q. B. D. 210.

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In *Consolidated Bank* v. *Neiloh*, 7 P. R. 251, an order was made for the examination, but it is not clear that any order is necessary: see *Ord.* 138 *post*.

Where objection to non-joinder, taken at hearing, decree may be made saving rights of absentees.

65. Where a defendant, at the hearing of a cause objects that a suit is defective for want of parties, the Court, if it thinks fit, may make a decree saving the rights of the absent parties. (20th Dec. 1865; Ord. 15.)

Ord. 65 how far in force.

This *Order* affects not only the practice of the Court, but to some extent its jurisdiction, and it would seem, if it be still in force, to be applicable to all the Divisions. Each of the other Divisions now having all the jurisdiction which the Court of Chancery formerly possessed. The Court may now in every action deal with the matters in controversy, so far as regards the rights and interests of the parties actually before it: *Rule S. C.* 103.

The Court will only act under *Ord.* 65 where justice can be done to all parties notwithstanding the defective constitution of the suit: *Lambert* v. *Hutchison*, 1 Beav. 277, 286.

Cases in which Order acted on.

Where in a suit to set aside an illeged fraudulent conveyance by a debtor, it appeared at the hearing that a note *pro confesso* entered against one of the defendants, the original debtor, had been waived by a subsequent amendment of the bill, the Court dismissed the bill as against that defendant, on the application of the plaintiff, without the dismissal being equivalent to a dismissal on the merits, and made a decree, saving the rights of that defendant: *Waddle* v. *McGinty*, 15 Gr. 261.

A decree has been made under this *Order* in the absence—of the assignee of a bankrupt: *Maybery* v. *Brooking*, 7 D. G. M. G. 673; of a mortgagee: *Feltham* v. *Clark*, 1 D. G. & L. 307;—of a person entitled in a remote contingency: *Daubuz* v. *Peel*, 1 Coo. *temp.* Cott 365;—of the heir-at-law of the last surviving trustee, and o the personal representative of a testator: *Faulkner* v. *Daniel*, 3 Hare. 199.

Objections for want of parties must be taken promptly.

An objection for want of parties should be taken as soon as possible, and not postponed until the hearing: *Luke* v. *S. Kensington*, 11 Ch. D. 121; *Sheehan* v. *Great Eastern R'y Co.*, 16 Ch. D. 59; 29 W. R. 69; the objection should be taken by motion, and not merely raised by statement of defence; *Ib.*, and see *ante* note to *Ord.* 57, and see *Vallance* v. *Birmingham*, 24 W. R. 454; *Roberts* v. *Evans*, 7 Ch. D. 830; 26 W. R. 280, where no costs of pleadings were allowed to plaintiff from the time the objection was taken.

V.—PLEADINGS, AND WRITTEN PROCEEDINGS GENERALLY.

Pleadings, &c., to be written or printed.

66. Pleadings and all other proceedings in a cause may be written or printed, or partly written and

partly printed: and where wholly printed, dates and sums occurring therein are to be expressed by figures instead of words. (6th Feb. 1865; Ord. 1 and 2.)

The provisions of *Ord.* 66, 67 seem in the main superseded by *Rules S. C.* 129, 451, 452, 453, 464; see *J. A.* s. 91, as to meaning of word "pleading."

Pleadings how to be written, or printed.

67. All pleadings and other proceedings are to be written or printed neatly and legibly on good paper, of the size and form heretofore in use; and if printed, the same are to be printed with pica type leaded, and the solicitor is not to be entitled to the costs of any pleading or other proceeding which is not in conformity with this Order; and the Clerk of Records and Writs, or Deputy Registrar, is to refuse to file the same. (6th Feb. 1865; Ord. 3.)

See note to *Ord.* 66. The *Rules S. C.* do not expressly require proceedings if written, to be written legibly—the costs of illegibly written affidavits were disallowed: *Burnham* v. *Garvey*, 27 Gr. 80; nor is there any provision requiring the officer to refuse to file proceedings not conforming to the *Rules S. C.* The provision as to costs in *Ord.* 67, would seem to be still in force. See *Rule S. C.* 445.

Pleadings and affidavits, how to be drawn.

68. Every bill, answer, and petition filed, and every affidavit to be used in any cause or matter, is to be divided into paragraphs, and every paragraph numbered consecutively, and, as nearly as may be, is to be confined to a distinct portion of the subject. No costs are to be allowed for any bill, answer, petition, or affidavit, or part of any bill, answer, petition, or affidavit, substantially violating this order; nor shall any affidavit violating this order be used in support of, or opposition to, any motion, without the express permission of the Court. (13th April, 1859; Ord. 4.)

Costs of proceedings in violation of Order to be disallowed.

The first part of this *Order* is in substance included in *Rules S. C.* 128 and 464. The provision as to costs so far as affidavits are concerned, is also included in *Rule S. C.* 464; but as to the disallowance of costs of pleadings not conforming to the *Rules S. C.* it would seem this *Order* is still in force. See *Rule S. C.* 445.

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Court may order scandalous matter to be expunged.

69. If upon the hearing of a cause or matter, the Court is of opinion that any pleading, petition, or affidavit, or any part of such pleading, petition, or affidavit is scandalous, the Court may order such pleading, petition, or affidavit to be taken off the file, or may direct the scandalous matter to be expunged, and is to give such direction as to costs as it may think right. (23rd Dec., 1857; Ord. 3, s. 9.)

As to scandalous matter in the statement of claim, or defence, see *Rule S. C.* 178.

Application to strike out scandalous matter.

Nothing can be scandalous which is relevant, per *Cotton, L. J.*: *Fisher* v. *Owen*, 8 Ch. D. 653; *Jones* v. *Huntingdon*, 3 Chy. Ch. R. 117; *B*—— v. *W*——, 31 Beav. 342. The Court has power to strike out scandalous matter from an affidavit, or to order the person who has filed it to pay the costs of it, on the application of any person, even a stranger to the action, or *mero motu*. It is not necessary that the applicant should be the injured person: *Cracknall* v. *Janson*, 11 Ch. D. 1; *Middlemas* v. *Wilson*, 10 L. R. Ch. 230; *Sadlier* v. *Smith*, 7 P. R. 409; 15 C. L. J. 52; *Goddard* v. *Parr*, 24 L. J. Ch. 783.

Costs of motion

The costs of the motion are between solicitor and client: *Ex parte Thorp*, 1 Ves. 394; *Ex parte Porter*, 2 M. & Ayr. 220; *Ex parte Simpson*, 15 Ves. 476, and both the party and his solicitor concerned are liable to pay costs of an application: *Ib.*; *Rattray* v. *George*, 16 Ves. 232, and see *Bishop* v. *Willis*, 5 Beav. 83; *Anon*, 4 P. R. 242. As to the disallowance of the costs of unnecessary matter in pleadings and affidavits, see *Rule S. C.* 435.

Motion may be made at any time before hearing.

70. A motion to have any pleading, petition, or affidavit taken off the file for scandal, or to have the scandalous matter expunged, may be made at any time before the hearing of the cause or matter. (23rd Dec. 1857; Ord. 3, s. 10.)

Scandal in statement of claim or defence.

As to scandalous matter in statements of claim or defence, see *Rule S. C.* 178; as to disallowance of costs of unnecessary matter contained in pleadings and affidavits, see *Rule S. C.* 435.

Master no power to strike out interrogatories for impertinence.

Under *Ord.* 70 the Master in Chambers, or Local Judge, or Master, has no power to strike out for impertinence, interrogatories which have been delivered for the examination of a witness under commission: *Williams* v. *Corby*, 8 P. R. 83.

For form of notice of motion, see *Leggos's Forms*, 2nd ed., No. 526.

71. If upon the hearing of a cause or matter, the

Court is of opinion that any pleading, petition, or affidavit is of unnecessary length, the Court may either direct payment of a sum in gross or in lieu of taxed costs therefor, or it may direct the taxing officer to look into such pleading, petition, or affidavit, and to distinguish what part or parts thereof is, or are, of unnecessary length, and to ascertain the costs occasioned to any party by any unnecessary matter; and the Court is to make such order as it thinks just, for the payment, set-off, or other allowance of such costs, by the party, or his solicitor. (23rd Dec., 1857; Ord. 3, s. 11.)

Costs of unnecessary matter in pleadings, &c.

The provisions of this *Order* appear to be superseded by *Rule S. C.* 435; see however *Rule S. C.* 445 with regard to the provision enabling the Court to direct payment of a sum in gross in lieu of taxed costs.

How far Ord. 71 in force.

Order 72 provided that all the pleadings in any cause must be filed at the same office, and is now superseded, see *Rules S. C.* 50, 150.

73. Every paper to be filed in the office of the Clerk of Records and Writs is to be distinctly marked at or near the top or upper part thereof on the outside, with the name of the City, or Town, in which the bill is filed. And the Clerk of Records and Writs is not to file any paper which is not so marked. (1st April, 1867; Ord. 1.)

Papers filed with Clerk of R. & W. to be marked with name of place where bill filed.

This *Order* seems to be still in force, but must be read "writ of summons issued," instead of the words "bill is filed." It appears to apply only in the Chancery Division. The object of the *Order* is to assist the Clerk of Records and Writs in filing papers away, and to enable him to distinguish papers filed in town, and country, causes.

Ords. 74-95.

Orders 74-76 related to the form of Bills of Complaint; **Order 77** to the filing of Bills; **Orders 78—84**, to the amendment of Bills; and **Order 85** to the filing of Bills for Discovery, and are now effete.

Orders 86-87 related to the Service of Bills and are obviously effete.

Order 88 was abrogated by *Ord.* 623.

Order 89 related to answering amended bills, and is effete.

Order 90 was abrogated by *Ord.* 623.

Orders 91-95 related to Service of Bills, and are now effete; *Ord.* 95 was abrogated by *Ord.* 623.

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Ords. 96-103. **Orders 96-98** related to the Allowance of Service of Bills, and are now effete.

Orders 99-102 related to Substitutional Service of Bills, and are now effete.

Order 103 related to Affidavits of Service of Bills, and is now effete.

VIII.—TAKING BILLS PRO CONFESSO.

Ords. 104-119. **Orders 104-111** related to taking Bills *pro confesso*, and are now effete.

Order 112 regulated right of defendant against whom bill is *pro confesso* to appear at the hearing, and is now effete.

Order 113 provided that a decree founded on a Bill taken *pro confesso*, was to be absolute, except in certain cases, and is now effete.

Orders 114-116 related to proceedings for making absolute decrees *nisi*, and are now effete; except as to decrees *nisi* pronounced prior to *The Judicature Act*.

Order 117 related to letting in defendant to answer, after decree *nisi*, and is now effete.

Order 118 related to decree which may be made on hearing *pro confesso*, and is now effete. See *Rule S. C.* 211.

Order 119 provided that the representatives of parties should be bound by, and be enabled to enforce, decree made on a bill taken *pro confesso*, and is now effete.

IX.—DEMURRERS.

Ords. 120-121. **Orders 120-121** related to Demurrers, and are now obsolete.

X.—ANSWERS.

Ords. 122-133. **Orders 122-133** related to Answers, and are now obsolete.

XI.—PRODUCTION OF DOCUMENTS.

Ords. 134-137. **Orders 134-137** related to Production of Documents, and are now obsolete.

See *Rules S. C.* 222, 228, 237, 238.

XII.—EXAMINATION OF PARTIES.

Examination of parties, for discovery.

138. Any party to a suit may be examined by the party adverse in point of interest, without any special order for that purpose; and may be compelled to attend and testify in the same manner, upon the same terms and subject to the same rules of examination, as any witness, except as hereinafter provided. (3rd June, 1853; Ord. 22, s. 1.)

This *Order* is still in force, under *The Judicature Act*: see *Rules S. C.* 219, 220; *Bank of British North America* v. *Eddy*, 19 C. L. J. 192; and note at the heading of *Rules S.C.*, and regulates the practice in the Chancery Division. The practice in the other Divisions continues to be governed by *R.S.O.*, c. 50, ss. 156 *et seq.*, as altered by the *Rules S.C.* (See *Rule S.C.* 224). As to whether the practice under this *Order* may be followed in actions in the Queen's Bench, and Common Pleas, Divisions, see note to *Ord.* 1, *ante*. Ord. 138, how far in force.

Parties adverse in point of interest.—Under the English Ord. 31, r. 1, providing for the examination of the "opposite party or parties," it has been held that a party added by the defendant in a counter claim, is not an opposite party as regards the plaintiff: *Molloy* v. *Kilby*, 15 Chy. D. 162. But a third party, who has been notified by the defendant under *Rules S. C.* 107, 108, and has appeared and obtained leave to defend, is liable to examination by the plaintiff, and is entitled to examine the plaintiff in the same manner as an original defendant: *McAllister* v. *Bishop of Rochester*, 5 C. P. D. 194; *Bradley* v. *Clark*, 19 C. L. J. 193. Who may be examined

The officers of a defendant corporation, may be examined by the plaintiff, *Ord.* 63; and the officers of a plaintiff corporation, by a defendant, *Ord.* 64. See notes to those *Orders*.

As to the time for making the examination, see *post Ord.* 140.

How attendance procured.—When a party resided in Quebec, a subpœna requiring his attendance for examination in Ontario was ordered to issue under *C. S. C.*, c. 79, s. 4: *Moffatt* v. *Prentice*, 6 P. R. 33; *Bank of British North America* v. *Eddy*, 19 C. L. J. 192; and see *Morell* v. *Morrison*, 6 P. R. 210. But such an order will not be granted *ex parte*: *Moffatt* v. *Prentice*, *supra*; and see *Dewalt* v. *Hughitt*, 7 P. R. 323. The party desiring the examination is also entitled to a commission: *Stratford* v. *G. W. Ry. Co.*, 6 P. R. 91. How attendance procured.

The party to be examined must be served with a subpœna, and paid proper witness fees: *McMurray* v. *G. T. Ry.*, 3 Chy. Ch. R. 130; *Vardon* v. *Vardon*, 7 P. R. 436. A subpœna dated prior to the time when the party issuing it was entitled to examine the party served therewith, is irregular: *McMurray* v. *G. T. Ry. supra*. The solicitor of the party to be examined should also be served with a copy of the examiner's appointment: *Fowler* v. *Boulton*, 12 Gr. 437.

Where the party to be examined is a resident out of the jurisdiction but temporarily present within the jurisdiction, and about to return to his home, $1 is an insufficient witness fee on which to detain him five days in order to attend the examination: *Bolkow* v. *Foster*, 7 P. R. 388.

The Examination.—The Examiner's office is not a public Court, and he has no discretion to admit the public, if objected to by any of the parties: *Re Western of Canada O. L. & W. Co.*, 6 Chy. D. 109. Examiner's office not a public Court.

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Exclusion of parties.

Where several parties attend for examination, the Examiner may, under *R. S. O.* c. 50, s. 260, exclude those in the same interest, while the others are under examination; but one of them should be allowed to remain for the purpose of instructing counsel, subject to his being first examined. *Sivewright* v. *Sivewright*, 8 P. R. 81. The refusal to comply with the Examiner's ruling is a contempt of Court: *Sadlier* v. *Smith*, 14 C. L. J. N. S. 30. A foundation must be laid in the pleadings for questions asked on the examination: *Dickson* v. *Covert*, 2 Chy. Ch. R. 242: *Nicholl* v. *Elliot*, 3 Gr. 535; *Proctor* v. *Grant*, 9 Gr. 31.

The party may be examined under this *Order*, and may be subsequently cross-examined on his affidavit on production in the Chancery Division as of course. Usually it is advisable to postpone the examination until after the affidavit on production has been filed. If the examination is unnecessary, or vexatious, the party taking it may have to pay, or at all events be disallowed, the costs of it: *Dobson* v. *Dobson*, 7 P. R. 256, over-ruling *Paxton* v. *Jones*, 6 P. R. 135.

Place of examination.

Place of Examination.—The Examination must usually be had before a Master, or Special Examiner, in the county where the party to be examined resides: *Gallagher* v. *Gardiner*, 2 Chy. Ch. R. 480; *McDermid* v. *McDermid*, *Ib.* 372; *Campbell* v. *Packer*, 7 P. R. 135; *Kahn* v. *Redford*, 3 Chy. Ch. R. 55; and note as to this case Cooper's Digest, 1873, p. 111.

Party for whose benefit suit prosecuted, or defended, may be examined.

Order 139 provided that a person for whose immediate benefit a suit is prosecuted or defended, is to be regarded as a party for the purpose of *Ord.* 138. This *Order* is superseded by *Rule S. C.* 224.

"A person for whose immediate benefit a suit is prosecuted or defended, is to be regarded as a party for the purpose of examination or production of documents." *Rule S. C.* 224.

Time when examination may be had.

140. A plaintiff may be so examined at any time after answer, and before and at the hearing of the cause; and a defendant may be examined at any time after answer, or after the time for answering has expired. (3rd June, 1853; Ord. 22, s. 7.)

Ord. 140 how far in force.

This *Order* is still in force and regulates the practice in the Chancery Division—as to the other Divisions, see *R. S. O.* c. 50, ss. 156, *et. seq.* 42 Vict., c. 15, s. 7, (O). As to whether the practice under this *Order* may be followed in actions in the Queen's Bench and Common Pleas Divisions, see note to *Ord.* 1 *ante*.

Party may be examined as a witness.

A party may be examined as a witness in support of a motion, although the time for examining him under this *Order* may not have arrived: *McClennaghan* v. *Buchanan*, 7 Gr. 92.

Under *Ord.* 140, it will be noted that the right of the plaintiff to examine only arises *after answer*, or after the time for answering has expired: *Davis* v. *Wickson*, 18 C. L. J. 166. He is not obliged to wait until all of several defendants have filed their statements of defence. If instead of answering, the defendant demurred, the right of examination did not arise until after the demurrer had been disallowed, or if allowed with leave to amend, then not until after amendment and the time for answering the amended bill had expired. See *Chance* v. *Henderson*, 1 Chy. Ch. R. 30, and it would seem under the new practice if the defendant demurs instead of filing a statement of defence, the right of examination is similarly postponed.

Time for examination by plaintiff.

The right of a defendant to examine the plaintiff only arises after he has filed his statement of defence.

Time for examination by defendant.

A defendant is entitled to examine the plaintiff as soon as his own statement of defence is filed, he is not obliged to wait until those of his co-defendants, if any, are filed: *Fowler* v. *Boulton*, 12 Gr. 437. He need not notify his co-defendants of the examination: *Ib.*

Co-defendants need not be notified of examination of plaintiff.

The examination may be had though the cause has been entered for trial: *Clarke* v. *Hawke*, 1 Chy. Ch. R. 346.

141. A party so examined may be further examined, on his own behalf, in relation to any matter respecting which he has been examined in chief. (3rd June, 1853; Ord. 22, s. 3.)

Party may be examined on his own behalf in explanation.

See Note to *Order* 146, *post*.

142. Where one of several plaintiffs or defendants, who are joint contractors, or united in interest, has been examined, any other plaintiff or defendant, united in interest, may also be examined on his own behalf, or on behalf of those united with him in interest, to the same extent as the party actually examined. (3rd June, 1853; Ord. 22, s. 3.)

Parties in same interest with parties examined, may be examined.

See *Ord.* 146 *post*, from which it would appear that any examination taken under this *Order* could formerly be read if the examination taken in chief or any part of it were used.

But *Ord.* 146 seems now to be superseded by *Rule S. C.* 239, which does not give the same right as *Ord.* 146, did, and therefore, the utility of *Ord.* 142 seems to some extent nullified.

143. Such explanatory examination must be pro-

Time for such examination.

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ceeded with immediately after the examination in chief, and not at any future period, except by leave of the Court. (3rd June, 1853, Ord. 22, s. 3.)

Neglect to make discovery, how punished.

144. A person refusing, or neglecting, to attend at the time and place appointed for his examination, or refusing or neglecting to obey an order for production of documents, may be punished as for a contempt; and the party who desires the examination, or production, in addition to any other remedy to which he may be entitled, may apply to the Court, upon motion, either to have the bill taken *pro confesso*, or to have it dismissed, according to circumstances. (3rd June, 1853, Ord. 22, s. 5.)

The practice in all the Divisions is to the same effect as that laid down in this *Order*. As to the Q. B. & C. P. Divisions, see 42 Vict., c. 8, s. 9 (O); and as to procedure for non-production of documents in all the Divisions, see *Rule S. C.* 236.

Proceedings in default of production.

The defaulting party is entitled to notice of a motion to commit: *Rule S. C.* 365, or to dismiss, or strike out defence; and it would seem a notice to commit should be personally served: *Mann* v. *Perry*, 44 L. T. N. S. 248; 50 L. J. Chy. 251; *Weir* v. *Matheson*, 1 Chy. Ch. R. 224. Two day's notice would seem to be sufficient in all cases. *Rule S. C.* 407.

The party in default may not only be committed, but if a plaintiff, his action may be dismissed: *Republic of Liberia* v. *Imperial Bank*, 9 L. R. Chy. 569; S. C., as *Republic of Liberia* v. *Roye*, 1 App. C. 139; *Dunn* v. *McLean*, 6 P. R. 156, or if a defendant his defence may be struck out, and the plaintiff be allowed to proceed as if he had not defended.

The party must have been regularly subpœnaed: *McMurray* v. *G. T. R'y Co.*, 3 Chy. Ch. R. 130, and paid his proper witness fees: *Bolkow* v. *Foster*, 17 P. R. 388, or no order can be made against him.

When a party has attended for examination but has refused to answer questions, the motion should be to compel him to attend again at his own expense and answer the questions, and in default that his action be dismissed, or defence struck out, as the case may require. When such an order has been obtained, and disobeyed, the motion to dismiss the action, or strike out the defence, may be made *ex parte*; *Dunn* v. *McLean*, 6 P. R. 156.

The Master in Chambers cannot entertain applications to commit

for non-production: *Keefe* v. *Ward*, 9 P. R. 220; 18 C. L. J. 166; 2 C. L. T. 260.

Where an action has been dismissed it will not be restored unless perhaps when the claim would otherwise be barred by the dismissal, *e. g.* by the Statute of Limitations: *Dunn* v. *McLean*, 6 P. R. 156. and see *Hodgson* v. *Paxton*, 2 Chy. Ch. R. 398; *Bank of Montreal* v. *Wilson*, 2 Chy. Ch. R. 117; and in *Dary* v. *Dary*, 2 Chy. Ch. R. 26. Restoring action dismissed for non-production.

145. The Court, upon such application, may, if it thinks fit, order either that the bill be taken *pro confesso*, or that it be dismissed, as the case may be; or make such order as seems just. (3rd June, 1853; Ord. 22, s. 5.)

See Note to *Ord.* 144.

146. Where the examining party uses any portion of the examination so taken, it shall be competent for the party against whom it is used to put in the entire evidence so taken, as well that given in chief as that in explanation. (3rd June, 1853; Ord. 22, s. 6.) How far examination may be used in evidence.

"Any party may at the trial of an action or issue, use in evidence any part of the examination of the opposite parties; provided always, that in such case the Judge may look at the whole of the examination, and if he shall be of opinion that any other part is so connected with the part to be so used, that the last mentioned part ought not to be used without such other part, he may direct such other part to be put in evidence." *Rule S. C.* 239. *Rule S. C.* 239.

Rule S. C. 239 deals with the same subject as *Ord.* 146, and appears to be a "special provision" within *J. A. S.* 12, which supersedes *Ord.* 146.

Under the former practice the plaintiff was entitled to read the defendant's examination as part of his answer in support of a motion for decree: *Proctor* v. *Grant*, 9 Gr. 31; *Mathers* v. *Short*, 14 Gr. 254. The same point was also decided in: *Dunnet* v. *Forneri*, 25 Gr. 199, though not noticed in the report. Under *The Judicature Act*, it is presumed, the plaintiff will have the same right to read a defendant's examination in support of a motion for judgment. The examination, however, cannot as a general rule be read as evidence against any party except the deponent. Plaintiff formerly entitled to read defendant's examination as part of his answer.

147. A party to the record who admits, upon his examination, that he has in his custody or power any deed, paper, writing, or document relating to the mat- A party admitting the possession of documents may be ordered to produce them.

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ters in question in the cause, is to produce the same for the inspection of the party examining him, upon the order of the Court, or of the Master, or Examiner, before whom he is examined, and for that purpose a reasonable time is to be allowed. But no party shall be obliged to produce any deed, paper, writing, or document, which would have been protected under the former practice. (3rd June, 1853; Order 22, s. 4.)

Where Master may order production.

The power of the Master, or Special Examiner, to order production of documents under *Ord.* 147, is confined to cases where *parties to the record* admit the possession of such documents. Where the admission is made by an officer of a corporation, it would seem that the Master, and Examiner, have no power to make the order, but in such a case an application in Chambers would appear to be necessary. See *Rule S. C.* 221. Production may be obtained under an order of course, as provided by *Rules S. C.* 222, 513. The provisions of *Ord.* 147 are intended to meet the case of a party who, having filed an affidavit in answer to an order to produce, on his subsequent cross-examination admits that he has other material documents which he has not produced. The examination may be adjourned for the purpose of enabling the party to comply with the Master's, or Examiner's, order for production.

Master's and Examiner's order for production appealable.

148. Either party may appeal from the order of the Master, or Examiner: and thereupon such Master, or Examiner, is to certify under his hand the question raised and the order made thereon; and the costs of appeal are to be in the discretion of the Court. (3rd June, 1853; Ord. 22, s. 4.)

Appeal from order directing production.

An appeal from a Master is to be brought by notice of motion to be given within four days after the decision complained of, or such further time as may be allowed by a Judge. *Rule S. C.* 427; *Dayer* v. *Robertson*, 9 P. R. 78; but see *McNeill* v. *McGregor*, 3 C. L. T. 309. The appeal must be to a Judge in Chambers, and must be brought on to be heard, within eight days after the decision: *Ib.*, or such further time as may be allowed by a Judge: *Rule S. C.* 427. In the Chancery Division such appeals are heard on Mondays, and in the other Divisions on Tuesdays and Fridays, except in vacation.

There is no special *Order* regulating appeals from Special Examiners, but it is presumed they should be brought and prosecuted in the same manner as appeals from Masters.

As to documents privileged from production, see Holmested's Manual, Pr 239-242; Maclennan, 239.

XIII.—REPLICATION—JOINING ISSUE.

Ord. 149-155.

Orders 149-155 related to replication, time for filing, &c., and are now obsolete.

XIV.—NOTICE TO ADMIT.

Ord. 156-157.

Orders 156-157 related to notices to admit, and are now superseded by *Rules S. C.* 241-243.

XV.—SETTING DOWN AND HEARING.

Ord. 158-164.

Orders 158-164 related to motions to change the venue, setting down causes for hearing, &c., and are now obsolete. See *Rules S. C.* 254-269.

Pleadings to be transmitted to place of trial, on precipe.

165. Where the hearing is to be had in any town or place, other than that in which the pleadings are filed, it shall be the duty of the party setting down the cause to deliver to the Clerk of Records and Writs, or the Deputy Registrar with whom the pleadings are filed, a sufficient time before the day fixed for the hearing, a precipe requiring him to transmit to the Registrar, or Deputy Registrar, at the place where the hearing is to be had, the pleadings and such other papers as may be specified in the precipe; and at the same time to deposit with him a sufficient sum to cover the expense of transmitting and re-transmitting such pleadings and papers; and thereupon it shall be the duty of the Clerk of Records and Writs, or Deputy-Registrar, forthwith to transmit the pleadings and such other papers as may be specified, accordingly. (10th Jan., 1863; Ord. 3.)

Costs of sending and returning to be prepaid.

This *Order* appears to be still in force; but now that a certified copy of the pleadings have to be left on entering an action for trial: *Rule S. C.* 262, there is not the same necessity as formerly of having the original pleadings in Court.

Ord. 166.

Order 166 provided that "No evidence to be used on the hearing of a cause other than, the examination of a party under *Ord.* 138, is to be taken before any Examiner, or Officer of the Court, unless by the order first had of the Court or a Judge thereof, upon special grounds adduced for that purpose." This *Order* is now obsolete: see *Rules S. C.* 239, 282, 285, 301-5.

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167. Witnesses resident out of the jurisdiction may be examined, as heretofore, upon commission. (23rd Dec., 1857 ; Ord. 2, s. 3.)

Commissions to take evidence.

The procedure in obtaining and executing commissions to take evidence abroad is regulated by *Rules S. C.* 286-300 : see Holmested's Manual, Pr. 164-169.

Before judgment, a commission cannot be issued without an order. Ordinarily, an order for a commission to take evidence abroad will not be granted until the cause is at issue : *Royal Canadian Bank* v. *Cummer*, 2 Chy. Ch. R. 388 ; *Allan* v. *Andrews*, 5 P. R. 32. But on a motion for judgment for administration, or partition, in Chambers, after the notice of motion has been served, an order may be obtained for a commission to take evidence in support of the motion, the application should be made on notice to the opposite party : *Farrell* v. *Cruikshank*, 1 Chy. Ch. R. 12. An order for a commission to take the examination of any party, or officer of a corporation, resident abroad, for discovery under *Ord.* 138, 63,64, may be obtained, but not before the party seeking to make the examination is entitled to take it : *Chance* v. *Henderson*, 1 Chy. Ch. R. 30, and see *Stratford* v. *Great Western Railway Co.*, 6 P. R. 91 ; or where the party or officer is resident in Quebec, he may be summoned by *subpœna* to be examined in Ontario : *Moffatt* v. *Prentice*, 6 P. R. 33 ; *C. S.*, *C.* c. 79, s. 4 ; R. S. O. 781. A commission may also be issued to take evidence abroad to be used on a reference before a Master, in such a case no order is necessary, but the commission may issue on the Master's certificate : see *Ord.* 221 and notes.

Not ordered as of course.

A commission will not be ordered as of course : *Price* v. *Bailey*, 6 P. R. 256 ; *Vivian* v. *Mitchell*, 13 C. L. J. N. S. 198 ; *Berdon* v. *Greenwood*, 46 L. T. N. S. 524, note *a* : *Re Boyse Crofton* v. *Crofton*, 46 L. T. N. S. 322.

Opening commission.

Formerly, in Chancery a commission might be opened by the officer to whom it was returned, on due notice to all parties interested, without an order : *Chalmers* v. *Pigott*, 1 Chy. Ch. C. 282 ; but at law an order was obtained *ex parte* for opening the commission, and notice was given to the opposite party of the time of opening : *Neale* v. *Withrow*, 4 U. C. L. J. 88 ; *Gordon* v. *Fuller*, 5 O. S. 174 ; but where the evidence was not published until the trial, the commission might be opened in open Court without a special order, and the evidence might be used by the opposite party, though he had not joined in the commission : *Gordon* v. *Fuller supra.*

Order 168.

Order 168 related to examination of witnesses at the hearing, &c., and is now obsolete : see *Rules S. C.* 282, 271, 272, 428.

169. Causes are to be argued at the same time that the witnesses are examined. (10th Jan., 1863 : Ord 2.)

See *J. A.* s. 45. Notwithstanding this *Order*, the Court after hearing the evidence, frequently postpones the hearing of the argument to some future day.

Ord. 170-171.

Orders 170-171 related to the examination of parties as witnesses, and were practically abrogated by *R. S. O.* c. 62, s. 4.

Recalling witness.

172. A witness may be recalled for further examination, as in trials at *nisi prius*, without any order of the Court having been obtained for that purpose. (23rd Dec., 1857 ; Ord. 2, s. 12.)

Discrediting witness.

173. Articles are not to be filed for the purpose of discrediting a witness ; but witnesses may be called for that purpose, without the leave of the Court ; and they are to be examined at the same time as the other witnesses, unless the Court otherwise orders. (23 Dec., 1856 ; Ord. 2, s. 13.)

Any party is at liberty to use evidence adduced by any other party

174. Any party is to be at liberty to make use of the evidence of a witness adduced by another party to the suit. (23rd Dec., 1857 ; Ord. 2, s. 15.)

The evidence taken by any party under a commission may be called for and used at the trial by any other party : *Gordon* v. *Fuller*, 5 O. S. 175, and see *post Ord.* 178.

Depositions taken in other causes may be read, without order, when.

175. A party shall be entitled, upon notice without order, to use depositions taken in another suit, in cases where under the former practice, he was entitled, upon obtaining the common order for that purpose, to use such depositions. (28th April, 1862.)

Effect formerly of order to read depositions, &c., in another cause.

Under the common order to read depositions taken in another cause, depositions could only be read where the other suit raised the same issue and was virtually between the same parties, *i. e.*, between persons representing the same interests : *Court* v. *Holland*, 8 P. R. 219 ; except in cases where hearsay, and reputation, would be good evidence, or in cases where the existence of a custom, or the right to tolls, was concerned, in these latter classes of cases, depositions were admissible as against other parties, provided they were not made *post litem motam*. But even then, if the question at issue were not precisely the same in both suits, the depositions in the former

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suit were not admissible. Where a person who had given evidence in an action at law between substantially the same persons as were parties to a suit in Chancery, was afterwards committed to the penitentiary and refused to give evidence in the Chancery suit, the Court ordered the witness's evidence given at *nisi prius* to be read from the notes of the Judge who had tried the action at law: *Switzer* v. *Boulton*, 2 Gr. 693.

See further as to practice on this subject, Danl Pr. (by Perkins) p. 1006; *Republic of Peru* v. *Ruzo*, 32 L. T. N. S. 598.

Affidavits of particulars witnesses, or of particular facts, may be used at hearings, by consent, or by leave of the Court.

176. At the hearing of any cause, or of any further directions therein, affidavits of particular witnesses, or affidavits as to particular facts and circumstances, may be used by consent, or by leave of the Court; and such consent may be given on behalf of persons under disability, with the approbation of the Court. (3rd June, 1853; Ord. 20, s. 4.)

Ord. in force as regards hearings on F.D.

This *Order* is in effect superseded so far as it relates to evidence at the trial of actions, by *Rules S. C.* 283, 301. It would seem to be still in force as regards hearings on further directions.

As to matters which may, and may not, be proved by affidavit under this *Order*, see Danl. Pr., 5th ed., 777, 1236; *Devey* v. *Thorton*, 9 Ha. 233; *Fowler* v. *Reynal*, 15 Jur. 1019; *Delevante* v. *Child*, 6 Jur. N. S. 118; *Bush* v. *Watkins*, 14 Beav. 33: *Hoghton* v. *Hoghton*, 15 Beav. 278; *Bear* v. *Smith*, 5 D. & S. 92; *Fallows* v. *Dillon*, 2 W. R 507; *Bateman* v. *Margerison*, 2 W. R. 607; *Howard* v. *Chaffers*, 11 W. R. 585; *Evans* v. *Lewis*, 2 L. T. N. S. 559; *Fleming* v. *East*, Kay App. lii.

Exhibits at hearing, how to be marked.

177. Exhibits put in at the hearing of a cause are to be marked thus: "In Chancery [*short title*]. This exhibit (the property of ,) is produced by the plaintiff (*or defendant C., as the case may be,*) this day of 186 , A. B.," (*Registrar or Deputy Registrar*). (1st April, 1867; Ord; 4)

Evidence oral or documentary cannot be withdrawn without leave.

178. Where a party or witness is examined at the hearing of a cause, or a document is put in as evidence and marked by the Registrar, or the Deputy Registrar, the deposition of the party, or witness, so examined, or the document so put in, is not to be withdrawn as evidence without the leave of the Court. (20th Dec., 1865; Ord. 16.)

See *Vanatto* v. *Mitchell*, 13 Gr. 665.

179. Where judgment is reserved, the exhibits used upon the hearing must be deposited with the Registrar, or Deputy Registrar, for the use of the Court. All exhibits deposited under this order must be described in a schedule, to be prepared by the party depositing the same. The schedule shall be in duplicate, one copy of which, signed by the Registrar, or Deputy Registrar shall be handed to the party depositing the exhibits, and the other retained for the use of the Court. Where this Order has not been complied with, the case will not be considered as standing for judgment. (13th April, 1859; Ord, 3.)

Where judgment reserved; Exhibits with Schedule to be left with Registrar.

Order 180 related to costs of proving facts which should have been admitted and is superseded by *Rule S. C.* 163.

Ord 180.

181. The solicitors for the several parties are to attend in Court when a cause is appointed to be heard, and during the hearing thereof. (13th April, 1859; Ord. 2.) (*Eng. Con. Ord.* 21, *r.* 11.)

Solicitors of all parties to attend trial.

This *Order* appears to be still in force; as to consequences of non-compliance with it, see *Ord.* 182.

182. Where, upon the hearing of a cause, it appears that the same cannot conveniently proceed by reason of the solicitor for any party having neglected to attend personally or by some person in his behalf, or having omitted to deliver any paper necessary for the use of the Court, and which, according to its practice, ought to have been delivered, such solicitor shall personally pay to the parties such costs as the Court thinks fit to award. (13th April, 1859; Ord. 2.) (*Eng. Con. Ord.* 21, *r.* 12.)

When cause cannot proceed in consequence of absence of solicitor, he may be ordered to pay costs.

A solicitor who neglected to appear for a defendant for whom he had undertaken to appear, was ordered to pay all the costs occasioned by his neglect: *Cook* v. *Broomhead*, 16 Ves. 133, and see *Courtney* v. *Stock*, 2 Dr. & War. 251.

Where no papers were delivered, and the plaintiff did not appear, the action was dismissed, with costs: *Farrell* v. *Wale*, 36 L. T. 95; *Eldrige* v. *Burgess*, 7 Ch. D. 411. But where the defendant has a

Plaintiff not appearing, action may be dismissed.

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counter claim he is bound to prove it so far as the onus is on him, even though the plaintiff do not appear. See Holmested's Manual Pr. 123. If the defendant do not appear the plaintiff must prove his claim so far as the onus is on him : *Ib.* 122.

Defendant must prove counter claim, if onus on him.

Where the action is dismissed in consequence of the plaintiff not being ready to proceed, owing to the illness of his solicitor, it may be restored on payment of the costs of the day and of the application to restore : *Birch* v. *Williams*, W. N. (76) 168 ; 24 W. R. 700.

Restoring action, dismissed for non-attendance.

As to restoring causes struck out on account of the absence of counsel : *Harvey* v. *Renon*, 12 Jur. 445, and as to costs so occasioned : *Godson* v. *Hall*, 7 Cl. & Fin. 549.

Ord. 183.

Order 183 related to the non-appearance of defendant at the hearing, and is superseded by *Rule S. C.* 268, *J. A.*, s. 44.

Ord. 184.

Order 184 related to the dismissal of bill by plaintiff after the cause had been set down for hearing, and to dismissals at the hearing for non-appearance of the plaintiff, and is superseded by *Rules S. C.* 269, 330.

XVI.—DECREES AND ORDERS.

Evidence not to be stated in decrees.

185. The evidence read upon the hearing, is not to be stated in the decree, but must be entered in the Registrar's book at the time of the hearing. (3rd June, 1853; Ord. 43. s. 10.)

The word "order" includes "decree and decretal order;" but the word "decree" does not include "order." See *Ord.* 7, *ante*. The provisions of this *Order* therefore are confined to decrees, and the same procedure appears to be continued under *The Judicature Act* as regards judgments : See Forms appended to *Rules S. C.* Nos. 155, 156, 157, 160, which will be found to contain no statement of the evidence.

Entry of evidence in Registrar's book.

In actions in the Chancery Division an entry of the evidence should still be made in the book of the Registrar, Local Registrar, Deputy Clerk of the Crown, or Deputy Registrar, or Clerk of Assize, present at the trial, as the case may be. The entry should include the names of all witnesses examined, and the exhibits put in by the respective parties, referring to them by the letter, or number, by which they are marked.

What may be entered.

Papers on which a decree by consent was obtained, were ordered to be entered as read, though not strictly proved : *Simmonds* v. *G. E. Ry. Co.*, 3 L. R. Chy. 797.

All affidavits which have been filed, and of which a party gives notice of reading on a motion for judgment, though not actually

mentioned on the motion, should be entered as read: See *Catholic Publishing Co.* v. *Wyman*, 1 N. R. 49: but not affidavits which are inadmissible as evidence, even though notice has been given of reading them: *Re Brampton and L. Ry. Co.*, 10 L. R. Chy. 186.

How entered.

Evidence should not be entered as "read *de bene esse*:" *Parker* v. *Morrell*, 2 Phil. 453; *Watson* v. *Parker*, *Ib.* 5; even by consent: *McMahon* v. *Burchell*, 2 Phil. 127; nor "saving just exceptions:" *Sherwood* v. *Beveridge*, 2 Coll. 536; *Drake*, v. *Darke*, 25 Beav. 641. But see *Gee* v. *Gurney*, 8 Beav. 315.

Orders to contain reference to evidence.

Although judgments need contain no statement of the evidence on which they are founded, it would seem to be necessary that orders should contain a reference to the evidence used: Danl. Chy. Pr. (5th ed.) 902, otherwise the costs of affidavits filed in support of a motion, but not entered in the order, will be disallowed, even as between solicitor and client: *Stephens* v. *Lord Newborough*, 11 Beav. 411. A party is entitled to have entered in an order as read, all affidavits filed in support of, or opposition to, a motion though not actually read: *Catholic Publishing Co.* v. *Wynan*, *supra*. But see *Camille* v. *Donato*, 11 Jur. N. S. 26; and is not bound actually to read them to be entitled to the costs thereof: *Freer* v. *Rimmer*, 14 Sim. 391. An order should not recite affidavits sworn after the date of the order: *Ashley* v. *Taylor*, 27 W. R. 228.

Where an order is granted subject to the production of further affidavits, the order should bear date after such affidavits are produced.

Admissions should be inserted in the order; *Mirehouse* v. *Barnett*, 22 So. Jour. 683; and see *Watson* v. *Rodwell*, 11 Ch. D. 150.

Liberty to apply, need not be reserved.

186. It shall not be necessary in any order to reserve liberty to apply, but any party may apply to the Court from time to time as he may be advised; and where any order directs the payment of money out of Court, it shall not be necessary to direct that a cheque be drawn for the purpose.

This *Order* appears to be still in force.

Implied in all Orders except of a final nature.

It is said that all orders of the Court carry with them *in gremio* liberty to apply to the Court, per Fry, J., *Fritz* v. *Hobson*, 14 Ch. D. 542; 42 L. T. N. S. 225. But this liberty was held, not to be implied in orders of a final nature: *Penrice* v. *Williams*, 48 L. T. N. S. 868.

Costs reserved to trial may be subsequently disposed of.

Where costs of an interlocutory motion were reserved "until the hearing or other final disposition of the cause," and an order was subsequently made allowing a demurrer to the plaintiff's bill for

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want of equity, but the costs of the interlocutory motion were not then asked for, it was held that a subsequent application might be made to the Court to amend the order by directing the allowance of the costs reserved: *St. Michael's College* v. *Merrick*, 26 Gr. 216; 18 C. L. J. 130; *Viney* v. *Chaplin* 3 D. G. & J. 281; *Fritz* v. *Hobson*, 14 Ch. D. 542.

Orders to be divided into paragraphs.

187. Orders are to be divided into convenient paragraphs, and such paragraphs are to be numbered consecutively; and where accounts are directed to be taken, or enquiries to be made, the order may be in the form set forth in schedule J hereunder written, with such variation as the circumstances of the case require. (1st April, 1867; Ord. 8; 3rd June, 1853; Ord. 43, s. 11.)

Sums to be stated in dollars and cents.

188. In all orders, sums are to be stated in dollars and cents. (6th Feb., 865; Ord. 145).

Ord. 189, 190.

Orders 189, 190, related to the enrolment of decrees, and are obsolete. Enrolment is "now a useless ceremony," per James, L. J.; *Hastie* v. *Hastie*, 2 Ch. D. 307, and see *J. A.*, s. 9.

Ord. 191.

Order 191 related to passing, and entering, of decrees *pro confesso*, and is now obsolete.

Queen's Counsel holding sittings to send statement of judgment to Registrar.

192. Where a Queen's Counsel has held a sitting of the Court under the Statute in that behalf, he is to inclose to the Registrar, as soon thereafter as may be, a statement signed by him, of his decree in each case heard by him, with the date and place of hearing, and is to set forth the terms of his decree either at full length or otherwise, as the case may require. His judgment containing the reasons for his decree, if he thinks fit to state the same in writing, is also to be transmitted to the Registrar for the information of the Court and the parties. (10th Sept. 1866; Ord. 9.)

This *Order* appears to be still in force. The Statute referred to, enables a retired Judge of a Superior Court, a County Court Judge, or a Queen's Counsel, to hold Sittings in Chancery upon request of any Judge of the Court of Chancery, or of the Court of Appeal: see *R. S. O.*, c. 40, s. 27.

193. A decree made by a Queen's Counsel is to be expressed in the body thereof to be the decree of the Court, but the name of the Queen's Counsel is to be given in the margin. (10th Sept. 1866; Ord. 10.)

Decree of Q.C. to be expressed to be decree of Court.

Order 194 provided that interlocutory orders are not to be enrolled, and is obsolete.

195. No order of course, and no order obtained *ex parte* and not being of a special nature, is to be entered unless the entry thereof shall be directed by the Court or a Judge; but this provision is not to be construed as applying to decrees, or decretal orders, or to final orders for sale, or foreclosure. (6th Feb. 1865; Ord. 20)

Orders of course, and orders obtained on motion *ex parte*, not to be entered unless directed.

See *post Ord.* 594, 650. An order of which there was no entry, and of which the original was lost, was directed to be redrawn: *Ex parte Dean of St. Paul's*, 18 W. R. 724.

Lost order, may be redrawn.

Orders of a special nature are still entered in the Chancery Division, but not in the other Divisions.

The entry of judgments in all the Divisions is now governed by *Rules S. C.* 325, 329.

196. In all cases where a person or party obtains an order from the Court, or from a Master, upon condition, and fails to perform or comply with the condition, he is to be considered to have waived or abandoned the order, as far as the same is beneficial to himself, and any other party or person interested in the matter, on the breach or non-performance of the condition, may either take such proceedings as the order in such case may warrant, or such proceedings as might have been taken if the order had not been made. (3rd June, 1853; Ord. 24, s. 4.) (*Eng. Con. Ord* 23, *r.* 22.)

Orders obtained on condition deemed to be abandoned so far as beneficial to party obtaining unless condition performed.

As to the execution of judgment granted upon condition, see *Rule S. C.* 345.

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XVII.—CHAMBERS.

Business to be transacted in Chambers.

197. The following business shall be disposed of in Chambers, together with such other matters as the Court from time to time thinks may be more conveniently disposed of there, than in full Court, viz :—

Applications for :—

Sale of infants' estate.

1. For the sale of the estates of infants, under the Consolidated Statutes of Upper Canada, chapter 12, s. 50;

Guardianship, maintenance, &c.

2. As to the guardianship, maintenance, and advancement of infants;

Administration.

3. For the administration of estates upon motion, without bill;

Time to defend.

4. For time to answer or demur;

Leave to amend.

5. For leave to amend bills;

To change venue.

6. For changing the venue;

To postpone trial.

7. To postpone the examination of witnesses, or to allow the production of further evidence;

Production.

8. For the production of documents;

Conduct of suits.

9. Relating to the conduct of suits or matters;

Management of property.

10. As to matters connected with the management of property;

Payment into, or out of, Court.

11. For the payment into Court of moneys, by parties desiring, on their own behalf, to pay in the same. (3rd June, 1853; Ord. 34, s. 1.)

Officers who may transact business in Chambers.

Under *The Judicature Act* and *Rules S. C.*, the business in Chambers may now, for the most part, be transacted before the Master in Chambers, or any Official Referee, sitting for him, and in country cases before the Local Masters, or County Court Judges. Certain matters, however, are excluded from their jurisdiction: *Rule S. C.* 420; *Ord.* 560; *R. S. O.* c. 39, s. 29; Reg. Gen., Feb., 1870, 29 Q. B. 623, and see Holmested's Manual Pr. 210, 211, 214. To the matters there noted as being beyond the jurisdiction of these Judges, and Officers, may be added, (1) Applications to set aside fraudulent conveyances by judgment debtors: *Queen* v. *Smith*, 7 P. R. 429; (2) Applications to transfer actions from one Division to another:

Applications excluded from jurisdiction of Master in Chambers, &c.

Hilliard v. *Thurstin*, 2 C. L. T. 261 ; 18 C. L J. 180 ; (3) Applications to commit for non-production : *Keefe* v. *Ward*, 18 C. L. J. 166, 2 C. L. T. 260 : *Darling* v. *Darling*, before Dalton, Q. C., Master in Chambers, 28 Feb., 1882.

Additional cases to which jurisdiction in Chambers has been extended :

Jurisdiction in Chambers extended in certain cases.

Subsequent Statutes, and *Orders*, extend the jurisdiction in Chambers to other matters, in addition to the business enumerated in *Ord.* 197, *e. g.* ;—

Applications to set aside fraudulent conveyances by judgment debtors.

1. Summary applications to set aside fraudulent conveyances by execution debtors : *R. S. O.* c. 49, s. 10, or for sale of equitable interests of execution debtor in lands : *Ib.* s. 11. Applications of this kind can only be made to a Judge : *Queen* v. *Smith*, 7 P. R. 429. Formerly in such cases the application was made for an order *nisi* : *Wark* v. *Moulton*, 7 P. R. 144, but now it is presumed the proper mode of procedure is to serve a notice of motion. See *Rules S. C.* 405, 406, 407. In some cases leave to serve notice of motion may be necessary. See Holmested's Manual, Pr. 201. Substituted service on an absconding execution debtor may be allowed : *Dobson* v. *Marshall*, 9 P. R. 1. The debtor may be ordered to pay the costs of an application for sale : *Watts* v. *Hobson*, 7 P. R. 334.

Motions for judgment : in mortgage cases.

2. Motions for judgment in ordinary mortgage actions, for sale, or foreclosure, or for redemption, where infants are concerned : see *Ord.* 434, 645 ; *Rule S. C.* 79. The Master in Chambers, Official Referees when sitting for him, and in the cases mentioned in *Rule S. C.* 422, the Local Masters, and County Court Judges, have jurisdiction to entertain such applications.

Partition.

3. Motions for judgment, by adult parties, in actions for partition, under *Ord.* 640, 641 : motions of this kind cannot be entertained by the Master in Chambers : *Re Arnott*, *Chatterton* v. *Chatterton*, 8 P. R. 39 : but are in certain cases within the jurisdiction of the Local Masters, but not of the County Court Judges, unless they be also Local Masters. See *Rule S. C.* 422, which in effect limits the jurisdiction of the County Court Judges, who are not Masters, to that exercised by the Master in Chambers.

Administration.

4. Motions for judgment on summary applications for administration, may also be made in certain cases, to Local Masters, under *Ord.* 638 ; motions of this kind may also be made to the Master in Chambers, and County Court Judges who are not Local Masters, but if opposed, their jurisdiction is excluded under *Ord.* 560, *Rules S. C.* 3, 420, 422 ; but opposed applications for administration are not excluded from the jurisdiction of the Local Masters ; see *Ord.* 638, *Rule S. C. C.* 422. As to procedure on motions for administration, see *Ord.* 467, 473, 552, 638, and notes ; Holmested's Manual Pr. 216.

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For judgment under *R.S.C* 80. To convey free from dower.

5. Motions for leave to enter judgment under *Rule S. C.* 80.

6. Applications to enable the owner of land, to convey free from the dower of his wife, under *R. S. O.* c. 126, ss. 8, 9, 10, and 43 Vict., c. 14, s. 4; *Re Eagles*, 7 P. R. 241; *Re Campbell*, 25 Gr. 187, 480; but applications of this kind can only be entertained by a Judge.

To appoint, or dispense with appointment of, representative of estate.

7. Applications to appoint, or to dispense with the appointment of, a person to represent the estate of a deceased person under *R. S. O.* c. 49, s. 9; see *ante* p. 32. The Master in Chambers, Official Referee sitting for him, or Local Masters, and County Court Judges, when acting under *Rule S. C.* 422, have jurisdiction to entertain such applications: *Collver* v. *Swayzie*, 8 P. R. 42.

Habeas corpus.

8. Applications for writs of *habeas corpus* may be made to a Judge in Chambers; *R.S. O.* c. 70; *Re Paton*, 4 Gr. 147: but where the custody is not for criminal or supposed criminal matter, see *Re Bigger*, 10 U. C. L. J. 329; *Re Hawkins*, 9 U. C. L. J. 298; 3 P. R. 239. As to whether a Judge can in Chambers rescind his own order for a writ of *habeas corpus*, or quash the writ itself on the ground that it issued improvidently: see *Re Ross*, 3 P. R. 301. The Master in Chambers cannot entertain applications of this kind. *Ord.* 560.

For declaration of lunacy.

9. Applications to declare a person a lunatic under *R. S. O.* c. 40, s. 65; *Re Patton*, 1 Chy. Ch. R. 192; *Re Flemming*, 13 C. L. J. N. S. 197; *Re Kelly*, 6 P. R. 220, or for a commission *de lunatico*: *Re Stuart*, 4 Gr. 44. The supposed lunatic is entitled to notice of the application: *Re Miller*, 1 Chy. Ch. R. 215, unless the Court on proper evidence of its being dangerous, or useless, to serve him, dispenses with service: *Re Newman*, 2 Chy. Ch. R. 390; *Re Mein Ib.* 429. Applications of this kind can only be made before a Judge, see *Ord.* 560; but where an order has been made declaring the lunacy, the Master in Chambers has jurisdiction to entertain applications respecting the property of the lunatic, under *R. S. O.* c. 40, ss. 67, *et seq.*

When Master in Chambers has no jurisdiction, matters may be brought before a Judge.

Applications in Chambers, to whom to be made:

Applications proper to be made in Chambers, but which are excluded from the jurisdiction of the Master in Chambers, Official Referee, Local Masters, and County Court Judges, may be made before a Judge of the High Court in Chambers. In the Queen's Bench, and Common Pleas, Divisions, a Judge sits in Chambers on Tuesday and Friday, and in the Chancery Division on Monday, in each week, except in vacation, when special arrangements are made.

Applications which can be made in Chambers should be made there, and not in Court: *Moffatt* v. *Ruddle*, 4 Gr. 44; *Anon Ib.*, 61; or the costs may be refused: *Murney* v. *Courtney*, 10 Gr. 52; or allowed only as of a motion in Chambers: *King* v. *Connor*, 10 Gr. 364.

Matters coming before any officer of the Court having jurisdiction in Chambers, should not be referred to a Judge because the parties desire it, but only when the officer can certify that it is a proper case to be heard before a Judge; *Rule S. C.* 426, and matters improperly referred to a Judge will not be entertained: *Hughes* v. *Rees*, 9 P. R. 86. Matters within jurisdiction of Master in Chambers not to be brought before a Judge.

Sale of Infants' Estates.—As to mode of proceeding for sale of infant's estate, see *R. S. O.* c. 50, s. 75, and *Ord.* 527 *et. seq.* and notes. Sale of infants' estates.

Guardianship, and Maintenance, &c., of Infants.—As to mode of proceeding for appointment of guardians, see *Ord.* 529-30; opposed applications respecting the guardianship of the person, or property, of infants, are excluded from the jurisdiction of the Master in Chambers, see *Ord.* 560, s. 9, *Rule S. C.* 420. The authority of the High Court is not excluded by *R. S. O.* c. 132, ss. 1-3; *Re Stannard*, 1 Chy. Ch. R. 15. Guardianship of infants.

Applications respecting the custody of infants under *R. S. O.* c. 130, s. 1, may be made to a Judge in Chambers: see *Re Davis*, 3 Chy. Ch. R. 277; *Re Keith*, 7 P. R. 138; *Re Lees*, 15 Gr. 580; *Re Murdoch*, 9 P. R. 132; *Re Smith*, 8 P. R. 23; *Re Scott*, *Ib.* 58; *Re Ferguson*, *Ib.* 556; but not to the Master in Chambers. See *Ord.* 560, s. 6.

Injunctions, and Receivers.—Applications for injunctions, and receivers, are usually made in Court, but where a Receiver has been appointed and dies, the application for the appointment of another in his place may be made in Chambers: *Grote* v. *Bing*, 9 Hare App. 1; but the appointment was made in the first instance in Chambers, by consent *Blackborough* v. *Ravenhill*, 16 Jur. 1085, and in a proceeding originating in Chambers, 22 So. Jour. 914. Injunctions, and receivers.

Appeals from the Master in Chambers, Local Masters, County Court Judges, or Official Referees, where exercising the jurisdiction of the Master in Chambers (*Rule S. C.* 427); and appeals from Masters' Reports (*Ord.* 642); and also appeals from the Taxing Officers (*Rule C. S.* 447), may now be brought before a Judge in Chambers. Appeals.

Order 198 regulated the course of proceeding, and service of notices of motion in Chambers and is superseded now by *Rules S. C.* 404-407, 412, 425. Ord. 198.

199. Where it appears, upon the hearing of any matter, that, by reason of absence, or for any other sufficient cause, the service of notice of the application, or Service of notice of motion in Chambers may be dispensed with.

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Or substituted service ordered.

of the appointment, cannot be made, or ought to be dispensed with, such service may be dispensed with, or any substituted service, or notice, by advertisement, or otherwise, may be ordered. (3rd June, 1853; Ord. 34, s. 5. (*Eng. Con. Ord.* 35, *r.* 18.)

Service of pleadings, &c.

Every pleading or other document required to be delivered to a party, or between parties, shall be delivered to the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor; but if no appearance has been entered for any party then such pleading or document shall be delivered by being posted up in the office from which the writ of summons was issued: *Rule S. C.* 131.

In actions, after service of the writ, and the time for appearance has elapsed and no appearance entered, a notice of motion or appointment may be served on any non-appearing defendant by posting up a copy in the office whence the writ issued under *Rule S. C.* 131: *Dymond* v. *Croft*, 3 Chy. D. 512.

But where the notice of motion required to be served is the first proceeding, or personal service is necessary on a party who has appeared but cannot be found, then *Ord.* 199 would seem to be in force and to authorize the allowance of substitutional service, or the dispensing with service altogether. For cases in which applications of this kind have been made, see Taylor & Ewart, 148.

Where account taken in Chambers, special directions may be given as to vouching, &c.

200. Where an account is taken in Chambers, special directions may be given with respect to the mode in which the account is to be taken and vouched; and in taking the account, the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised. (3rd June, 1853; Ord. 35, s. 1.)

In this *Order* the word "shall" is to be read as permissive: *Ord.* 550.

Accounts are now rarely taken in Chambers, except in infancy matters; a reference to the Master being usually directed.

Account how to be brought in.

201. An accounting party is to bring in his account in the form of debtor and creditor, and verify the same

by affidavit, unless otherwise directed. The items on each side of the account are to be numbered consecutively, and the account is to be referred to by the affidavit as an exhibit, and not to be annexed thereto, and is to be left at Chambers. (3rd June, 1853; Ord. 35, s. 3.) (*Eng. Con. Ord.* 35, *r.* 33.)

To be verified by affidavit
Items to be numbered.

A party who is cross-examined on his affidavit verifying his accounts, is, according to the English practice, entitled to notice of the points on which he is to be cross-examined: *Re Lord, Lord* v. *Lord*, 2 L.R. Eq. 605; *Wormsley* v. *Sturt*, 22 Beav. 398; and it is not sufficient to state that all the items but one are objected to, but the notice should specify the points on which the cross-examination is to proceed: *McArthur* v. *Dudgeon*, 15 L. R. Eq. 102; and see *Glover* v. *Ellison*, 20 W. R. 408.

Party intended to be cross-examined on his affidavit entitled to notice.

The cross-examination may be had before the account is vouched: *Meacham* v. *Cooper*, 16 L. R. Eq. 102.

202. A party seeking to charge an accounting party beyond what he has by his account admitted to have received, is to give notice thereof to the accounting party, stating, as far as he is able, the amount sought to be charged, and the particulars thereof, in a short and succinct manner. (3rd June, 1853; Ord. 35, s. 3.) (*Eng. Con. Ord.* 35, *r.* 34.)

Notice of surcharge to be given

See note to *Ord.* 237, *post.*

203. No state of facts, charges, or discharges, are to be brought into Chambers; and where original deeds or documents can be brought in, no copies are to be made without special direction. (3rd June, 1853; Ord. 34, s. 4.)

No state of facts, &c., to be brought in.

See *Ord.* 229, *post.*

204. Where directed, copies, abstracts, or extracts of or from accounts, deeds, or other documents, are to be supplied. (3rd June, 1853; Ord. 34, s. 4.)

Copies, &c., to be furnished if directed.

See *Ord.* 230, *post.*

205. Where, in the prosecution of any proceeding under a decree, it appears that some persons, not

Adding parties.

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already parties, ought to be made parties, and ought to attend, or be enabled to attend the proceedings, directions may be given for serving an office-copy of the decree upon such parties, and upon due service thereof such persons are to be treated and named as parties to the suit, and shall be bound by the decree in the same manner as if they had been originally made parties to the suit. (3rd June, 1853; Ord. 34, s. 6.)

Parties added to be served with office-copy of decree.

See *Ord.* 244 and notes.

Endorsement on office-copy.

206. Every office-copy of a decree directed to be served under Order 205, is to be indorsed with a notice to the effect set forth in schedule L hereunder written with such variations as circumstances may require. (3rd June, 1853; Ord. 34, s. 6.)

See *Ord.* 245 and notes.

Party served may move against decree.

207. A party served with an office-copy of a decree under Order 205 may apply to the Court, at any time within fourteen days from the date of such service, to discharge the order, or to add to, set aside, or vary the decree. (3rd June, 1853; Ord. 34, s. 7.)

See *Ord.* 246 and notes.

Matters may be adjourned from Court to Chambers, or *vice versa*.

208. The Court may adjourn for consideration in Chambers any matter which, in the opinion of the Court, may be disposed of more conveniently in Chambers; and any matter pending in Chambers may be adjourned to open Court; and such matter may be so adjourned at the request of either party, subject to such order as to costs or otherwise, as the Court thinks right to impose. (3rd June, 1853; Ord. 34, s. 3.)

Matters adjourned from Chambers, to be heard by single Judge.

209. Matters adjourned from Chambers are to be heard in Court by one Judge, unless by special leave, which may be granted *ex parte;* and without such leave are not to come before the full Court, except by way of rehearing the order made in Court thereon. (20th Dec. 1865; Ord. 14.)

Power of Master in Chambers to refer cases to a Judge.

The Master in Chambers, Local Masters, and County Court Judges, are empowered to refer matters coming before them in Chambers to a Judge of the High Court: *Rule C. C.* 426; but this power is not to be exercised at the mere request of the parties, but only where the officer, or County Court Judge, as the case may be, can certify that the case is proper to be heard before a Judge of the High Court. Matters improperly referred will not be entertained: *Hughes* v. *Rees*, 9 P. R. 86.

Matters improperly referred will not be entertained.

Judge in Chambers may exercise powers of Court, and also powers of the Master.

210. A Judge sitting in Chambers may exercise the same power and jurisdiction, in respect of the business brought before him, as is exercised by the Court; all orders made by a Judge in Chambers are to have the force and effect of orders of the Court; and all or any of the powers, authorities, and jurisdictions, given to the Master by any Act or Acts now in force, or by any General Order or Orders of the Court, may be exercised by the Judge sitting in Chambers. (3rd June, 1853; Ord. 34, s. 2.)

XVIII.—MASTER'S OFFICE.

Masters are officers of Supreme Court.

The Master in Ordinary, and Local Masters, are all officers of the Supreme Court, *J. A.* s. 58, ss. 2, and as such, actions may be referred to them, from any Division of the High Court. See *J. A.* s. 64.)

For list of Masters see Holmested's Manual Pr. 20, 21.

Powers of Local Masters in Chambers.

The Local Masters, in addition to their duties as Masters, have also jurisdiction in certain cases in Chamber applications, in actions in the Chancery Division; and where they are also Judges of the County Court, their jurisdiction in Chambers extends in certain cases to actions in any of the Divisions: See Holmested's Manual Pr. 213; *Rules S. C.* 422, 423.

As to whether Masters may practise as solicitors; *quære.*

Formerly a Master in Chancery was debarred from practising as a solicitor in Chancery, or in partnership with any other person practising as a solicitor in Chancery, even though he received no part of the emoluments: *McLean* v. *Cross*, 3 Chy. Ch, R. 432. They might however practise as attorneys in the other Courts. Now, however, that the Masters have jurisdiction in all the Divisions of the High Court, it seems doubtful if they can practise at all as solicitors. There is however no express provision either in *The Judicature Act*, or *Rules* debarring Masters from practising; and see *Rule S. C.* 422, from which it may be inferred that it was not the intention of *The Judicature Act* to deprive them of the right of practising.

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Place of reference.

Under the former practice in Chancery the plaintiff was *prima facie* entitled to have a reference, when necessary, directed to the Master at the place where his bill was filed: *Macara* v. *Gwynne* 3 Gr. 310; *Watson* v. *Henderson*, 2 Chy. Ch. R. 370; and the defendant might for good cause apply to change the reference: *McNab* v. *McInnis*. 4 Chy. Ch. R. 53.

Prima facie, plaintiff entitled to have reference where writ issued.

The same rule it is presumed will still be followed, and a plaintiff will have the right *prima facie* to have the reference, if any, directed to the Master in the county where the writ issued. Formerly when it was sought to change the reference on the score of expense, the difference of expense must have been considerable; and if on the ground of convenience, a clearly preponderating convenience for the proposed change must have been established, and the fact that a defendant was a man in extensive business, or a trustee, was not a sufficient ground for changing the reference: *McNab* v. *McInnis*, *supra*; *Jackson* v. *Harriman*, 9 C. L. J. N. S. 29.

Reference may be changed; on what grounds.

Since *The Judicature Act* it has been held that the policy of that Act is to decentralise business, and to send local matters to the Local Masters, and the fact that a partnership business had been carried on in the county to which it was proposed to change the reference to take the partnership accounts, and that a delay of two months would be incurred by retaining the reference at the place directed by the judgment, was held sufficient ground to warrant the change: *Aitken* v. *Wilson*, 9 P. R. 75.

When Master has been professionally concerned.

When the Master has been professionally concerned for any of the litigants, in reference to the same or any other matter, that is a sufficient ground for changing the reference: *Bigelow* v. *Bigelow*, 6 P. R. 124; *Boyd* v. *Simpson*, before *Spragge*, C., 19th June, 1878. (See Reg. Lib.)

But when the reference was directed to a Master who had, prior to the appointment, been counsel for one of the litigants, neither party objecting, and the Master certifying that he acted in the reference at the pressing request of both parties, the Court held that the party against whom the Master reported could not raise that objection on appeal from the report, having taken the chance of the Master's finding in his favour: *Cotter* v. *Cotter*, 21 Gr. 159.

Where necessary to add Master as a party.

Where in the course of a suit it becomes necessary to add as a party the Master to whom the cause is referred, the reference will be changed on an *ex parte* application by the plaintiff: *Weldon* v. *Templeton*, 1 Chy. Ch. R. 360.

Application to be made on notice.

Usually however the party having the conduct of the reference is entitled to notice of any application to change it, and an order made in his absence is irregular and will be set aside: *McConnell* v. *McConnell*, 3 Chy. Ch. R. 122.

The following *Orders* 211–257, which regulate the practice in the Master's offices, apply to actions in all the Divisions, which are referred to a Master.

211. Every order referring any matter to the Master, is to be brought into his office within fourteen days after the order is drawn up, or after the same should have been drawn up, by the party having the carriage of the same: otherwise any other party to the cause, or any party having an interest in the reference, may assume the carriage of the order, and carry the same into the Master's office. (3rd June, 1853; Ord. 42, s. 1.)

Order of reference to be carried into M. O. within 14 days.

Otherwise any other party may assume the carriage of it.

An order, or judgment, directing a reference is to be bespoken, and the necessary papers left for preparing the same within *seven* days after the order, or judgment, is pronounced or finally disposed of by the Court, see *Ord.* 10,—and *Ord.* 7, as to meaning of word "order,"—and otherwise is not to be drawn up without leave being obtained in Chambers, see *Ord.* 11. In practice the solicitor having the carriage of the order, or judgment, usually prepares the minutes and within the time limited by *Ord.* 10, procures them to be settled by the Registrar, or obtains an appointment from him to settle them. See *Ord.* 596.

Time for issuing order of reference and carrying into M. O.

It would appear, therefore, that the party having the conduct of an order, or a judgment, directing a reference, is entitled to at least twenty-one days from the time the order, or judgment, was pronounced, or finally disposed of, by the Court, within which to issue the order, or judgment, and carry it into the Master's office.

The rule which regulates the question, as to who shall have the carriage of an order, or judgment, directing a reference to a Master, is a technical one, and in the majority of cases, the solicitors alone are interested. The solicitor of the party having the conduct of the judgment is entitled to prosecute all those proceedings which relate to the general enquiries, and the other parties only prosecute those which relate exclusively to themselves, or such as it would be inconsistent for the party having the carriage of the order, or judgment, to do. Thus if the plaintiff have the conduct, his solicitor bespeaks and procures to be inserted all advertisements whether for creditors, or for next of kin, or for the sale of property, he prepares the abstract, and answers the requisitions; and if the purchaser requires a reference of title, he attends upon it. He furnishes, where directed, for the purposes of answering the general enquiries and taking the general account, copies, abstracts, or extracts of, or from accounts, deeds or other documents, and pedigrees, etc., relating to proceedings of a

Conduct of reference, who entitled to.

Duty of solicitor having conduct.

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general character, and not belonging to particular parties to prosecute. Smith's Pr., 7th ed., 729.

May be changed for delay.

Where the party having the carriage of a judgment, or order, directing a reference, is guilty of delay in carrying it into the Master's office, any other party to the action, or any party having an interest in the reference may assume the carriage of the judgment, or order, which, where necessary, would include the right to draw up the minutes and procure them to be settled, and the order, or judgment, to be passed and entered. No order seems neccessary to entitle him to do this, but see *Re Shaw*, 14 Gr. 524, where a special application was made. Where the judgment or order has been drawn up and entered, but has not been carried into the Master's office within the prescribed time, an office-copy of the judgment, or order, may be obtained and carried into the Master's office by any other party interested. Persons who are not parties to the action, but who are interested in the reference, *e. g.*, creditors, next of kin, heirs, &c., are entitled under *Ord.* 211, to assume the carriage of the order, or judgment, where the prescribed time has elapsed. See *Re Shaw*, 14 Gr. 524.

Party interested may assume carriage, when.

Where a judgment or order has been carried into the Master's office, in the event of delay arising on the part of the party having the carriage of it, the Master may transfer the conduct of the reference to any other person interested. See *Ord.* 212.

Master may change conduct of reference.

212. Where a party prosecuting a reference, does not proceed before the Master with due diligence, the Master is at liberty, upon the application of any other party interested, either as a party to the suit, or as one who has come in and established his claim before the Master under the order, to commit to him the prosecution of the order; and from thenceforth neither the party making default nor his solicitor is to be at liberty to attend the Master as the prosecutor of the order. (3rd June, 1853; Ord. 42, s. 10.)

This *Order* is taken from Eng. Ord. 56, of 3rd of April, 1828. See *Edward's Chy. Orders*, p. 19.

The Master in his discretion may entertain an application to change the conduct of the reference *ex parte*: *Stephenson* v. *Nicolls*, 14 Gr. 144; but ordinarily the application should be made on notice: 1 Sm. Pr. 2nd ed., 312, and see *Sims* v. *Ridge*, 3 Mer. 458; *Edwards* v. *Acland*, 5 Mad. 31.

Master's order subject to appeal

An appeal lies from the order of the Master changing the reference: *Stephenson* v. *Nicholls*, 14 Gr. at pp. 147 149, and in *Wyatt* v. *Sadler*, 5 Sim. 450; the Court on a substantive motion

changed the reference, after the Master had refused an application for that purpose. But the application must in the first instance be made to the Master : *Miller* v. *McNaughten*, 1 Chy. Ch. R. 206.

Creditor may apply.

Where there has been great delay in prosecuting a judgment in a creditor's suit, a creditor may apply to have the conduct of the cause, though it has become defective by the death of a defendant : *Cook* v. *Bolton*, 5 Russ. 282, and see *Re Shaw*, 14 Gr. 524 ; *Patterson* v. *Scott*, 4 Gr. 145.

Party to whom conduct of reference committed, entitled to inspect papers.

A party to whom the conduct of the reference is committed is entitled to inspect and take copies of briefs, and documents in the possession of the party, or his solicitor, from whom the carriage of the reference has been taken : *Bennett* v. *Baxter*, 10 Sim. 417 ; and see *Heslop* v. *Metcalf*, 8 Sim. 622.

Plaintiff may apply to amend order of reference, though conduct taken from him.

An order taking the conduct of the reference from the plaintiff, does not preclude him from applying to amend a clerical error in the judgment, or order, under *Rule S. C.* 338 : *Whitehead* v. *North*, Cr. & Ph. 78. *Ord.* 212 only enables the Master to transfer the conduct of proceedings in his office.

Where there is undue delay in prosecuting a reference the Master may close the reference as provided by *Ord.* 584.

Reference to be proceeded with on day fixed.

213. Every reference is to be called on and proceeded with at the day and time fixed, unless the Master in his discretion thinks fit to postpone the same ; and in granting an application to postpone the hearing of a reference, the Master may make such order, as to the costs consequent upon such postponement, as he thinks just. (3rd Junn, 1854 ; Ord. 42, s. 8.)

Costs of postponement.

Master cannot proceed in vacation.

The Master cannot proceed with a reference in vacation, except by consent of all parties : *Anderson* v. *Thorpe*, 12 Gr. 542. A report made in vacation, without the consent of all parties, is null and void, as against a party having no notice of the proceedings on which it is founded, and it is not necessary to appeal from it : *Fuller* v. *McLean*, 8 P. R. 549.

References to proceed, *de die in diem*.

214. As soon as the Master has entered upon the hearing of a reference, he is to proceed therewith to the conclusion without interruption, where that is practicable ; and where any reference cannot be concluded in a single day, the Master is to proceed *de die in diem*, without a fresh warrant, unless he is of opinion that an adjournment other than *de die in diem* would be

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proper, and conducive to the ends of justice; and when an adjournment is ordered, the Master is to note in his book the time and reason thereof. (3rd June, 1853; Ord. 42, s. 8.)

"It is the bounden duty of the Masters to observe these *Orders* to the letter, wherever it is not absolutely impracticable to follow them literally," per *Spragge, C.*; *Fails* v. *Powell*, 20 Gr., at p. 468.

References not to be adjourned to take up other cases.

215. In no case is any matter to be discontinued or adjourned for the mere purpose of proceeding with any other matter, unless that course becomes necessary. (3rd June, 1853; Ord. 42, s. 8.)

Warrant to consider to be taken unless dispensed with by Master.

216. Upon the bringing in of an order, the solicitor bringing in the same is to take out a warrant (unless the Master dispenses therewith) appointing a time, which is to be settled by the Master, for the purpose of taking into consideration the matters referred by the order, and is to serve the same upon the parties, or their solicitors, unless the Master dispenses therewith. (3rd June, 1853: Ord. 42, s. 2.)

This *Order* is adapted from the English Ord. 51, of 3rd April, 1828. See *Kennedy's Ord.*, p. 17.

Where judgment erroneous, Master may refuse to proceed on it.

Where a judgment is manifestly erroneous, the Master may properly refuse to proceed upon it until it has been corrected: *Swainson* v. *Bartley*, 18 C. L. J. 15; and see *Commercial Bank* v. *Graham*, 4 Gr. 419; *Mitchell* v. *Strathy*, 28 Gr. 80; *Adamson* v. *Adamson*, *Ib.*, at p. 224; but the mistake must be very obvious to warrant the Master in refusing to proceed.

Warrant to consider.

A warrant to consider a judgment, or order, only requires one day's service; see *Sutherland* v. *Rogers*, 2 Chy. Ch., R. at p. 192; other warrants require two clear days' service: *Ib.*; except warrants to settle report, which require four days' service: see post *Ord.* 247 note.

The warrant must be underwritten so as to explain clearly what proceedings are to be taken under it: *Denison* v. *Denison*, 3 Chy. Ch. R. 349.

Defendant entitled to notice.

The fact that a decree under the former Chancery practice had been pronounced *pro confesso* against a defendant, did not *ipso facto* disentitle the defendant to notice of proceedings in the Master's office: see *Robinson* v. *Whitcomb*, 20 Gr. 415. In mortgage suits, incumbrancers made parties before the hearing were expressly re-

quired to be served with notice, notwithstanding the bill may have been taken *pro confesso* against them. See *Ord.* 446.

How far defendant who has not appeared is entitled to notice in M. O.

Ord. 111 now obsolete, dispensed with service of an order to take a bill *pro confesso*, and provided that "all further proceedings in the case may be *ex parte* as to such defendant, unless the Court orders otherwise." Notwithstanding this *Order*, it was held improper, as a general rule, for a Master to proceed *ex parte* with a reference, against a defendant as to whom the bill was taken *pro confesso*, and that the Master was bound to exercise his discretion as to requiring, or dispensing with, service on such defendants: *Robinson* v. *Whitcomb*, 20 Gr. 415; and see *Buchanan* v. *Tiffany*, 1 Gr. 98; *Walsh* v. *Bourke*, *Ib.* 105; *Hawkins* v. *Jarvis*, *Ib.* 257; 1 E. & A. 246; *McCormick* v. *McCormick*, 6 P. R. 208. But see *Perrin* v. *Davis*, 3 Gr. 161. And where the reference was directed by an administration order obtained without a bill being filed, it was held that notice of the proceedings on the reference must be given to the defendant, and that the proceedings taken *ex parte* under such circumstances were irregular, and the Court refused to act on a report so made: *Jackson* v. *Matthews*, 12 Gr. 47.

Under the present practice there is no provision for taking the action *pro confesso* as under the former Chancery practice; and although judgments may be awarded against a defendant for default of appearance, or for default of defence, there is no provision enabling the future proceedings to be carried on against him, *ex parte*. In such cases, therefore, it would seem that the defendant is entitled to notice of proceedings upon a reference.

Posting up notice, quære if sufficient.

Where, however, the defendant has not appeared, service of notice of proceedings under a reference may possibly be effected, by posting up the document required to be served, in the office whence the writ issued: See *Rule S. C.* 131.

In Toronto, in actions in the Queen's Bench, and Common Pleas, Divisions, it would seem such notices should be posted in the office of the Registrar of the Division where the pleadings are filed. It is not clear, however, whether the provisions of *Rule S. C.* 131 extend to proceedings after judgment.

Warrant to consider, proceedings on return

217. Upon the return of the warrant to consider, or upon the bringing in of the reference where the warrant is dispensed with, the Master is to fix a time at which to proceed to the hearing and determining of the refererence, and is to regulate in all other respects the manner of proceeding with the reference, and is to give any special directions, he thinks fit, as to :—

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1. The parties who are to attend on the several accounts and enquiries;
2. The time at which, or within which, each proceeding is to be taken;
3. The mode in which any accounts referred to him are to be taken or vouched;
4. The evidence to be adduced in support thereof;
5. The manner in which each of the accounts and enquiries is to be prosecuted;

And such directions may be afterwards varied or added to, as may be found necessary. (3rd June, 1853; Ord. 42, s. 2.)

Master may regulate who to appear on creditors' claims against estate.

In any cause, or matter, for the administration of the estate of a deceased person, no party other than the personal representative, shall, unless by the leave of the Master, be entitled to appear on the claim of any person not a party to the cause, against the estate of the deceased, in respect of any debt or liability. The Master may direct any other party to the cause to appear, either in addition to, or in the place of, the personal representative, upon such terms as to costs and otherwise as he shall see fit. See *Rules S. C.* 114, 518.

As to mode of taking and verifying accounts generally, see *Ord.* 227–233, 240; and as to taking accounts of creditors' claims against the estate of a deceased person, see *Ord.* 474–485.

Subject to appeal.

The ruling of the Master is not conclusive, and the Court may give a party leave to attend proceedings whom the Master has excluded: *Davis* v. *Combermere*, 9 Jur. 76. But it would seem that any objection to the Master's ruling should be brought up by way of appeal, and not as a substantive motion.

Master may classify, and appoint solicitors to represent different classes.

218. Where, at any time during the prosecution of a reference, it appears to the Master, with respect to the whole or any portion of the proceedings, that the interests of the parties can be classified, he may require the parties constituting each or any class, to be represented by the same solicitor; and where the parties constituting such class, cannot agree upon the solicitor to represent them, the Master may nominate such solic-

itor for the purpose of the proceedings before him; and where any one of the parties, constituting such class, insists on being represented by a different solicitor, such party is personally to pay the costs of his own solicitor, of, and relating to, the proceedings before the Master, with respect to which such nomination has been made, and all such further costs as are occasioned to any of the parties by his being represented by a different solicitor from the solicitor so nominated. 20th Dec. 1865; Ord. 35.)

Party insisting on being represented by a different solicitor to pay costs occasioned thereby.

When the Master appoints a solicitor to act for a class, all the individuals composing that class are bound by the acts of the solicitor so appointed, and cannot repudiate them, unless they appoint a separate solicitor: *Re McConnell*, 3 Chy. Ch. R. 423.

Solicitor appointed by Master to represent a class, binds all of the class.

A solicitor so appointed is entitled to act for the class, not only in the Master's office, but also in proceedings arising out of, or connected with, the proceedings in the Master's office; *Ib.*

After the appointment of a solicitor to act for a class, the separate costs of any member of that class subsequently incurred will not ordinarily be allowed against the estate under administration: *Re Etna Insurance Company*, 17 Gr. 160.

The Master should not appoint a separate solicitor for parties who are sufficiently represented by the plaintiff; and where *prima facie* the plaintiff represents (see *Ord.* 58, *ante*) the class, if the Master appoint a separate solicitor, he should state the reason for so doing in his report: *Gorham* v. *Gorham*, 17 Gr. 386.

Solicitor not to be appointed to represent a class already represented in the action.

219. To enable the Master to exercise all or any of the powers conferred upon him by, or to take the accounts and make the enquiries referred to in, the following Orders, it shall not be necessary that any of the matters therein mentioned, shall have been stated in the pleadings, or that evidence thereof shall have been given before the order of reference, or that the order shall contain any specific direction in respect thereof. (3rd June, 1853; Ord 42, s. 13.)

No statement in pleading, or evidence at trial necessary, to entitle Master to exercise powers conferred by Orders.

This and the following *Order* very materially altered the practice previously in force, and extend the jurisdiction, and discretion, of the Masters in taking accounts, very far beyond that exercised by

Jurisdiction of Master enlarged by *Ord.* 219, 220.

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the Chief Clerks, or even a Judge in Chambers, under the English practice: *Sculthorpe* v. *Burn*, 12 Gr. 427.

Former rule required case to be made in pleadings, &c.

The former rule, as laid down by Lord Eldon, was that the plaintiff must aver in his bill, and prove, at least one act of wilful neglect or default, in order to obtain a decree directing an enquiry as to wilful neglect, or default: Seton 477; *Sleight* v. *Lawson*, 3 K. & J. 292. In the same way, according to the English practice, a foundation is required to be laid in the pleadings for, and the judgment must specially direct, the taking of an account with rests: Seton 474; or the setting of an occupation rent: *Trulock* v. *Robey*, 15 Sim. 265.

This *Order* distinctly abrogates those rules of practice, and enables the Master to take an account with rests, and to charge the accounting party for rents, and profits, which might have been received, but for wilful neglect and default, and to set an occupation rent, in any case referred to him; although there be nothing in the pleadings: *McLennan* v. *Heward*, 9 Gr. at pp. 178 and 187; and though no evidence may have been given as to any such matters at the trial.

It was formerly held that under a common administration order obtained on motion without bill, by any person but the personal representative himself, there could be no enquiry as to wilfu lneglect, or default: *Harrison* v. *McGlashan*, 7 Gr. 532. But where the order was obtained by the personal representative himself, such an enquiry might be made: *Ledgerwood* v. *Ledgerwood*, 7 Gr. 584.

Enquiry as to neglect and default, &c., can now be made without special direction.

The case of *Carpenter* v. *Wood*, 10 Gr. 354, though not referring to *Harrison* v. *McGlashan*, is said in effect to have over-ruled it; and the practice was stated by *Boyd*, C., to be now settled that under *Ord.* 219, 220, the enquiry as to wilful neglect and default, may be made in all cases under the common administration order: *Re Allan, Pocock* v. *Allan*, 9 P. R. 277.

If the Master refuse to exercise the power to take the accounts in the manner mentioned in *Ord.* 220, his ruling would be appealable; but it would seem to be more proper to bring the question up on further directions. See *Sievewright* v. *Leys*, 1 O. R. 375.

Powers of Master to take accounts.

220. Under an order of reference, the Master shall have power:

With rests.

1. To take the accounts with rests or otherwise;

To enquire as to wilful neglect & default.

2. To take account of rents and profits received or which, but for wilful neglect or default might have been received;

To set occupation rent.

3. To set occupation rent;

4. To take into account necessary repairs, and lasting improvements, and costs and other expenses properly incurred otherwise, or claimed to be so; — To allow for improvements.

5. To make all just allowances; — To make just allowances.

6. To report special circumstances; — To report special circumstances.

7. And generally, in taking the accounts, to inquire, adjudge, and report as to all matters relating thereto, as fully as if the same had been specially referred. (3rd June, 1853; Ord. 42, s. 13.) — And to enquire as to all matters relating to accounts.

Taking the account with rests :—

Taking an account with "rests" means, either that the accounting party is charged with compound interest on the amount found due from him; or that the surplus income remaining after satisfying the interest due to him, is applied at certain periods in reduction of the principal. The amalgamation of principal and interest, or the application of income to pay off the principal, may take place yearly, half-yearly; or at other times more or less frequently, and these periods are termed "rests." In *Robinson* v. *Cumming*, 2 Atk. 410, Lord Hardwicke said rests were only ordered in accounts of realty, and not of personalty, but this is no longer the rule. When the Master declines to take an account with rests, if it is intended to appeal from his decision, he should be required to report the facts, so as to enable the Court to judge of the propriety of his decision; *Sievewright* v. *Leys*: 1. O. R. 375; but it has been said the preferable method is to bring the question up on further directions: *Ib.* — Taking account with rests, what it is.

RESTS, AS AGAINST EXECUTORS, AND TRUSTEES.—In taking accounts against an executor, or trustee, he is to be charged "with what he ought to have made, with what he actually did make, or with what he must be presumed to have made," *Esten*, V. C., *Smith* v. *Roe*, 11 Gr. 312. The principle on which the Court proceeds in charging an executor, or trustee, with interest, is that of restoring to the *cestui que trust* his own, and of fairly compensating him for loss directly attributable to the neglect, or breach of duty, by the trustee; and on the other hand, that of withdrawing from the trustee any advantage he has appropriated by abusing his position: *per* Moss, C. J.; *Inglis* v. *Beatty*, 2 App. R., at p. 490. It is not that of punishment to the executor, or trustee: *Attorney General* v. *Alford*, 4 D. M. & G. 843; *Burdick* v. *Garrick*, 5 L. R. Chy. 233, *Vyse* v. *Foster*, 8 L. R. Chy. 309; 7 H. L. 318. Compound — Rests—when allowed as against executors, and trustees.

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interest may in some cases be a convenient mode of making this compensation, but in other cases it may be oppressive, and sound more as punishment than compensation, and therefore in such cases it ought not to be charged. See *Fielder* v. *O'Hara*, 14 Gr. 223.

English Rule when executor, or trustee, guilty of mere neglect.

In England the amount of interest with which an executor, or trustee is charged, depends on the circumstances : (1). When he is guilty of mere neglect, and gets no personal benefit, he is charged with simple interest at 4 per cent.: *Forbes* v. *Ross*, 2 Cox 116 ; *Rocke* v. *Harte*, 11 Ves. 58 ; *Robinson* v. *Robinson*, 1 D. M. & G. 247 ; *Tebbs* v. *Carpenter*, 1 Mad. 290; *Mousley* v. *Carr*, 4 Beav. 49; *Attorney General* v. *Alford*, 4 D. M. & G. 843 ; or with the interest he should have received with half-yearly rests : *Gilroy* v. *Stephen*, 46 L. T. N. S. 761.

When guilty of positive breach of trust—or has employed trust funds in his own business.

(2). Where he is guilty of a positive breach of trust, or has employed trust money for his own benefit, he is charged with 5 per cent.; or, at the option of the beneficiary, with the profit actually made : *Jones* v. *Foxall*, 15 Beav. 388. The neglect to comply with a specific direction for investment, has been held to be such a positive breach of trust : *Crackelt* v. *Bethune*, 1 J. & W. 586 ; *Berwick* v. *Murray*, 7 D. M. & G. 519 ; *Mosley* v. *Ward*, 11 Ves. 581 ; and when the trust directed accumulation, the accounts have been taken with rests : *Raphael* v. *Boehm*, 11 Ves. 92 ; *Knott* v. *Cottee*, 16 Beav. 77 ; *Jones* v. *Foxall*, 15 Beav. 388 ; and where a breach of trust, and the employment of the trust fund for his own benefit, in trade, or speculation, concur, whether there be any direction for accumulation or investment or not, the trustee is charged with 5 per cent., sometimes with : *Burdick* v. *Garrick*, 5 L. R. Chy. 233 ; and sometimes, without, rests, or, in the option of the beneficiary, with the profits actually realised from the fund : *Flocton* v. *Bunning*, 8 L. R. Chy. 323 ; *Saltmarsh* v. *Barrett*, 31 Beav. 349 ; *Docker* v. *Somes*, 2 My. & K. 655 ; *Heathcote* v. *Hulme*, 1 J. & W. 122 : *Sutton* v. *Sharpe*, 1 Russ. 146 ; *Robinson* v. *Robinson*, 1 D. M. & G. 247. In *Walker* v. *Woodward*, 1 Russ. 107, annual rests were ordered, but this was said to have been obtained by surprise, see *Attorney General* v. *Solly*, 2 Sim. 518. In *Jones* v. *Foxall*, 15 Beav. 388 ; *Williams* v. *Powell*, 15 Beav. 461 ; *Heighington* v. *Grant*, 1 Ph. 600 ; rests were ordered. In *Docker* v. *Somes*, 2 My. & K. 655 ; *Palmer* v. *Mitchell*, 2 My. & K. 672 ; *Macdonald* v. *Richardson*, 1 Giff. 81 ; accounts of profits arising from employment of trust funds in trade were ordered ; and see *Crawshay* v. *Collins*, 15 Ves, 218 ; 1 J. & W. 267 ; 2 Russ. 325 ; *Willett* v. *Blanford*, 1 Ha. 253 ; *Wedderburn* v. *Wedderburn*, 22 Beav. 84. The paying in money to the general account of a firm of solicitors, of which the trustee was a partner, was held not to be a using of the money in his own business, so as to render him liable for compound interest : *Burdick* v. *Garrick*, 5 L. R. Chy. 233. When an infant is interested, an enquiry will be directed whether it is for his advan-

tage to take interest, or profits: *Burden* v. *Burden*, cited in *Heathcote* v. *Hulme*, 1 J. & W. 134-5. No special direction seems necessary to authorize the Master making that enquiry in Ontario. **Rests.**

In this Province prior to the repeal of the usury laws, the rule was to charge interest at the rate of 6 per cent., and where according to the English cases a higher rate of interest than 4 per cent. would be charged, to take the account with half-yearly rests, see *Landman* v. *Crooks*, 4 Gr. 353; *Small* v. *Eccles*, 12 Gr., at p. 40. Since the abolition of the usury laws, an accounting party chargeable according to the English cases with more than 4 per cent., may now be charged, either with a higher rate of interest than 6 per cent., according to the value of money, as was done in: *Wightman* v. *Helliwell*, 13 Gr. 330 (where an executor was charged with 8 per cent. simple interest); or it would seem he may be charged with compound interest at 6 per cent.: *Wiard* v. *Gable*, 8 Gr. 458; *Erskine* v. *Campbell*, 1 Gr. 570; or even at a higher rate if the money have been used in trade: *Wightman* v. *Helliwell*, 13 Gr. at p. 343: *Small* v. *Eccles*, 12 Gr. 40, or, at the option of the *cestui que trust*, with the actual profits realised. Rule in Ontario as to rate of interest.

But where the trustee, or executor, has neglected to pay over sums in his hands to the parties entitled, he is chargeable with interest on such sums, no matter what the amount, from the time the payment ought to have been made: *McLennan* v. *Heward*, 9 Gr. at p. 190. Interest on sums neglected to be paid over

Where the executor, or trustee, retains trust money in his hands, under a *bona fide*, though mistaken, belief that it is his own, he may be exonerated altogether from payment of interest: *Bruere* v. *Pemberton*, 12 Ves. 386; *Davenport* v. *Stafford*, 14 Beav. 319; or he may be ordered to pay simple interest: *Inglis* v. *Beatty*, 2 App. R. 453; and where there has been great delay on the part of the *cestui que trust* in making claim to the trust fund: *Browne* v. *Cross*, 14 Beav. 105, provided such delay can be said to amount to acquiescence: *The Life Assurance Co.* v. *Siddal*, 3 D. G. F. & J. 72: *Blain* v. *Terryberry*, 12 Gr. 221: the trustee or executor may be relieved from paying interest thereon. A trust to invest in "public securities," is violated by investing in municipal debentures: *Ewart* v. *Gordon*, 13 Gr. 40; and a direction to carry on a business will not justify an executor in embarking more capital in it: *Smith* v. *Smith*, 13 Gr. 81. Where retained under *bona fide* belief of ownership. Neglect of *c. q. t.* to demand payment. Neglect of trustee to invest.

In cases of simple neglect to invest, the Master is not justified in charging interest against the trustee until the balance amounts to a sum sufficient for an ordinary investment. $400 was considered a reasonable sum for this purpose: *McLennan* v. *Heward*, 9 Gr. 178. No interest on sums charged to executor, which he has not actually received.

When trustees, or executors, lend money to themselves at a lower rate than could have been obtained by investing it according to the trust, they will be chargeable with the higher rate, but not with Executors lending money to themselves.

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rests : *Smith* v. *Roe*, 11 Gr. 311, at p. 315 ; and see *Forbes* v. *Ross*, 2 Cox 116.

Or not investing as directed.

But when a trustee is authorized to invest in either of two specified modes, and by mistake invests in neither, the measure of his liability is the loss arising from his not having invested in the less beneficial of the authorized modes. Thus when a trustee was authorized to invest in Government securities, or mortgages, and he invested in Bank stocks, which proved a loss ; he was charged with what would have been obtained had the investment been made in Government securities, although a larger rate of interest could have been obtained on mortgages : *Paterson* v. *Lailey*, 18 Gr. 13 ; and see *Cameron* v. *Bethune*, 15 Gr. 486.

Nor is an executor, or trustee, liable for neglect in not calling in investments made by the testator, in order to invest at a higher rate of interest, although authorized so to do : *Smith* v. *Roe*, 11 Gr. 311.

An administratrix, who allowed the moneys of the estate in her hands to be used by her husband, was charged with simple interest at six per cent. ; it not being shown that the money had been used in trade, or that any larger sum had been realised : *Fielder* v. *O'Hara*, 14 Gr. 223.

Where an executor, or trustee, has properly deposited the trust fund for safe keeping, or kept it in his hands unemployed, he may be relieved from payment of interest, except such as he has actually received ; but if he have not kept it apart from his own moneys, or have used it, he will be liable for interest on it : *Beaton* v. *Boomer*, 2 Chy. Ch. R. 89.

Interest when it runs.

An executor, or trustee, charged with principal sums which have never come to his hands, but which have been lost by his neglect, is not always chargeable with interest thereon as well : *Vanston* v. *Thompson*, 10 Gr. 542 ; *Re Shaw*, 15 Gr. 626 ; unless his neglect or default amounts to acquiescence in the spoliation of the estate : *Sovereign* v. *Sovereign*, 15 Gr. 559 ; *Cudney* v. *Cudney*, 21 Gr. 153.

The commencement of a suit does not stop interest running: *McLennan* v. *Heward*, 9 Gr. 178 : *McMillan* v. *McMillan*, 21 Gr. 369. But see *Blogg* v. *Johnston*, 2 L. R. Chy. 225.

As against executors, interest should not ordinarily be charged, until after the lapse of a year from the testator's death.

When a trustee or executor has made advances to the trust estate, he may be allowed simple interest on the balances of principal due to him from year to year, but not compound interest : *Finch* v. *Pescott*, 17 L. R. Eq. 554.

Principal and agent.

PRINCIPAL AND AGENT.—An agent who had used moneys of his principal, with his consent, was only charged simple interest : *McLennan* v. *Heward*, 9 Gr. 178 ; and where the state of accounts

could not be ascertained until they had been taken by the Court, interest on the balance was charged only from the date of the Master's certificate: *Turner* v. *Burkinshaw*, 2 L. R. Chy. 488; and see *Blogg* v. *Johnson*, *Ib.* 225. **Rests.**

Where the principal was found indebted to the agent, interest on the balance was allowed from the filing of the declaration in the action by the agent to recover the amount: *Ridley* v. *Sexton*, 19 Gr. 146.

LEGATEES.—Interest on legacies runs from the end of a year from the death of the testator, in the absence of any express direction in the will to the contrary: see *Smith* v. *Seaton*, 17 Gr. 397; but this rule does not apply to sums appointed by will, under a power. As to such sums, interest runs from the death of the testator: *Deedes* v. *Graham*, 20 Gr. 258. But no interest can be usually recovered on arrears of annuities; *Goldsmith* v. *Goldsmith*, 17 Gr. 213. **Legatees.**

When a legacy is vested in trustees upon an express trust, more than six years arrears of interest are recoverable: *Loring* v. *Loring*, 12 Gr. 374.

A legatee receiving more than his share may be ordered to refund, with interest: *Davidson* v. *Boomer*, 17 Gr. 509.

POLICIES OF INSURANCE.—Interest does not begin to run, until the party claiming is in a position to give a full discharge: *Toronto Savings Bank* v. *Canada Life*, 14 Gr. 509. **Policies of insurance.**

PARTNERSHIP ACCOUNTS.—In the absence of any agreement to the contrary, advances of capital made by a partner do not bear interest: *Hill* v. *King*, 9 Jur. N. S. 527; 3 D. J. & S. 418; *Cooke* v. *Benbow*, 3 D. G. J. & S. 1; *Stevens* v. *Cook*, 5 Jur. N. S., 1415. But see *Millar* v. *Craig*, 6 Beav. 433. This applies not only to the original capital put in, but also to subsequent advances made by a partner on capital account: *Jardine* v. *Hope*, 19 Gr. 76. **Partnership accounts.**

Neither is interest chargeable on capital agreed to be advanced by a partner, but not advanced by him: *Wilson* v. *McCarthy*, 13 C. L. J. N. S. 303; *Rishton* v. *Grissell*, 5 L. R. Eq. 326. **No interest allowed on capital.**

As to advances in the way of temporary loans there seems to be no settled rule. In *Cooke* v. *Benbow*, *supra*, Turner, L. J., thought interest should not be allowed; and see *De Hertel* v. *Supple*, 14 Gr. 421. But in *Ex parte Chippendale*, 4 D. M. & G. 36, Knight Bruce, L. J., was of the contrary opinion; and see *Re German Mining Co.*, 17 Jur. 745, 747; *Pim* v. *Harris*, 10 L. R. Ir. Eq. 442. **As to temporary loans—*quaere*.**

Interest is chargeable on sums in the hands of a partner, and not accounted for: *Hutcheson* v. *Smith*, 5 Ir. Eq. 117; or improperly applied: *Evans* v. *Coventry*, 8 D. M. & G. 835. But a partner in possession of partnership property is not obliged to account on the **Interest allowed on sums in the hands of a partner, or not accounted for.**

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footing of wilful default: *Rowe* v. *Wood*, 2 J. & W. 556; *Davidson* v. *Thirkell*, 3 Gr. 330, at pp. 347–8.

No interest on capital withdrawn, or profits.

Interest is not chargeable on withdrawal of capital, unless fraudulent or improper: *Cooke* v. *Benbow*, *supra*; *Meymott* v. *Meymott*, 31 Beav. 445; nor on undrawn profits: *Dinham* v. *Bradford*, 5. L. R. Chy. 519.

Interest payable on capital during partnership, stopped by dissolution.

When capital carries interest during the continuance of a partnership, it does not do so after a dissolution: *Watney* v. *Wells*, 2 L. R. Chy. 250; *Rhodes* v. *Rhodes*, John 653; although the business is carried on for the purposes of a sale: *Watney* v. *Wells*, *supra*; unless where the capital is treated as a debt: *Wood* v. *Scoles*, 1 L. R. Chy. 369; *Barfield* v. *Loughborough*, 8 L. R. Chy. 1; or in the case of a sleeping partner: *Parsons* v. *Hayward*, 4 D. F. & J. 474.

Interest from date of report.

After the Master's report, simple interest at six per cent. runs on the amount found due: *Bonville* v. *Bonville*, 35 Beav. 129: *Brewer* v. *Yorke*, 46 L. T. N. S. 289.

Losses how borne.

Losses resulting from investments of partnership moneys, are to be borne by the partners, in the same proportions they are entitled to share in the profits of the partnership business: *Storm* v. *Cumberland*, 18 Gr. 245.

Mortgagee in possession, when rests chargeable against.

MORTGAGEES IN POSSESSION.—When a mortgagee in possession, has in that character, received rents and profits, or is chargeable with an occupation rent, in excess of the interest due, the Master may strike a balance periodically, and apply the surplus to the reduction of the principal; this is called taking the account with rests: *Thorneycroft* v. *Crockett*, 2 H. L. C. 239; *Wilson* v. *Cluer*, 3 Beav. 136; *Schofield* v. *Ingham*, 1 C. P. Co. 477; *Thompson* v. *Hudson*, 10 L. R. Eq. 407; and see Fisher on Mortgages, 957, *et seq.* And where a mortagee after having been paid in full has continued in possession, he may be charged with compound interest on his receipts: *Wilson* v. *Metcalfe*, 1 Russ. 530; *Lloyd* v. *Jones*, 12 Sim. 490.

In *Caldwell* v. *Hall*, 9 Gr. 110, VanKoughnet, C., stated it to be the settled practice of the Court, "that when a mortgagee enters, *his money being in arrear*, he is not liable to account for the rents received by, or chargeable against him, with rests, until he is paid off in full." And see *Wilson* v. *Cluer*, 3 Beav. 136; *Wilson* v. *Metcalfe*, 1 Russ. 530; *Paul* v. *Johnson*, 12 Gr. at p. 482; *Davis* v. *May*, 19 Ves. 384; *Finch* v. *Brown*, 3 Beav. 70; *Latter* v. *Dashwood* 6 Sim. 462. But if he enter when nothing is in arrear, it seems the account may be taken with rests from the beginning of the possession: *Nelson* v. *Booth*, 3 D. & J. 119.

But the mere fact of nothing being due when possession is taken, is not conclusive as to the right to have the account taken with rests; every attendant circumstance must be regarded: *Horlock* v.

Smith, 1 Coll. 287. Thus a mortgagee who took possession of lease- **Rests.**
holds to prevent a forfeiture is not liable so to account, though no- Mortgagee when liable to account with rests.
thing was in arrear when he entered: *Patch* v. *Wild*, 30 Beav. 99; and see *Gordon* v. *Eakins*, 16 Gr. 363.

If a mortgagee holds bills, or notes, for arrears when he enters, he is nevertheless not liable to account with rests, if they are dishonoured: *Dobson* v. *Land*, 4 D. & S. 575.

Rests may be made when a mortgagee in possession sets up an unfounded claim to the equity of redemption, or resists the mortgagor's right to redeem; or when overpaid, has denied that his mortgage was satisfied: *Incorporated Society* v. *Richards*, 2 Dr. & W. 258; *Crippen* v. *Ogilvie*, 15 Gr. 569; *Montgomery* v. *Calland*, 14 Sim. 79.

When the mortgagee is in occupation and is charged with an occupation rent more than sufficient to pay the interest, the account may be taken with rests, if the mortgage debt was not in arrear when he entered, subject to the qualifications above mentioned, from the time he entered, or if then in arrear, then from the time he was paid in full: *Wilson* v. *Metcalfe*, 1 Russ. 530; *Binnington* v. *Harwood*, T. & R. 477; *Coldwell* v. *Hall*, 9 Gr. 110; where the account is taken with rests, it would seem that the proper time for making the rests, is at the time of each payment of rent, whenever the payment exceeds the interest then in arrear.

The mere fact that a mortgagee resides with the owner of the equity of redemption on the mortgaged property, does not render him liable to account as a mortgagee in actual occupation: *Paul* v. *Johnson*, 12 Gr. 474.

A person entering as a *bona fide* purchaser from a mortgagee is not liable to account as a mortgagee in possession, in the event of his purchase being held invalid: *Parkinson* v. *Hanbury*, 2 L. R. H. L. 1; *Carroll* v. *Robertson*, 15 Gr. 173. But a mortgagee who entered claiming to have purchased the equity of redemption, but who was held to be still redeemable, was ordered to account with rests: *Aitchison* v. *Coombs*, 6 Gr. 643; this point is not noticed in the report, but see the decree D. B. 4, fo. 576; but see *Parkinson* v. *Hanbury*, *supra*.

Prior to *Ord.* 220, the account could not be taken against a mort- No special direction now necessary.
gagee with rests, without an express direction in the decree to that effect: *Webber* v. *Hunt*, 1 Madd. 13. Under *Ord.* 219, 220, no express direction in the judgment is necessary; but the Master of course cannot properly take the account with rests in cases where it would not, under the former practice, have been ordered by the Court.

STATUTE OF LIMITATIONS.—A mortgagee in occupation, is liable to Statute of Limitations.
account for more than six years' occupation rent prior to the com-

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mencement of the action, the Statute of Limitations is no bar : *Coldwell* v. *Hall*, 9 Gr. 110 ; S. C. 7 U. C. L. J. 42 ; 8 U. C. L. J. 93.

Statute of Limitations how far a bar to recovery of interest.

As against the person of the debtor, arrears of interest, or rent, payable under a covenant, accruing, or acknowledged in writing, or by part payment, to be due, at any time within twenty years of the commencement of the action, have been held recoverable, even though such interest, or rent, be charged upon, or payable out of, land : *R. S. O.* c. 61, ss. 1 & 6 ; *Allan* v. *McTavish*, 2 App. R. 278 ; but see *contra*, *Sutton* v. *Sutton*, 48 L. T. N. S. 95 ; *Fearnside* v. *Flint*, *Ib*, 154 ; but as against land, no arrears of rent, or interest, in respect of any sum of money charged upon, or payable out of any land, or rent, or in respect of any legacy charged upon land, can be recovered but within six years after the same shall have respectively become due, or next after any acknowledgment of the same, in writing has been given to the person entitled thereto or his agent signed by the person by whom the same was payable, or his agent : *R. S. O.* c. 108, s. 17. But where any prior mortgagee, or other encumbrancer, has been in possession of any land, or in the receipt of the profits thereof, within one year next before an action is brought by any person entitled to a subsequent mortgage, or other encumbrance, on the same land, the person entitled to the subsequent mortgage, or encumbrance, may recover in such action the *arrears of interest* which have become due during the whole time that such prior mortgagee, or encumbrancer, was in possession, or receipt, as aforesaid, although such time may have exceeded the time of six years. See *R. S. O.* c. 108, s. 18.

When the Statute of Limitations is intended to be relied on as a bar to the whole claim, it should be specially pleaded : *Rule S.C.* 147 ; but it would seem that it may be set up in the Master's office as a bar to part of the claim, without having been pleaded : *Wright* v. *Morgan*, 1 App. R. 613 ; *Cattanach* v. *Urquhart*, 6 Pr. R. 28.

The Statute of Limitations may be pleaded as a bar to the taking of partnership accounts : *Noyes* v. *Crawley*, 10 Ch. D. 31 ; and see *Storm* v. *Cumberland*, 18 Gr. 245 ; *Carroll* v. *Eccles*, 17 Gr. 529 ; this latter decision, however, would seem to be qualified by *Wright* v. *Morgan*, *supra*, but see *Rule S. C.* 147.

Wilful neglect nd default; English rule regarding.

Wilful Neglect, and Default.—Under the present English practice, the accounts cannot be taken on the footing of wilful default without a special direction in the judgment, or order, of reference ; and where wilful default is not pleaded, no order can be made on the footing of wilful default, either at the trial, or any subsequent time ; but where wilful default has been alleged and a case made for it in the pleadings, an account may be directed on the footing of wilful default, either at the hearing or trial of the action, or at any subsequent stage : *Re Symons*, *Luke* v. *Tonkin*, 46 L. T. N. S. 684; *Bar-*

ber v. *Mackrell*, 12 Ch. D. 534 ; 41 L. T. N. S. 23, 201 ; where *affidavits* raising a case of fraud, were treated as pleadings, and see *Job* v. *Job*, 6 Ch. D. 562 ; *Mayer* v. *Murray*, 8 Ch. D. 424 ; *Re Bowen*, *Bennett* v. *Bowen*, 47 L. T. N. S. 114. **Wilful neglect and default.**

In Ontario no statement in the pleadings is necessary, in order to authorize the Master to take accounts, in any proper case, on the footing of wilful default. See *Ord.* 219. Mortgagees in possession, were always liable, as of course, to account on the footing of wilful neglect and default, and the effect of *Ord.* 219, 220, is to place trustees, executors, and others, liable for wilful default, upon the same footing in this respect as mortgagees in possession. Section 2 of *Ord.* 220, applies in terms only to accounts of realty, but it has been held that under *Sec.* 7, the Master may enquire as to wilful neglect and default, in all cases referred to him without any special direction so to do : *Carpenter* v. *Wood*, 10 Gr. 354. Wherever wilful neglect and default is charged against an accounting party, the Master is to determine whether or not he is liable to account on that footing, and if so, the amount that is due ; he should not report the facts as "special circumstances : " *Walmsley* v. *Bull*, 2 Chy. Ch. R. 344, and in his report, he should distinguish between sums actually received, and those charged by reason of wilful default, in order to enable the Court to deal with the question of costs : *Moodie* v. *Leslie*, 12 Gr. 537. Ontario rule.

EXECUTORS, AND TRUSTEES.—Formerly it was necessary to aver in the pleadings, and prove at the hearing, at least one act of wilful default, to entitle the plaintiff to a decree to enquire as to wilful neglect and default: *Sleight* v. *Lawson*, 3 K. & J. 292 : this is no longer necessary, and the Master may now make the enquiry, though no case of wilful neglect or default be averred in the pleadings, or proved at the trial : *Carpenter* v. *Wood*, 10 Gr. 354, and see *Ord.* 219. Formerly it was thought that the enquiry could not be made under the common administration order obtained in Chambers : *Harrison* v. *McGlashan*, 7 Gr. 531 ; except when obtained by the personal representative himself : *Ledgerwood* v. *Ledgerwood*, *Ib.*, 584 ; but the practice is now settled that the enquiry may be made in every case per *Boyd*, C., *Re Allan*, *Pocock* v. *Allan*, 9 P. R. 277. Executors and trustees, when liable for wilful neglect and default.

An executor improperly delaying to sell lands which, by the will are saleable for the payment of debts, in order to benefit himself, is liable to account for rents and profits : *Emes* v. *Emes*, 11 Gr. 325 ; and executors without authority intermeddling with, and assuming the management of, the realty, are liable to account as, if duly empowered to act as trustees : *Chisholm* v. *Barnard*, 10 Gr. 479 ; but in such a case they are not entitled to any compensation for so doing : *Dagg* v. *Dagg*, 25 Gr. 542.

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Executors and trustees, entitled to benefit of doubt.

But it is the duty of the Court in all cases where executors, or trustees, are concerned, to administer equity in such a manner, that honest and respectable men shall not be deferred from accepting the office, and if there is a doubt, where men have acted honestly and *bona fide* in discharge of their duty, although they have made mistakes, the doubt should be determined in favour of the executor, or trustee: *Re Owens, Jones Owens*, 47 L. T. N. S. 62, *Speight* v. *Gaunt*, 48 L. T. N. S. 279.

When a testator expressed the fullest confidence in one of the trustees named in his will and directed the other trustees to be guided by his views at to sale, disposal, and reinvestment, of his American securities, and declared that his trustees should not be responsible for any loss occasioned thereby. It was held that the co-trustees were not answerable to legatees for loss occasioned by unauthorized investments of their moneys, made by the trustee: *Burritt* v. *Burritt*, 29 Gr. 321. But as regards creditors it seems they might not be discharged: *Doyle* v. *Blake*, 2 Sch. & L. 239.

While the Court will not require from executors, and trustees, any greater care than a prudent man ordinarily bestows on the management of his own property, yet it will require them to give full explanations of all their dealings, and of the causes why outstanding assets were not collected, or property of the estate has disappeared, and a trustee, or executor, who cannot account for the one or the other, will be chargeable with them: *Chisholm* v. *Barnard*, 10 Gr. 481; a trustee is not liable for losses arising through the default of agents to whom he may have properly confided the management of the trust: *Speight* v. *Gaunt*, 48 L. T. N. S. 279. Executors have a fair discretion in taking or delaying legal proceedings against a debtor, and a delay in suing, even though causing a loss of the debt, is not necessarily such negligence as subjects them to any liability: *Re Owens, Jones* v. *Owens*, 47 L. T. N. S. 61. In the absence of special circumstances, an executor is only liable for his own individual receipts, and not for those of his co-executor, but he is liable for the receipts of any agent jointly employed by himself and his co-executor: *Harrison* v. *Patterson*, 11 Gr. 105.

Losses on investments.

There is no fixed rule as to the relative proportion which loans made by trustees ought to bear to the value of the property. As a general rule more than two-thirds the value should not be advanced; but a trustee who, in the honest exercise of his discretion, lends a little more than two-thirds, is not liable in the event of the security proving insufficient: *Re Godfrey, Godfrey* v. *Faulkner*, 48 L. T. N. S. 853.

Mortgagees in possession, liable for wilful neglect and default.

MORTGAGEES.—A mortgagee in possession is bound to account, as of course, for what he has, or but for his wilful default might, or ought to have, received: *Chaplin* v. *Young*, 33 Beav. 330; *Parkin-*

son v. *Hanbury*, 2 L. R. H. L. 1 ; *Hughes* v. *Williams*, 12 Ves. 493 ; *Kensington* v. *Bouverie*, 7 D. M. & G. 134 ; *Quarrel* v. *Beckford*, 1 Madd. 274. But he is not liable for more than he has actually received, unless it is clearly proved that he knew a greater rent might and could have been obtained and that he refused or neglected to obtain it : *Merriam* v. *Cronk*, 21 Gr. 60 ; *Coldwell* v. *Hall*, 9 Gr. 110, 114 ; *Metcalfe* v. *Campion*, 1 Moll. 238 ; *Hughes* v. *Williams*, 12 Ves. 493 ; *Brandon* v. *Brandon*, 10 W. R. 287 ; *Cocks* v. *Cray*, 1 Giff. 77.

Neglect and default.

Mortgagee in possession.

A mortgagee not in possession, is not chargeable with rent which a tenant of the mortgagor had promised to pay him, but did not : *Waddell* v. *McColl*, 14 Gr. 211.

Not chargeable with rents promised to be paid but not received.

Where a mortgagee takes possession at a rent agreed on between him and the morgagor, he is only liable to account to the mortgagor on the footing of the agreement, but such agreement is not binding on any subsequent incumbrancer, and as to him the Master may charge the mortgagee with a fair occupation rent, though it exceed the amount agreed to by the mortgagor : *Court* v. *Holland*, 29 Gr 19, and see *Gilmour* v. *Roe*, 21 Gr. 284 ; *Gregg* v. *Arrott*, Ll. & Goo. *temp. Sugd.* 246.

How far agreement between mortgagee and mortgagor binding on subsequent incumbrancers.

VENDOR AND PURCHASER.—After the time fixed for completion of the contract, the vendor is liable for rents and profits, but usually only for those actually received : *Howell* v. *Howell*, 2 My. & Cr. 486, unless he allow the rent to fall in arrear, when he will be held accountable for the arrears : *Acland* v. *Gaisford*, 2 Madd. 28 ; *Wilson* v. *Clapham*, 1 J. & W. 36 ; formerly a special case must have been made at the hearing to entitle a purchaser to have the account taken on the footing of wilful default : *Sherwin* v. *Shakspear*, 5 D. M. & G. 517, 532 ; *Phillips* v. *Sylvester*, 8 L. R. Chy. 173. But this is no longer necessary in Ontario : see *ante*, p. 9. Where no time was named in the contract for deliveryof possession, the purchaser was held entitled to the rents from the date of the contract : *Brady* v. *Keenan*, 6 P. R. 262, and see *Dudley* v. *Berczy*, 2 Ch. Ch. R. 364, as to liability of vendor in possession.

Vendor after time fixed for completing is liable to purchaser for rents and profits.

No more than six years' arrears of interest on purchase money can be recovered from a purchaser as a charge on the land, whether he has been in possession or not : *Airey* v. *Mitchell*, 21 Gr. 512 ; *Gunn* v. *Trust & L. Co.*, before Boyd, C., 19th Jan., 1882 ; but in some cases where more than six years' arrears, was recoverable against the estate of a deceased person the excess beyond six years was allowed to avoid circuity of action : *Carroll* v. *Robertson*, 15 Gr, 173 ; *Taylor* v. *Hargrave*, 19 Gr. 271 ; *Howeren* v. *Bradburn*, 22 Gr. 96 ; *Weaver* v. *Vandusen*, 27 Gr. 481.

Interest on purchase money.

PRINCIPAL AND AGENT.—A Bailiff at common law was liable to account for what he might have made of the lands, but for his wilful

Bailiff liable for neglect and default.

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default : Seton 779 ; *Wheeler* v. *Horne*, Willes 208 ; Co. Lit. 172 *a* ; and an agent acting under a power of attorney is liable so to account, though the power be defective *Bradburne* v. *Shanly*, 7 Gr. 569. But a solicitor who paid off a mortgage for a client, and entered into the receipt of rents, was held not to be liable on the footing of wilful default, his possession being that of his client : *Ward* v. *Carttar*, 1 L. R. Eq. 29.

Persons not liable to account for wilful neglect and default.

Persons not Liable to Account for Wilful Default :—

Partners.

PARTNERS in possession of partnership property are not liable to account in the footing of wilful default : *Davidson* v. *Thirkell*, 3 Gr. 330, at p. 348 : *Rowe* v. *Wood*, 2 J. & W. 556 ; but one partner may have a demand against another for compensation for negligence, or fraud : *Bury* v. *Allen*, 1 Coll. 589 ; *Doupe* v. *Stewart*, 13 Gr. 637.

Tenants in common.

TENANTS IN COMMON who have received more than their share, though liable to account for the excess : *Lorimer* v. *Lorimer*, 5 Madd. 363 ; *Turner* v. *Morgan*, 8 Ves. 145 ; are not answerable for wilful default : *Wheeler* v. *Horne*, Willes, 208.

Purchaser for value.

PURCHASER FOR VALUE evicted by person having a better title, and of which he is fixed with constructive notice, is not liable to account on the footing of wilful default : *Howell* v. *Howell*, 2 My. & Cr. 478.

Persons who obtain possession by fraud.

PERSONS WHO HAVE OBTAINED POSSESSION BY FRAUD, are not liable to account on the footing of wilful default : *Murray* v. *Palmer*, 2 Sch. & L. 474 ; *Trevelyan* v. *Charter*, 9 Beav. 140 ; 4 L. J. N. S. 209 ; 11 Cl. & F. 74.

Occupation rent, when chargeable.

Occupation Rent—A person liable to account for rents and profits may generally, if he have been himself in actual occupation of the property in question, be charged with a fair rent for the time he has so occupied,—which account of rent is liable to be taken with rests, wherever rests would be charged if rents and profits had been received.

As against Vendors.

VENDORS.—A vendor who continues in occupation after the time fixed for completion may be charged with an occupation rent : *Leggott* v. *Metropolitan R. W. Co.*, 5 L. R. Chy. 716; *Dyer* v. *Hargrave*, 10 Ves. 505 ; but not in cases where the purchaser could and ought to have taken possession : *Dakin* v. *Cope*, 2 Russ. 170 ; nor where—the purchaser making default in payment—the vendor continues to carry on his business : *Leggott* v. *Metropolitan R. W. Co.*, *supra*.

Purchasers

PURCHASERS.—Where a conveyance is set aside, an occupation rent may be charged against a purchaser who has been in occupation : *Bloomer* v. *Spittle*, 13 L. R. Eq. 427, *Neesom* v. *Clarkson*, 2 Ha. 163, but see *Parkinson* v. *Hanbury*, 2 L. E. H. L. 1.

MORTGAGEE.—A mortgagee may be charged with an occupation rent, if it be proved that he has actually occupied the mortgaged premises *Trulock* v. *Robey*, 15 Sim. 265. Any agreement as to the amount of the rent made between mortgagor and mortgagee, though binding between them, is not binding on others interested in the equity of redemption who are not parties to it: *Court* v. *Holland*, 29 Gr. 19; *Gregg* v. *Arrott*, Ll. & G. temp. Sugd. 246. And where rent is paid in advance to a prior mortgagee, and applied, with the consent of the mortgagor, in discharge of other liabilities than the mortgage debt, a subsequent assignee of the equity of redemption is entitled to have all rents accruing subsequent to the assignment applied in reduction of the prior mortgage, notwithstanding the payment and application in advance: *Gilmour* v. *Roe*, 21 Gr. 284. A mortagee who continues in occupation after payment in full, is chargeable with interest on the occupation rent, with rests: *Wilson* v. *Metcalf*, 1 Russ. 537; *Quarrel* v. *Beckford*, 1 Madd. 269; *Lloyd* v. *Jones*, 12 Sim. 491.

Occupation rent

Mortgagee, liability of, for occupation rent.

A mortgagee in occupation, is entitled to set off, against the occupation rent, with which he is charged, the arrears of interest, so far as they were recoverable against the land at the time the rent accrued; *i. e.* for six years prior to its accruing: *Walton* v. *Bernard*, 2 Gr. 358; *Harrison* v. *Jones*, 10 Gr. 99. A prior mortgagee is not bound to account to a subsequent mortgagee on the footing of a mortgagee in possession, merely because there is an attornment clause in the prior mortgage, if he have not actually taken possession: *Western District Bank, Limited*, v. *Turner*, 47 L. T. N. S. 433; *Stanley* v. *Grundy*, 22 Ch. D. 478; 48 L. T. N. S. 106.

May set off arrears of interest.

TENANTS IN COMMON.—A tenant in common who has been in exclusive occupation, cannot be charged with an occupation rent, if he have not ousted his cotenant: *Rice* v. *George*, 20 Gr. 221. But he cannot recover for substantial repairs and improvements, *Ib.*; nor even for encumbrances paid off by him, unless he also submit to account for an occupation rent: *Teasdale* v. *Sanderson*, 33 Beav. 534; *Rivet* v. *Desourdi*, 12 C. L. J. 203. But a tenant in common who has been in exclusive occupation, and has ousted his cotenant, is liable to account for an occupation rent: *Pascoe* v. *Swan*, 27 Beav, 508.

Tenants in common, how far liable for occupation rent.

HEIRS.—An heir-at-law, is liable to account to a doweress for an occupation rent: *Bamford* v. *Bamford*, 5 Ha. 203.

Heir-at-law.

TRUSTEES, express, or constructive, in occupation, of the trust property, are liable to account to their *cestui que trust* for an occupation rent: *Mill* v. *Hill*, 3 H. L. C. 828; *Lamont* v. *Lamont*, 7 Gr. 258.

Trustees.

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Improvements.

Improvements :—

Persons in possession under void deeds, how far entitled to.

PERSONS IN POSSESSION OF LANDS UNDER VOID DEEDS, making lasting improvements, by which the value of the estate has been enhanced, may, within certain limits, be allowed for such improvements : *Jortin* v. *South Eastern Railway Co.*, 2 Sm. & G. at p. 73 ; *Quarrel* v. *Beckford*, 14 Ves. at p. 179 ; and whether in as actual, or constructive trustees : *Williamson* v. *Seaber*, 3 Y. & C. Ex. 717 ; *Cawdor* v. *Lewis*, 1 Y. & C. Ex. 427 ; *Bridge* v. *Brown*, 2 Y. & C. C. C. 191 ; *Bevis* v. *Boulton*, 7 Gr. 39 ; or as solicitors : *Robinson* v. *Ridley*, 6 Madd. 2 ; or agents : *Trevelyan* v. *White*, 1 Beav. 588 ; or as mortgagees believing themselves absolutely entitled : *Neesom* v. *Clarkson*, 2 Har. 176 ; *S. C.* 4 Har. 97 ; or as a *bonâ fide* purchaser under the void deed : *Aston* v. *Innis*, 26 Gr. 42 ; *Churcher* v. *Bates*, 42 Q. B. 466 ; *Pegley* v. *Woods*, 14 Gr. 47 ; *Gummerson* v. *Banting*, 18 Gr. 516 ; and the claim for such improvements may be actively enforced, and allowed, whether the party claiming them be plaintiff, or defendant : *Ib.* ; (but see *Re Brazill, Barry* v. *Brazill*, 11 Gr. at p. 256) ; and even though the party claiming adversely be an infant : *Beris* v. *Boulton*, *supra* ; and see *Biehn* v. *Biehn*, 18 Gr. 497 ; *Wood* v. *Wood*, 16 Gr. 471.

But when possession had been taken in pursuance of an immoral agreement which was void, it was held that there could be no lien for improvements : *Moon* v. *Clarke*, 30 C. P. 417.

Tenants at will, improvements by.

TENANTS AT WILL.—improvements made by a tenant at will cannot be allowed : *Foster* v. *Emmerson*, 5 Gr. 135 ; but improvements made on wild land by a son, to whom his father had promised to give it by way of advancement, which he failed to do, were allowed as against the co-heirs of the father : *Biehn* v. *Biehn*, *supra* ; *Horey* v. *Ferguson*, see 18 Gr. 498 ; but see *Foster* v. *Emmerson*, *supra*.

Wrongdoers not allowed for improvements.

WRONGDOERS.—A mere wrongdoer, entering without colour of right, is not usually allowed for improvements made by him : *Townsley* v. *Neil*, 10 Gr. 72 ; *Scott* v. *Hunter*, 14 Gr. 376 ; nor persons entering with actual notice of a paramount title : *Wyoming* v. *Bell*, 24 Gr. 564 ; *Smith* v. *Gibson*, 25 C. P. 248 ; *Kilborn* v. *Workman*, 9 Gr. 255.

Exceptions to rule.

But it would seem mere legal fraud will not deprive a party of the right to improvements : *McLaren* v. *Fraser*, 17 Gr. at p. 569 ; and see *Nevills* v. *Nevills*, 6 Gr. 121, 139 : and the owner standing by, and not objecting, may preclude himself from getting back his estate, except on the terms of paying for improvements : *Davis* v. *Snyder*, 1 Gr. 134.

Mistake of title, improvements made under, how far recoverable.

IMPROVEMENTS MADE UNDER MISTAKE OF TITLE.—Improvements made under a *bonâ fide* mistake of title may now be allowed under *R.S.O.*, c. 95, s. 4 : *Fawcett* v. *Burwell*, 27 Gr. 445 ; *McGregor* v. *McGregor*, *Ib.* 470 ; *McCarthy* v. *Arbuckle*, 29 C. P. 529 ; *Carrick* v.

Smith, 34 Q. B. 389; and see *Skae* v. *Chapman*, 21 Gr. 549. But improvements made with actual knowledge of the paramount title, will not be allowed under that Act: *Wyoming* v. *Bell*, 24 Gr. 564; *Smith* v. *Gibson*, 25 C. P. 248; and see *Kilborn* v. *Workman*, 9 Gr. 225. Improvements made after action commenced, cannot be allowed; *O'Grady* v. *McCaffrey*, 2 O. R. 309. **Improvements.**

Improvements made under mistake of title by a person in as mortgagee, but believing himself absolute owner, are allowed more liberally than improvements made by a mortgagee knowing he is a mortgagee: *Carroll* v. *Robertson*, 15 Gr. 173. By mortgagee believing himself to be the owner.

TRUSTEES.—Substantial and lasting improvements, and repairs, made by a trustee on the trust property, are usually allowed to him: *Bevis* v. *Boulton*, 7 Gr. 39; *Mill* v. *Mill*, 3 H. L. C. 828; *Smith Bonnisteel*, 13 Gr. at p. 35, *Ex parte Hughes*, 6 Ves. 624; *Ex parte James*, 8 Ves. 352; *Campbell* v. *Walker*, 5 Ves. 682; *Darey* v. *Durant*, 1 D. G. & J. 535; *King* v. *Anderson*, 8 Ir. R. Eq. 625, 636. Repairs are allowed even in the case of actual fraud: *Baugh* v. *Price*, 1 G. Wils. 320; and in one case improvements also; *Oliver* v. *Court*, 8 Price 172. But see *contra*:—*Kenney* v. *Browne*, 3 Ridg. 518; *Stratton Murphy*, 1 Ir. R. Eq. 361. Trustees are entitled to be allowed for improvements on trust estate.

RECEIVERS have been allowed for improvements made without the previous sanction of the Court: *Tempest* v. *Ord*, 2 Mer. 55. Receivers.

COMMITTEE OF LUNATIC.—Also allowed for improvements made, without previous sanction: *Re Shaw*, 15 Gr. 618; *Re Churchill*, 3 Jur. 719. Committee.

PERSONAL REPRESENTATIVE.—An unauthorized expenditure by an executrix in improving the realty, was allowed, so far as the value of the estate had been enhanced, and those interested had benefited by it: *Morley* v. *Matthews*, 14 Gr. 551. But where an administratrix had occupied and improved the realty, in a suit by her for administration, such improvements were disallowed as against infant heirs; but she was not charged with any increase of rental in consequence of such improvements: *Re Brazill*, *Barry* v. *Brazill*, 11 Gr. 253. Personal representative.

PURCHASER.—Failing to complete purchase is not entitled to be allowed for improvements: *Re Yaggie*, 1 Chy. Ch. R. 52. Purchaser.

MORTGAGEE—The ordinary rule is, that a mortgagee will not be allowed for improvements further than is proper to keep the premises in necessary repair. But if buildings, are incomplete or ruinous, he may complete, or pull them down, and rebuild, and the rebuilding, or repairing, may be done in an improved manner, and more substantially than before, so that the work be done providently, and that no new or expensive buildings be erected for purposes different from those for which the former buildings were used; for the property when restored ought to be of the same nature as when the mortgagee received it. Mortgagee.

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Fisher Mort. 1532. And while the mortgagee in possession is not allowed to charge for lasting improvements which are not requisite for the purpose of keeping the property in necessary repair, he is not, on the other hand, chargeable with the increased rents and profits which are directly traceable to such improvements made by him. See Jones on Mortgages, s. 1127.

Mortgagees entitled to be allowed for necessary repairs.

Mortgagees in possession are entitled to be allowed for necessary repairs as just allowances. But in England no allowance for substantial repairs or, permanent improvements, can be made without an express direction. Seton 1080. In Ontario, under *Ord.* 219, 220, no special direction in the judgment is necessary to enable the Master, in a proper case, to allow substantial improvements.

But not such as are not necessary for preservation of property.

A mortgagee in possession cannot charge the mortgaged property with improvements that are not necessary for its preservation, *Harrison* v. *Jones*, 10 Gr. 99, unless with the consent of the parties entitled to the equity of redemption: *Kirby* v. *Kirby*, 5 Gr. 587.

Mortgagor's sanction not necessary.

And improvements made even with the mortgagor's sanction must not be such as to improve him out of his property: *Sandon* v. *Hooper*, 6 Beav. 246. Fish. Mortg. 948. But a mortgagee is not bound to give the mortgagor notice before making any reasonable permanent improvement: *Shepherd* v. *Jones*, 47 L. T. N. S. 604; 21 Ch. D. 469.

If mortgagee charged with increased rents arising from improvements, he should be allowed improvements also.

When a mortgagee is charged with rents, or improved rents, arising from his improvements, he should either be allowed for such improvements: *Constable* v. *Guest*, 6 Gr. 510, or he should not be charged with the rent, or improved rent, arising therefrom: *McGregor* v. *McGregor*, 19 C. L. J. 78.

The Master is not necessarily bound to allow the actual cost of improvements, but should limit the allowance to the benefit which the property has derived therefrom: *Paul* v. *Johnson*, 12 Gr. at p. 479.

Improvements by purchaser, when sale invalid, allowed.

A person who had *bonâ fide* purchased under a power of sale in a mortgage, notwithstanding the sale being held invalid, was allowed improvements made by him as far as they enhanced the value of the property, and was not restricted to such improvements as a mortgagee in possession would have been entitled to make, knowing himself to be a mortgagee: *Carroll* v. *Robertson*, 15 Gr. 173; and see *McLaren* v. *Fraser*, 17 Gr. 567: *Davey* v. *Durant*, 1 D. G. & J. 534. But when a purchaser from a mortgagee, who had obtained a decree of foreclosure, which was defective owing to there being outstanding claims, which were not foreclosed, entered, and made improvements, having notice of the outstanding title, such improvements were disallowed as against the unforeclosed parties; *Russell* v. *Romanes*, 3 App. R. 635; and see *Romanes* v. *Herns* 22 Gr. 469.

Secus if he have knowledge of defect.

Mortgagee submitting to be redeemed after foreclosure entitled to all improvements.

But where the mortgagor released his equity of redemption, and two months afterwards the mortgagee agreed to reconvey, upon being repaid principal and interest, and all costs of improvements made by him. On a bill to redeem, the mortgagee was held entitled to recover for all permanent improvements, although the estate might not have been increased in value to an amount equal to the sum expended: *Brotherton* v. *Hetherington*, 23 Gr. 187.

What improvements allowed.

WHAT IMPROVEMENTS ALLOWED.—The clearing of land for farming purposes is a permanent improvement, under *The Dower Act*, *R. S. O.* c. 55, s. 3, ss. 2; *Robinet* v. *Pickering*, 44 Q. B. 337.

After suit commenced, the only improvements which can ordinarily be allowed, are such as are made to save the premises from deterioration: *Hawn* v. *Cashion*, 20 Gr. 518; and see *O'Grady* v. *McCaffrey*, 2 O. R. 309.

Trustees with power to invest in the purchase of real estate, may be allowed for erecting a new building where an increased income can be obtained thereby: *Re Henderson*, 23 Gr. 45.

Covenant to pay for improvements in rectorial lease invalid.

A rector cannot make a lease with a covenant, to pay for improvements, which will be binding on his successor: *Kirkpatrick* v. *Lyster*, 13 Gr. 323; 16 Gr. 17.

Costs, and other Expenses:—

Costs and expenses recoverable by mortgagees.

MORTGAGEES.—A mortgagee is entitled to charge against the estate, the costs of defending the title to the mortgaged estate, for the benefit of all parties interested in the equity of redemption; but not of defending his own title to the mortgage, unless those interested in the equity of redemption had concurred in, or assisted, the litigation: *Parker* v. *Watkins*, John. 133. Also, costs of a suit to redeem, brought by a subsequent incumbrancer, and dismissed: *McKinnon* v. *Anderson*, 17 Gr. 636; 18 Gr. 684.

Costs of sales.

The mortgagee may also be allowed the expenses of sales, and of receiving the purchase money: Fish. Mortg. 952. But he is not entitled to a commission on a sale in addition to the costs, even though he has stipulated for it: *Eyre* v. *Hughes*, 2 Ch. D. 148; *Broad* v. *Selfe*, 9 Jur N. S. 885.

Costs of taking possession, and insurance, etc.

A mortgagee is also entitled to the expenses of taking and holding possession of a ship, advertising it for sale, and insurances: *Wilkes* v. *Saunion*, 7 Ch. D. 188.

Cannot charge for personal services.

He is not entitled to charge for personal trouble in collecting rents: *Bonithon* v. *Hockmore*, 1 Vern. 316; *Langstaffe* v. *Fenwick*, 10 Ves. 405; *Godfrey* v. *Watson*, 3 Atk. 518; *Leith* v. *Irvine*, 1 M. & K. 277; not even if he have stipulated for it with the mortgagor: *French* v. *Baron*, 2 Atk. 120; *Barrett* v. *Hartley*, 2 L. R. Eq. 789; *Chambers* v. *Goldwin*, 9 Ves. 271. And, except under special circum-

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Nor for bailiff's or agent's services, collecting rents.

stances, the mortgagee is not entitled to any allowance for an agent, or bailiff, collecting rents: *Stains* v. *Banks*, 9 Jur. N. S. 1049; *Eyre* v. *Hughes*, *supra*.

Insurance, when recoverable.

INSURANCE.—Sums paid for insurance by a mortgagee cannot, in the absence of a special contract, be charged against the mortgaged estate; *Bellamy* v. *Brickenden*, 2 J. & H. 137; *Brook* v. *Stone*, 13 W. R. 401; *Dobson* v. *Land*, 8 Ha. 216; *Russell* v. *Robertson*, 1 Chy. Ch. R. 72; 6 U. C. L. J. 143; but see *Scholefield* v. *Lockwood*, 11 W. R. 555. But in the case of a trustee, such payment may be allowed, without any express stipulation to that effect in the instrument creating the trust: *Heron* v. *Moffatt*, 22 Gr. 370.

Where a subsequent account is directed to be taken, sums properly paid for insurance since the last account, may be allowed under the head of just allowances, without any express direction: *Bethune* v. *Calcutt*, 3 Gr. 648.

Prior encumbrances.

PRIOR ENCUMBRANCES.—A mortgagee paying off prior encumbrances, is entitled to recover the amount paid, and interest on the principal; at the rate in his own mortgage, and on the interest and costs, at six per cent.: *McMaster* v. *Hector*, 8 C. L. J. N. S. 284; and see *Teeter* v. *St. John*, 10 Gr. 85. But a tenant in common in sole possession paying off encumbrances, is not entitled to be allowed therefor, unless he submit to account for an occupation rent: *Rivet* v. *Desourdi*, 12 C. L. J. N. S. 203.

Trustees entitled as against *c. q. t.*, to expenses of bailiffs &c.

TRUSTEES are entitled to recover as against the beneficiaries the expense of bailiffs, surveyors, and accountants, when necessarily employed, and also the necessary legal expenses of carrying the trust into effect: *Wilkinson* v. *Wilkinson*, 2 S. & S. 237; *McNamara* v. *Jones*, 2 Dick. 587; *Henderson* v. *McIver*, 3 Madd. 275.

But solicitor trustee not intitled to charge for professional services, unless expressly authorized by trust so to do.

But a trustee acting as solicitor for himself, or for himself and others as trustees, in any action in which he, or they, are plaintiffs, is in general, only entitled to costs and expenses out of pocket, properly incurred, *Moore* v. *Frowd*, 3 My. & Cr. 45, 50: *Robinson* v. *Pett*, 2 W. & T. Lead. Ca. Eq. 241; unless there be a special power to charge for professional services: *Re Sherwood* 3 Beav. 338; *Moore* v. *Frowd* *supra*; *Re Wyche*, 11 Beav. 209; but even then, no charge can be allowed for doing professionally, any thing that he would have been bound to do himself, if not a solicitor: *Harbin* v. *Darby*, 28 Beav. 325; and what he cannot charge for professionally himself, he cannot recover for, if done by a partner though not a trustee: *Christophers* v. *White*, 10 Beav. 523; *Collins* v. *Carey*, 2 Beav. 128; unless the business was done by the partner for his own benefit, and the trustee does not share therein: *Clack* v. *Carlow*, 7 Jur. N. S. 441; 9 W. R. 568; and where a solicitor trustee, who is one of several trustees, and acts for them as *defendants*, he may recover profit costs against the trust estate: *Cradock* v. *Piper*, 1 Mc. & G. 664; 17 Sim. 41; but

Or where he is defendant.

see Lewin 249 : *Manson* v. *Baillie*, 2 Macq. 80. The profit costs of professional services which cannot be recovered as against the *c. q. t.* or out of the trust estate may be recoverable by the trustee against a third party : *Colonial Trusts Co.* v. *Cameron*, 24 Gr. 548 ; *Meighen* v. *Buell*, 25 Gr. 604. Profit costs recoverable against third parties.

A retaining fee paid by trustees to their solicitor in an administration suit, may be allowed under certain circumstances ; see *Chisholm* v. *Barnard*, 10 Gr. 479 ; and see *Hayes* v. *Hayes*, 29 Gr. 90 ; but they are not entitled to any allowance for gratuitous services of an agent : *Chisholm* v. *Barnard*, 10 Gr. 479. Retaining fee and costs paid by trustees, how far recoverable.

Costs paid by an executor, administrator, or trustee, to his solicitor, in respect of business of the trust estate, may be allowed, but the Master should examine the bill, and without strictly taxing it, should moderate it, by deducting such charges, if any, as are improper : *McCargar* v. *McKinnon*, 17 Gr. 525 ; *Hayes* v. *Hayes*, 26 Gr. 90.

Trustees expenses are a lien upon the trust estate, and have priority to the costs of suit : *Morison* v. *Morison*, 7 D. M. & G. 214 ; 2 S. & G. 564 ; *Gaunt* v. *Taylor*, 2 Har. 413 ; unless the payments are not strictly authorized and the estate is insufficient : *Robison* v. *Killey*, 30 Beav. 520 ; or they have misconducted themselves : *Rose* v. *Sharrod*, 11 W. R. 356. Trustees expenses are a lien on trust estate.

Just Allowances.—Several of the matters which may be allowed under the head of "just allowances" have already been discussed in the preceding notes to this *Order*. Just allowances.

COMPENSATION TO EXECUTORS, AND TRUSTEES.—Compensation for care, pains, and trouble, may be allowed by the Master to trustees under any deed, settlement, or will ; or to any other trustee, however the trust is created ; and to executors, and administrators ; and to any guardian appointed by any Court ; or to any testamentary guardian *R. S. O.* c. 107, ss. 36-40 : *Re Commissioners of Cobourg*, 22 Gr. 377 ; *Re Toronto Harbour Commissioners*, 28 Gr. 195. The Act is retrospective : *Thomson* v. *Freeman*, 15 Gr. 384 ; *McMillan* v. *McMillan*, 21 Gr. 369. The Surrogate Judge has also power to allow compensation to trustees under wills, and to executors, and administrators : *R. S. O.* c. 107, s. 41. But when an action is pending in the High Court in regard to the administration of an estate, it is improper for the Surrogate Judge to interfere by ordering the allowance of compensation to the executors, or trustees : *McLennan* v. *Heward*, 9 Gr. 279 ; *Cameron* v. *Bethune*, 15 Gr. 486. And the Master is bound to exercise his own discretion as to the compensation to be allowed, regardless of any order of a Surrogate Judge made under such circumstances : *Biggar* v. *Dickson*, 15 Gr. 233 Compensation to executors and trustees.

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No fixed rule as to amount of compensation.

No fixed rule can be laid down as to the amount of compensation proper to be allowed, as it must necessarily depend on the circumstances of each case; see *Robinson* v. *Pett*, 2 W. & T. L. C. Eq. 241.

Usually a percentage on receipts, and payments.

Usually the amount is fixed by a percentage on the amount of money passing through the hands of the trustee, or executor. In some cases five per cent has been allowed: *Bald* v. *Thompson*, 17 Gr. 154; *McLennan* v. *Heward*; 9 Gr. 178; *Chisholm* v. *Barnard*, 10 Gr. 479. But this may in some cases be more, and in some, less, than an adequate compensation. In *Torrance* v. *Chewett*, 12 Gr. 407, four per cent. was allowed; and in *McMillan* v. *McMillan*, 21 Gr. 381,

But a lump sum may be allowed.

two and a-half per cent. was allowed. The Master may, instead of a percentage, allow a lump sum, but only upon proper evidence as to the services rendered: *Stinson* v. *Stinson*, 8 P. R. 530; *Denison* v.

A sliding scale suggested.

Denison 17 Gr. 306. In fixing compensation, it has been suggested that it would be proper to adopt a sliding scale, similar in principle to that on which the poundage of Sheriffs is fixed; see observations of Spragge, V. C.: *Thompson* v. *Freeman*, 15 Gr. at p. 387. In that case, the estate amounted to nearly $300,000, and five per cent. on the amounts disbursed, which included investments, and reinvestments, made in the course of fifteen years, was considered excessive; and on appeal, the allowance was reduced to five per cent. on investments of sums of $600, and three per cent. on investments over that amount.

Allowance of percentage on investments, and reinvestments, disapproved.

But in a later case it was considered vicious in principle, to allow any commission on investments, or reinvestments, on the ground that it offered an inducement to trustees to be constantly, and unnecessarily, calling in and changing, the investments: *Re Berkeley's Trusts*, 8 P. R. 193. No commission should be allowed for merely receiving the trust estate until it has also been duly accounted for: *Ib.*

Legacies given to executors as compensation

When a legacy is given to executors or trustees as a compensation for their trouble, they are not precluded from claiming a further sum under the statute, if the legacy is inadequate: *Denison* v. *Denison*, 17 Gr. 306. But see *Kennedy* v. *Pingle*, 27 Gr. 305. Such a legacy, precludes any presumption that the executor is entitled beneficially to the undisposed of residue: *Loveless* v. *Clarke*, 24 Gr. 14. Such a legacy in the event of

Do not abate.

a deficiency of assets, does not abate with other legacies, even though it exceed what the executor would be entitled to under the statute: *Anderson* v. *Dougall*, 15 Gr. 405; and such leg-

Bear interest.

acies bear interest at the expiration of a year from the testator's death; *Anderson* v. *Dougall*, per Strong, V. C., on appeal from report, 8th & 14th Dec. 1870. Where the executor is also a residuary legatee, he is entitled to commission on the receipt, but not on the payment of the share of the residue to which he is beneficially entitled: *Boys' Home* v. *Lewis*, 19 C. L. J. 139.

When trust fixes compensation Master cannot allow less.

When the amount of a trustee's compensation is fixed by the trust deed, the Master cannot reduce the amount: *Heron* v. *Moffatt*, 7 P. R. 438.

Executors compensation is prior to claims of creditors.

An allowance to trustees, or executors, for compensation is prior to the claims of creditors: *Harrison* v. *Patterson*, 11 Gr. 105, at p. 113; or of *cestuis que trust*: *The Life Association of Scotland* v. *Walker*, 24 Gr. 293; and a trustee may retain it from time to time, out of moneys received, and is not bound to wait until the expiration of his trust: *Heron* v. *Moffatt*, *supra*.

Misconduct, how far it disentitles executor to compensation.

Misconduct in the management of the estate may, but does not necessarily, disentitle an executor, or trustee, to compensation for what he has properly done; see *Kennedy* v. *Pingle*, 27 Gr. 305; *Sievewright* v. *Leys*, 1 O. R. 375; *Gould* v. *Burrit*, 11 Gr. 523; *City Bank* v. *Maulson*, 3 Chy. Ch., R. 334. But commission cannot be allowed on moneys which were not actually received, but charged against the executor, or trustee, on the ground of wilful default: *Bald* v. *Thompson*, 17 Gr. 154; and an allowance cannot be made to an executor, for unauthorised receipts of rents, and profits, of the real estate: *Dagg* v. *Dagg*, 25 Gr. 542.

Trustees entitled to credit *pro tanto* for defective securities;

Trustees who have invested the trust fund, at the instance of one of their number, in a defective security, are nevertheless entitled to credit for the value of such security: *Larkin* v. *Armstrong*, 9 Gr. 390.

And for sums paid for maintenance.

An allowance may be made to executors, for sums paid for the maintenance and education of infant *cestuis que trust* out of the capital of the fund to which they are entitled, where the income thereof is insufficient; *Stewart* v. *Fletcher*, 16 Gr. 235.

Claims not referred cannot be allowed.

CLAIMS NOT REFERRED TO MASTER, CANNOT BE ALLOWED.—But the authority to make "just allowances" does not authorize the Master to allow claims which are not referred to him by the judgment to take an account of, however reasonable they may appear to be. The Master may, however, report such a claim as "a special circumstance," and on the hearing on further directions, an application may be made to the Court for its allowance: *Fielder* v. *O'Hara*, 2 Chy. Ch. R. 255.

Special Circumstances:—

Special circumstances. Master may report.

Notwithstanding this *Order* the Master may refuse to report as special circumstances, facts which would be immaterial on a hearing on further directions, or which would lead to evidence in relation to matters not necessary to the enquiry directed by the decree: *Braun* v. *Aumond*, 19 Gr. 172. But he may, at the request of any party, report specially as to any matters which he may deem proper for the information of the Court: *Rosebatch* v. *Parry*, 27 Gr. at p. 199; and he ought to report any matter bearing on the question of costs: *Simpson* v. *Horne*, 28 Gr. at p. 7; *Hayes* v. *Hayes*, 29 Gr. 90.

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Special circumstances.

And the Master may, at the request of a party, report specially as to matters not particularly referred to him, but which form the subject of charges of fraud in the pleadings: *Ib.*

In a mortgage suit the Master may report specially, as to the existence of a claim of the wife of a mortgagor to dower in the surplus: *Rowe* v. *Wert*, 13 L. J. N. S. 326; 7 P. R. 252.

The Master should not report circumstances, showing an accounting party to have been guilty of wilful neglect, and default, as a "special circumstance," but he should himself determine whether or not the party is so liable, and if so, find the amount due on that footing: *Walmsley* v. *Bull*, 2 Ch. Ch. R. 344.

Claims which are not referred to the Master to take an account of, cannot be allowed by the Master, but may be reported as "special circumstances." See *Fielder* v. *O'Hara*, *supra*.

General Powers of Master:—

General powers of Master, to enquire as to all matters relating to accounts.

Order 220 provides that, generally, in taking the accounts, the Master is to inquire, adjudge, and report as to all matters relating thereto, as fully as if the same had been specially referred to him.

The general powers here given, enable the Master to enquire as to, and to take the accounts on the footing of, wilful default in accounts of personalty, as well as of realty, and he is not limited to the matters of enquiry specially enumerated in this *Order*: *Carpenter* v. *Wood*, 10 Gr. 354.

But it will be seen that it is only matters *relating* to the accounts which are referred to him to take, as to which he has these general powers he cannot allow claims altogether outside of the accounts, he is directed to take, and not necessarily connected therewith. Such claims though they cannot be allowed by the Master, may, however, be reported by him as "special circumstances," and the Court, in its discretion, may on further directions, or on special application for that purpose, allow them: *Fielder* v. *O'Hara*, 2 Chy. Ch. R. 255.

Under these general powers, in an administration suit where a creditor made a claim by virtue of a partnership with the testator, it was held that the partnership accounts might be taken in order to establish the claim: *Kline* v. *Kline*, 3 Chy Ch. R. 137; and the Master may enquire as to a stated account set up in the defence, though no evidence was given of it at the hearing: *Edinboro' Life Association* v. *Allen*, 23 Gr. 230. See p 220 & Rules 415 p 746

Master may order witness to be examined before Examiners.

221. Under an order of reference, witnesses may be examined before any Examiner of the Court; and foreign commissions for the examination of witnesses without the jurisdiction of the Court, may, on the cer-

tificate of the Master, be issued by the Clerk of Records and Writs upon precipe. (3rd June, 1853; Ord. 42, s. 14.)

Commission may issue on Master's certificate.

The Master may direct witnesses to be examined before any other Master, or Examiner, of the Court, without the consent of the parties: *Re Casey, Biddell* v. *Casey*, 1 Chy. Ch. R. 198.

Foreign commission not issued of course.

The Master cannot grant a certificate for a commission *ex parte*, *McLennan* v. *Helps*, 3 Chy Ch. R. 193; except where the reference is *ex parte*. A commission to take evidence is not granted as of course: *Price* v. *Bailey*, 6 P. R. 256; *Berdan* v. *Greenwood*, 46 L. T. N. S. 524, note *a*; *Vivian* v. *Mitchell*, 13 C. L. J. N. S. 198; *Re Boyse*; *Crofton* v. *Crofton*, 46 L. T. N. S., 522; and as to proceedings under a commission, see Holmested's Manl. Pr. 165, *et seq.*; *Rules S. C.* 286-300.

Where an application is made to the Master for a commission to cross-examine a plaintiff resident abroad, on an affidavit filed by him in support of his account, the Master cannot properly refuse it, so long as the plaintiff relies on the affidavit in support of his claim: *Townend* v. *Hunter*, 3 C. L. T. 310.

The Master's certificate for a commission should, *mutatis mutandis*, follow, as nearly as may be, the form of order given in the *Rules S. C.*; see Form No. 129.

Master may cause parties to be examined, and may order production of documents.

222. The Master may cause parties to be examined, and to produce books, papers, and writings, as he thinks fit, and may determine what books, papers, and writings are to be produced, and when and how long they are to be left in his office; or in case he does not deem it necessary that such books and papers or writings should be left or deposited in his office, he may give directions for the inspection thereof, by the parties requiring the same, at such time and in such manner as he deems expedient. (3rd June, 1853; Ord. 42, s. 14.)

Witnesses in M. O.

Witnesses.—Any party to an action is now eligible as a witness in his own behalf: see *R. S. O.* c. 62, ss. 2-11.

Corroboration when necessary

In actions by, or against, heirs, or personal representatives, or assigns, of a deceased person: *Ib.* s. 10; or by or against a lunatic, or an inmate of a lunatic asylum: *Ib.* s. 11. The evidence of any opposite, or interested party, must be corroborated. As to the nature of the corroboration required, see *Sugden* v. *Lord St. Leonards*, 1 P. D. 154, 179; *McDonald* v. *McKinnon*, 26 Gr. 12, *Stoddart* v. *Stoddart*, 39 Q. B. 203; *McKay* v. *McKay*, 31 C. P. 1; *Adamson* v.

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Witnesses in M. O.

Adamson, 28 Gr. 228; *Brown* v. *Capron*, 24 Gr. 91; *Re Robbins*, 23 Gr. 162; *Halleran* v. *Moon*, 28 Gr. 319; *Re Ross*, 18 C. L. J. 11; *Re Laws, Laws* v. *Laws*, 28 Gr. 382; *Parker* v. *Parker*, 32 C. P. 113; *Birdsell* v. *Johnson*, 24 Gr. 202; *Findley* v. *Pedan*, 26 C. P. 483; *Rose* v. *Hickey*, 3 App. R. 309.

Cross-examination of.

A witness may be cross-examined in the Master's office on the whole case. The Master cannot properly confine the cross-examination to the evidence given in chief. But in some cases, it may be proper to exercise his discretion, as to the party to pay the fees of the examination: *Crandell* v. *Moon*, 6 U. C, L. J. 143.

Not to be recalled.

The Master should not allow a witness who has been examined, to be recalled in order to supplement his testimony, except in such cases as the Court itself would allow him to be re-examined. See *Patterson* v. *Scott*, 1 Gr. 582. As to subpœnaing witnesses in the Master's office, see *Ord.* 266.

Depositions in other actions.

DEPOSITIONS IN ANOTHER ACTION, OR BOOKS OF ACCOUNT, HOW FAR EVIDENCE.—As to how far evidence taken in another action, and books of account of third parties are receivable in evidence in the Master's office: see *Court* v. *Holland*, 8 P. R. 219.

Production of documents

Production of Books and Papers.—When books are in constant use, and the party required to produce them, offers to allow them to be inspected in his counting house, the Master should not require them to be left in his office, in the absence of any special ground for so doing: *Re Ross*, 8 P. R. 86; 5 App. R. 82; but the usual affidavit on production must be filed, though the deposit of the books in the Master's office be dispensed with: *Ib.*

Remedy for default in production.

DEFAULT.—Where default has been made in the production of documents, or the attendance of a witness to be examined, an application may be made to commit for contempt. The application should be made to a Judge, and not to the Master in Chambers, or to any County Court Judge, or Local Master: *Keefe* v. *Ward*, 18 C. L. J., 166; 2 C. L. T. 260. For form of certificate of default, see Leggo's Forms, 2nd ed., Nos. 669, 966; *Sutherland* v. *Rogers*, 2 Chy. Ch. R. 191.

Master may advertise for creditors, heirs, next of kin, &c.

223. The Master may cause advertisements for creditors, and if he thinks it necessary, but not otherwise, for heirs or next kin, or other unascertained persons, and the representatives of such as are dead, to be published as the circumstances of the case require; and in such advertisements he is to appoint a time within which such persons are to come in and prove their claims, and within which time, unless they so come in,

Time to be limited for coming in

they are to be excluded from the benefit of the decree. (3rd June, 1853; Ord. 42, s. 14.)

Master may dispense with advts. for creditors if proper advts. have been published, but not merely on account of lapse of time.

The Master may dispense with an advertisement for creditors in an administration action, where the personal representative had, before action, duly advertised under *R. S. O.* c. 107, s. 34; *Cuthbert* v. *Wharmby*, W. N. (69) 12; but he should state in his report that he has done so, and the reason for so doing. But mere lapse of time, even of twenty years, from the death of the deceased person whose estate is being administered, is not sufficient to warrant the Master in dispensing with an advertisement for creditors, and the Court has referred causes back to the Master to advertise for creditors, where the Master has omitted to do so, merely in consequence of the lapse of time.

Forms of advertisements.

See further as to advertisments for creditors of a deceased person, *Ord.* 475, and for form of advertisement for creditors in an administration action, see Schedule V, *post*; and for heirs or next of kin, see Leggo's Forms, 2nd ed., No. 893; a month at least should be allowed for creditors to file claims, three weeks was considered too short a time. See *Wood* v. *Weightman*, 13 L. R. Eq. 434.

Time to be allowed for sending in claims.

Persons interested to be served with copy of judgment.

Where the action has been constituted as provided by *Ord.* 58, heirs, and other persons interested, whose presence as original parties is dispensed with by that *Order*, are nevertheless to be served with a copy of the judgment, as provided by *Ord.* 60, unless the Master dispenses with service: *Ord.* 587. Where any of such persons cannot be found to be served with the judgment, the Master may require an advertisement to be published as a condition of dispensing with service on them.

Master to proceed on claims brought in.

224. The Master is to proceed on the claims brought in before him pursuant to such advertisement, without further notice, and may examine witnesses in relation thereto at the time appointed in the advertisement, or thereafter as he sees fit; and he is to allow or disallow, or adjourn the claims as to him seems just. (3rd June, 1853; Ord. 42, s. 11.)

Mode of proving claims of creditors.

In actions for the administration of a deceased person's estate, the mode of proving claims of creditors is regulated by *Ord.* 475 *et seq.*

In other actions the creditor, or claimant, is required to file his claim with an affidavit verifying it. If the claim be disputed, the claimant may be required, at the instance of an opposing party, to establish his claim by oral evidence. When the claim is evidenced by some written document, the production of the document and proof

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of its due execution, if disputed, and the claimant's affidavit of the amount due is usually a sufficient *prima facie* case, and the onus then rests with the party opposing the claim to adduce evidence; see *Court* v. *Holland*, 8 P. R. 213; and see *Ord* 448 and notes. A claimant may be cross-examined on his affidavit: *Cast* v. *Poyser*, 3 Sm. & G. 369; 3 Jur., N. S. 38; 26 L. J. Ch. 353, and see *Rule S. C.* 283.

Parties entitled to attend on proof of claims.

In actions for the administration of a deceased person's estate, no party other than the personal representative, unless by leave of the Master, can appear on the claim of any person, not a party to the cause, against the estate of the deceased in respect of a debt or liability. But the Master may direct any other party to the cause to appear, in addition to, or in place of, the personal representative, upon such terms as to costs as he shall think fit; see *Rules S. C.* 114, 518; and see ante *Ord.* 217, 218.

In creditors' actions, plaintiff must prove claim, and any creditor may dispute any other creditor's claim.

In a creditor's action, the plaintiff must prove his claim, and any creditor may dispute the claim of any other creditor: *Field* v. *Titmuss*, 1 Sim. N. S. 218; *Owens* v. *Dickinson*, Cr. & Ph. 48, subject to *Rules S. C.* 114, 518, referred to *infra*.

Creditors coming in, after time has expired.

Creditors who have omitted to file their claims within the time limited, may be allowed to come in and prove their claims, before report, by leave of the Master; and after report, on application in Chambers, so long as the fund remains in Court: *Lashley* v. *Hogg*, 11 Ves. 602; *Angell* v. *Haddon*, 1 Madd. 529; *Re Metcalfe*, W. N. (79) 166. But a creditor coming in after a dividend has been paid, is only entitled to prove against the residue of the fund for a similar proportion of his debt, he is not permited to disturb any prior division: *Gillespie* v. *Alexander*, 3 Russ. 130; *Greig* v. *Somerville*, 1 R. & M., 338; *Todd* v. *Studholme*, 3 K. & J. 324.

Creditor objecting to form of decree might rehear

A creditor proving a claim, and objecting to the form of the decree, could, under the former practice, only obtain relief by rehearing the cause: *Mulholland* v. *Hamilton*, 12 Gr. 413; *Willis* v. *Will's*, 20 Gr. 396. And a petition of a creditor to vary a decree was refused with costs: *Mulholland* v. *Hamilton supra*.

Creditor whose claim disallowed may appeal.

A creditor whose claim is disallowed, may appeal at once on a certificate of disallowance, without waiting for a general report: *Re Clagett, Fordham* v. *Clagett*, 20 Ch. D. 637; 46 L. T. N. S. 70.

Interest on claims, when allowed.

Interest cannot be allowed on merchants' accounts unless a demand of interest under the Statute *R. S. O.*, c. 50., s. 267 is proved: *Inglis* v. *Wellington Hotel Co.*, 29 C. P. 387. But in *Michie* v. *Reynolds*, 24 U. C. Q. B. 303, 310, Draper, C. J., said: "It has been the practice for a very long time to leave to the discretion of the jury to give interest where the payment of a just debt has been withheld, and we can find no good reasons to depart from that practice." And in

Spence v. *Hector*, *Ib.* 277, 281, the same learned Judge remarked that "interest is in practice much more frequently allowed by our juries than English authorities would seem to warrant;" and see *R. S. O.* c. 50, s. 266. After judgment has been recovered for a sum of money, payable "with interest until paid," it is doubtful whether the rate reserved by the contract can be recovered after judgment. In *Rykert* v. *St. John*, 4 App. R. 213, it was held that the contract became merged in the judgment, and only the interest payable under the judgment could be recovered. But in *Popple* v. *Sylvester*, 22 Ch. D. 98; 47 L. T. N. S. 329, it was held that the difference between the rate payable by the contract, and the rate recovered on the judgment, for the period between the recovering of judgment and payment, might be recovered in a subsequent action; and see. 19 C. L. J. 21.

Interest on claims, at what rate allowed.

225. The costs of proving such claims are, in the discretion of the Master, to be allowed to the creditors proving the same, and added to their debts respectively, or to be disallowed. And in case of their being allowed, they may be allowed in gross in place of taxed costs. (3rd June, 1853; Ord. 42, s. 11.)

Master may allow cost of proving claims.

In actions for the administration of the estate of a deceased person, no costs should be allowed to creditors whose claims are rendered pursuant to the advertisement, except when formal proof is also required and given; see *Ord.* 475 *et seq.* Where a claimant attempts to prove a claim and fails, the Master should tax to the party successfully opposing the claim the costs of the contestation, and an application can then be made in Chambers, or at the hearing on further directions, for the payment of such costs, notice being given to the claimant of the application: *Hatch* v. *Searles*, 2 Sm. & G. 147; Danl. Pr., 5th ed. 1109.

No costs to be allowed creditors who send in claims without formal proof

Costs of unsuccessful attempt to prove claim. how recoverable.

In the case of a deficiency of assets, the costs of creditors proving claims are to be added to their debts, and paid proportionately, and they are not entitled to be paid in priority to the debts: *Re Ætna Insurance Co.*, 17 Gr. 160; *Morshead* v. *Reynolds*, 21 Beav. 638; *Canham* v. *Neale*, 26 Beav. 266; Morgan & Davy on Costs: pp. 130, 131.

Costs of creditors added to their debts.

226. Under every order whereby the delivery of deeds or execution of conveyances is directed, the Master is to give directions as to the delivery of such deeds, and to settle conveyances where the parties differ, and to give directions as to the parties to the conveyances, and as to the execution thereof. (3rd June, 1853; Ord. 42, s. 14.)

Master's power as to settlement of conveyances.

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Additional powers of Master as to settlement of conveyances.

In every judgment, or order, directing a sale, the Master to whom the action is referred may, without any special directions, settle all necessary conveyances in case the parties differ, or in case there be any parties interested in the sale who are under any disability except coverture; see *Rule S. C.* 331; and see further as to sales, *Ord.* 374-397. Under this *Order* the Master has power to deal with questions arising on the conveyance as to the payment off of incumbrances; and when a party applied to the Court instead of to the Master, no costs were given: *Stammers* v. *O'Donohoe*, 29 Gr. 64.

Form of accounts to be brought in by accounting party.

227. Where any account is to be taken, the accounting party is, unless the Master otherwise directs, to bring in the same in the form of debtor and creditor, verified by affidavit. The items on each side of the account are to be numbered consecutively, and the account is to be referred to by the affidavit as an exhibit, and not to be annexed thereto. (3rd June, 1853; Ord. 42, s. 6.)

Personal representative bound to make up accounts from books in his possession.

When a personal representative of a deceased person is required to account in respect of the dealings of the deceased, he is bound to make up the accounts of such dealings, from the books in his possession: *Strathy* v. *Crooks*, 6 Gr. 162.

Objections to accounts, waiver of.

A party may be estopped by acquiescence from moving to set aside accounts brought in, in an improper form: *Weale* v. *Rice*, C. P. Coo. 438.

Cross-examining accounting party

Notice of objections necessary.

The deponent may be cross-examined on an affidavit verifying accounts. A party who is to be cross-examined on an affidavit verifying accounts, is entitled to detailed notice of the points in respect to which he is to be examined: *Re Lord*, *Lord* v. *Lord*, 2 L. R. Eq. 605. A notice that all the items but one are objected to, is insufficient: *McArthur* v. *Dudgeon*, 15 L. R. Eq. 102; and see *Ord.* 237, *post*. Such cross-examination may take place before the account is vouched: *Meacham* v. *Cooper*, 16 L. R., Eq. 102.

Master may direct books of account to be taken as *prima facie* evidence.

228. The Master, if he thinks fit, may direct that in taking accounts, the books of account, in which the accounts required to be taken have been kept, or any of them, be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objection thereto as they may be advised. (3rd June, 1853; Ord. 42, s. 2.)

This *Order* is adapted from Imp. Stat. 15 & 16 Vict. c. 86, s. 54.

Every sum of $8 and under, is allowed without a voucher, upon the oath of the accounting party; see *Everard* v. *Warren*, 2 Ch. Ca. 249; but his oath must be positive, and not on belief only: *Robinson* v. *Cumming*, 2 Atk. 410; and it would seem that the aggregate of such items should not exceed $400 in amount: Bennett's M. O. 86. Greater latitude in proving other items is also allowed when the account is of long standing: *Ib.* Receipts, or other vouchers, must be produced, but when they are lost, or accidentally destroyed, secondary evidence will be let in: *Ib.*; and it is to such cases, or when, for any other reason, it is impossible to vouch the account in any other way, that *Ord.* 218 is intended to apply: *Lodge* v. *Prichard*, 3 D. M. & G. 906; and see *Ewart* v. *Williams*, 7 D. M. & G. 67. In partnership cases, however, the books of account of the firm are admissible by virtue of the general law, without any special direction: *Gething* v. *Keighley*, 9 Ch., D. 547, 551. Books of trustees of a will, were allowed to be taken as *prima facie* evidence for a period of 21 years, as against a *cestui que trust* who had access to them, but had not actually inspected them: *Banks* v. *Cartwright*, 15 W. R. 417; and see *Sleight* v. *Lawson*, 3 K. & J. 292; *Ogden* v. *Battams*, 1 Jur., N. S. 791, *Hardwick* v. *Wright*, 15 W. R. 953.

Sums of $8 and under allowed without voucher.

Vouchers to be produced.

Books of account when admissible.

229. No state of facts, charges, or discharges are, to be brought into the Master's office; and where original deeds or documents can be brought in, no copies are to be made without special direction. (3rd June, 1853; Ord. 42, s. 5.)

No state of facts, &c., to be brought in.

230. Where directed, copies, abstracts of, or extracts from accounts, deeds, or other documents and pedigrees, and concise statements, are to be supplied; and where so directed, copies are to be delivered as the Master may direct. (3rd June, 1853; Ord. 42, s. 5.)

Copies, abstracts, &c., to be supplied as Master directs.

The party having the conduct of the reference, is usually required to furnish copies, abstracts, &c., which relate to the general enquiries, and the other parties only such as relate exclusively to themselves; see *ante* note to *Ord.* 211.

231. A party directed by the Master to bring in any account, or do any other act, is to be held bound to do the same in pursuance of the direction of the Master, without any warrant or written direction being served for that purpose. (3rd June, 1853; Ord. 42, s. 2.)

Parties bound by Master's direction without warrant.

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This *Order* of course implies that the party directed to do the act, or his solicitor, has actual notice of the direction, otherwise a warrant must be taken out and served.

Warrant to appoint a day to ascertain what is admitted and what contested.

232. Before proceeding to the hearing and determining of a reference, the Master may appoint a day in the meantime, if he thinks fit, for the purpose of entering into the accounts and inquiries, with a view to ascertaining what is admitted and what is contested between the parties. (3rd June, 1853; Ord. 42, s. 2.)

When day not previously appointed, warrant may issue to ascertain what admitted.

233. Where the Master has omitted to appoint a day for the purposes mentioned in Order 232, he may grant to the party bringing in accounts a warrant to proceed on the same, for the purposes aforesaid; such warrant to be underwritten, as follows: "On leaving the accounts of, &c.; and take notice that you are required to admit the same, or such parts thereof as you can properly admit." (3rd June, 1853; Ord. 42, s. 3.)

As to the costs occasioned by any party improperly refusing to admit facts, see *Ord.* 234; *McIntyre* v. *Canada Co.*, 18 Gr. 370, and see *Rule S. C.* 163.

Master to tax costs occasioned by improper refusal to admit items of account or other matters, and to state in report how they were occasioned.

234. Where it becomes necessary to adduce evidence or to incur expenses otherwise, in establishing or proving items of account, or other matters which in the judgment of the Master ought, under all the circumstances, to have been admitted by the party sought to be charged therewith, and which the party has refused to admit, the Master, before making his report, is to proceed to tax such costs, occasioned by such refusal, as shall appear to him reasonable and just, and shall state in his report the amount of such costs and how the same were occasioned." (3rd June, 1853; Ord. 42, s. 3.)

This *Ord.* appears to be still in force: See *Rule S. C.* 445.

As to recovering such costs by execution, see *Ord.* 235, and as to setting off same against general costs, see *Ord.* 236.

Process may issue to enforce payment of such costs.

235. The party to whom costs are payable under Order 234, is to be entitled, upon the Master's report becoming absolute to the process of the Court to com-

pel payment thereof as in other cases. (3rd June, 1853; Ord. 42, s. 3.)

It is not very clear from this *Order*, whether, or not, it is necessary to apply for an order for the payment of interlocutory costs awarded by a Master under *Ord.* 234, before execution can issue. Usually no execution can issue except under an order, or judgment, of the Court, or Judge, or of the Master in Chambers, or other officer having power to act in Chambers. See *Hatch* v. *Searles*, 2 Sm. & G. 147.

Costs occasioned by improper refusal to admit may be set off.

236. Where the party entitled to receive the general costs of the cause is the party ordered to pay costs under Order 234, he is at liberty to deduct such costs from the general costs, where the general costs and the interlocutory costs, are between the same parties. (3rd June, 1853; Ord. 42, s. 3.)

This *Ord.* appears to be still in force: See *Rule S. C.* 445.

Party seeking to discharge accounting party must give notice of particulars.

237. A party seeking to charge an accounting party beyond what he has in his account admitted to have received, is to give notice thereof to the accounting party, stating so far as he is able, the amount so sought to be charged, and the particulars thereof in a short and succint manner. (3rd Jund, 1853; Ord. 42, s. 7.) (*Eng. Con. Ord.* 35, *r.* 34.)

Accounting party entitled to notice of items, he is to be cross-examined on.

An accounting party who is intended to be cross-examined on his affidavit verifying his accounts, is entitled to notice of the items on which he is to be cross-examined: *Re Lord*, *Lord* v. *Lord*, 2 L. R., Eq. 605; *Wormsley* v. *Sturt*, 22 Beav. 398, and it is not sufficient to inform him that all the items except one are objected to, but the notice must specify the points on which the cross-examination is to proceed: *McArthur* v. *Dudgeon*, 15 L. R., Eq. 102, and see *Glover* v. *Ellison*, 20 W. R. 408, and unless he be duly notified he may refuse to be sworn: *McArthur* v. *Dudgeon*, *supra*; see Eng. Ord. 30, of 16th Oct., 1852.

Master's Book, how to be kept.

238. The Master is to keep in his office a book, to be called the "Master's Book," in which, upon the bringing in of an order of reference, are to be entered, the style of the cause, the name of the solicitor prosecuting the reference, the date of the order being brought in, and the proceedings then taken; and the Master is

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also to enter therein, from time to time, the proceedings taken before him, and the directions which he gives in relation to the prosecution of the reference, or otherwise. (3rd June, 1853; Ord. 42, s. 4.)

Master to certify proceedings in his office.

239. Upon the application of any person, the Master is to certify, as shortly as he conveniently can, the several proceedings had in his office in any cause or matter, and the dates thereof. (3rd June, 1853; Ord. 42, s. 9.)

After a Master has made his report, he should not certify as to any matters before him in the course of the enquiry upon which he has made his report, unless required by the Court so to do: *Rosebatch* v. *Parry*, 27 Gr. 193.

For forms of certificates, see Leggo's Forms, 2nd ed., Nos. 669, 966, As to appealing from a certificate, see *post Ord.* 252, note.

Master to devise simplest and speediest method of prosecuting references.

240. In giving directions, and in regulating the manner of proceeding before him, the Master is to devise and adopt the simplest, most speedy, and least expensive method of prosecuting the reference, and every part thereof; and with that view, to dispense with any proceedings ordinarily taken, but which he conceives to be unnecessary and to shorten the periods for taking any proceedings; or to substitute a different course of proceedings for that ordinarily taken. (3rd June, 1853, Ord. 42, s. 2.)

The Master is not authorized under this *Order* to employ the services of experts: *Re Robertson, Robertson* v. *Robertson*, 24 Gr. 553.

Appointments for several days may be included in one warrant.

241. Where the Master directs parties not in attendance before him, to be notified to attend at some future day, or for different purposes at different future days it shall not be necessary to issue separate warrants, but the parties shall be notified by one appointment, signed by the Master, of the proceedings to be taken, and of the times by him appointed for the taking of the same. (29th June, 1861.)

The words "warrant" and "appointment," though apparently used in this and the two following *Orders* as distinct things, appear

nevertheless to be in effect convertible terms : see Bennett's M. O., p. 6 *et. seq.*, and see form of warrant : Bennett's M. O. App. i.

242. Where parties are notified by appointment from the Master, of proceedings, to be taken before him, no warrants are to be issued as to such parties, in relation to the same proceedings. (29th June, 1861.)

Parties notified by Master not to be served with warrant.

243. Parties making default upon such appointments, are to be subject to the same consequences as if warrants had been served upon them. (26th June, 1861.)

Parties notified, liable for default, as if served with warrant.

244. Where in proceedings before the Master, it appears to him that some persons not already parties ought to be made parties, and ought to attend, or be enabled to attend the proceedings before him, he may direct an office-copy of the decree to be served upon such parties ; and upon due service thereof, such parties are to be treated and named as parties to the suit, and are to be bound by the decree in the same manner as if they had been originally made parties. (3rd June, 1853 ; Ord. 42, s. 15.)

Master may add parties in his office.

see Order 60

The Master has power to dispense with service of the judgment on parties required to be served therewith under *Ord.* 60 ; see *Ord.* 587 ; but he would seem to have no power to dispense with service on parties who ought to be added as parties under the provisions of this *Order*.

Master may dispense with service of judgment.

Persons served with a copy of a judgment under *Ord.* 60, are not thereby made parties to the action : see notes to *Ord.* 60 ; but persons required to be served under *Ord.* 244, are made parties to the action.

Where persons are required to be added as parties, the Master usually issues an order making them parties, and directing them to be served with the judgment, or order, of reference, indorsed as required by *Ord.* 245.

Adding parties

Persons who acquire equitable interests in the subject matter of litigation *pendente lite* need not be added as parties, but are nevertheless bound, and concluded, by the proceedings : thus, a person recovering a judgment, and execution, against a mortgagor : *Wallbridge* v. *Martin*, 2 Chy. Ch. R. 275 ; or obtaining a mortgage, or other incumbrance from him : *Robson* v. *Argue*, 25 Gr. 407 ; pending an action for foreclosure, or sale, by a prior mortgagee, need not be made a

Persons acquiring interest *pendente lite* need not be added.

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Except assignee of legal estate

party. But where a person acquires the legal estate *pendente lite* it may sometimes be necessary to make him a party for the purpose of obtaining a conveyance.

Persons having paramount title cannot be added in M. O.

Persons having a paramount title to the plaintiff, can not be made parties in the Master's office, if they object: *Montgomery* v. *Shortis*, 3 Chy. Ch. R. 69. Thus in a suit by an execution creditor, to set aside a fraudulent conveyance of the equity of redemption by the execution debtor, an order adding a prior mortgagee for the purpose of redeeming him, was discharged. When that is required he should be made an original party to the action: *Crawford* v. *Meldrum*, 19 Gr. 165. But when a decree had been made to take partnership accounts, in the absence of one of the partners alleged to be insolvent and out of the jurisdiction, it was held that he was properly made a party in the Master's office on his returning to the jurisdiction pending the reference: *Paterson* v. *Holland*, 7 Gr. 563; and as to parties interested in the equity of redemption, see *Ord.* 438.

Party out of jurisdiction when action commenced, may be added in M. O. on his return.

When action is deemed to be commenced, as against parties added in M. O.

The action is only deemed to be commenced as against parties added in the the Master's office from the date of the order adding them: *Juson* v. *Gardiner*, 11 Gr. 23; and see *Dumble* v. *Larush*, 27 Gr. 187; *Sterling* v. *Campbell*, 1 Chy. Ch. R. 147. Where it is made to appear to the Master that all liability on the part of a party added, is barred by the Statute of Limitations, he may discharge the order adding him as a party: *Kline* v. *Kline*, 3 Chy. Ch. R. 161.

No relief can be had against parties added.

No direct relief can be had against parties added in the Master's office, and they cannot be required to account: *Hopper* v. *Harrison*, 28 Gr. 22; *Rolph* v. *Upper Canada Building Society*, 11 Gr. 275, 278; *Walker Seligmann*, 12 L. R. Eq. 152. And it would seem they cannot themselves get any relief against co-defendants beyond what is claimed by the plaintiff: see *Whitney* v. *Smith*, 4 L. R. Chy. 513; they are simply bound by the proceedings.

Party filling two capacities, added in one, may not be bound in the other.

A party filling two capacities, if made a party to a suit distinctly in one capacity only, may not be bound as to his rights in the other capacity; *e. g.*, a person added as a defendant in his character of a judgment creditor, was held not to be bound in his character as a mortgagee: *Crooks* v. *Watkins*, 8 Gr. 340.

Office copy of judgment to be served on parties added in M. O.

245. The office-copy of a decree directed to be served under Order 244, is to be indorsed with a notice to the effect set forth in schedule L to these Orders, with such variations as circumstances require. (3rd June, 1853: Ord. 42, s. 15.)

Parties added in M. O. may move against judgment.

246. A party served with an office-copy of a decree under Order 244, may apply to the Court, at any time

within fourteen days from the date of such service, to discharge the order, or to add to, vary, or set aside the decree. (3rd June, 1853; Ord. 34, s. 7.)

Application when to be heard.

The application should be brought on to be heard within the fourteen days, see *Ord.* 339, and cases there noted. But the application may, in the discretion of the Court, be entertained after that time: *Stewart* v. *Hunter*, 2 Chy. Ch. R. 265.

The time of vacation is excluded from the fourteen days: *Ord.* 408, s. 7.

Party added who claims to be prior to plaintiff, should move to discharge order, or may appeal.

Where a party is added who claims by title paramount to the plaintiff, he should move to discharge the order: *Montgomery* v. *Shortis*, 3 Chy. Ch. R. 69; *Crawford* v. *Meldrum*, 19 Gr. 165. But an incumbrancer claiming priority to the plaintiff, but whom the Master finds to be subsequent, may also appeal from the report on the question of priority: *McDonald* v. *Rodger*, 9 Gr. 75.

Master may discharge order when.

The Master may himself discharge the order adding a party who subsequently appears to be an unnecessary party: *Kline* v. *Kline*, 3 Chy. Ch. R. 161.

Master to notify parties when hearing concluded, and to note it in his book. Thereafter no evidence can be given except by leave.

247. As soon as the hearing of any matter pending before the Master is completed, he shall so inform the parties to the reference then in attendance, and make a note to that effect in his book; and after such entry no further evidence is to be received, or proceedings had, without the special permission of the Master; and the Master may proceed to prepare his report or certificate without further warrant, except the warrant to settle, which is to be served on the parties, as the Master directs. (3rd June, 1853; Ord. 42, s, 16.)

Warrant to settle report to be served.

Master's report and certificate.

There is no difference between a report and a certificate of a Master, "though we apply the term 'report' to the more lengthened productions of a Master, and the term 'certificate' to his shorter statements. It is, I think, clear that all his reports are certificates, and all his certificates are reports," per Shadwell, V. C., *Chennel* v. *Martin*, 4 Sim. 344.

Parties served with judgment, not entitled to notice, unless they attend proceedings.

Parties served with the judgment under *Ord.* 60, who do not give notice to the plaintiff that they desire to attend the proceedings, need not be served with a warrant to settle the report: *Green* v. *Measures*, W. N. (66), 122; *Lee* v. *Sturrock*, W. N. (76), 226.

Warrant to settle report.

It would seem that a warrant to settle a report requires four days' service. See Bennett's M. O. 20; Beames' Ord. in Chy. 259.

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Application to open reference.

When the Master has closed the reference, an application to let in further evidence may be made to him at any time before the report is signed: *Re Ritchie, Sewery* v. *Ritchie*, 23 Gr. 66. After report, the application can only be made to the Court: *O'Donohoe* v. *Hembroff*, 9 C. L. J. 312, or a Judge: see note to *Ord.* 252. But to warrant such application being granted, the applicant must in general make such a case as would entitle him to a new trial: *Waddell* v. *Smyth*, 3 Chy. Ch. R. 412; and see *Patterson* v. *Scott*, 1 Gr. 582; *Saunders* v. *Saunders*, 45 L. T. N.S.628; *Carradice* v. *Currie*, 19 Gr. 108; *Mason* v. *Seney*, 12 Gr. 143; *Hosking* v. *Terry*, 8 Jur. N. S. 977.

Master not *functus officio* till he has fully reported.

A Master is not *functus officio* until he has made his report on all the matters referred to him: *Rae* v. *Geddes*, 3 Chy. Ch. R. 404; but after he has made his report he should not certify as to any matters before him in the course of the enquiry upon which he has made his report, unless required by the Court so to do: *Rosebatch* v. *Parry*, 27 Gr. 193.

Masters' Reports are either, General, Special, or Separate.

General report.

A GENERAL REPORT, is that which comprises the conclusion which the Master has come to, upon all the matters referred to him by the judgment, or order under which he has proceeded.

Separate report.

A SEPARATE REPORT is that which embraces one or more separate matters of the reference, and the conclusion the Master has come to thereon; and is limited thereto apart from the other matters referred.

Special report.

A SPECIAL REPORT, is a report of special circumstances found by the Master, as a guide to the Court for some further direction upon the facts so reported.

Special reports on matters which the Master has power himself to adjudicate upon, and dispose of, are not to be made, unless specially directed by the judgment, or order, of reference. See Bennett's M. O. 18, 19; *Walmsley* v. *Bull*, 2 Chy. Ch. R. 344.

A report should not be dated before the costs included therein have been revised, when revision is necessary: *Waddell* v. *McColl*, 14 Gr. 211.

Report should state results, not reasons, or arguments, unless directed.

A report, like a judgment, should state results only, and should not set forth the evidence, arguments, or reasons on which the conclusions are arrived at: *Sovereign* v. *Sovereign*, 15 Gr. 559.

When the Master is specially directed to state his reasons, they should be stated briefly: *McCargar* v. *McKinnon*, 15 Gr. 361. All unnecessary prolixity in reports is to be avoided: S. C., 17 Gr. 525.

It should not go beyond order of reference.

The report should not go beyond the order, or judgment, of reference, or the Court will not respect it; see Beames's Orders 23; and see *Clouster* v. *McLean*, 10 Gr. 576. And matters should not be

reported specially, or as special circumstances, which the Master has himself power to adjudicate upon : *e. g.*; whether or not an accounting party is chargeable on the footing of wilful default, &c. : *Walmsley* v. *Bull*, 2 Chy. Ch., 344 ; whether or not a particular debt is, or or is not, an asset of an estate being administered : *Clouster* v. *McLean*, 10 Gr. at p. 578.

Nor report specially matters the Master has power to adjudicate on.

But the Master should state in his report such matters as may be necessary for the information of the Court, on further directions, or to enable it to dispose of the question of costs : *e. g.* The priorities of creditors : *Lavin* v. *O'Neill*, 13 Gr. 179 ; and of legatees : *Clouster* v. *McLean*, 10 Gr. 576, should be stated ; and when a separate solicitor is appointed to represent a class, which is *prima facie* sufficiently represented by the plaintiff, or some other party to the action, the reason for the appointment should be stated : *Gorham* v. *Gorham*, 17 Gr. 386.

But should report matters necessary for disposition of costs

Sums charged against an accounting party, on the footing of wilful default, should be distinguished in the report from sums actually received : *Moodie* v. *Leslie*, 12 Gr. 537.

Sums charged against a party for wilful neglect should be distinguished.

When the Master dispenses with service of judgment on parties required to be served therewith by *Ord.* 60, he must state his reasons therefor, in his report ; see *Ord.* 587.

When service of judgment dispensed with, it should be stated.

The Master should not make a final report in an action until he is in a position to deal with all the matters referred to him : *e. g.*, it is improper to make a final report in an action to wind up a partnership, finding a balance due from one partner to another, until all the assets are realised : *Smith* v. *Crooks*, 3 Gr. 321. But when the Master is not able to make a final report, he may, when necessary, make a *separate* report as to certain of the matters referred to him, and which he is able to report on. A report on sale is a familiar illustration of a *separate* report ; see *Ord.* 247, note.

Final report not to be made, until the Master is in a position to deal with all matters referred.

For forms of reports on sales see *Ord.* 387 ; and of reports in administration actions, *Ord.* 589.

248. Parties are to raise before the Master, in respect of any matter presented in his office, for his decision, all points which may afterwards be raised upon appeal; and in case an appeal is allowed on any ground not distinctly taken before the Master, the Court may order the appellant to pay the costs of the appeal. (6th Feb., 1865 ; Ord. 36.)

Points intended to be raised on appeal to be taken before Master.

From the terms of this *Order* it would seem that the Court may, in its discretion, entertain appeals on grounds not distinctly taken before the Master, but in such cases may order the appellant, even if successful, to pay the costs of the appeal.

Points intended to be raised on appeal should be distinctly taken before Master.

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In order to avoid any question as to whether or not any point intended to be raised on appeal, has been taken before the Master, it is safer to deliver the objection in writing, or to have it noted in the Master's Book; but this is not absolutely necessary. See *Ord.* 253.

Or Court may refuse to entertain it.

Although the Court may allow an appeal on a ground not taken before the Master, it may refuse so to do. Thus, the Court refused to allow the Statute of Limitations to be raised on appeal, it not having been raised before the Master: *Brigham* v. *Smith*, 18 Gr. 224; and see *Clouster* v. *McLean*, 10 Gr. 576.

See further as to appeals from reports: *Ord.* 253 and notes.

Accounts, charges, affidavits, &c., not to be set out in report.

249. In the Master's reports no part of any account, charge, affidavit, deposition, examination, or answer, brought in or used in the Master's office, is to be stated or recited, but, instead thereof, the same may be referred to by date or otherwise, so as to inform the Court as to the paper or document so brought in or used. (3rd June, 1853; Ord. 42, s. 12.)

As to form of reports, see note to *Ord.* 247, pp. 130-1.

Schedule to be attached as to moneys in Court, or payable into Court.

250. Reports affecting money in Court, or to be paid into Court, are to set forth in figures, in a schedule, a brief summary of the sums found by the report, and which may be paid or payable, into, or out of Court. (10th Sept. 1865; Ord. 16.)

Report to be issued to party prosecuting reference, or if he decline it, then to any other party.

251. As soon as the Master's report or certificate is prepared, it is to be delivered out to the party prosecuting the reference, or in case he declines to take the same; then, in the discretion of the Master, to any other party applying therefor; and a common attendance is to be allowed to the party taking the same. (3rd June, 1853; Ord. 42, s. 16.)

Report when to become absolute.

252. A report is to become absolute, without an order confirming the same, at the expiration of fourteen days after the filing thereof, unless previously appealed from. (29th June, 1861.)

Reports requiring confirmation.

Reports which Require Confirmation.—All reports and certificates, which are the subject of appeal, are, as a general rule, required to be confirmed before they can be acted on: *Scott* v. *Livesey*, 2 Sim.

& S. 300; or any application can be made to the Court founded thereon: *Hayes* v. *Hayes*, 8 P. R. 546; *Nichols* v. *McDonald*, 6 Gr. 594. There are, however, some reports, and certificates, which may be acted upon without confirmation, on their being filed. Reports which require confirmation, may be confirmed by special order before the expiration of the time limited for appealing therefrom, upon notice to, or consent of, all parties interested. An order confirming a report may be made by the Master in Chambers.

Reports not requiring confirmation.

Reports which do not Require to be Confirmed.—All reports, or certificates, of mere calculation, and of matters of opinion, which do not require any further order from the Court to give effect to, or sanction them,—except reports on sales,—do not require confirmation. Under this head are included certificates of compliance, or non-compliance, with any order of the Master, or of the Court, (but not certificates of insufficient compliance; *e.g.*, that accounts filed are insufficient in substance and form: *Foster* v. *Morden*, 9 P. R. 70.) Certificates for commissions to take evidence; certificates of scandal, or impertinence, in pleadings, or affidavits, referred to the Master; reports appointing trustees, or committees: (but see *Finkle* v. Date, 7 P. R. 413; *Foster* v. *Morden*, *supra*;) reports on passing the accounts of receivers, or committees; reports computing subsequent interest, or of apportionment of a fund on principles and in proportions, declared by the Court: reports approving of conveyances; and other certificates and reports of a like description; see Sm. Pr. 2nd ed., Vol. II., 357-8.

No appeal after confirmation, without leave

No Appeal After Confirmation without Leave.—After a report requiring confirmation has been confirmed, no appeal from it will be entertained without leave first given, on special application: *Thomson* v. *Luke*, 10 Gr. 281.

Effect of confirmation.

Effect of Confirmation.—After confirmation, the parties are concluded by the report; yet the Court in its discretion may refuse to act upon it, and may refer the cause back to the Master, or require additional information to be furnished: *Taylor* v. *Craven*, 10 Gr. 488.

Clerical errors may be corrected notwithstanding.

Notwithstanding confirmation, clerical errors, and accidental slips in a report, may be corrected at any time upon motion in Chambers without appeal: *Morley* v. *Matthews*, 12 Gr. 453; *King* v. *Connor*, 10 Gr. 364; *Watson* v. *Moore*, 1 Chy. Ch., R. 266; and where the error was apparent on the face of the report, the application was granted *ex parte*: *White* v. *Courtney*, 1 Chy Ch., R. 11. But although the error be apparent, it does not follow that the proper correction is apparent, and the motion therefore is usually required to be on notice, or consent: *Simpson* v. *Ottawa*, 2 Chy. Ch., R. 12. Mistakes in a report, however, cannot be corrected by the Master *mero motu*, on any subsequent reference in the action: *Crooks* v. *Street*, 1 Chy Ch., R. 78; but on a reference back upon an appeal,

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when the Court enunciates a principle, which is applicable to other parties, and other points, than those expressly concerned in the appeal, it is the duty of the Master so to apply that principle in all cases to which it is applicable in making his new report, even though it involve the readjustment of an account not appealed from: *Denison* v. *Denison*, 17 Gr. 306.

Motion to refer back.

Formerly, motions to refer a report back to the Master, were required to be made in Court; they could not be entertained in Chambers, even on consent: *Graham* v. *Godson*, 2 Chy. Ch., R. 472; or though the Master certified that he had made a mistake: *Bently* v. *Jack*, 2 Chy. Ch. R. 473. But now that appeals from Masters' reports are required to be brought before a Judge in Chambers, (see *Ord.* 642, *Rule S. C.* 3;) it would seem that a motion to refer back a report may also be properly made to a Judge in Chambers; *Ross* v. *Stevenson*, 7 P. R. 126. But it would seem the Master in Chambers has no jurisdiction to entertain such applications. Even though an appeal be had, the report will stand confirmed as to matters not objected to by the appeal, and which the decision on the appeal does not affect: *Denison* v. *Denison*, 17 Gr. 308; *Ross* v. *Perrault*, 13 Gr. 206. And when the report is referred back, an appeal will not lie from the further report, for matters disposed of by the first report, and not objected to on the first appeal: *Ross* v. *Perrault*, *supra*, or affected thereby: *Denison* v. *Denison*, 17 Gr. 308.

Report stands confirmed, as to matters not embraced in appeal.

Waiver of objection that appeal too late.

When notice of appeal is delivered, without leave, after a report is confirmed, the delivery of notice of cross-appeal is a waiver of the objection: *Larkin* v. *Armstrong*, 1 Chy. Ch., R. 31.

Report not to be dated before costs revised,—made in vacation, is irregular.

The report should not be dated before the costs have been revised, where revision is necessary, *Waddell* v. *McColl*, 14 Gr. 211. A report made in vacation without the consent of all parties is irregular: *Anderson* v. *Thorpe*, 12 Gr. 542; and as to parties who have no notice, it is a nullity: *Fuller* v. *McLean*, 8 P. R. 549; but parties having notice of the proceedings before the Master in vacation, must move against them, or they will be confirmed: *Mitchell* v. *Mitchell*, 22 Gr. 23.

Confirmation of report.

Confirmation of Report.—This *Order* is modified by *Ord.* 642, *Rule S. C.* 3.

A report requiring confirmation, does not now become absolute until thirty days from the making, and fourteen days from the filing thereof, have elapsed: *Re Eaton, Byers* v. *Woodburn*, 8 P. R. 289. An application to extend the time for appealing from a report, even before confirmation, must be made on notice; see *Hamilton* v. *Tweed*, 9 P. R. 448; as also an application for leave to appeal after the time has expired: *Peterborough* v. *Ireton*, before Proudfoot, J., Nov. 11th, 1883.

Where it is desired to confirm a report before the expiration of the month, a special application in Chambers may be made for that purpose, but such applications are usually granted only where all parties entitled to appeal consent. Special order confirming report, when made.

Filing Report.—The report must be filed before an appeal will lie: *Hayes* v. *Hayes*, 8 P. R. 546. If it appoint a day for payment of money, it should be filed before the day of payment: *Mills* v. *Dixon*, 2 Chy. Ch. R. 53; and confirmed: *Mountain* v. *Porter*, 1 Chy. Ch. R. 207, if it is a report requiring confirmation. No proceedings can properly be taken on a report until filed, either by the issue of process, or otherwise; Beames' Ord. 293; *Jellett* v. *Anderson*, 8 P. R. 387; even though the report or certificate be one not requiring confirmation: *Ib*; but such reports can be acted on, immediately on filing, it is not necessary to wait fourteen days: *Re Yaggie*, 7 U. C. L. J. 293. Filing report; time for.

Place of Filing.—The former practice of the Court of Chancery required that a report should be filed in the office of the Clerk of Records and Writs, at Toronto, no matter where the suit might have been commenced. The same practice has been continued in the Chancery Division since the *The Judicature Act*. The Registrar of the Common Pleas Division, however, has declined to file a report in his office, when the action in which it was made, was commenced in an outer office: see *Rule S. C.* 50. As the filing of the report in the proper office is an essential preliminary to its confirmation, it is important that there should be no mistake made in the place of filing. Where to be filed

Leave to Appeal After Confirmation.—After a report is confirmed, leave to appeal from it may be granted on motion in Chambers. The application must be made on notice, or consent: *Cozens* v. *McDougal*, 1 Chy. Ch. R. 29; *Cade* v. *Newhall*, 1 Chy. Ch. R. 200; *Peterborough* v. *Ireton*, before Proudfoot, J, 11th November, 1883; all parties are entitled to notice even though they be in the same interest as the party seeking to appeal: *Larkin* v. *Armstrong*, 1 Chy. Ch. R. 31. Where leave has been granted *ex parte*, the objection to the order may be taken on the appeal coming on for argument, *Peterborough* v. *Ireton*, *supra*. On such application it is necessary to account for the delay, and to show a *primâ facie* ground of appeal: *Dickson* v. *Avery*, 3 Chy. Ch. R. 222; *Rowe* v. *Wert*, 13 C. L. J. 326; *Caisse* v. *Burnham*, 6 P. R. 201; *Dudley* v. *Berezy*, 3 Chy. Ch. R. 81; *Chard* v. *Meyers*, 3 Chy. Ch. R 420. It is not absolutely necessary that the grounds of the proposed appeal, should be stated in the notice of motion for leave to appeal: *Romanes* v *Herns*, 2 Chy. Ch. R. 363; but reasonable, and probable, grounds of appeal, must be shown by the affidavits: *Ib*. and a mere statement of the proposed grounds of appeal in the notice of motion will not suffice: *De Blaquiere* v. *Armstrong*, 9 C. L. J. 363; but costs unnecessarily incurred in making out a case on the merits were disallowed: *Nash* v. *Glover*, 6 P. R. No appeal after confirmation without leave. What necessary to be shown on application.

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Master in Chambers may grant leave.

267. The Master in Chambers has jurisdiction to entertain the application ; *Russel* v. *Brucken* 3 Chy. Ch. R. 488.

Leave to appeal was refused with costs, where it appeared that the object of the appeal, was to fix executors with interest upon a sum which they had invested, and upon which a loss had been incurred : *Coates* v. *McGlashan*, 2 Chy. Ch. R. 218.

Appeal from Master's report.

253. An appeal shall lie to the Court, upon motion, at any time after the signing of the report until the expiration of fourteen days from the filing of the same, in respect of the finding of the Master upon any matter presented in his office for his decision, without written objections or exceptions being previously taken. (29th June, 1861.)

This *Order* is modified by *Ord.* 642, *Rule S. C.* 3.

Appeal when necessary.

Appeal, when Necessary.—Ordinarily, where the objection to the report is not manifest on its face, an appeal must be brought, unless the report be a nullity as, *e. g.*, where made without notice in vacation: *Fulier* v. *McLean*, 8 P. R. 549 ; or under an invalid order: *Queen* v. *Smith*, 7 P. R. 429 ; *Brown* v. *Dollard*, 6 P. R. 113 ; where the report goes beyond the judgment, or order, of reference, the report as to such matters will "not be respected" by the Court : Beames' Ord. 23. and therefore no appeal as to such matters would seem necessary ; an incumbrancer claiming priority to the plaintiff, who is made a party as a subsequent incumbrancer, may either move to set aside the order making him a party, or appeal from the report on the question of priority : *McDonald* v. *Rodger*, 9 Gr. 75, and see *Montgomery* v. *Shortis*, 3 Chy. Ch. R. 69.

Time for appealing.

Time for Appealing.—An appeal from any report, ruling, or other determination, of any Master, may now be brought on for argument, on any day that a Judge may sit in Chambers, within one month from the date of such report, ruling, or other determination—or within such further time as a judge may think proper ; vacation is excluded from the computation of the month : *Ord.* 642. An appeal from a ruling of a Master, must be brought within the same time as is allowed for appealing from a report : *Mitchell* v. *Mitchell*, 22 Gr. 23.

Notice of appeal, and setting down for argument.

Notice of Appeal, and Setting Down for Argument.—Seven clear day's notice, of the appeal must be given to the opposite party; *Hayes* v. *Hayes*, 8 P. R. 546 ; and the appeal must be set down for argument, not later than the Saturday preceding the day on which it is to be argued : *Ord* 642 *Rule S. C.* 3.

In the Chancery Division, such appeals are heard on Monday ; and in the other Divisions on Tuesday, and Friday, in each week, vacations excepted.

Before notice of an appeal is given the report must be filed: *Hayes* v. *Hayes*, 8 P. R. 546. Report must be first filed.

The notice of appeal should set out *seriatim* the grounds upon which the appeal is brought, and should include all the grounds of objection intended to be urged—objections cannot be raised on an appeal from a further report, made in pursuance of an order to the Master to review his report, which might have been taken, but were not, on the appeal from the original report: *Ross* v. *Perrault*, 13 Gr. 206. Notice of appeal should set out grounds.

Who Entitled to Appeal.—Any person, having a substantial interest in the question involved in an appeal, is entitled to appeal; but persons having no interest in the subject of appeal, cannot appeal, even though the report be erroneous: *Thompson* v. *Luke*, 10 Gr. 281; *McCargar* v. *McKinnon*, 17 Gr. 525; neither will an appeal lie from a Master's ruling, or direction, by a party who has complied with it, even though it be to escape commitment for disobedience: *Mitchell* v. *Mitchell*, 22 Gr., at p. 24; neither will an appeal lie, where the amount involved is of trifling amount *e. g.*, where not more than $10 was in question, an appeal was dismissed: *McQueen* v. *McQueen*, 2 Chy. Ch. R. 344. Appeals might formerly be brought from a Master's certificate of taxation: *Grahame* v. *Anderson*, 2 Chy. Ch. R. 303; *Re Ponton*, 15 Gr. 355; from a Master's ruling as to any point, raised on a taxation of costs: *Stinson* v. *Martin*, 2 Chy. Ch. 86; but now, there is no appeal to a Judge direct from a local officer's taxation, but his taxation must be first revised by one of the Taxing Officers in Toronto, from whom an appeal can be had to a Judge: *Crowe* v. *Steeper*, 2 C. L. T. 83; *McGannon* v. *Clarke*, 19 C. L. J. 236; *Gage* v. *Canada Publishing Co.*, 19 C. L. J. 175; 3 C. L. T. 267; *Torrance* v. *Torrance*, 9 P. R. 271. An appeal may also be brought, before the Master has made his report, from his ruling as to the admissibility of evidence: *McDonald* v. *Wright*, 12 Gr. 552; or upon his finding as to the principle upon which an account should be taken: see *Court* v. *Holland*, 29 Gr. 19; or by a creditor from the Master's ruling, disallowing his claim: *Wood* v. *Brett*, 9 Gr. 452, and he need not wait for a general report, but may at once obtain a certificate of disallowance and appeal therefrom: *Re Clagett*, *Fordham* v. *Clagett*, 20 Ch. D. 637; 46 L. T. N. S. 70. Who entitled to appeal. Party having no interest, or who has complied with Master's ruling, cannot appeal. No appeal where amount involved is trifling. Appeal may be had from taxation, by taxing officer. And from Master's ruling as to admissibility of evidence; or principle on which accounts to be taken; or on disallowance of a claim.

Where a cause had been referred to a Master as an arbitrator, by a consent decree, which provided that "either party should be at liberty to appeal against the award in the same manner and to the same extent that a report may be appealed from," it was held nevertheless, that an appeal from the award could not be entertained: *Burns* v. *Chamberlin*, 25 Gr. 148. Where the order directing the reference was made without jurisdiction, the Court refused to enter- No appeal from an award.

tain any appeal from a report made thereunder: *Queen* v. *Smith*, 7 P. R. 429; *Brown* v. *Dollard*, 6 P. R. 113.

Matters not objected to on first appeal, not appealable on a subsequent appeal

When on an appeal from a Master's report a reference back to review the report is ordered, the appellant cannot appeal from the further report as to matters disposed of by the first report, and not objected to on the first appeal: *Ross* v. *Perrault*, 13 Gr. 206.

Hearing of appeal.

Hearing of Appeal.—Appeals from the Master's ruling as to the regularity of proceedings in his office, in point of form, will not be readily allowed, even though the Court be of opinion that he might have properly taken an opposite view: *Scalthorpe* v. *Burn*, 12 Gr. 427.

On questions of fact; credibility; or weight of evidence; Master, who has seen witnesses, not readily overruled.

On matters of fact decided by the Master who has had the witnesses before him, the Judge will differ from the Master with great hesitation, and only when it is manifest that he has fallen into error: *Coldwell* v. *Hall*, 9 Gr. at p. 115: and the Judge will not in general interfere with the decision of the Master as to the weight of evidence, and as to the relative credibility of witnesses whose evidence has been taken before him, *viva voce*: *Day* v. *Brown*, 18 Gr. 681; *Waddell* v. *Smyth*, 3 Chy. Ch. R. 412. But if it can be shown, that there is not only a balance of direct testimony, but also corroborative circumstances pointing strongly against the Master's conclusion, the Judge on appeal may review the evidence, and reverse his finding on a question of fact: *Chard* v. *Meyers*, 19 Gr. 358; *Armstrong* v. *Gage*, 25 Gr. 1; *Morrison* v. *Robinson*, 19 Gr. 480. When the Master determines the question without seeing the witnesses, the Judge will, in such a case, be less trammelled by the Master's finding, and will dispose of the question upon his own judgment as to the weight of evidence: *Fawcett* v. *Burwell*, 27 Gr. 445.

But if he have not seen witnesses, Judge, on appeal, will exercise his own judgment.

Grounds of appeal to be recited in order.

Order on Appeal.—The order on appeal should always recite the grounds of the appeal: *Downey* v. *Roaf*, 6 P. R. 89.

Variation of report.

Where the report is varied it would seem that it is not the proper practice to make any actual alteration in the original: *Fox* v. *Bearblock*, 45 L. T. N. S. 469; 17 Ch. D. 429; 46 L. T. N. S. 145; nor where the alteration is simple, need it be referred back to the Master to alter: *Teeter* v. *St. John*, 10 Gr. 85, the order on the appeal specifying the alteration made, being sufficient: *Ib.*

On reference back, if further evidence not to be received, it should be so stated.

Where the report is referred back, and it is not intended that further evidence should be received, the order must contain a direction to that effect: *Morley* v. *Matthews*, 12 Gr. 453; 3 C. L. J. 21.

Further evidence, when receivable.

Reference back.—When a report is referred back, the Master is at liberty, as of course, to receive further evidence, unless the Judge otherwise orders, or the reference back is expressed to be for a purpose on which further evidence could not be material: *Morley*

v. *Matthews*, 12 Gr. 453. Where the reference back is to ascertain a particular fact, the Master cannot open other matters in his report not objected to on appeal: *Williams* v. *Haun*, 10 Gr. 553. Nor on a reference back can the Master entertain a claim not previously made before him, unless specially ordered so to do: *Romaines* v. *Heins*, 22 Gr. 469.

Costs.—See *Ord.* 248, 320, and notes. Costs of Appeal.

254. Any party affected by a report may file the same, or a duplicate thereof, and the filing of a duplicate shall have the same effect as the filing of the report. (29th June, 1861.) Any party may file report, or duplicate.

The report, or certificate, must be filed before an appeal can be had therefrom: *Hayes* v. *Hayes*, 8 P. R. 546; or before any process can issue thereon: *Jellett* v. *Anderson*, 8 P. R. 387. And where it appoints a time for the payment of money it should be filed before the day of payment: *Mills* v. *Dixon*, 2 Chy. Ch. R. 53; and be confirmed where necessary: *Mountain* v. *Porter*, 1 Chy. Ch. R. 207. Report must be filed before appeal, and before it can be enforced.

As to delay in filing a duplicate report by a party intending to appeal see *Caisse* v. *Burnham*, 6 P. R. 201.

255. Where the Master is directed to appoint money to be paid at some time and place, he is to appoint the same to be paid into some Bank at its head office, or at some branch or agency office of such Bank, to the joint credit of the party to whom the same is made payable, and of the Registrar of the Court; the party to whom the same is made payable to name the Bank into which he desires the same to be paid, and the Master to name the place for such payment. (29th June, 1861.) Payment of money into bank, how to be directed in report.

The word "Registrar" in this *Order* was changed to "Accountant" by *Ord.* 569; and the word "Accountant" was subsequently changed to "Referee in Chambers" by *Ord.* 626. The latter office is now practically abolished. Under the circumstances it is perhaps advisable that the Registrar of the Division in which the action is pending, should be named. Money paid into bank to joint credit of party and officer of Court.

This *Order* does not relate to the payment of money into Court (as to that, see *Ord.* 352), but is intended to provide for the payment of money in cases where the payee is required to do some act, as a condition of his receiving the money; *e. g.*, in specific performance actions where the vendor is required to execute a conveyance; or in Reason for.

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in mortgage actions, where the mortgagee, or incumbrancers, are required to release and discharge their incumbrances, &c.

How paid out.

Money paid into a bank under this *Order*, is paid out on a joint cheque of the officer of the Court and of the party to whose credit it is paid in. The cheque will be signed by the officer either upon an order, obtained for that purpose, being produced, or without order, upon filing the written consent of the solicitor of the party paying the money in.

If the money be paid in to the sole credit of the party entitled under *Ord.* 256, he may draw it out at his pleasure.

Order for when necessary.

Where the party paying money in, refuses to consent to its payment out to the party entitled, the latter may move in Chambers for an order to the officer to sign the cheque: *Bernard* v. *Alley*, 2 Chy. Ch. R. 91; *Weeks* v. *Stourton*, 11 Jur. N. S. 278. Although the refusal to consent appears to have been without reason, the applicant in *Bernard* v. *Alley* was refused his costs. The application must be made on notice: *Totten* v. *McIntyre*, 2 Chy. Ch. R. 462.

Report should be filed before day appointed for payment,

A report appointing the payment of money, should be filed before the day named for the payment: *Mills* v. *Dixon*, 2 Chy. Ch. R. 53; and confirmed, where the report is one requiring confirmation: *Mountain* v. *Porter*, 1 Ch. R. 207.

If the bank closes its office on or before the day named for payment, and default be made, an application must be made in Chambers to appoint a new day and to name another bank, and the order must be served: *King* v. *Connor*, 1 Chy. Ch. R. 274.

Party may pay money in to the sole credit of the party entitled thereto or to the joint credit of such party and the Registrar.

256. Where money is paid into a Bank, in pursuance of such appointment, the party paying, may pay the same either to the credit of the party to whom the same is made payable, or to the joint credit of the party and the Registrar; and if the same be paid to the sole credit of the party, such party shall be entitled to receive the same without the order of the Court. (29th June, 1861.)

The word "Accountant" was substituted for "Registrar" by *Ord.* 569. And the word "Accountant" was subsequently changed to "Referee in Chambers" by *Ord.* 626. The latter office is now practically abolished; see note to *Ord.* 255.

Default in payment, how to be certified.

257. Where default is made in the payment of money appointed to be paid into a Bank, the certificate of the Cashier, Manager, or Agent of the Bank, where the same

is made payable, or of the like Bank officer, shall be sufficient evidence of default. Where the affidavit of the party entitled to receive the same is by the present practice required, the same shall still be necessary. (29th June, 1861.)

Certificate of non-payment, how to be signed.

The certificate should be signed by the cashier, manager, or agent, or like officer. The certificate of an accountant in the bank is not sufficient: *Campbell* v. *Garrett*, 1 Chy. Ch. R. 255. A certificate of default should state that the money was not paid before, as well as on, or since, the day appointed: *Farrell* v. *Stokes*, 1 Chy. Ch. R., 201.

XIX.—AFFIDAVITS.

Affidavits, how to be drawn.

258. All affidavits are to be taken and expressed in the first person of the deponent, and his name at the commencement of the affidavit is to be written in full, and not designated by any initial letter merely; and the jurat may be in the form or to the effect set forth in schedule M. hereunder written. No costs are to be allowed in respect of an affidavit which has not been drawn in conformity with this order. (3rd June, 1853; Ord. 40, s. 5.)

Affidavits, practice as to, governed by *Rules S. C.* 284, 455 464-470,

The practice as to affidavits is now regulated by *Rules S. C.* 284, 453, and 464-470; and see *Ord.* 68, *ante*. The *Rules S. C.* cover the principal matters provided for in this *Order*. They do not, however, require the name of the deponent to be written in full, nor do they prescribe a form of jurat. This *Order* therefore as to these two particulars is still in force. See also Rules of Q. B. & C. P. 112, 114-118, *post*.

Style of cause in affidavits.

An affidavit should entitled in the cause or matter in which it is to be used. The shortened style of A. B. and others, plaintiffs, and C. J. and others, defendants, may be used, *Ord.* 509; but not "Brown *v.* Jones."

Erroneously entitled, may be resworn

Affidavits erroneously entitled have been allowed to be taken off the files, and resworn without a fresh stamp: *Pearson* v. *Wilcox*, 10 Ha. app. xxxv.; *Hawes* v. *Bamford*, 9 Sim. 653.

Affidavits by parties to the cause.

In affidavits made by parties to the cause it is sufficient to describe the deponent as the abovementioned plaintiff, or defendant, without specifying any residence, or other addition: *Crockett* v. *Bishton*, 2 Madd. 446. And the same rule prevailed at common law: *Poole* v.

Pembrey, 1 Dowl. P. C. 693 ; *Brooks* v. *Farlar*, 5 Dowl. P. C. 361 ; *Lyman* v. *Brethron*, 2 U. C. Cham. R. 108 ; *Ewing* v. *Lockhart*, 3 U. C. R. 248.

Affidavits received though irregularly drawn.

The Court has sometimes received affidavits sworn abroad, although drawn in the third person : *Re Husband*, 12 L. T. N. S. 303 ; and see *Dryden* v. *Frost*, 8 Sim. 380. And an affidavit without the signature of the deponent was received : *Re Howard*, 9 L. R. C. P. 347. But see *contra*, *Anderson* v. *Stather*, 9 Jur. 1085.

But omitting words "make oath" rejected.

An affidavit omitting the words "make oath" will be rejected : *Allen* v. *Taylor*, 10 L. R. Eq. 52 ; *Phillips* v. *Prentice*, 2 Ha. 542 ; *Re Newton*, 2 D. F. & J. 3.

Affidavits before whom to be sworn.

Affidavits sworn before the solicitor, or partner, or managing clerk, or agent, of the solicitor, of the party on whose behalf the affidavit is filed, cannot be read : *Dunn* v. *McLean*, 9 C. L. J. N. S. 212 ; 6 P. R. 95 ; *Duke of Northumberland* v. *Todd*, 7 Ch. D. 777 ; and see Rule of Q. B. & C. P. 114 *post*. But this rule does not apply to the partner of a counsel engaged in the cause, but not otherwise connected therewith : *Wilde* v. *Crow*, 10 C. P. 406.

Commissioner should not take voluntary affidavits.

A commissioner ought not to take affidavits not made in any cause, nor authorized by statute to be taken by him. Such oaths are voluntary : *Jackson* v. *Kassel*, 26 U. C. Q. B. 341 ; *McIlroy* v. *Hall*, 25 U. C. Q. B. 303 ; and see 37 Vict c. 37 (D).

Affidavits sworn abroad.

Affidavits sworn out of Ontario may be sworn before any of the persons enumerated in *R. S. O.* c. 62, s. 38. Affidavits sworn before any other person than those mentioned in that statute cannot be read : *McEwan* v. *Boulton*, 3 Chy. Ch. R. 63.

Officer should add his name of office.

The officer taking the affidavit should add after his signature the name of his office. The words "A Commissioner, &c.," or "A Commissioner," or "A Comr.," have been held sufficient : *Henderson* v. *Harper*, 2 U.C.Q. B. 97 ; *Brown* v. *Parr*, 2 U.C.Q. B. 98 ; *Murphy* v. *Boulton*, 3 U. C. Q. B. 177 ; *Pawson* v. *Hall*, 1 P. R. 294 ; *Brett* v. *Smith*, *Ib.* 309. But the signature alone has been held insufficient : *Babcock* v. *Bedford*, 8 C. P. 527. "Sworn before, &c.," omitting "me," was held sufficient : *Martin* v. *McCharles*, 25 U. C. Q. B. 279 ; and see *De Forrest* v. *Bunnell*, 15 U. C. Q. B. 370.

Fisher v. *Green*.

Superlative, and needlessly offensive expressions not to be used in affidavits.

In drawing affidavits, the following observations of Wilson, J., in *Fisher* v. *Green* 2 C. L. J. N. S. 16, may be useful to the student : "I regret to find, in several instances lately, that superlative words are used in stating facts in affidavits. There can be no stronger expression of the very truth than that it is stated on oath. If less certainty is intended, the statement should be qualified. The terms to which I object are, "*I most positively swear*," &c. I can only show my disapproval of such language, by refusing to allow costs to be taxed for affidavits drawn in this style, when costs are in my dis-

cretion. In one of the affidavits before me, I observe the expression, that the statement made by another person in another affidavit was "false." I suppose the affidavit was drawn by a young man of little experience, for the one had detailed a transaction in one light, and the other had stated the same transaction in another light, but the term "false," as applied by one to the other, could in no way verify the statement of him who used the offensive expression."

Means of knowledge to be shown.

259. Each statement in an affidavit, which is to be used as evidence on any proceeding before the Court, or before a Judge, or before an officer of the Court, is to shew the means of knowledge of the person making the statement. (10th July, 1861.)

See *Eng. Con. Ord.*, 5 Feb., 1861, r. 23, to the same effect.

How far Ord. 259 in force.

It is not free from doubt whether this *Order* continues in force or not. *Rule S.C.* 284 provides: "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which, statements as to his belief, with grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of, or extracts from, documents, shall be paid by the party filing the same."

Rule S. C. 284.

Under this *Rule S.C.*, the grounds of statements made on "belief" are required to be stated, but not the means of knowledge for positive allegations. The *Rule* therefore does not seem to cover the same ground as *Ord.* 259, and it is possible therefore it is still in force. No similar rule existed at common law. But it is obvious that the provision of *Ord.* 259 is a very wholesome check on rash statements being made in affidavits, without sufficient means of knowledge. A statement by plaintiffs' agent that he had the management of all plaintiff's business in this country was held sufficient to show his means of knowing of the plaintiff's ownership of certain property deposed to: *McEwen* v. *Boulton*, 2 Chy. Ch., R. 399.

Statements of means of knowledge, when they may be omitted from affidavits.

When the deponent swears, that to disclose his means of knowledge would defeat the ends of justice, the requirements of this *Order* may be dispensed with: *Merchants' Express Co.* v. *Morton*, 15 Gr. 274; 2 Chy. Ch,, R. 319.

Affidavits on information and belief not admissible when.

Evidence on information and belief, though generally admissible on interlocutory applications, is not admissible on a proceeding which, though interlocutory in form, finally decides the rights of the parties; and the party against whom it is adduced, is not bound to contradict it; but if in the Court below he deals with the evidence as admissible, he may be precluded from objecting to it before the Court of Appeal: *Gilbert* v. *Endean*, 9 Ch. D. 259.

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Scandalous affidavits.

Affidavits may be ordered to be taken off the files, if scandalous and irrelevant: *Sadleir* v. *Smith*, 7 P. R. 409; 15 C. L. J. 52; *Osmaston* v. *Association of Land Financiers*, W. N. (78) 101; *Kernick* v. *Kernick*, 12 W. R. 335; *Goddard* v. *Parr*, 3 W. R. 633; or the scandalous matter may be expunged: *Warner* v. *Mosses*, W. N. (81) 69: and see *ante Ord.* 69 and note.

Affidavits on motions, to be filed with Clerk of R. & W.

260. Affidavits, either in support of, or in opposition to, any special motion or petition, are to be filed, with the Clerk of Records and Writs. This Order is not to be taken to warrant the taxation of the costs of obtaining office-copies of affidavits, for use upon the hearing of any matter, by the party on whose behalf they are filed. (3rd June, 1853; Ord. 40, s. 2; 29th June, 1861.)

Affidavits, where to be filed under present practice.

This *Order* is modified by the new practice, and it applies now only to motions or petitions, in actions in the Chancery Division, to the Court, or to a Judge in Chambers.

On motions before the Master in Chambers, the affidavits in support of, or opposition to, the motion, are required to be filed with the Clerk in Chambers.

In actions in the Chancery Division the papers filed in Chambers, are transmitted to the Clerk of Records and Writs, on the conclusion of the motion: in actions in the other Divisions the papers are retained by the Clerk in Chambers.

On motions before a Judge of the County Court, or Local Master, the affidavits in support of, or opposition to, such motions, will have to be filed in the former case with the Local Registrar, or Deputy Clerk of the Crown, as the case may be, and in the latter case with the Master himself.

Must be stamped.

Affidavits must be stamped with a proper filing stamp before they can be used. *Rule S. C.* 470.

Affidavits in chief, and in answer, when to be filed.

261. All the affidavits upon which a notice of motion or petition is founded, must be filed before the service of the notice of motion or petition; and affidavits in answer must be filed not later than the day before that appointed for the hearing of the motion or petition. (3rd June, 1853; Ord. 40, s. 2; 29th June, 1861.)

Affidavits in reply.

No regulation is made with regard to the filing of affidavits in reply; but when used they must be duly stamped, and delivered to the proper officer in Court, or in Chambers. *Rule S. C.* 470; see Holmested's Manual, Pr. 204.

The affidavits and papers intended to be used in support of a motion, must be mentioned in the notice of motion: *Farish* v. *Martyn*, 1 Gr. 300, and when the motion is intended to be supported by affidavits filed previous to the date of the notice of motion, the date of the filing of such affidavits, should be stated in the notice, or they cannot be used: *Fraser* v. *Fraser*, 13 Gr. 183; *McMartin* v. *Dartnell*, 2 Chy. Ch. R. 322; documents referred to in the affidavits filed in support of a motion, may be read without special reference to them in the notice: *Johnson* v. *Ashbridge*, 2 Chy. Ch. R. 251. If a party gives notice of reading an affidavit in support of a motion, but declines to do so, the opposite party may, nevertheless, read it: *Clark* v. *Law*, 2 K. & J. 28; *Cauty* v. *Houlditch*, 14 Sim. 75, and may cross-examine the deponent though the party filing it offers to withdraw it: *Pike* v. *Robinson*, W. N. (73) 178.

Affidavits in support to be mentioned in notice of motion.

Opposite party may read affidavits, and cross-examine, though party filing offer to withdraw them.

Affidavits of service must be filed at latest before the rising of the Court on the day on which the application is made: *Miltown* v. *Stuart*, 8 Sim. 34; but see contra, *Sear* v. *Webb*, Law Times for July 28, 1883, p. 238, where it was held that they were filed in time, if filed at any time before the order was drawn up.

Orders 262-263 related to service of notices of motion, and are superseded by *Rules* S. C. 407, 410, 411.

Or. 262-263.

XX.—MOTIONS AND PETITIONS.

264. Except in cases where it is otherwise provided there must be at least two clear days between the service of a petition, and the day appointed for hearing the same; and in the computation of such two clear days, Sundays, and days on which the offices are closed, are not to be reckoned. (3rd June, 1853; Ord. 39, s. 2.)

Petitions, two clear days' notice of hearing requisite.

See English *Con. Ord.* 34 r. 2, to the same effect.

See *Rule S. C.* 407, as to notices of motion.

As to where petition should be served, instead of a notice of motion, see Holmested's Manual Pr., 202.

A petition presented by a person, not a party to the action should set out his residence and occupation: *Hunter* v. *Mountjoy*, 2 Chy. Ch. R. 90: *Glazbrook* v. *Gillatt*, 9 Beav. 492.

The petition need not be filed before the day of hearing, and a petition filed before it had been served was ordered to be taken off the files for want of prosecution; *Re Western Insurance Co.*, 6 P. R. 86. But it must be filed before any order made thereon can be issued, but where the original is lost, or the petitioner refuses to de-

Petition must be filed before order is issued on it

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liver it to the respondent to file, a copy may be filed instead: *Smith* v. *Harwood*, 1 Sm. & G. 137; *Sanderson* v. *Walker*, 1 M. & Cr. 359; *Re Hobler*, 9 Jur. 419; *Andrews* v. *Walton*, 1 M. & Cr. 360.

Tender of $5 costs to formal respondents.

Formal parties, may with the petition be tendered $5 for costs, and if they appear unnecessarily they will get no more costs: *Rule S. C.* 434, where several respondents appear by the same solicitor, the tender of one sum of $5 is sufficient; *Re Mitchell*, 45 L. T. N. S. 60.

Judge's fiat dispensed with.

265. It shall not be necessary to procure a Judge's fiat to a petition appointing a time and place for the hearing thereof, but in lieu of such fiat there is to be indorsed on the petition a notice addressed to the parties concerned, stating the time and place at which the petition is to be heard, and informing them that if they do not appear on the petition at such time and place, the Court may make such order, on the petitioner's own shewing, as shall appear just. (6th Feb. 1865; Ord. 30.)

Petition to be indorsed with notice of hearing

When petition to be made returnable.

The day to be named for the hearing of a petition to the Court or a Judge, must be one on which the Court, or Judge, sits for such business. In the Chancery Division, petitions to the Court, are taken by a single Judge in Court on Tuesdays, and petitions to a Judge in Chambers, on Mondays. In the other Divisions, petitions to the Court, or a Judge in Chambers, are taken on Tuesday, and Friday, in each week, vacation excepted.

Service of petition, how made.

When the petition is required to be served on a party to an action who has not appeared, leave to serve the petition is necessary if the time for appearance has not expired: *Rule* S. C. 411; and see Holmested's Manl. Pr. 201-2. But not if the time for appearance has expired: *Rule S. C.* 410. If the time for appearance has expired, and no appearance has been entered for a defendant, he may be served by posting up the petition, in the office whence the writ issued: *Rule S. C.* 131; J. A. s. 91; and where the writ issued in the Q. B. or C. P. Divisions, in Toronto, in the office of the Registrar of the Division in which the action is brought.

Witness may be subpœnaed to give evidence upon any motion or other proceeding.

266. A party in any cause or matter may, by a writ of subpœna *ad testificandum*, or *duces tecum*, require the attendance of a witness before the Court, or before a Master, or an Examiner, for the purpose of using his evidence upon any motion, petition, or other proceeding before the Court. (3rd June, 1853; Ord. 40, s. 7.)

"The Court, or a Judge, may, in any cause or matter, where it shall appear necessary for the purposes of justice, make any (*sic*) order for the examination upon oath before any officer of the Court, or any other person or persons, and at any place, of any witness or person, and may order any deposition so taken to be filed in the Court, and may empower any party to any such cause or matter to give such deposition in evidence therein, on such terms, if any, as the Court or Judge may direct": *Rule* S. C. 285. *Rule S.C.* 285.

Ord. 266 said to be superseded by *Rule S.C.* 285. *Sed quære.*

It has been ruled by the learned Master in Chambers, that *Ord.* 266 is superseded by *Rule S. C.* 285, so far as motions in Chambers are concerned: *Monaghan* v. *Dobbin*, 18 C. L. J. 180, 2 C. L. T. 260; and see Taylor & Ewart, 311. A contrary opinion was previously expressed by the writer; see Holmested's Manl. Pr. 205; and in England it has been held by the Court of Appeal that the analagous English Ord. xxxvii, r. 4, from which our *Rule S. C.*, 285 is taken, does not supersede the provisions of 15 & 16 Vict. c. 86 s. 41, from which *Ord.* 266 is taken: *Raymond* v. *Tapson*, 48 L. T. N. S. 403.

If the ruling in *Monaghan* v. *Dobbin* be correct, no examination of witnesses in support of, or in opposition to, any motion, petition, or other proceeding, can now be had without an order for that purpose being first obtained. And it would seem doubtful whether witnesses can any longer be examined upon a reference before a Master, without an order being first obtained.

Subpœna, date of.

A subpœna for the examination of a witness, dated prior to the time at which the party issuing the same was entitled to examine the witness, was held to be irregular: *McMurray* v. *Grand Trunk Ry. Co.*, 3 Chy. Ch. R. 130.

Depositions taken under *Ord.* 265, when no motion was pending, were irregular, and could not be read: *Stovel* v. *Coles*, 3 Chy. Ch. R. 362.

Notice of examination.

The party required to be examined was entitled to reasonable, but not necessarily to 48 hours' notice: *North Wheal Exmouth Mining Co.*, 31 Beav. 628; 8 Jur. N. S. 1168; unless he had no solicitor, in which case he was held entitled to 48 hours' notice: *Watson* v. *Ham*, 1 Chy. Ch. R. 293.

Witness fees to be paid.

A witness, whether a party, or stranger, to the cause, who was required to attend for examination, was entitled to be paid ordinary witness fees, and might refuse to attend, or if attending might refuse to be sworn, until paid: *Brocas* v. *Lloyd*, 23 Beav. 129; *Wiltshire* v. *Marshall*, W. N. (66) 80; *Davey* v. *Durrant*, 24 Beav. 493, and see *Robins* v. *Carson*, 2 Chy. Ch. R. 343.

Examination of party out of jurisdiction.

Where the witness, or party, required to be examined in support of a motion is out of the jurisdiction, an order for a commission may be obtained as soon as the notice of motion is served: *Farrell* v.

Cruikshank, 1 Chy. Ch. R. 12; or if a resident in Quebec a *subpœna* may be ordered to issue under C. S. C. c. 79, s. 4: *Moffatt* v. *Prentice*, 6 P. R. 33; *McKerchie* v. *Montgomery*, 1 Chy. Ch. R. 225.

Default of witness, how punished.

Default of Witness.—The certificate of default should show that the witness had been duly subpœnaed, a statement in the certificate, that evidence of the service had been produced, is insufficient: *Waddle* v. *McGinty*, 2 Chy. Ch. R. 442; and see *Sutherland* v. *Rogers*, *Ib.*, 191.

A witness failing to attend was liable to be committed for default. A witness who attended, but refused to answer proper questions, might, on motion, be ordered to attend again and submit to answer the questions at his own expense, or in default be committed.

A motion to commit must now be made before a Judge: *Keefe* v. *Ward*, 18 C. L. J. 166; 2 C. L. T. 260.

A witness attending for examination, is not bound to wait more than half an hour, unless notified that his examination is to be proceeded with; *Perks* v. *Stottart*, 1 N. R. 563.

Notice of examination.

267. Forty-eight hours notice of the examination is to be given to the opposite party, or parties, and the cross-examination, in such case, is to follow immediately upon the examination, and is not to be deferred to any future time. (3d June, 1853; Ord. 40, s. 8.)

How far Ord. 267 in force.

Whether or not this *Order* is in force, depends apparently on whether or not *Ord.* 266 is in force, as to which point, see note to that *Order*.

Notice to be served.

The notice referred to in this *Order* is to be served on the opposite party. The witness to be examined is not necessarily entitled to forty eight hours' notice, but only to reasonable notice according to circumstances: *North Wheal Exmouth Mining Co.*, 31 Beav. 628; where the witness is also a party to the action, the forty-eight hours' notice should be served on his solicitor, if he have one, and if not, then upon the party himself: *Watson* v. *Ham*, 1 Chy. Ch. R. 293. Where the evidence was taken abroad before a Special Examiner, this *Order* was not strictly applied: *De Brito* v. *Hillel*, 15 L. R. Eq. 213.

Ord. 268 superseded by *Rule S.C.* 283.

Order 268 is superseded by *Rule S. C.* 283, which is to the same effect.

Persons making affidavits, are liable to cross-examination.

"Upon any motion, petition, or summons, evidence may be given by affidavit; but any person having made an affidavit to be used, or which shall be used on any motion, petition or other proceeding before the Court, shall be bound to attend for the purpose of being cross-examined, on being served with a writ of *subpœna ad testificandum*,

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but the Court nevertheless may act on the evidence before it at the time, and may make such interim order, or otherwise, as appears necessary to meet the justice of the case." *Rule S. C.* 283.

No cross-examination after proceeding disposed of.

When the proceeding for which the affidavit has been filed has been disposed of, the right of cross-examination is gone: *Catholic Printing Co.* v. *Wiman*, 11 W. R. 399; *Eden* v. *McGill*, 3 Chy. Ch. R. 56; *Clendinning* v. *Varcoe*, 7 P. R. 61.

Cross-examination on affidavits in reply.

Deponents making affidavits in reply, are liable to cross-examination: *Re Foster*, 6 P. R. 95; 9 C. L. J. 313.

Affidavit can not be withdrawn to avoid cross-examination.

A party cannot withdraw an affidavit which he has given notice of reading, so as to avoid a cross-examination of the deponent: *Clarke* v. *Law*, 2 K. & J. 28; *Pike* v. *Dickinson*, 21 W. R. 852; W. N. (73) 178; *Re Quartz Mining Co.*, 47 L. T. N. S. 644; 21 Ch. D. 642. The party cross-examined cannot insist on the passage in his affidavit being read, or shown, to him, before he answers: *Gargune* v. *Watney*, 31 L. T. O. S. 231.

Witness not entitled to hear affidavit read

As to expense of producing witness for cross-examination: see *Knight* v. *Gardiner*, 49 L. T. N. S. 94; W. N. (83) 152; 19 C. L. J. 273, *Rule S. C.* 304.

Forty-eight hours' notice to be given of cross-examination

269. Forty-eight hours' notice of the cross-examination is to be given to the party on whose behalf such affidavit was filed, or to the party intending to use the [illegible] Ont. Law, 1873; Ont. 40, s. 9.)

fresh step in the action: *Manning* v. *Birely*, 2 C. L. J. N. S. 331; *Larkin* v. *Armstrong*, 1 Chy. Ch. R. 31; or making any demand respecting the alleged irregular proceedings which would put

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Cruikshank, 1 Chy. Ch. R. 12; or if a resident in Quebec a *subpœna* may be ordered to issue under C. S. C. c. 79, s. 4: *Moffatt* v. *Prentice*, 6 P. R. 33; *McKerchie* v. *Montgomery*, 1 Chy. Ch. R. 225.

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268. Any person having made an affidavit to be used, or which shall be used on any motion, petition, or other proceeding before the Court, shall be bound to attend for the purpose of being cross-examined, on being served with a writ of subpœna ad testificandum, but the Court nevertheless, may act on the evidence before it at the time, and make such interim order, or otherwise, as appears necessary to meet the justice of the case. (3rd June, 1853; Ord. 40, s. 7.)

with r Ryan 10 P R 45 examined, on being served with a writ of *subpœna ad testificandum*,

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When the proceeding for which the affidavit has been filed has been disposed of, the right of cross-examination is gone: *Catholic Printing Co.* v. *Wiman*, 11 W. R. 399; *Felan* v. *McGill*, 3 Chy. Ch. R. 56; *Clendinning* v. *Varcoe*, 7 P. R. 61.

Cross-examination on affidavits in reply.

Deponents making affidavits in reply, are liable to cross-examination: *Re Foster*, 6 P. R. 95; 9 C. L. J 313.

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A party cannot withdraw an affidavit which he has given notice of reading, so as to avoid a cross-examination of the deponent: *Clarke* v. *Law*, 2 K. & J. 28; *Pike* v. *Dickinson*, 21 W. R. 862; W. N. (73) 178; *Re Quartz Mining Co.*, 47 L. T. N. S. 644; 21 Ch. D. 642. The party cross-examined cannot insist on the passage in his affidavit being read, or shown, to him, before he answers: *Gwynne* v. *Watney*, 31 L. T. O. S. 231.

Witness not entitled to hear affidavit read

As to expense of producing witness for cross-examination: see *Knight* v. *Gaydiver*, 49 L. T. N. S. 94; W. N. (83) 152; 19 C. L. J. 273, *Rule S. C.* 304.

Forty-eight hours' notice to be given of cross-examination.

269. Forty-eight hours' notice of the cross-examination is to be given to the party on whose behalf such affidavit was filed, or to the party intending to use the same (3rd June, 1853; Ord. 40, s. 9.)

This *Order* would seem to be still in force and applicable to examinations had under *Rule S. C.* 283. See note to *Ord.* 267.

Ord. 270-272.

Orders 270-272 regulated the practice on motions for decree, and are superseded by *Rules S.C.* 211, 315, 318-324.

Ord. 273-276.

Orders 273-276 regulated the practice on motions to dismiss for want of prosecution, and are superseded by *Rules S. C.* 203, 255; but see *Bucke* v. *Murray*, 19 C. L. J. 233.

Irregularities.

277. A notice of motion to set aside any proceeding for irregularity, must specify clearly the irregularity complained of. (9th May, 1862.)

The practice laid down by this *Order* is the same as formerly prevailed at law under the Rule of Practice of 1856, No. 107.

Party moving to set aside proceeding for irregularity must be regular, and move promptly, and before taking fresh step, or making demand

A party moving against an irregularity must himself be regular, and is not entitled to any indulgence: *Scott* v. *Burnham*, 3 Chy. Ch. R. 399; *Waterous* v. *Farran*, 6 P. R. 31; *Poole* v. *Poole*, 2 Chy. Ch. R. 379; *Donelly* v. *Jones*, 4 Chy. Ch. R. 48; he must move promptly: *Miller* v. *Miller*, 9 U. C. L. J. 132; and before taking a fresh step in the action: *Manning* v. *Birely*, 2 C. L. J. N. S. 331: *Larkin* v. *Armstrong*, 1 Chy. Ch. R. 31; or making any demand respecting the alleged irregular proceedings which would put

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the opposite party to expense: *Carpenter* v. *Hamilton*, 2 Chy. Ch. R. 282; *Bennett* v. *O'Meara*, 2 Chy. Ch. R. 167; or he may be held to have waived the irregularity.

Proceedings that are merely irregular are valid until set aside, but a nullity has no effect whatever; *Fuller* v. *McLean*, 8 P. R. 549.

Receiver.

XXI.—RECEIVERS.

Receivers, how appointed.

The appointment of Receivers, which was formerly exclusively within the jurisdiction of the Court of Chancery, may now be made by any Division of the High Court, in any case in which it shall appear to the Court to be just, or convenient: *J. A. s.* 18, ss. 8.

Duty of Receiver.

A Receiver is an indifferen person between the parties, appointed by the Court to collect and receive the rents, and profits, of land, or the produce of personal estate, or to take the care and custody of any other property which it does not seem proper to the Court that either of the litigants should do, either by reason of the controversy existing between them, or by reason of personal disability on the part of the party legally entitled, *e.g.*, infancy, or lunacy.

Claim for, should be indorsed on writ.

Where the appointment of a receiver is a substantial part of the relief sought by a plaintiff, he should indorse a claim to that effect on his writ: *Colebourne* v. *Colebourne*, 1 Ch. D. 690.

Appointment operates as injunction.

The appointment of a Receiver operates as an injunction, and neither of the litigants can receive the money, or property, committed to a Receiver, without a contempt of Court, and it is not necessary in the order appointing a Receiver to grant an injunction in terms: Kerr on Receivers, 8.

As to whether interim Receiver superseded by judgment *quære*.

It has been said that an interim Receiver is superseded by the judgment subsequently given in the action, unless he be expressly continued by it; Kerr on Receivers, 2nd ed. 186, *Reeves* v. *Neville*, 10 W. R. 335: Taylor's Ord. 274; *Gibson* v. *Montfort*, 1 Ves. Sr. 485; but the authorities cited do not appear to bear out the proposition; see Seton, 412. The question would appear to depend on the terms of the order appointing the Receiver; if appointed "until the trial," then it would seem clear, that unless continued by the judgment pronounced at the trial, he would be superseded by it; but if appointed generally without any limitation as to time, or "until the Court make order to the contrary," then it would seem that he would not necessarily be superseded by the judgment subsequently pronounced, even though not expressly continued by it.

Receiver, when appointed.

Receiver; when Appointed:—

Infants' estate.

INFANTS.—A receiver will be appointed of an infant's estate in a proper case, as where the father is of bad character or insolvent, and there is danger of loss: *Kiffin* v. *Kiffin*, cited 1 P. W. 704; *Ex parte Mountfort*, 15 Ves. 449 *n.*; *Re Cormicks*, 2 Ir. Eq. 264; or

there is no testamentary guardian, or one who declines to act: *Hicks* v. *Hicks*, 3 Atk. 273; *Bridges* v. *Hales*, Mos. 111; or the guardian is misconducting himself: *Beaufort* v. *Berty*, 1 P. W. 704, and see *Dillon* v. *Lord Mountcashel*, 4 Bro. P. C. 306. Receiver.

LUNATICS.—A Receiver will be appointed over a lunatic's estate, where no person will act as committee, or where the committee is infirm, or the management of the estate onerous: Kerr on Receivers, 78. Lunatics' estates.

EXECUTORS, AND TRUSTEES.—The Court will in a proper case appoint a receiver to act in place of an executor, or trustee, but it will not do so on slight grounds. Where fraud is charged a receiver will be appointed; *Vernon* v. *Kinzie*, 2 O. S. 40, and see *Meacham* v. *Draper*, 2 Gr. 316; or in case of misconduct or improper management, or where there is danger of loss of the trust property: *Middleton* v. *Dodswell*, 13 Ves. 266; *H.* v. *H.*, 1 Ch. D. 276; *Colebourne* v. *Colebourne*, *Ib.* 690; or is wasting the assets: *Keene* v. *Riley*, 3 Mer. 436; or that being a sole executor, or trustee, he is insolvent: *Harrold* v. *Wallis*, 9 Gr. 443; *Re Johnson*, 1 L. R. Chy. 325; *Gawthorpe* v. *Gawthorpe*, W. N. (78) 91; although mere poverty is no ground for the appointment: *Anon*, 12 Ves. 4; but if coupled with bad character it may be: *Everett* v. *Prythergh*, 12 Sim. 368; or if being a female, she has married a man in necessitous circumstances, the *cestuis que trust* being infants: *Dillon* v. *Lord Mountcashel*, 4 Bro. P. C. 306. A receiver may also be granted before probate, or administration, to prevent waste or spoilation, and to provide for the collection of assets pending litigation as to the right to administration: *Atkinson* v. *Henshaw*, 2 V. & B. 85; *Ball* v. *Oliver*, *Ib.* 96. *Jones* v. *Godrich*, 4 Jur. 98; *Wood* v. *Hitchings*, 2 Beav. 289; 4 Jur. 858; *King* v. *King*, 6 Ves. 172; but see *Knight* v. *Duplessis*, 1 Ves. Sr. 324, but to warrant the appointment there must in general be shown to be litigation pending, or threatened, in the Surrogate Court: *Jones* v. *Jones*, 3 Mer. 174; *Jones* v. *Frost*, 3 Madd. 1; Jac. 466; *Marr* v. *Littlewood*, 2 My. & Cr. 458; *Parkin* v. *Seddons*, 16 L. R. Eq. 36; or that there is some difficulty in obtaining administration: *Overington* v. *Ward*, 34 Beav. 175. As against executors, and trustees.

MORTGAGEE.—Formerly a receiver would not be granted at the instance of a mortgagee entitled to the legal estate: *Berney* v. *Sewell*, 1 J. & W. 648; except under special circumstances: See Kerr on Receivers, 29-30, 34. Nor against a prior mortgagee in possession at the instance of a subsequent incumbrancer, so long as anything remained due on the prior mortgage. And the Court would only act on the prior mortgagee's own admission that he had been paid off, or his refusal to accept what was due to him: *Berney* v. *Sewell*, 1 J. & W. 649; *Hiles* v. *Moore*, 15 Beav. 180. But where the prior Receiver, when granted on application of, or against, mortgagee of legal estate.

Receiver.

mortgagee in possession had himself acquired the equity of redemption, and it appeared he had received rents and profits more than sufficient to pay off his mortgage, a receiver might be granted: *Steinhoff* v. *Brown*, 11 Gr. 114. And now a receiver may be appointed at the instance of mortgagee of the legal estate, if it shall seem to the Court to be just or convenient so to do: *Pease* v. *Fletcher*, 1 Ch. D. 273; but see *North London Railway Co.* v. *Great Northern Railway Co.*, 48 L. T. N. S. 695.

When on application of equitable mortgage.

An equitable mortgagee may, after default, have a receiver as against a mortgagor in possession "without prejudice" to the rights of any prior mortgagee: *Aikins* v. *Blain*, 13 Gr. 646; Kerr on Receivers, 35. The Court would not try on an interlocutory motion, the question whether a prior mortgagee in possession had been paid off, when he himself distinctly swore that there was something due; but his affidavit as to the amount due was required to be specific. If vague, or his accounts were so negligently kept that he could not speak positively, a receiver might be appointed: *Rowe* v. *Wood*, 2 J. & W. 558; *Hiles* v. *Moore*, 15 Beav. 180 *Codrington* v. *Parker*, 16 Ves. 469.

Interim Receiver when granted on application of creditors.

CREDITORS.—An injunction to restrain a debtor from alienating his property *pendente lite*, cannot in general be obtained by a simple contract creditor suing to recover his debt, where the debtor is *in esse*; nor under such circumstances could a receiver be granted: *National Provincial Bank of England* v. *Thomas*, 24 W. R. 1013; *Owen* v. *Homan*, 4 H. L. C. 1036; *Robinson* v. *Pickering*, 50 L. J. C. A. 527; *Hepburn* v. *Patton*, 26 Gr. 587; not even though the debtor be a public company: *McCall* v. *Canada Farmers' Mutual Insurance Co.*, 18 C. L. J. 117; *Milts* v. *Northern Railway of Buenos Ayres Co.*, 5 L. R. Chy. 621; not even though the creditor be an unpaid vendor, and the company admit their liability: *Latimer* v. *Aylesbury and Bedford Railway Co.*, 9 Ch. D. 385.

But when the debtor is dead, a receiver may be obtained by a simple contract creditor against the personal representative, or devisee, wasting the assets of the deceased: see *Keene* v. *Riley*, 3 Mer. 436; and of the realty when it appears the personal estate is insufficient: *Jones* v. *Pugh*, 8 Ves. 71; *Chalk* v. *Raine*, 13 Jur. 981: Kerr on Receivers, 40.

After judgment Receiver may be appointed.

And a creditor who has obtained judgment may apply for a receiver by way of equitable execution, as against property of the debtor, which could not be reached by a writ of execution: *Anglo-Italian Bank* v. *Davies*, 9 Chy. D. 275; *Smith* v. *Hurst*, 1 Coll. 705; 10 Ha. 48. *Wells* v. *Kilpin*, 18 L. R. Eq. 298: *Tillett* v. *Pearson*, 43 L. J. Chy. 93. Formerly, in such cases it was necessary, before applying for a receiver, to sue out a writ of execution; but it would seem now that if the property cannot be reached by the writ,

such a preliminary is not necessary: *Ex parte Evans*, 13 Chy. D. 259. **Receiver.**

Although an *interim* receiver cannot, in general, be granted in favour of a creditor against a debtor company: *McCall* v. *Canada Farmers' Mutual Insurance Co.* 18 C. L. J. 117, it is sometimes the only relief that can be awarded, after judgment has been obtained. Thus, neither an execution creditor, nor a mortgagee, of a railway company, can enforce payment of his demand, by sale, or foreclosure, of the railway; he can only do so, by procuring a receiver and manager of the undertaking to be appointed: *Galt* v. *Erie & Niagara Railway Co.* 14 Gr. 499; *Peto* v. *Welland Railway Co.*, 9 Gr. 455, affirmed on rehearing, 16th Feb. 1864; *Brantford* v. *Grand River Navigation Co.*, 8 Gr. 246; and see *Breeze* v. *Midland Railway Co.*, 26 Gr. 225, (where the plaintiff claimed a mechanic's lien). Kerr on Receivers, 46-7, 50. **Against Railway Company.**

Where a receiver is appointed at the instance of a judgment creditor, it is without prejudice to the claims of prior mortgagees, if any: *Legg* v. *Mathieson*, 2 Giff. 71; *Wildy* v. *Mid-Hants Railway Co.*, 16 W. R. 409; *Potts* v. *Warwick & B. C. Co.*, Kay 145. **Receiver appointed without prejudice to prior mortgagee.**

PARTNERS.—The Court in granting a receiver of partnership property, thereby takes the affairs of the partnership out of the hands of all the partners, and entrusts them to a receiver or manager of its own appointment; and while an injunction only restrains one or more of the partners from doing what may be complained of, the appointment of a receiver excludes all alike from taking part in the management of the concern: *Hall* v. *Hall*, 3 Mc. & G. 86. It, therefore, does not follow that the Court will grant a receiver *pendente lite*, in every case where it would grant an injunction. **Receiver, when appointed in partnership cases.**

When a dissolution is neither sought, nor is absolutely necessary, a receiver *pendente lite* will not in general be granted of a "going concern": *Goodman* v. *Whitcomb*, 1 J. & W. 589; *Roberts* v. *Eberhardt*, Kay 148; *Hall* v. *Hall supra*; unless there is danger of the business being destroyed, or the assets misapplied in the meantime; or unless one partner is misconducting himself; *e.g.*, by colluding with debtors of the firm: *Estwick* v. *Conningsby*, 1 Vern. 118; or carrying on a separate trade with the partnership property: *Harding* v. *Glover*, 18 Ves. 281; or is wrongfully excluding the plaintiff from the management: *Wilson* v. *Greenwood*, 1 Sw. 481; *Goodman* v. *Whitcomb*, 1 J. & W. 592; *Rowe* v. *Wood*, 2 J. & W. 558; *Const* v. *Harris*, T. & R. 525; *Prentiss* v. *Brennan*, 1 Gr. 371; *Bilton* v. *Blakely*, 6 Gr. 575; *Steele* v. *Grossmith*, 19 Gr. 141. **Not appointed *pendente lite* of going concern.**

Where a partnership is alleged on one side and denied on the other, usually a receiver is appointed until that question has been **Exceptions to rule.**

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determined: *Peacock* v. *Peacock*, 16 Ves. 49; *Chapman* v. *Beach*, 1 J. & W. 504 *n*; *Fairburn* v. *Pearson*, 2 Mc. & G. 144.

Receiver, when appointed as against co-tenant in common.

TENANTS IN COMMON.—A receiver has been appointed in a partition action *pendente lite*, although there has been no exclusion by any of the co-owners *Porter* v. *Lopes*, 7 Ch. D. 358. Formerly a case of destructive waste, or gross exclusion, was necessary to be made to warrant the appointment of a receiver in such case: Kerr on Receivers, 79; but see *Gaskin* v. *Balls*, 13 Ch. D. 313, per Thesiger, L. J.: and *North London R. W. Co.* v. *Great Northern R. W. Co.*, 11 Q. B. D. 30; 48 L. T. N. S. 695, where it was held the jurisdiction to grant injunctions, has not been extended by *The Judicature Act*.

Or between vendor and purchaser.

VENDOR AND PURCHASER.—In actions for specific performance, a receiver *pendente lite* may, in a proper case, be appointed; *Kennedy* v. *Lee*, 3 Mer. 448; *Hall* v. *Jenkinson*, 2 V. & B. 125: *McLeod* v. *Phelps*, 2 Jur. 962; and see *Taylor* v. *Eckersley*, 2 Ch. D. 302; 5 Ch. D. 740, a case of chattels; or in actions to set aside conveyances as obtained by fraud: *Stillwell* v. *Wilkins*, Jac. 282; *Huguenin* v. *Baseley*, 13 Ves. 107: 2 White & Tud. Lg. Cases, 547.

Receiver, when appointed against holder of legal title.

LEGAL TITLE.—Formerly the Court would not, except under special circumstances, or in cases covered by *R. S. O.* c. 40, s. 39, appoint a receiver against a person in possession of lands claiming under a legal title; but since *The Judicature Act*, it has been held that the jurisdiction is extended, and that a receiver may be appointed even as against a person claiming a legal title, wherever the Court may think it "just or convenient:" *Real and Personal Advance Co.* v. *McCarthy*, 27 W. R. 703; but see *North London R. W. Co.* v. *Great Northern R. W. Co.*, 11 Q. B. D. 30; 48 L. T. N. S. 695.

Application for, to be made in Court.

Application for Appointment.—The application for the appointment of a receiver, must in the first instance be made in Court, but after a receiver has been appointed, applications to fill vacancies, subsequently occurring in the office may be made in Chambers: *Grote* v. *Bing*, 9 Ha. App. l., but the order for a receiver has been granted in Chambers, by consent: see *ante*, p. 81.

Under *Rule S. C.* 399, a defendant may, before judgment, apply for an interim injunction, and receiver. He may do so, notwithstanding the plaintiff has already served notice of motion for the like purpose. In such case, one order will be made on the two motions, but the conduct of it will, in general, be given to the plaintiff: *Sargant* v. *Read*, 1 Ch. D. 600.

Master's warrant for appointment of receiver, to

278. The party prosecuting the order for a Receiver is to obtain an appointment or a warrant from the

Judge or Master, and to serve the same on all the necessary parties, naming in the copy thereof served, the proposed receiver and his sureties. (3rd June, 1853; Ord. 38, s. 1.)

name proposed receiver and his sureties.

If the receiver is named by the Court, "on his giving security," no other person can be named in the warrant, and if the person named in the order fail to give the security, a further order would be necessary to enable the Master to appoint some one else.

Receiver, an Officer of the Court.

A receiver when appointed is an officer of the Court, and stands in the position of trustee, to all who are interested in the estate or fund. In making the appointment the Master should endeavour to select a person acceptable to all parties, as well as otherwise fit and competent for the duties he will be called on to perform: *Simpson* v. *Prescott & Ottawa R. W. Co.*, 1 Chy. Ch. R. 99, and see *Brant* v. *Willoughby*, 17 Gr. 627.

Should be disinterested, unless Court appoint one of the parties.

A receiver should in general be wholly disinterested, unless the parties otherwise consent, or the Court is of opinion that the appointment of one of the parties interested would be beneficial to the estate: *Sargant* v. *Read*, 1 Ch. D. 600. When a party to the action is appointed it is only on his undertaking to act without salary: *Ib.*; *Wilson* v. *Greenwood*, 1 Sw. 471, 483; *Blakeney* v. *Dufaur*, 15 Beav. 40, 44; Kerr on Receivers, 95. Where a receiver is appointed of trust property, the *cestui que trust* is entitled to have the superintendence of the trustee, as a check upon the receiver; the trustee should not therefore be himself appointed, except under special circumstances: Kerr 95, 86; and where a receiver is appointed of the property of any person not *sui juris*, the guardian or committee of such person, should not be appointed for the same reason, nor yet any person connected with him, nor the solicitor in the action: *Re Lloyd*, 12 Ch. D. 447; nor a Master of the Court: *Ex parte Fletcher*, 6 Ves. 427.

Who should be appointed, of trust estate.

Parties cannot propose themselves without leave of Court.

A party to the action cannot propose himself as receiver unless leave to do so be embodied in the order: *Davis* v. *Duke of Marlborough*, 2 Sw. 118.

On return of warrant, bond to be brought in.

279. At the time appointed, the party prosecuting the order is to bring into the Judge's Chambers or the Master's office, the recognizance or bond proposed as security; the bond or recognizance is to be of the Master (3rd June, 1853; Ord. 38, s. 1.)

The recognizance, or bond, here referred to, is intended to be brought in as a draft, and should not be executed until it has been

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approved by the Master, see *Ord.* 281, otherwise its re-execution may be necessary.

Bond, how to be given.

The bond, or recognizance, must now be made to the "Accountant of the Supreme Court, his executors, administrators, or assigns." *Rule S. C.* 519.

The bond of a guarantee company may be accepted as security: 42 Vict. c. 30, and see *Carpenter* v. *Solicitor to the Treasury*, 46 L. T. N. S. 821; *R. S. O.* c. 15, s. 24.

Party desiring to propose another person as Receiver, to give notice.

280. Any other party desirous of proposing another person as Receiver, is to serve notice of his intention so to do upon the other parties, naming in such notice the person proposed by him as Receiver, and his sureties, and is then in like manner to bring into the Judge's Chambers or Master's office the recognizance or bond proposed by him as security. (3rd June, 1853; Ord. 38, s. 1.)

Master to appoint Receiver, and settle, and approve, security.

281. At the time named in the appointment or warrant the Judge or Master is, in the presence of the parties, or those who attend, so consider of the appointment of the Receiver, and to determine respecting the same; and to settle and approve of the proposed security. (3rd June, 1853; Ord. 39, s. 1.)

Evidence to be produced on settling security.

In order to enable the Master to settle the security to be given, affidavits must be filed proving the amount of property likely to come to the receiver's hands. The amount of the security required, will vary according to the circumstances; usually security will be required to be given by the receiver and at least two sureties in double the amount of the probable annual rents of realty, and double the probable amount of personal estate, likely to come to his hands.

Discharge of bond.

When a receiver has passed his final accounts, and paid his balances as directed by the Court, an application may be made to discharge the bond; all parties interested are entitled to notice of the application: *Brown* v. *Perry*, 1 Chy. Ch. R. 253.

Master not to make report appointing a Receiver.

282. The Master is to make no report approving of or appointing the Receiver; but the Judge or Master is to appoint such Receiver by signing a written appointment to the following effect, viz: "IN CHANCERY,

[*style of cause*]—I hereby appoint [*Receiver's name*] Receiver in this cause, [*signature of Judge or Master*];" which appointment is to be signed without any warrant or attendance for that purpose. (3rd June, 1853; Ord. 38, s. 1.)

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But to sign appointment

Committees of lunatics, and guardians of the person and estate of infants, are to be appointed in the same manner as receivers. *Ord.* 537.

283. When signed, the appointment is to be filed by the party who has procured the person named by him as Receiver to be appointed, and is then to have the same effect as the filing of the Master's report appointing a Receiver under the former practice; but the same is not to be filed until after the execution and filing of the securities settled and approved by the Judge or Master. (3rd June, 1853; Ord. 38, s. 1.)

Master's appointment of Receiver to be filed.

Security, if any required, must be first perfected.

A receiver appointed "upon his giving security," is not effectually constituted receiver until he has given the security: *Edwards* v. *Edwards*, 1 Ch. D. 454; 2 Ch. D. 291; but if no security be required, he is legally clothed with the character of receiver from the date of his appointment: *Taylor* v. *Eckersley*, 2 Ch. D. 302; 5 Ch. D. 740.

Receiver's appointment, when effectual.

Interference by third parties with the property in question, before the appointment is completed, is not a contempt of Court: *Ib.*; and see *Fox* v. *Nipissing R. W. Co.*, 29 Gr. 11.

After the appointment of the receiver is complete, any interference with the property committed to his charge and in his possession, either by parties to the action, or third parties having notice of his appointment, is a contempt of Court, unless the leave of the Court have been first obtained: *Angel* v. *Smith*, 9 Ves. 335; *Russell* v. *East Anglian R. W. Co.*, 3 Mc. & G. 104; *Ames* v. *Birkenhead Docks*, 20 Beav. 353; even though such interference be by persons claiming by title paramount to that of the parties to the action in which the receiver is appointed: *Ib.*; *Evelyn* v. *Lewis*, 3 Ha. 475; *Hawkins* v. *Gathercole*, 1 Drew. 17; *Randfield* v. *Randfield*, 1 Dr. & Sm. 314; and the Court will not permit any one, without its sanction, to intecept, or prevent payment, or delivery to the receiver, of any money or property which he has been appointed to receive: *Ames* v. *Birkenhead Docks*, 20 Beav. 353; but where goods in the posession of a receiver were sold for taxes, and neither the bailiff, nor purchaser, had notice of the receiver's rights the Court refused to hold the sale void: *Gibson* v. *Lovell*, 18 Gr. 197.

Interference with Receiver, a contempt of Court.

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Receiver to obtain leave to sue, or defend, or distrain.

When it is necessary for the receiver to bring, or defend, an action, or take other legal proceedings, to recover, or maintain, his right to property committed to him, he should first obtain the sanction of the Court : *Thomas* v. *Torrance*, 1 Chy. Ch. R. 9. After attornment, to the receiver, he may distrain in his own name, before attornment leave must be obtained to distrain in the name of the person having the legal estate : Kerr 142, 143. The application for leave to sue, defend, or distrain, may be made in Chambers : *Thomas* v. *Torrance*, 1 Chy. Ch. R. 9 ; notice to the tenants is not necessary : *Paxton* v. *Dryden*, 6 P. R. 127.

Proceedings against, restrained.

Proceedings instituted against a receiver for acts done by him in the execution of his office, will be restrained : *Simpson* v. *Hutchison* 7 Gr. 308. See *post* p. 215 as to proceedings by persons claiming adversely to a receiver.

Accounts of.

ACCOUNTS OF RECEIVER.—See *post*, *Ord.* 588.

Ord. 284.

Ord. 284 related to injunctions to stay proceedings at law, and is effete.

Ord. 285.

Ord. 285 provided, that on motion to dissolve an injunction, affidavits might be used to support, or contradict, the answer, and is effete.

XXIII.—STOP ORDERS.

Liability of person obtaining Stop Order to pay costs and expenses, occasioned thereby.

286. Where any stock, debentures, funds, securities, or moneys, are standing in Court to the credit of any cause, or to the account of any class of persons, or are invested in the name of the Registrar, or other officer of the Court, and an order is made to prevent the transfer or payment of such stock, debentures, funds, securities, or moneys, or any part thereof, without notice to the assignee of any person entitled in expectancy or otherwise to any share or portion of such stock, debentures, funds, securities, or moneys, the person by whom any such order shall be obtained, or the share of such stock, debentures, funds, securities, or moneys affected by such order, shall be liable at the discretion of the Court or a Judge, as the case may be, to pay any costs, charges, and expenses, which by reason of any such order having been obtained, shall be occasioned to any party to the cause or matter, or any person interested in any such stock, debentures, funds, securities, or moneys. (*Eng. Con. Ord.* 26, *r.* 1.)

Jurisdiction to grant stop orders.

The power to grant stop orders was formerly part of the jurisdiction of the Court of Chancery, and which now, under *The Judicature Act*, is vested in all the Divisions of the High Court equally.

This *Order*, it would seem, should, therefore, now be read as applying to the moneys and investments in Court, in any action pending in any of the Divisions of the High Court, and which are now vested in the Accountant of the Supreme Court *Rule H. C. J.* x.

The object of the *Order* is to prevent injustice being done by the granting of stop orders *ex parte*. The applicant for a stop order is always required to submit to be bound by the terms of this *Order* as a condition of getting the stop order. See form of order Seton, 300.

Object of stop order.

The effect of a stop order is simply to prevent the payment out of money, or the transfer of securities in Court, to the person appearing on the books of the Accountant to be entitled thereto, without notice being first given to the person who obtains the stop order. Nothing is decided thereby as to the rights of the parties: *Lucas* v. *Peacock*, 9 Beav. 177. A stop order has no effect until delivered to the Accountant, but the payment out may be stayed for twenty-four hours, on lodging a caveat with that officer.

When granted

Stop orders may be granted against a fund in Court, on the application of a judgment creditor of the party entitled to the fund: *Wilson* v. *McCarthy*, 7 P. R. 132; *Courtoy* v. *Vincent*, 15 Beav. 486. A stop ordered may be obtained on a fund ordered to be paid into Court, though it has not been actually paid in: *Shaw* v. *Hudson*, 48 L. J. Ch. 689, but not when it is neither in Court, nor ordered to be paid in: *Wellesley* v. *Mornington*, 11 W. R. 17. An assignor should be served with notice of the application for a stop order by the assignee, even though a party to the cause, notwithstanding *Ord.* 287: *Parsons* v. *Groome*, 4 Beav. 521. The application must be supported by evidence of the applicants' title: *Wood* v. *Vincent*, 4 Beav. 419; *Quarman* v. *Williams*, 5 Beav. 133.

Application to pay out.

Sometimes the stop order is followed by an application for payment to the party obtaining it, such a motion is of course made on notice to all parties interested in the fund: *Re Gilchrist, Bohn* v. *Fife*, 7 P. R. 430, including any other persons who have obtained stop orders against the fund: see *Hulkes* v. *Day*, 10 Sim. 41.

Where the party obtaining the stop order does not move for an order for payment to him of the fund, the opposite party may move for payment out notwithstanding the stop order, or may move to discharge the stop order; such motions must, of course, be made on notice to the person who has obtained the stop order.

Effect of stop order on priorities.

Priorities.—As between specific chargees on a fund, a subsequent chargee having at the time of his advance notice of the prior charge,

cannot obtain priority over it by first obtaining a stop order against the fund: *Livesey* v. *Harding*, 23 Beav. 141; *Brearcliff* v. *Dorrington*, 4 D. G. & S. 122; *Swayne* v. *Swayne*, 11 Beav. 463, but if he had no notice of the prior charge when making his own advances, he may gain priority over it by first obtaining a stop order, even though he do so after notice of the prior charge: *Ib.*, *Greening* v. *Beckford*, 5 Sim. 195, but as between parties having no specific charge against the fund; *e. g.*, judgment creditors, he who first obtains a stop order will gain priority: *Thomas* v. *Cross*, 2 Dr. & S. 423.

The priority acquired by a stop order extends only to the charge in respect of which it was obtained: *Macleod* v. *Buchanan*, 33 Beav. 234; 4 D. J. & S. 265.

Stop order cannot defeat lien of solicitor.

The stop order cannot defeat the rights of third parties to the fund: thus, the lien of a solicitor on the fund, cannot be defeated by obtaining a stop order against his client, even under an assignment: *Haymes* v. *Cooper*, 33 Beav. 431.

Costs of.

Costs of obtaining a stop order are not given as of course: *Grimsby* v. *Webster*, 8 W. R. 725; *Hoole* v. *Roberts*, 12 Jur. 108; *Waddilove* v. *Taylor*, 6 Har. 307.

Notice of Stop Order need not be served on parties not sought to be affected thereby.

287. A person applying for such order, shall not be required to serve notice thereof upon the parties to the cause, or upon the persons interested in such parts of the stock, debentures, funds, securities, or moneys, as are not sought to be affected by the order. (*Eng. Con. Ord.* 26, *r.* 2.)

Service on assignor not dispensed with.

This *Order* does not dispense with service on the assignor, although a party to the cause: *Parsons* v. *Groome*, 4 Beav. 521, nor on other parties who have obtained stop orders against the fund: *Hulkes* v. *Day*, 10 Sim. 41. The applicant may be ordered to pay the costs of parties unnecessarily notified: *Glazbrook* v. *Gillatt*, 6 Beav. 611.

XXIV.—PROCESS.

Ord. 288.

Ord. 288, provided for issuing attachments on *præcipe* in certain cases; and is superseded by *Rule S. C.* 365, which provides that no attachment is to issue without an Order: *Thomas* v. *Palin*, 47 L. T. N. S. 207; 21 Ch. D. 360.

Upon attachment of contemnor. Sequestration may issue on *precipe*.

289. In case the party shall be taken or detained in custody under the writ of attachment, without obeying the order, then upon the sheriff's return that the

party has been so taken or detained, the party prosecuting the order shall be entitled, upon *præcipe*, to a commission of sequestration against the estate and effects of the disobedient party. (3rd June, 1853; Ord. 46, s. 2.)

Sequestration.

Sequestration.—Originally the writ of sequestration was the last prerogative process, issued out of the Court of Chancery, for the purpose of enforcing obedience to its decrees. The right of the Court of Chancery to issue such writs, was at first contested by the Common Law Courts, on the ground that the Court of Chancery could not enforce its decrees by process *in rem*, but only *in personam*. And it was even ruled at law, that to kill a sequestrator in the execution of such process was no murder. But the authority of the Court to issue such writs was ultimately established, in spite of the "bloody and desperate resolutions" of the common lawyers. See Gilbert's Chy. Pr. 77.

"A grand distress."

A sequestration is in "the nature of a grand distress." It is a process of contempt *in rem*: *Tatham* v. *Parker*, 1 Sm. & G. 506; (see, however, observations of Spragge, C., *Meyers* v. *Meyers*, 21 Gr. 216,) and may be issued to enforce either an interlocutory order, or a final judgment. It affects the personal estate, and the rents and profits of the realty, of the person whose estate is sequestered: *Jackson* v. *Jackson*, 1 Chy. Ch. R. 115; but it does not appear to bind the land itself: *Hyde* v. *Greenhill*, 1 Dick. 107; in *Meyers* v. *Meyers*, 19 Gr. 191 Mowat, V. C., expressed the opinion that under 5 Geo. II. c. 7, s. 4, in Ontario, lands were bound by the writ of sequestration from the time of its delivery to the sequestrator; and that the Court might order a sale of sequestered lands; bu the full Court were of opinion that lands could not be sold under a sequestration: S. C. 21 Gr., at p. 218. According to English authorities, it is said that the writ binds from its date and not merely from its execution: *Burdett* v. *Rockley*, 1 Vern. 58; but see *Angel* v. *Smith*, 9 Ves. 336; *Harris* v. *Meyers*, 3 Chy. Ch. R. 107.

Binds personalty, and rents and profits of realty.

From date of sequestration.

At one time it was doubted whether choses in action could be reached by sequestration; the later authorities establish that they can: *Irving* v. *Boyd*, 15 Gr. 157; and see *McDowell* v. *McDowell*, 1 Chy. Ch. R. 140.

Writ may issue without order, where contemnor in custody.

Formerly the writ could in no case issue except under special order. *Ord.* 289 makes an exception to this rule, where the party is in actual custody for contempt, without obeying the judgment, or order, sought to be enforced. In such cases the writ may be obtained on *præcipe*, upon filing the sheriff's return.

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Practice continued under *J. A.*

The Judicature Act appears to have made no change in this practice; and it would seem that this *Order* continues in force; and that it now applies to all the Divisions; the process of sequestration being a matter not only of practice, but of jurisdiction, which is now vested in the Queen's Bench, and Common Pleas, Divisions, in common with the Chancery Division: *Rules S. C.* 344, 360; *J. A.* s. 9; and see Holmested's Manl. Pr. 149.

Property liable; goods and chattels.

Property Liable to Sequestration—All goods, and chattels, in the possession of the contemnor, are liable to be seized; and also any property belonging to him, which can be reached by the sequestrator without suit, or action. And if the keys are denied him, the sequestrator may open rooms, and boxes, that are locked, and schedule the contents; but may not remove property off the premises without the special order of the Court: *Pelham* v. *Newcastle*, 3 Sw. 290 n. By the Imperial Statute 11 Geo. IV. and 1 Wm. IV. c. 36, s. 15, r. 16, sequestrators have the same power over documents in the *custody* of a person committed for not delivering them, or depositing them in Court, as they have over the contemnor's own property. This provision is incorporated into the law of this Province by *R. S. O.* c. 40, ss. 34, 36.

Documents in custody of contemnor.

Choses in action, how far bound.

CHOSES IN ACTION.—As regards *choses in action*, an order of the Court is necessary, to enable the sequestators to sue for their recovery *Irving* v. *Boyd*, 15 Gr. 157; or they may be reached by motion in the action in which the sequestration issued: see *Ward* v. *Booth*, 14 L. R. Eq. 195; *Ex parte Nelson, Re Hoare*, 14 Ch. D. 41.

But the *chose in action* is not bound by the writ of sequestration, until either the sequestrator, or the party prosecuting it, take steps to obtain payment: *McDowell* v. *McDowell*, 1 Chy. Ch. R. 140; 10 U. C. L. J.; *London and Canadian Loan and Agency Co.* v. *Merritt*, 32 C. P. 375.

How recovered under.

If the debtor admits the liability, and submits to the order of the Court, an order may be made, without further suit, authorizing the debtor to pay, and deliver, the fund, or property, to the sequestrator; or authorizing the latter to seize the property: *Wilson* v. *Metcalfe*, 1 Beav. 263; *Re Slade, Slade* v. *Hulme*, 45 L. T. N. S. 276; 18 Ch. D. 653: *Crispin* v. *Cumano*, 1 L. R. P. & M. 622. But such order cannot be made without the debtor's assent: *Ib.*

A claim to indemnity, which a surety has against his principal, before payment by the surety, is not a *chose in action*, which can be reached by sequestration: *Irving* v. *Boyd*, 15 Gr. 157.

Pensions and salaries.

PENSIONS, AND SALARIES.—Pensions granted entirely for past services, may be sequestered: *Willcock* v. *Terrell*, 3 Ex. D. 323; *Dent* v. *Dent*, 1 L. R. P. & M. 366; *McCarthy* v. *Goold*, 1 Ba. & B. 387; but pensions and salaries for services, still being rendered, or which

may be required *in futuro*, cannot be sequestered : *Fenton* v. *Lowther*, 1 Cox 315 ; *McCarthy* v. *Goold*, *supra* ; *Collyer* v. *Fallon*, 1 T. & R. 459 ; *Spooner* v. *Payne*, 1 D. M. & G. 383, and see *Lloyd* v. *Cheetham*, 3 Giff. 171. **Sequestration**

RENTS, AND PROFITS, OF REAL ESTATE, including crops, or other natural produce, or rents paid in kind, are liable to sequestration, but land, whether freehold, or leasehold, cannot be sold under the writ, which only confers a right to the possession, but does not transfer any title to the land, or term, to the sequestrator : *Shaw* v. *Wright*, 3 Ves. 22 : or confer any priority over prior specific charges : *Meyers* v. *Myers*, 20 Gr. 185 ; 21 Gr. 214. Tenants in possession should be notified to attorn to the sequestrator, and pay their arrears, and growing rents, to him : Danl. Pr. 916 ; and upon refusal, the sequestrator may obtain an order compelling them to attorn : *Rowley* v. *Ridley*, 3 Sw. 306. The sequestrator may, with the sanction of the Court, lease lands for any period, during which the rents in the aggregate, would not exceed the amount for which the writ issued : *Harris* v. *Meyers*, 3 Chy. Ch. R. 89. Rents and profits of realty bound but land not saleable under. Tenants to be notified. Order against.

If a tenant attorns to the sequestrator, and afterwards pays his rent to another party, he may be compelled to pay it over again to the sequestrator : *Harris* v. *Meyers*, 2 Chy. Ch. R. 121. A sequestrator can make leases, for any period during which the aggregate rents, will not exceed the amount for which the sequestration issued : *Harris* v. *Meyers*, 3 Chy. Ch. R. 89. But the sequestrator cannot, by his lease, affect the right of a person holding an encumbrance prior to the claim of the party issuing the sequestration : *Meyers* v. *Meyers*, 19 Gr. 541 Paying rent to third party after attornment to sequestrator. Lease by sequestrator.

Disposition of Property Sequestered.—*Prima facie* a sequestration confers merely a right of detainer of the property sequestered. Where the sequestration however is issued for non-payment of money, the proceeds of the goods seized will be ordered to be applied in satisfaction of the demand : *Davis* v. *Davis*, 2 Atk. 24. The sequestrator should not, however, make the application, but should pay the proceeds into Court upon leave obtained on motion in Chambers : Danl. Pr. 917. Disposition of property sequestered

SALE OF PROPERTY.—Where necessary a sale of personal property sequestered, may, on the application of the sequestrator, be ordered, *e. g.*, where goods are of a perishable nature : *Shaw* v. *Wright*, 3 Ves. 22 ; or it is necessary for the satifaction of the claim for which the writ issued : *Ib* ; *Mitchell* v. *Draper*, 9 Ves. 208 ; a defendants reversionary interest in a fund in Court, has been ordered to be sold : *Cowper* v. *Taylor*, 16 Sim. 314. The application for leave to sell must be made on notice : *Mitchell* v. *Draper*, 9 Ves. 208 ; but service of notice may be dispensed with : *Re Rush*, 19 W. R. 417. Sale, when ordered.

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Notice of application for sale must be given to debtor.

Notice must be given to the debtor, of an application for an order to sell property seized under a sequestration: *Forbes* v. *Connolly*, 1 Chy. Ch. R. 6. According to the *dictum* of Mowat, V. C., in *Meyers* v. *Meyers*, 19 Gr. 185, sequestered land may now be ordered to be sold, as well as goods and chattels; but the full Court in *Meyers* v. *Meyers*, 21 Gr. at p. 218, expressed the contrary opinion, and stated that "all that the Court does is to direct the application of the rents and profits, and this, not by way of execution, but upon the ground that the party is in contempt for disobedience of some order of the Court." See also *Nelson* v. *Nelson*, 6 P. R. 194.

Parties having claims adverse to sequestration,—proceedings by.

Adverse Claims.—Where property affected by a sequestration, or any interest therein, is claimed by some third person, he may apply to the Court for relief, by a summary application in the cause: See *Ord.* 398–401, *post.*

He should not commence an action against the sequestrator, or disturb his possession without the leave of the Court. If he do so, he may be restrained by injunction.

Obstruction of sequestrator a contempt.

OBSTRUCTION OF SEQUESTRATOR, is a contempt of Court: *Angel* v. *Smith*, 9 Ves. 335; *Pelham* v. *Newcastle*, 3 Sw. 289 *n*, and see *Francklyn* v. *Colhoun*, 3 Sw. 276. But persons having claims on the property sequestered, adverse to the sequestrator, are not driven to bring actions, but may apply to the Court for relief upon a motion in a summary way, under *Ord.* 398-401, and see *Meyers* v. *Meyers*, 19 Gr. 541.

Death of contemnor; when proceedings may be continued against his representatives.

Death of Contemnor.—Where a sequestration has issued to compel payment of money, in case the contemnor die, an order may be obtained to continue proceedings against his heir, or devisee, as the case may be, where the lands descended, or devised, would be assets for the payment of the debt: *Hyde* v. *Greenhill*, 1 Dick, 107; but where the writ issues for personal contempt, on the part of the contemnor, on the death of the contemnor, no order to continue proceedings can be obtained: *Turley* v. *Meyers*, 3 Chy. Ch. R. 102; Gilbert's Chy. Pr. 86-87; except perhaps for the costs: see *R. S. O.* c. 40, s. 102

Sequestration may issue for default in payment of money, on application in Chambers.

290. If an attachment cannot be executed against the party refusing or neglecting to obey the order, by reason of his being out of the jurisdiction of the Court, or of his having absconded, or that with due diligence he cannot be found, and the Court is satisfied by affidavit that such is the case, the party prosecuting the order shall be entitled to an order for a commission of

sequestration against the estate and effects of the disobedient party; and it shall not be necessary for that purpose to sue out an attachment. (3rd June, 1853; Ord. 46, s. 3.)

No sequestration granted after proceedings stayed on appeal.

An order for sequestration will not be granted against a defendant required to do an act, where an appeal is pending from the judgment directing its performance, and the defendant has perfected the security required by the Orders of the appellate Court, entitling him to a stay of proceedings: *Dundas* v. *Hamilton & Milton R. Co.*, 19 Gr. 455.

Attachment need not issue to found sequestration.

Originally the sequestration only issued after an attachment, and all other process had been exhausted. Under this *Order* in cases where it would be impossible to execute an attachment, it is unnecessary to go through the form of issuing one.

An attachment may be ordered against a party who is out of the jurisdiction: *Bloomfield* v. *Brooke*, 6 P. R. 264, and see *Farewell* v. *Wallbridge*, 3 Gr. 628.

Sequestration may issue for non-payment of money.

291. If a party who is ordered to pay money, neglects to obey the order according to the exigency thereof, the party prosecuting the order, may, at the expiration of the time limited for the performance thereof, apply in Chambers for a writ of sequestration against the defaulting party, and upon proof of due service of a notice of the motion, unless the Court thinks proper to dispense with such service, and upon proof by affidavit of such other matters, if any, as the Court requires, the Court may order a writ of sequestration to issue.

Sequestration. when granted to enforce payment of money demand.

Where a writ of sequestration is sought, to enforce the payment of money, unless some special ground is made for proceeding *ex parte*, notice of motion must be given; and the ordinary procedure for recovering money demands, viz: writs of *fi. fa.* &c., and attachment of debts, should be first resorted to, or shewn to be unavailing: *Nelson* v. *Nelson*, 6 P. R. 194; but see *Re Russell Burnet* v. *Allen*, before Spragge, C., January 24, 1876, where the writ of sequestration was granted without such preliminary proceedings.

An order for payment of money need not be personally served in order to found a motion for a sequestration: *Long* v. *Long*, 6 P. R. 137.

The writ cannot properly be issued, to enforce an ordinary judgment for the recovery of money, which does not expressly order pay.

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ment, or limit a time therefor : *London and Canadian L. & A. Co.* v. *Merritt*, 32 C. P. 375 ; *Ex parte Nelson, Re Hoare*, 14 C. D. 41.

Commission of Sequestration to be directed to Sheriff.

292. Commissions of sequestration are to be directed to the Sheriff, unless otherwise ordered. (3rd June, 1853 ; Ord. 46, s. 4.)

For form of writ see : *Rule S. C.*, Form No. 182.

Ord. 293.

Order 293 provided that every order for the performance of an act, other than the payment of money, should limit a time after service for its performance, and provided an indorsement, notifying the party he was liable to attachment, &c. The similar English order has been held to be no longer in force, as attachments can no longer issue on *præcipe : Thomas* v. *Palin*, 47 L. T. N. S. 207 : *Rule S. C.* 365.

Writ of attachment, or injunction, need not issue to enforce Order for possession.

294. It shall not be necessary to issue a writ of attachment or injunction upon an order for delivery of possession, but the party prosecuting the order, upon filing with the Clerk of Records and Writs an affidavit of service of the same, and of non-compliance therewith, shall be entitled without further order to a writ of assistance. (3rd June, 1853 ; Ord. 46, s. 8.)

Writ of assistance may issue.

How far Ord. 294 in force now.

Rules S. C. 341 and 379 provide that judgments for the recovery, or for the delivery of the possession, of land may be enforced by writ of possession. It may be open to question whether these *Rules* apply to orders for delivery of possession, for example, orders made under *Ord.* 464 *post*. This *Order* may, therefore, still be in force for the purpose of authorizing the issue of a writ of possession to enforce orders, as distinguished from judgments, for possession.

Orders *nisi* abolished.

295. In lieu of an order *nisi*, notice is to be given of the motion for an order absolute. (6th Feb. 1865 ; Order 31.)

Prior to this *Order*, if an order obtained on *præcipe*, were disobeyed, the party prosecuting the order, might on proof of service of, and of non-compliance with, the order, obtain on an *ex parte* application in Chambers, an order *nisi* against the party in default. This order required the party in default to perform the act required of him in four days, and was required to be indorsed with the notice prescribed by *Ord.* 293, and to be personally served, and if it were disobeyed an attachment might then issue upon præcipe. This *Order* dispenses with the order *nisi*, and enables the party prosecuting an order of course, to move at once to commit in the event of non-compliance with it : See note to next *Order*.

296. Where the application for such order is made by reason of default in production of books and papers in the Master's office, or in the office of the Clerk of Records and Writs, or in carrying in accounts, service of the notice of motion upon the solicitor of the party required to obey the same, is to be sufficient service.

On application for order to commit for non-production in M.O., or office of Clerk of Records and Writs, service of notice on solicitor sufficient.

Motion to commit; service of notice of motion.

The application referred to in this *Order* is one for an order absolute to commit for non-production of documents in the Master's office, or in the office of the Clerk of Records and Writs, and Deputy Registrar, or for not bringing in accounts. Service of a notice of motion to commit is generally required to be personal: *Mann* v. *Perry*, 50 L. J. Chy. 251, and see Gilbert's Chy. Pr. 198–9, but this *Order* makes an exception to the general rule, in the cases mentioned.

Formerly the notice of motion to commit for breach of an order, of course, was required to be a four clear days' notice: *Gray* v. *Hatch*, 2 Ch. R. 12, but two clear days' notice seems now sufficient, *Rule S. C.* 407; but see *Exchange Bank* v. *Newell*, 19 C. L. J. 253.

Motion must be made before a Judge.

The motion must be made before a Judge in Chambers: *Keefe* v. *Ward*, 18 C. L. J. 166.

Default; how established.

On motions to commit for non-production, or not bringing in accounts into the Master's office, the Master is to determine whether the party has been sufficiently notified. The Master's certificate of default is the only evidence of default which is necessary, or can be used: *Paxton* v. *Dryden*, 6 P. R. 83; *Wilson* v. *Wilson*, 7 P. R. 57, but on motions to commit for non-production in the office of the Clerk of Records and Writs, or Local Registrars, Deputy Clerk of the Crown, or Deputy Registrar, it is necessary to prove the due service of the order, and also to produce the certificate of the officer that it has not been complied with, *Ib.*

The certificate of default should bear the latest possible date: *Sommerville* v. *Joyce*, 1 Chy, Ch. R. 202. Such a certificate may be read, though no notice of reading it be given: *Malloch* v. *Plunkett*, 1 Chy. Ch. R. 381.

Costs, where order obeyed pending motion.

Where the order has been complied with, after notice of motion served, the motion will be refused, but the applicant will be entitled to his costs: *Ib.*; *Berrie* v. *Moore*, 1 Chy. Ch. R. 107.

Discharge from custody, on subsequent obedience.

And even after committal for not bringing in accounts, the party is entitled to be discharged on production of the Master's certificate that the accounts have been brought in, and the sufficiency of the accounts will not be enquired into on the application for discharge, nor will the payment of costs be made a condition precedent of the discharge: *Clark* v. *Clark*, 3 Chy. Ch. R. 67.

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Sufficiency of compliance; how determined.

Where the party has complied with the order, but it is contended his compliance is insufficient, the question of sufficiency must be determined in cases pending in the Master's office, by the Master upon a warrant to bring in a better affidavit, or accounts, as the case may be: *Merkely* v. *Casselman*, 1 Chy. Ch. R. 292, and see *Wilson* v. *Wilson*, 7 P. R. 57.

But where there is an alleged insufficient compliance with an order in the office of the Clerk of Records and Writs, Local Registrar, Deputy Clerk of the Crown, or Deputy Registrars, the question of sufficiency must be determined on motion in Chambers to compel the party to bring in a better affidavit, or in default that he be committed: *Ross* v. *Robertson*, 2 Chy. Ch. R. 66.

Ord. 297.

Order 297 provided that orders in favor of, or against, persons not parties to a cause, may be enforced by same process as in case of parties, and is superseded by *Rule S. C.* 358 which is to the same effect.

Ord. 298-303.

Orders 298-303, were abrogated by *Ord.* 616, and see *R. S. O.* c. 40, ss. 95, 96; c. 50, ss. 23-24.

XXV.—COSTS.

Rules and Orders, of Courts of Chy. and Q. B. and C. P. as to costs, &c., continued in force.

"The Rules, Orders, and practice of any Court, whose jurisdiction is vested in the High Court of Justice, or Court of Appeal, relating to costs, and to the allowance of the fees of solicitors, and attorneys, and to the taxation of costs, existing prior to the commencement of the Act, shall, in so far as they are not inconsistent with the Act, and the Rules of the Court in pursuance thereof, remain in force and be applicable to costs of the same, or of analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court, and the taxation of costs in the High Court of Justice, and the Court of Appeal." *Rule S. C.* 445; and see *Rule S. C.* 428.

Sum in gross may be awarded in lieu of taxed costs.

304. Where the Court deems it proper to award costs to either party, it may by the order direct payment of a sum in gross in lieu of taxed costs, and direct by and to whom such sum in gross is to be paid. And the same may likewise be done, upon such proceedings before the Court, or in Chambers, as have heretofore been matters of reference to the Master. (3rd June, 1853; Ord. 45, s. 1.)

This *Order* would seem now to be in force in all the Divisions, inasmuch as it relates not merely to practice, but also to the jurisdiction of the Court on the question of costs.

Under this *Order* the Court may award a lump sum, not only on interlocutory applications, but also for the general costs of the cause, or may award costs according to the lower scale, even in cases which were beyond the former equitable jurisdiction of County Courts: *Palmer* v. *Postle*, before full Court, 7th Dec., 1878; see Reg. Lib. of that date.

Court may award lower scale costs, in a case not formerly within C.C. jurisdiction.

The jurisdiction of the County Court, was excluded in many cases, where, nevertheless, the amount in controversy was very insignificant. See note to *Ord.* 553 *post*. Under the powers conferred by this *Order* the Court may award costs on the lower scale, even in cases not within the provisions of *Ord.* 553.

305. It shall also be competent for a Local Master, upon disposing of applications made to him under Order 36, in like manner to direct payment of a sum in gross in lieu of taxed costs, and to direct by and to whom such sum in gross is to be paid. (3rd June, 1853; Ord. 45, s. 1.)

Local Master may allow sum in gross, in lieu of taxed costs, on Chamber motions.

The jurisdiction of the Local Masters is now extended: *Rule S. C.* 422, and see Holmested's Manl. Pr. 214. But it would seem that the power to award a sum in gross for costs, would apply to applications, made to them under their extended jurisdiction, as well as to applications authorized by *Ord.* 36. It would also seem that the Local Judges of the High Court, may in like manner act under the provisions of this *Order*, in proceedings before them in actions in the High Court. See *Ord.* 304, *Rule S. C.* 445.

306. If upon the taxation of costs it should appear to the Master that any proceedings have been taken unnecessarily, and which were not calculated to advance the interests of the party on whose behalf the same were taken, it shall be the duty of the Master to disallow the costs of such proceedings, as well on the taxation of costs between solicitor and client, and as between solicitor and client, as on a taxation between party and party, unless the Master shall be of opinion that such proceedings were taken by the solicitor because they were in his judgment, reasonably exercised, conducive to the interest of his client. It shall not be the duty of the Master, on a taxation of costs

Costs of unnecessary procedings not to be taxed between party and party, or between solicitor and client.

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Exception in case of taxation between solicitor and his client, when costs incurred at client's request, after notice that proceeding unnecessary.

between a solicitor and his client, to disallow to the solicitor his costs of such proceedings where it is made to appear that such proceedings were taken by the desire of the client, after being informed by his solicitor that the same were unnecessary, and not calculated to advance the interests of the client; but the costs of such proceedings are not to be allowed in any case where, according to the present practice and rules of taxation, the same would not be allowed. (3rd June, 1853; Ord. 45, s. 2.)

The costs of unnecessary affidavits, going into the merits, filed on a motion for leave to appeal from a Master's report: *Nash* v. *Glover*, 6 P. R. 267, and on a motion to vacate a decree: *Redford* v. *Todd*, 6 P. R. 154, were disallowed.

And see *Rules S. C.* 435, 158 *d. e.*, 220, 230, 453 and 463, which also relate to the disallowance of costs of unnecessary proceedings.

Certain costs taxable between party and party, as would be allowed as between solicitor and client.

307. Where costs are to be taxed as between party and party, the Master may allow to the party entitled to receive such costs, the like costs as are taxable where costs are directed to be taxed as between solicitor and client, in respect of the following matters:

1. Advising with counsel on the pleadings, evidence, and other proceedings in the cause;
2. Procuring counsel to settle and sign such pleadings and petitions as may appear to have been proper to be settled by counsel;
3. Procuring and attending consultations of counsel;
4. The amendment of bills;
5. On proceedings in the Master's office;
6. Supplying counsel with copies of, or extracts from, necessary documents. (3rd June, 1853; Ord. 45, s. 3.)

Where, in an administration suit, the plaintiffs, who were next of kin, had incurred the expense of several journeys to examine the books of the estate and make enquiries, &c.; and also of other proceedings in the Master's office, without the consent of the creditors who were alone beneficially interested, and after they knew that the estate was insolvent; such costs were disallowed: *Re Robertson, Robertson* v. *Robertson*, 24 Gr. 555.

Extraordinary expenses incurred by plaintiff having no beneficial interest, disallowed as against estate.

Notwithstanding this *Order*, charges, and allowances, which might very properly be allowed on a taxation between solicitor and client, when the costs come out of the plaintiff's fund, or one in which he is interested, may nevertheless be disallowed out of a fund in which he has no interest: *Ib.* The costs of preparing and tendering a conveyance before suit are not taxable as costs in a cause subsequently brought: *Pringle* v. *McDonald*, 7 P. R. 152.

Though taxable between solicitor and client

308. In allowing such costs, the Master is not to allow the party any costs which do not appear to have been necessary or proper for the attainment of justice, or for the defending his rights; or which appear to have been incurred through over-caution, negligence or mistake, or merely at the desire of the party. (3rd June, 1853; Ord. 45, s. 3.)

Master not to allow costs not necessary, or incurred through over-caution.

309. The fees and disbursements set forth in the Tariff annexed to these Orders, may be charged in respect of the services therein enumerated.

Tariff of fees.

This *Order* is now to a great extent superseded by *Rule S. C.* 432, and the new tariff of fees promulgated 10th September, 1881. See Holmested's Manl. Pr. 188. But where no Court fees are provided by the old common law tariff for any proceeding, resort is still to be had to the tariff referred to in this *Order*, so far as it is not abrogated by the tariff prescribed by *Ord.* 615.

Ord. 309, how far in force.

310. No bill of costs where the amount claimed exceeds thirty dollars is hereafter to be taxed by the Accountant, Registrar, or Judges' Secretary, but every bill exceeding that sum is to be taxed by the Taxing Officer, notwithstanding anything to the contrary contained in the order. (1st April, 1867; Ord. 16.)

No bill of costs exceeding $30 to be taxed by Registrar.

Prior to *The Judicature Act* the costs of motions in Chambers and in Court, where they were under $30, might be taxed by the officer

Taxation of costs in Toronto must

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be by Taxing Officer

issuing the order. It is doubtful, however, whether any costs can now be taxed in Toronto, except by one of the Taxing Officers. See *Rule S. C.* 438.

Revision of taxations by local officers.

311. Every Local Master is forthwith, after taxing a bill of costs, to transmit the same by mail to Toronto, addressed "To the Taxing Officer of the Court of Chancery, Toronto," and he is to allow in the bill the postage for the transmission and return of the bill, and shall prepay the same; and is to allow in the bill the sum of one dollar as a fee for the revision of the bill by the Taxing Officer at Toronto, and a law stamp for that sum, with postage stamps for the postage, is to be paid at the time of taxation by the party procuring the bill to be taxed; and the Local Master is to transmit with the bill to the Taxing Officer at Toronto, the law stamp, and the necessary stamps for postage on the return of the bill to the Local Master. (6th Feb. 1865; Ord. 37.)

Revision of taxation, when necessary, and when optional.

This *Order* is modified by *Rule S. C.* 311. A revision of taxation is now necessary to be had only in actions, for the administration of an estate, or for partition, or for foreclosure, redemption, or sale of mortgaged premises, or in actions where the costs are payable out of an estate, or out of a fund in Court, or where infants are affected by the taxation: See *Rule S. C.* 439. In other cases the revision may be demanded by any party interested; but unless demanded it is not necessary: *Rule S. C.* 439, *b. c.* See Holmested's Manl. Pr. 181-2.

Review of taxation.

Appeal from taxation by local officers how brought.

A review of taxation may also now be had, and an appeal therefrom to a Judge, as provided by *Rules S. C.* 447–450. See Holmested's Manl. Pr. 183. Notwithstanding *Rule S. C.* 449, it has been held that an appeal from a taxation by a Local Officer, will not lie direct to a Judge, but that the bill must be revised by one of the Taxing Officers in Toronto, from whom alone an appeal to a Judge will be entertained; *Crowe* v. *Steeper*, 2 C. L. T. 83.

Duty of Taxing Officer on receipt of bill for revision.

312. The Taxing Officer at Toronto, upon receiving the bill of costs, is to examine the same, and to mark in the margin such sums (if any) as may appear to him to have been improperly allowed, or to be questionable; and he is to revise the taxation, either *ex parte*,

or upon notice to the Toronto agent (if any) of the solicitor whose bill is in question, as in his discretion he may see fit; but notifying such agent (if any) in all cases where the taxation is not clearly erroneous, or where the amount in question is so large as in the judgment of the Taxing Officer, to make such notification proper. Such notification may be by appointment mailed to the address of the agent (if any). If upon the revision the sums disallowed shall amount to one-twentieth of the amount allowed upon taxation, the Taxing Officer is to add to the amount taxed off, the amount of postages, and the sum of one dollar aforesaid, and is thereupon to re-transmit the bill so revised to the Local Master. (6th Feb. 1865; Ord. 38.)

Powers of Taxing Officer on revision.

The Taxing Officer, on revision, may restore items improperly disallowed by a Local Master; as well as strike out, or reduce, any which may have been improperly allowed, even though in the discretion of the local officer: *Keim* v. *Yeagley*, 6 P. R. 60; *Re Robertson*, *Robertson* v. *Robertson*, 24 Gr. 555.

But the Taxing Officer cannot receive evidence to show that costs are payable otherwise than the order awarding them, construed by the ordinary rules of construction, directs: *Keim* v. *Yeagley*, 6 P. R. 60.

No sum to be inserted for costs, in report, until after revision.

313. No sum is to be inserted in the report of a Local Master as taxed and allowed for costs, until such revision by the Taxing Officer; but in a case of urgency a writ of execution may issue to levy debt or costs, or both, upon the order of a Judge, subject to the future revision by the Taxing Officer. (6th Feb. 1865; Ord. 39.)

But execution in cases of urgency may issue.

Where revision necessary, report not to be dated until revision completed.

Where it is necessary that costs should be revised, the Master should state in his report that they have been revised, and should not date his report until the revision is complete: *Waddell* v. *McColl*, 14 Gr. 211.

Guardian *ad litem*, fee of $15 to be paid in lieu of taxed costs.

314. Where a guardian *ad litem* is appointed on the application of the plaintiff, to an infant, or to a person of unsound mind, not so found by inquisition, no costs are to be taxed to the guardian; but in lieu thereof,

the plaintiff is to pay to the guardian a fee of fifteen dollars, and his actual disbursements out of pocket; and the plaintiff in case he is allowed the costs of the suit, is to add to his own bill of costs the amount he so pays. But the Court may, in special cases, direct the allowance of taxed costs to a guardian *ad litem*. (1st April, 1867; Ord. 18.)

But Court may award taxed costs.

315. Where two or more defendants defend by different solicitors under circumstances that, by the law of the Court, entitle them to but one set of costs, the Taxing Officer, without any special order from the Court, is to allow but one set of costs; and if two or more defendants defending by the same solicitor separate unnecessarily in their answers, or otherwise, the Taxing Officer is, without any special order of the Court, to allow but one answer and set of costs. (1st April, 1867; Ord. 17.)

Defendants improperly severing are to be allowed but one set of costs without special order.

Rule as to defendants joining in defence, only applies to trustees, or *c. q. t.*

The rule which requires defendants in the same interest to join in the defence, appears only to apply to defendants standing in a fiduciary position, either as trustees: *Farr* v. *Sheriffe*, 4 Har. 528; or *cestuis que trust*: *Peillon* v. *Brooking*, 4 L. T. N. S. 731; Sm. Pr. 837-8; but see *Crawford* v. *Lundy*, 23 Gr. 251. Thus in a suit for specific performance by a vendee against the vendor, and a subsequent vendee of the same property, it was held the defendants might properly sever in their defence, and employ separate solicitors: *Barrett* v. *Campbell*, 7 P. R. 150. But when husband and wife severed in a partition suit, the costs were ordered to be borne by the wife's share: *Mildmay* v. *Quicke*, 46 L. J. Ch. 667.

And not then where fraud charged,

Where one of several defendants is charged with fraud, the others are justified in severing, even though they stand in a fiduciary position: see *Conolly* v. *Hill*, 7 P. R. 441.

One defendant improperly severing; Master can not act under this Order.

Where defendants have severed under circumstances which, if the severance were improper, would disentitle one of them to costs *in toto*, the Master cannot act under this *Order*, if the judgment award the defendants costs generally. The *Order* applies only where all the defendants are to blame for the severance, and one set of costs is consequently apportionable between them: *Reid* v. *Stephens*, 3 Chy. Ch. R. 372.

Taxing Officer may tax costs without express reference.

316. Where costs are awarded to be paid, it shall be competent to the Taxing Officer to tax the same, without an express reference to him for that purpose. (29th June, 1861.)

Where costs in administration, or partition ends amount to 25 per ct., of the estate. Master to report specially as to.

317. Where in a suit for administration, or partition, or partition and sale, the Master finds that the costs amount to twenty-five per cent of the value of the property involved in the suit, he is to certify to the Court the amount of the costs, and the special circumstances, if any, connected therewith.

See now *Ord.* 643, *post*.

The provisions of this *Order* would still apply when taxed costs are allowed instead of a commission, as provided by *Ord.* 643.

Ord. 318.

Order 318. Provided that where a plaintiff's costs were ordered to be taxed, and the Master found the case to be within the competence of a County Court, he was to tax no costs unless the order also contained a declaration that the cause was proper to be brought in Chancery. This *Order* is now obsolete.

Lower scale of costs.

After the passing of the *Order*, the equitable jurisdiction of the County Courts was taken away and vested in the Court of Chancery, and a lower scale of costs provided to meet such cases. See *Ord.* 533, *Rule S. C.* 515.

Master to tax according to scale applicable without special direction.

Under a general direction to tax costs, the Master is to tax according to the scale applicable, having regard to the nature, and amount, of the claim involved: *Brough* v. *The Brantford N. & P. B. R. W. Co.*, 25 Gr. 43; *Kennedy* v. *Brown*, 6 P. R. 318. The Master's decision, however, is appealable: *Smith* v. *McDonald*, 25 Gr. 600: but see *Crowe* v. *Steeper*, 2 C. L. T. 83.

As to cases in which the lower scale is applicable, see *Ord.* 553 and note.

Costs may be ordered to be paid by one defendant to another.

319. Where the costs of one defendant ought to be paid by another defendant, the Court may order payment to be made by the one defendant to the other directly; and it is not to be necessary to order payment through the plaintiff. (20th Dec. 1865; Ord. 18.)

Costs in discretion of Court.

Under *Rule S. C.* 428 the costs of, and incident to, all proceedings, are in the discretion of the Court, but a trustee, mortgagee, or other

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person entitled by the rules of equity to costs out of a particular estate, or fund, cannot be deprived thereof.

Costs between co-defendants.

A defendant is usually liable to pay costs to his co-defendant, when the latter is an innocent party, and is necessarily brought into the litigation in order to enable the plaintiff to obtain complete relief in the action: see *McLean v. Grant*, 20 Gr. 76. Formerly at law there was no practice, authorizing a judgment to be given against a defendant, for the payment of the costs of a co-defendant either directly or indirectly: and even in equity, prior to this *Order*, the Court of Chancery was accustomed only to order such costs to be paid by the circuitous process of directing the plaintiff to pay them, and add them to his own costs. In interpleader proceedings by sheriffs, the costs of the sheriff were included in the costs of the successful party under *R. S. O.*, c. 54, s. 16. This *Order* would seem now to apply to all Divisions of the High Court as it appears to be of the class, which regulate not only the procedure but the jurisdiction of the Court, inasmuch as it confers a jurisdiction on the Court to do directly, what it formerly only did in an indirect way.

Costs of appeal from report may be awarded to appellant.

320. In the case of an appeal from a Master's report, the Court may give the costs of the appeal, or any part thereof, to a successful appellant. (20th Dec. 1865; Ord. 36.)

Costs of appeals from reports, how awarded.

When some grounds of appeal are allowed with costs, and others disallowed with costs; the appellant is entitled to all the costs of the appeal that are exclusively applicable to the objections allowed, and to a proportionate share of those costs common to all the objections, according to the number of really distinct grounds of appeal on which he succeeds; and the same rule applies to the costs of a respondent: *Bank of Montreal* v. *Ryan*, 13 Gr. 204. Sometimes instead of giving costs to each party of so much of the appeal as to which he succeeds, the general costs of the appeal are awarded to one of the parties, subject to the deduction of a proportionate part of the gross amount, in respect of the partial success of the other party. Thus, when there were four district grounds of appeal embraced in eleven objections, of which objections two only were allowed, the Court gave the general costs of the appeal to the respondent, deducting therefrom one-fourth in respect of the partial success of the appellant: *Ferguson* v. *Frontenac*, 21 Gr. 188.

Notwithstanding the provisions of *Rule S. C.* 428 referred to in the preceding note, it is probable that no alteration will be made in the practice as to the disposition of the costs of appeals from Master's reports, and the Judges will probably continue to follow the rules of the Court of Chancery. The general rule is, that the costs

should follow the event of the appeal: *Downey* v. *Roaf*, 6 P. R. 89; *Huntington* v. *Van Brocklin*, 8 Gr. 421; and the word "event" is to be understood distributively: *Bank of Montreal* v. *Ryan*, 13 Gr. 204. But where the appeal fails on the principal point involved, and succeeds only as to a comparatively insignificant one, the whole costs of the appeal may be given to the respondent: *Brownlee* v. *Cunningham*, 13 Gr. 586. And where the Court is of opinion, that the finding of the Master was a fit subject for discussion under the circumstances, although the appeal be dismissed, costs may be refused: *Secord* v. *Terryberry*, 14 Gr. 172, and costs have also been refused of a successful appeal, where the report was defective, and the solicitors appeared to have been negligent: *Clouster* v. *McLean*, 10 Gr. 576.

General rule is, that costs follow the event

But when appeal successful only on some insignificant point, appellant may be ordered to pay all costs

When an appeal was dismissed on a ground raised for the first time on the appeal, and not adjudicated upon by the Master, the Court refused costs: *Heward* v. *Wolfenden*, 14 Gr. 188; *McDonald* v. *Wright*, *Ib.*, 284, and the same rule applies when the appeal is successful on a ground not taken before the Master: *Goddard* v. *Jeffreys*, 46 L. T. N. S. 904. Where an appeal by an executrix was allowed without costs, on the hearing on further directions the Court refused to order the costs of the appellant to be paid out of the estate: *Story* v. *Dunlop*, 13 Gr. 375.

Costs, when appeal dismissed or allowed on point, not adjudicated upon by Master.

Order 321 provided that bonds for security for costs were to be made to the Registrar, that all defendants were to be included in the same bond; and the amount of the penalty was to be fixed by the Judge, or Master, making the order, and is superseded by *Rules S. C.* 430, 431.

Ord. 321.

XXVI.—PROCEEDINGS TO REVERSE, ALTER, OR EXPLAIN, DECREES, OR ORDERS.

Orders 322-329 regulated the practice on the rehearing of decrees, and orders, and are superseded by *Rules S. C.* 510, 522-531.

Ord. 322-329.

330. Any party entitled by the former practice to file a bill of review, praying the variation or reversal of an order, upon the ground of matter arising subsequent to the order, or subsequently discovered, or a bill in the nature of a bill of review, or a bill to impeach a decree on the ground of fraud, or a bill to suspend the operation of a decree, or a bill to carry a decree into operation, is to proceed by petition in the cause, praying the relief which is sought, and stating the grounds upon which it is claimed. (3rd June, 1853; Ord. 9, s. 18.)

Application by petition, substituted for bills of review, bills to impeach decrees, and bills to carry decrees into operation.

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Ord. 330, whether now in force.

How far this *Order* continues in force, if at all, is doubtful. It prescribes the filing of a petition in lieu of various forms of supplemental bills, which are abolished by *Ord.* 6 *ante*. In England, where no such practice as that prescribed by this *Order* was in force at the time of the passing of *The Judicature Act*, and the practice of filing supplemental bills prevailed, it has been held since *The Judicature Act* came into force, by analogy to the former practice, that in order to set aside a judgment obtained by fraud, a new action must now be brought: *Flower* v. *Lloyd*, 6 Ch. D. 297. Whether in this Province, relief in such a case could be granted on motion, or on petition, in the original action under this *Order*; or whether a new action is necessary, has to be determined.

On petition under Ord. 330, security required.

A person presenting a petition under this *Order*, in a case where formerly a bill of review, or a bill in the nature of a bill of review, should have been filed, was required to give security for costs: *Sadlier* v. *Doyle*, before Proudfoot, V. C., 19 and 26 Nov. 1877, and see Beames' Orders, pp. 314, 366, and see Canadian Order in Chy. 12th July, 1844, lxxix; but see *Ord.* 1 *ante*.

Leave to file petition unnecessary

Leave to file a petition under this *Order* was not necessary in any case: *Duggan* v. *McKay*, 1 Chy. Ch. R. 380.

For cases in which petitions have been presented under this *Order*, see *Bank of Upper Canada* v. *Wallace*, 16 Gr. 280: *Brouse* v. *Stayner*, 16 Gr. 1; *Dumble* v. *Cobourg & P. R. W. Co.*, 29 Gr. 121; *Mason* v. *Seney*, 12 Gr. 143; *Colonial Trusts* v. *Cameron*, 21 Gr. 70; *Robson* v. *Wride*, 14 Gr. 606; 15 Gr. 565.

Bills to impeach decrees on ground of fraud.

BILLS TO IMPEACH DECREES ON THE GROUND OF FRAUD.—A bill of this kind was, prior to this *Order*, proper, where a decree had been obtained through fraud. Where the decree, however, had also been affirmed by the House of Lords, it would seem necessary that application should be first made to the House of Lords for directions: *Shedden* v. *Patrick*, 1 Macq. H. L. C. 535, and see *Tommey* v. *White*, 4 H. L. C. 313.

Bills to suspend operation of decree.

BILLS TO SUSPEND THE OPERATION OF A DECREE.—Bills of this kind were formerly necessary whenever it was sought to stay the execution of a decree, *e. g.*, where an appeal was pending from the decree. But relief of this kind has, since this *Order*, been granted on motion in Chambers, without even a petition: *Campbell* v. *Edwards*, 6 P. R. 159; *Walker* v. *Niles*, 3 Chy. Ch. R. 418. In such cases security is generally required to be given: *Ib.* The staying proceedings pending an appeal is discretionary. In a case where the Court refused to stay proceedings pending an appeal from an order allowing a demurrer, it directed that an answer filed should not pre-

judice the appeal: *McMurray* v. *Grand Trunk R. W.* 3 Chy. Ch. R. 125.

BILLS TO CARRY A DECREE INTO OPERATION, were sometimes necessary where the parties had neglected to proceed upon the decree, and their rights under it had become embarrassed by subsequent events, and it was necessary to have them settled by the decree of the Court. See Mitford Pleadings, 3rd ed., 75. Bills to carry decree into operation.

BILLS OF REVIEW, AND BILLS IN THE NATURE OF BILLS OF REVIEW.—Prior to this *Order*, where a party sought to impeach a decree, either for error in law appearing in the body of the decree, without further examination of matters of fact, or in respect of some new matters arising after the decree; or on new evidence discovered after decree made, which could not possibly have been used when the decree was pronounced. In such cases, where the decree had been enrolled, a bill of review was filed, and where it had not been enrolled, a bill in the nature of a bill of review was the proper proceeding. Bills of review.

When the bill was filed on the ground of error, it was necessary to specifically assign the error complained of, and it must have been an error of law, apparent on the face of the decree, and not a mere error of judgment: *Green* v. *Jenkins*, 6 Jur N. S. 515, *e. g.*: It could not be assigned for error that any matter had been decreed contrary to the proofs: *Mellish* v. *Williams*, 1 Vern. 166; and see *Ord.* 334 *post*. When bill filed on ground of error, error of law must be apparent on face of decree.

SETTING DOWN PETITION.—The practice on this point is regulated by *Ord.* 418, *post*. Setting down petition.

331. The petition is to be verified by affidavit, and served upon the solicitors of all parties interested; and in case a party has no solicitor, then upon the party. (3rd June, 1853; Ord. 9, s. 18.) Petition to be verified, and served on all parties interested.

See note to *Ord.* 330.

332. Upon the copy of the petition served is to be endorsed the following memorandum or notice: "If you do not appear on the petition the Court will make such order on the petitioner's own shewing as shall appear just, in your absence; and if this petition is served personally you will not receive any notice of the future proceedings on the petition." (9th May, 1862.) Notice to be indorsed on copy served.

See note to *Ord.* 330.

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Hearing of petition.

333. Upon the hearing of the petition, the Court may either make a final order, or direct the petition to stand over, with liberty to the parties interested in sustaining the decree to file a special answer to the same; and may make such order as to the production of further proof, and the manner thereof, and the further hearing of the petition, as the Court deems meet. (3rd June, 1853; Ord. 9, s. 18.)

See note to *Ord.* 330.

The respondent may file affidavits in answer to the petition, without first obtaining the leave of the Court: *Robson* v. *Wride*, 14 Gr. 606; 15 Gr. 565.

When reversal sought on new matter, same evidence requisite as on motion to file bill of review.

334. Where the reversal or variation of an order is sought upon new matter, such proof as would have been requisite upon a motion to file a bill of review must be supplied. (3rd June, 1853; Ord. 9, s. 18.)

See note to *Ord.* 330.

Proof requisite to support bill of review.

The rule as to the proof requisite upon a motion to file a bill of review was thus laid down in the Privy Council, in *Hosking* v. *Terry*, 8 Jur. N. S. 977: "The rule which we collect from the cases cited in the argument is this, that the party who applies for permission to file a bill of review, on the ground of having discovered new evidence, must show that the matter so discovered has come to the knowledge of himself and his agents, for the first time since the period at which he could have made use of it, and that it could not with reasonable diligence have been discovered sooner; and secondly that it is of such a character, that if it had been brought forward in the suit, it might probably have altered the judgment." See also *Mason* v. *Seney*, 12 Gr. 143.

Orders not drawn in conformity with judgment,—clerical errors and accidental slips, &c., amendable in Chambers.

335. An application to amend an order which has not been drawn up in conformity with the judgment pronounced, so as to make the same conformable thereto; and an application to correct, any other clerical mistake in an order, or an error arising from an accidental slip or omission, may be made in Chambers on petition, and the Court may grant the same, if under all the circumstances the Court sees fit. (20th Dec. 1865; Ord. 19.)

Clerical errors may be amended on motion.

Clerical mistakes in judgments, or orders, or errors arising therein from any accidental slip, or omission, may at any time be corrected by the Court, or a Judge, on motion without an appeal. *Rule S. C.* 338.

This *Rule* in part covers the same ground as *Ord.* 335, it does not in terms include the cases intended to be covered by the prior part of that *Order*—and as to such, the *Order* would seem to be in force in all the Divisions of the High Court.

Motion to amend must be made on notice.

An application to amend under this *Order*, should as a general rule, be made on notice: *Radenhurst* v. *Reynolds*, 11 Gr. 521. Where anything beyond the judgment delivered by the Judge, and the judgment, or order, drawn up in pursuance thereof, have to be looked at, the motion should be made in Court: *Lapp* v. *Lapp*, 3 Chy. Ch. R. 234; S. C. 4 Chy. Ch. R. 3.

Amendment of judgment on *præcipe*.

A judgment entered on *præcipe* cannot be amended on an application in Chambers, by inserting therein any special direction which could not properly be included in a judgment issued on *præcipe*: *Ross* v. *Vader*, 3 Chy. Ch. R. 236.

Consent judgment, or order, amendment of.

A consent judgment, or order, may be amended by striking out terms not consented to: *Merchants Bank* v. *Grant*, 3 Chy. Ch. R. 64.

But after a judgment by consent, has been passed, and entered, it cannot be varied, on the ground that the consent was given inadvertently, without evidence of mistake, or misapprehension, sufficient to set aside an agreement: *Attorney-General* v. *Tomline*, 7 Ch. D. 388; *Davis* v. *Davis*, 13 Ch. D. 861.

An interlocutory order, consented to under a mistake, may be discharged, though the mistake was on one side only: *Mullins* v. *Howell*, 11 Ch. D. 763; and see *Gilbert* v. *Endean*, 9 Ch. D. 259.

Names of persons joined as petitioners without their consent struck out.

The names of persons who have been joined as co-petitioners without their consent, have been struck out of an order made on such petition: *Re Savage*, 15 Ch. D. 557.

Usual words, and directions, may be added on amendment.

Under *Rule S. C.* 338, any usual words, or directions, which may have been inadvertenly omitted from an order, or judgment, may be added: see *Ex parte Straight*, 16 W. R. 661; *Andrews* v. *Bohannon*, W. N. (69) 80; *Warman* v. *Zeal*, W. N. (71) 241; *Moffatt* v. *Hyde*, 6 U. C. L. J. 94; *Jefferys* v. *Smith*, 11 W. R. 479; *Re Granville*, W. N. (78) 21; *Bird* v. *Heath*, 6 Ha. 236; *Re Tiel*, 11 W. R. 351; *Turner* v. *Hodgson*, 9 Beav. 265; *Trevelyan* v. *Charter*, 9 Beav. 140; *Hughes* v. *Jones*, 26 Beav. 24.

So also omissions as to costs reserved, and which were by mistake not provided for, may be supplied: *Viney* v. *Chaplin*, 3 D. G. & J. 282; and see *St. Michael's College* v. *Merrick*, 26 Gr. 216; *Fritz* v. *Hobson*, 14 Ch. D. 542.

But not any term, or direction upon which judgment of the Court necessary except by consent.

But the omission of any term, or direction, which could only be introduced under the express judgment of the Court, could not formerly be supplied upon an application under *Ord.* 335: *Bird* v. *Heath*, 6 Ha. 236; nor could any substantial addition be made to a decree on motion, except by consent: *Willis* v. *Parkinson*, 3 Sw. 233; but see *Ord.* 336.

And where the decree did not direct the payment of costs "forthwith," and it did not appear that such a direction was intended by the judgment, an application to amend was refused: *Wilson* v. *Robertson*, 3 Chy. Ch. R. 100.

Order made without jurisdiction stands, if not moved against, and cannot be questioned in collateral proceeding.

An order made without jurisdiction, if not appealed against, must stand: *West* v. *Downman*, 27 W. R. 697; and a *de facto* judgment, which has not been set aside, cannot be objected to, as having been rendered *ultra vires*, in an action of trespass for acts done under it: see *Bruce* v. *Canadian Bank of Commerce*, before Osler, J., 26th September, 1882; *Forester* v. *Thrasher*, 9 P. R. 383.

Amendment of order, as to matters on which there was no adjudication.

336. Where an order as drawn up requires amendment in any other particular on which the Court did not adjudicate, the same may be amended in open Court on petition without a re-hearing, if under all the circumstances the Court deems fit. (20th Dec. 1865; Ord. 20.)

Where the application was made after the time within which the cause could have been reheard without leave, it was held that the applicant need not apply for leave to move, but must, nevertheless, make out such a case as would be necessary, in order to obtain leave to rehear after the time had elapsed: *O'Donoghue* v. *Hembroff*, 19 Gr. 95.

XXVII.—REVIVOR AND SUPPLEMENT.

Ord. 337-343.

Orders 337-343 related to the revivor of suits; and are superseded by *Rules S. C.* 383-391.

Ord. 344-351.

Orders 344-351 related to amendments, when a suit was defective by reason of some imperfection in the bill, and not in consequence of an event arising subsequent to its institution; or when facts occurring after the institution of the suit were sought to be put in issue; and are now superseded by the *Rules S. C.* See Holmested's Manl. Pr. 248-252.

XXVIII. PAYMENT OF MONEY INTO, AND OUT OF COURT.

Ord. 352-373, how far applicable.

The following *Orders* 352-473 regulated the office of the Accountant of the Court of Chancery. At the time of the passing of *The Judicature Act* there was no Accountant of that Court, but the duties of that office were discharged by the then Referee in Chambers of the Court of Chancery. See *Ord.* 633.

The suitors' accounts in the Courts of Queen's Bench, Common Pleas, and Chancery, were, on the passing of *The Judicature Act*, consolidated, and placed in charge of an officer called the Accountant of the Supreme Court: *Rule S. C.* 475, and by *Rule* H. C. J. x., passed 25th August, 1881, all moneys and securities &c., standing in the name of the Accountant of the Court of Chancery, or the Referee in Chambers, or any other officer named by the Court of Chancery, or in the name of the Clerk of the Crown and Pleas of the Court of Queen's Bench, or the Clerk of the Crown and Pleas of the Court of Common Pleas, on the 21st August, 1881, were transferred to, and vested in, the Accountant of the Supreme Court as such Accountant. See J. A. s. 68.

Ord. 352-373, and 568-583, are not expressly made applicable to the office of the Accountant of the Supreme Court; but, in the absence of any other positive regulations to the contrary, the practice in that office continues to be governed by those *Orders*, with such modifications as the new *régime* necessitates.

Money ordered to be paid into Court, is to be paid into Canadian Bank of Commerce.

352. Money ordered to be paid into Court by any person is to be paid into the Canadian Bank of Commerce, at Toronto, with the privity of the Registrar, and in no other manner. (10th Sept. 1866; Ord. 18.)

See *Rule S. C.* 476: Maclennan 360.

The word "Registrar," in the *Order* was changed to "Accountant" by *Ord.* 568; and for "Accountant" was substituted "Referee in Chambers" by *Ord.* 626, the latter office is now practically abolished.

On payment into Court, order to be produced, and *præcipe* to be filed.

353. A person desiring to pay money into Court, is to produce to the Ledger Clerk the order, if any, under which the same is payable, and is to file a *præcipe* in the form set out in Schedule O. (10th Sept. 1866; Ord. 19.)

The words "Ledger Clerk" were changed to "Accountant," by *Ord.* 569; and for "Accountant" was substituted "Referee in Chambers," by *Ord.* 626.

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Receipt to be given in duplicate by Bank.

354. The Bank, on receiving money to the credit of any cause or matter, is to prepare a receipt therefor in duplicate; and one copy is to be delivered to the party making the deposit, and the other is to be posted or delivered the same day to the Ledger Clerk. (10th Sept. 1866; Ord. 20.)

The words "Ledger Clerk" were changed to "Accountant" by *Ord.* 560; and for "Accountant" was substituted "Referee in Chambers," by *Ord.* 626.

Ord. 355.

Order 355, related to the signing of cheques, and was abrogated by *Ord.* 559.

On application for payment out, orders and reports to be produced.

356. The person entitled to a cheque is to produce and leave with the Ledger Clerk the orders and reports entitling such person to the money, and is to file a *præcipe* in the form set out in Schedule O (10th Sept. 1866; Ord. 22).

The words "Ledger Clerk" were changed to "Accountant" by *Ord.* 569: and for "Accountant" was substituted "Referee in Chambers," by *Ord.* 626.

Liability of solicitor, for improperly procuring money to be paid out of Court.

Where one member of a firm of solicitors was cognizant of a fraudulent application to the Court, whereby money was improperly paid out to a party not entitled, it was held that each member of the firm was liable to refund it, including those who were ignorant of the fraud. *Brydges* v. *Branfill*, 12 Sim. 389, and see *Atkinson* v. *Mackreth*, 2 L. R. Eq. 570; *St. Aubyn* v. *Smart*, 3 L. R. Chy. 646; *Dundonald* v. *Masterman*, 7 L. R. Eq. 504; *Plumer* v. *Gregory*, 18 L. R. Eq. 621: but see *Re McCaughey & Walsh*, 3 O. R. 425.

Consent of purchaser to payment out of purchase money when necessary.

Purchase money is not paid out except either on proof being given the Accountant of the purchaser having received a conveyance or vesting order, or upon the production of thewritten consent of the purchaser, or his solicitor, and see Daniel Pr., 4th ed., 1190.

Ord. 357.

Order 357, related to the preparation, and countersigning of cheques, and is now obsolete: see *Rules S. C.* 477-8.

Orders, and reports, to be returned.

358. The orders and reports produced as aforesaid are to be re-delivered to the party entitled thereto, with the cheque. (10th Sept. 1866; Ord. 25.)

359. The following Account Books are to be kept, relating to money in Court, or invested under the authority of the Court: Books of account to be kept.

1. A Book of Directions to the Bank to receive money;
2. A Book of Cheques;
3. A Money Journal;
4. A Money Ledger;
5. A Stock Journal;
6. A Stock Ledger;
7. A Balance Book;
8. A Book as to the Mortgages and Investments, other than Dominion Stock, made under the authority of the Court. (10th Sept 1866; Ord. 11.)

360. The Book of Directions, and the Book of Cheques, are respectively to be in the same form as hitherto, or in such form as the Judges from time to time direct or approve. The Cheques are to specify in the body thereof the amount of interest, if any, payable therewith; and the directions and cheques are respectively to be numbered consecutively. (10th Sept. 1866; Ord. 12.) Books of Directions. Cheques.

361. The Money Journal is to shew the sums paid into, and out of, Court from day to day; and it is to be so arranged and kept that at the foot of each page will appear the total amount in the Bank, assuming all cheques to have been presented. (10th Sept. 1866; Ord. 13.) Money Journal.

362. The Money Ledger is to contain a separate account for every cause or matter in which there is money Money Ledger.

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in Court; and also the Suitors' Fee Fund Account, and the General Bank Interest Account; each of which accounts is to shew correctly the state and condition thereof for the time being. (10th Sept. 1866; Ord. 14.)

Suitors' accounts how to be kept.

363. In each of the suitor's accounts, there are from time to time, to be entered the date, purport, or short material contents, of all orders and reports affecting the same; also, every sum paid into, and out of, Court, and by whom paid, and for what paid, and under what authority. There is also to be credited to the account, the Bank interest computed or included in any order or report; and a corresponding transfer of interest is to be made at the Bank, by cheque signed and countersigned as in other cases. There is likewise to be entered in the account, a statement or memorandum of any other matters material for the information of the Court or its officers, or of any of the parties. (10th Sept. 1866; Ord. 15.)

Stock Journal & Stock Ledger, entries in.

364. In the Stock Journal, and Stock Ledger, are to be entered all transactions relating to Dominion Stock, held or purchased by the Court for suitors, and all orders, reports, and other particulars as to the said Stock, in such manner as the Judges from time to time direct or approve.

Balance Book.

365. The Balance Book is to contain a statement entered therein quarterly, of the balances at the credit of the various accounts in the two ledgers at the date of such statement, such balances are to be made up on the fifteenth of March, fifteenth of June, fifteenth of September, and fifteenth of December, of every year, The balances from the Money Ledger are to be so entered after a comparison of the accounts in the Ledger with the Bank's accounts; which comparison is to be made by the Registrar and Ledger Clerk

jointly, and the list thereupon entered in the Balance Book is to be signed therein by them. (10th Sept. 1866; Ord. 26.)

The duty imposed by this Order on the Registrar and Ledger Clerk jointly, was transferred to the "Accountant" by *Ord.* 570; and from the "Accountant" to the "Referee in Chambers." by *Ord.* 626.

Mortgage Book.

366. In the Book of Mortgage Investments, are to be entered, under the heading of the cause or matter in which any mortgage or other security has been taken by the order of the Court, the date and short material contents of such mortgage or security, and of all subsequent orders and proceedings in relation thereto, until such mortgage or other security is discharged by order of the Court. (10th Sept. 1866; Ord. 27.)

List of mortgages and securities to be left half yearly with Judges.

367. A list, signed by the Registrar and Ledger Clerk of all the mortgages and securities, other than Dominion Stock, outstanding on the 1st January and 1st July, in each year is to be delivered to, and left with, the Judges within ten days thereafter, and such list is to set forth in convenient form:

1. The short style of the cause or matter;
2. Date of order under which mortgage or other security executed;
3. Date thereof;
4. Amount;
5. When payable;
6. For whose benefit;
7. What sums, if any, overdue for principal or interest;
8. Name of mortgagor or party giving security;

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9. Locality (not description) of mortgaged property;

10. Remarks. (10th Sep. 1866; Ord 28.)

For the words "Registrar and Ledger Clerk," "Accountant" was substituted by *Ord.* 570; and for Accountant," the words "Referee in Chambers" were substituted by *Ord.* 626.

Certificates.

368. The books kept under these Orders are to be open to inspection; and the Registrar is to give a certificate of the state of any account, or an extract therefrom, at the desire of any party interested, or his solicitor. (10th Sept. 1866; Ord. 29.)

For the word "Registrar," "Accountant," was substituted by *Ord.* 569, and for "Accountant" the words "Referee in Chambers," were afterwards substituted by *Ord.* 626.

Investments in Dominion Stock.

369. Persons entitled to money in Court may have a sufficient amount of the unappropriated Dominion Stock standing in the Registrar's name, appropriated as an investment of such money, or of part thereof, at the current rate, but at not less than par.

For the word "Registrar's," was substituted "Accountant's," by *Ord.* 569, and for "Accountants," the words "Referee in Chamber's," were substituted by *Ord.* 626.

Consent of parties to investment, to be filed.

370. If all parties interested consent in writing, the consent is to be filed with the officer having charge of the books, and he is to make the appropriation without an order being drawn up for the purpose, and is to enter the consent in the Stock Ledger, under the heading of the cause or matter, with the material contents of all orders necessary to shew who are interested in such account, and the shares in which they are respectively interested therein.

If no unappropriated stock, purchase of stock may be made.

371. If there is no unappropriated stock applicable to the purpose, a direction, signed and countersigned in the same manner as a cheque, is to be delivered to the Bank, for the purchase to be made in the name

of the Registrar, and when the purchase is made, a cheque is to be drawn for the amount, signed and countersigned as aforesaid, and like entries are to be made in the Stock Ledger.

For the word "Registrar," the word "Accountant" was substituted by *Ord.* 569, and for the word "Accountant," the words "Referee in Chambers" was subsequently substituted by *Ord.* 626.

372. The interest on stock so appropriated or purchased, is, each half-year, to be credited to the various accounts entitled thereto; and wherever interest is ordered to be paid from time to time to any person, he is to be entitled to receive a cheque therefor without further order.

Interest on stock to be credited to accounts.

373. Mortgages and other securities taken under an order of the Court, are to be taken in the name of the Registrar, unless the order directs the security to be taken in the name of some other officer of the Court.

Mortgages, &c., to be taken in the name of the Registrar.

For the word "Registrar," the word "Accountant" was substituted by *Ord.* 569, and for the word "Accountant," the words "Referee in Chambers" were subsequently substituted by *Ord.* 926.

Mortgages, and other securities, are now taken in the name of the Accountant of the Supreme Court.

XXIX.—SALES.

374. Where a sale is to take place under an order of the Court, no copy of the order, or any part thereof, is to be brought into Chambers, or the Master's office, but the original order is to be used, unless the Judge or Master requires a copy. (3rd June, 1853; Ord. 36, s. 1.)

Copy of order directing sale, is not to be brought into M. O. unless required by the Master.

Orders 374-397, would seem to apply to all the Divisions of the High Court.

Conduct of the Sale.—The party having the carriage of the order, or judgment, directing a sale, is the party usually entitled to the conduct of the sale.

Conduct of sale. Who entitled to.

The mere extent of the interest of any party in the property, or the possession by him of title deeds, do not give any right to

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conduct the sale. Every party to the action is bound to facilitate the sale: *Knott* v. *Cottee*, 27 Beav. 33. Interference by other parties, with the party having the conduct of the sale, may be restrained by injunction: *Dean* v. *Wilson*, 10 Ch. D. 136.

Trustees entitled to, in certain cases.

But "where the trusts of any will, or settlement, are being administered, and a sale is ordered of any property vested in the trustees of such will, or settlement, upon trust for sale, or with power of sale by such trustees, the conduct of such sale shall be given to such trustees, unless the Judge shall otherwise direct." *Rule S. C.* 403.

Duty of solicitor having conduct of sale.

It is the duty of the solicitor of the party having the conduct of the sale, to prepare the advertisement, to procure its settlement by the Master, and to see to its publication, pursuant to the Master's direction, to make the necessary arrangements with the auctioneer, to attend the sale, to see that the contracts are duly signed by the purchasers, to prepare the necessary affidavits proving the sale, and procure the report on sale to be settled and filed, to deliver abstracts and answer requisitions, and objections, and to attend any reference as to the title; to attend the settlement of the conveyances, and procure their execution by all necessary parties to the action; and to enforce, if necessary, by motion the due performance by the purchasers of their contracts. He is usually styled "the vendors' solicitor," and as such he acts for the purpose of the sale, and as regards the purchaser, for all the parties to the action who are interested in the land directed to be sold; *Dalby* v. *Pullen*, 1 R. & M. 296; *Street* v. *Hallett*, 6 P. R. 312.

Party having conduct, not at liberty to bid without leave.

The party having the conduct of the sale, is not at liberty to bid, except leave be granted specially: see *post*, *Ord.* 381. Usually the plaintiff having the carriage of the judgment, or order, will also have the conduct of the sale: *Dale* v. *Hamilton*, 10 Ha. App. vii. But where it is for the benefit of all parties, the conduct of the sale may be given to a defendant: *Hewitt* v. *Nanson*, 7 W. R. 5; *Dixon* v. *Pyner*, 7 Ha. 331; or where all parties to the action wish to bid, it may be given to an independent solicitor: *Ramsay* v. *McDonald*, 8 P. R. 283.

After abortive sale property may be put up again.

Where a sale has proved abortive for want of bidders, the property may be advertised and put up again for sale without further order: *Sherwood* v. *Campbell*, 1 Chy. Ch. R. 299.

Appointment to settle advertisement.

375. An appointment or warrant in respect of the sale is to be obtained from the Judge or Master, and served upon all necessary parties. (3rd June, 1853; Ord. 36, s. 2.)

376. At the time appointed thereby, the party having the conduct of the sale, is to bring into Chambers, or the Master's office, a draft advertisement, but no particulars or conditions of the sale, or any draft or copy thereof. (3rd June, 1853 ; Ord. 36, s. 3.)

Draft advertisement to be brought in, but no particulars or conditions.

It will be seen from the next *Order*, that any particulars in which the proposed conditions of sale differ from the standing conditions, are to be set out in the advertisement. This *Order*, therefore, renders it unnecessary to bring in any particulars and conditions of sale, apart from those necessarily embodied in the advertisement.

377. The advertisement is to contain the following particulars :—

Advertisements of sale to contain.

1. The short style of cause ; — Style of cause.
2. That the sale is in pursuance of an order of the Court ; — Recital of order.
3. The time and place of sale ; — Time and place of sale.
4. A short and true description of the property to be sold ; — Description of property.
5. The manner in which the property is to be sold, whether in one lot or several, and if in several, in how many, and what lots ; — Manner of sale.
6. What proportion of the purchase money is to be paid down by way of deposit, and at what time or times, and whether the residue of such purchase money is to be paid with, or without, interest ; — Terms of payment of purchase money.
7. Any particulars, in which the proposed conditions of sale differ from the standing conditions. (3rd June, 1853 ; Ord. 36, s. 4.) — Any special conditions.

Advertisements of sale, how to be framed.

Advertisements of sale should be framed as concisely as possible, and all matter which conveys no necessary information to intending purchasers should be excluded. The introduction of "puffing" is to be avoided: *Baxter* v. *Finlay*. 1 Chy. Ch. R. 230 ; *Buchan* v.

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Wilkes, *lb.* 231. The advertisement should set out the improvements: *Heward* v. *Ridout*, 1 Chy. Ch. R. 244; and the existence of a favourable lease, if any: *McAlpine* v. *Young*, 2 Chy. Ch. R. 171. But any omissions of this kind, must, as a general rule, be objected to at the time of settling the advertisement, or before the sale has taken place: *Creswick* v. *Thompson*, 6 P. R. 52. But, where a material fact was omitted from the advertisement, *e. g.*, that a lease was subject to a ground rent, the purchaser was discharged from his purchase: *Jones* v. *Rimmer*, 14 Ch. D. 588; 43 L. T. N. S. 111; 49 L. J. Ch. 775.

Defects in, how corrected

Misdescription in the advertisement, where it amounts to a material misrepresentation, is also a ground for compensation to the purchaser; *Stammers* v. *O'Donohoe*, 28 Gr. 207; even after conveyance: *Bull* v. *Harper* 6 P. R. 36; or may entitle the purchaser, at his option, to be relieved from his purchase: *Mathias* v. *Yetts*, 46 L.T. N. S.497; *Redgrave* v. *Hurd*, 45 L. T. N. S. 485; 51 L. J. Ch. 113.

Misrepresentation in, effect of.

Special Conditions.—Unnecessarily stringent conditions of sale ought not to be sanctioned by the Master; thus where the title, or the proof of it, was involved in no difficulty, a condition of sale that "The vendor is not to be bound to give any evidence of title, or any title deeds, or copies thereof, other than such as are in his possession, or prove any abstract," was condemned by the Court: *McDonald* v. *Gordon*, 2 Chy. Ch. R. 125, and see *Dance* v. *Goldingham*, 8 L. R. Chy. 902.

Special conditions of sale, not to be resorted to without cause.

In sales by the Court, if a good title can be made, the parties are not at liberty to relieve themselves by special conditions from the obligation to make such a title, and the Court will not provide by conditions for imaginary defects, *per* Mowat, V. C., *McDonald* v. *Gordon*, 2 Chy, Ch. R. 126; *Piers* v. *Piers*, Sau. & Sc., 414. "It is the uniform practice of a Court of Equity, not to set up for sale a title knowing it to be bad:" *Bennett* v. *Wheeler*, 1 Ir. Eq. 16; *Lahey* v. *Bell*, 6 Ir. Eq. 122; Sugden, V. & P., 14th ed., 100, and see *Hume* v. *Bentley*, 5 D. G. & S. 527.

A condition of sale is bad, as misleading, if it require the purchaser to assume, what the vendor knows to be false; or if it state that the state of the title is not accurately known, when in fact it is known to the vendor. And a purchaser purchasing at a sale by the Court under such conditions, is entitled to have a good title made, notwithstanding the conditions; but where the conditions on the face of them purport to give only a good holding title, that is all the purchaser, even though relieved from the conditions, can insist on: *Re Banister*, *Broad* v. *Munton*, 12 Ch. D. 131.

Condition requiring purchaser to assume as true, what is false, is bad.

And where a sale was had, under a condition that precluded the

purchaser from objecting to the title prior to the document chosen as the root of the title, but the purchaser enquired into the prior title and refused to complete, on the ground that the prior title was bad, the Court being of opinion that the objection was well founded, refused to enforce the sale against the purchaser, and discharged him from his purchase: *Else* v. *Else*, 13 L. R. Eq. 196; *Williams* v. *Wood*, 16 W. R. 1005; *Bennett* v. *Wheeler*, 1 Ir. Eq. 16; *Hume* v. *Bentley*, 5 D. G. & S. 527.

The standing conditions of sale are those referred to in *Ord.* 379.

Where an advertisement is not settled in proper form, it may on motion in Chambers be referred back to the Master to be re-settled, and if necessary to appoint a new day for the sale: *Heward* v. *Ridout*, 1 Chy. Ch. R. 244; such an application being in the nature of an appeal from the Master, would seem to be beyond the jurisdiction of the Master in Chambers, and to be proper to be made to a Judge in Chambers.

Advertisement not in proper form, may be ordered to be re-settled.

378. At the time named in the appointment or warrant, the Judge or Master is, to settle the advertisement; to fix the time and place of sale; to name an auctioneer, where one is to be employed; and to make every other necessary arrangement preparatory to the sale, so that nothing may remain to be done but to insert the advertisement; and all the before mentioned matters must be done at one meeting, namely, upon the return of the appointment or warrant, where it is practicable; and no adjournment of such meeting is to take place, and no new meeting is to be appointed for the aforesaid purposes, unless it is unavoidable. (3rd June, 1853; Ord. 36, s. 5.)

Master, on return of warrant, to settle advertisement—to appoint auctioneer, and fix time, and place, of sale, &c.

Formerly all sales directed by the Court must have been had by auction, unless the order, or decree, expressly authorized a sale in some other way. Even after an abortive attempt to sell by auction, a sale in any other way could not be had except by express order: *Berry* v. *Gibbons*, 15 L. R. Eq. 150. Now, where a sale is ordered, the Master may cause the property, or a competent part thereof to be sold either by public auction, private contract, or tender, or part by one mode, and part by another, as he may think best for the interest of all parties; and he may fix an upset price, or reserved bidding, but such price, or bidding, must be so fixed at the meeting held by him for the settling of the advertisement, and making the other arrange-

Formerly, sale must be by auction, unless otherwise ordered.

But now Master may direct sale by tender, or private contract, fix reserved bid, &c.

ments preparatory to the sale, and must be notified in the conditions of sale. *Rule S. C.* 331. The Master is not justified in accepting a tender from the person having the conduct of the sale: *Ramsay* v. *McDonald*, 8 P. R. 283.

Sales by auction, highest bidder entitled to be declared purchaser.

When land is offered for sale by auction, unless in the particulars or conditions of sale it is stated that the land will be sold subject to, a reserved price, or a right of the seller to bid, the sale is to be deemed, and taken, to be without reserve; and upon any sale without reserve, it is unlawful for the seller, or a puffer, to bid, or for the auctioneer knowingly to take any bidding from a seller, or puffer. See *R. S. O.* c. 98, ss. 13, 14. Upon a sale without reserve it is not open to the vendor to refuse a bid however small: *O'Connor* v. *Woodward*, 6 P. R. 223; *McAlpine* v. *Young*, 2 Chy. Ch. R. 171. The offer of property subject to a reserved bidding, does not involve also a right for the seller to bid, or to employ a puffer; thus, where a sale was advertised under a decree subject to a reserved bid, but no right on the part of the seller to bid was reserved, but a puffer was employed whose bids did not exceed the reserved bid, the sale was on the application of the purchaser set aside: *Gilliat* v. *Gilliat*, 18 W. R. 203; 9 L. R. Eq. 60, and if a limited right to bid be reserved, and the limit be exceeded, the sale is voidable: *Parfitt* v. *Jepson*, 46 L. J. C. P. 529.

Reserved bid does not authorize employment of puffer.

Limited right of vendor to bid cannot be exceeded.

Master, or his clerk, may act as auctioneer without license.

The Master, or his clerk, may conduct the sale if no auctioneer is employed: see *Ord.* 383. No license to act as auctioneer under *R. S. O.* c. 174, s. 465, ss. 2, is necessary: *Regina* v. *Chapman*, 1 O. R. 582.

In mortgage suit, mortgagor should see that advertisement provides for withdrawing land not necessary to be sold

Under a judgment for sale in a mortgage suit, it is the mortgagor's duty to see to the parcelling out of the land directed to be sold, and if he consider too much is offered for sale he should urge the objection at the time of settling the advertisement, and it should be stated in the advertisement that so soon as sufficient has been realized by the sale to pay off the plaintiff's and other claims, the remaining lots, if any, will be withdrawn, if that course is intended to be pursued: *Beaty* v. *Radenhurst*, 3 Chy. Ch. R. 344.

Standing conditions of sale.

379. The standing conditions of sale are to be those set forth in schedule P. (3rd June, 1853; Ord. 36, s. 13.)

Where owner of equity of redemption died without heirs, sale may be ordered in suit, to which A. G. is a party.

Where the owner of the equity of redemption is dead, and his heirs are out of the jurisdiction, or unknown, a sale may be directed in an action against a subsequent mortgagee, and the Provincial Attorney-General as representing the deceased mortgagor, but the circumstances under which the sale is directed, must be stated in the particulars of sale: *Smith* v. *Good*, 14 Gr. 444.

Any conditions varying from, or in addition to, the special conditions must be stated at length in the advertisement, *Ord.* 377.

As to special conditions see note to *Ord.* 377.

380. The Judge or Master may, without further order, fix an upset price, or reserved bidding, where it is thought expedient; but this must be done at the meeting before mentioned, and it must be notified in the conditions of sale. (3rd June, 1353; Ord. 36, s. 7.)

Master may fix upset price, or reserved bidding.

In order to enable the Master to fix a reserved bid, an affidavit made by some competent surveyor must be filed. See Leggo's Forms, 2nd ed., No. 940.

Reserved bid, how fixed.

According to the English practice affidavits for the purpose of enabling the Judge to fix reserved biddings are to state the value of the property by reference to an exhibit, so that the value may not be disclosed by the affidavit when filed. Judge's Regulations, Aug. 1857, xiii: Snow & Winstanley Ch. Pr. 575.

Where the Master omitted on the settling of the advertisement to fix a reserved bid, on motion in Chambers leave to fix reserved bid, and re-advertise was granted: *Fraser* v. *Bens*, 1 Chy. Ch. R. 71.

How communicated to auctioneer.

Where the sale takes place elsewhere than before the Master, a note of the amount of the reserved bid under a sealed cover is to be delivered to the auctioneer, or person selling the estate, with instructions not to open it until the biddings are closed, and not to make the amount of it known even then.

381. All parties may bid, without taking out an order for the purpose, except the party having the conduct of the sale, and except any trustees, agents, and other persons in a fiduciary situation; and where any parties are to be at liberty to bid, it must be notified in the conditions of sale. (3rd June, 1853; Ord. 36, s. 7.)

All parties may bid, except party having conduct of sale, trustees, agents, and others, in a fiduciary position.

Where parties at liberty to bid, it must be notified in condition of sale.

Leave will not usually be granted to the party having the conduct of the sale to bid: *Phillips* v. *Conger*, 1 O. S. 231; *Domville* v. *Berrington*, 2 Y. & C. 723; *Sidney* v. *Ranger* 12 Sim. 118, nor to his servants, or agents: see *Martinson* v. *Clowes*, 46 L. T. N. S. 882; 51 L. J. Ch. 594. Except upon the terms of transferring the conduct of the sale to an independent solicitor, if none of the other parties will

Leave to bid, not granted to party having conduct of sale.

Nor to executor, receiver, guardian *ad lit.* nor trustee.

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take it: *Ramsay* v *McDonald*, 8 Pr. R. 283. Leave to bid has also been refused to an executor, in an administration action: *Geldard* v. *Randall*, 9 Jur. 1085; to a receiver: *Alven* v. *Bond*, 1 Flan. & K. 196; to a guardian *ad litem*; see Seton 1396; *Crawford* v. *Boyd*, 6 P. R. 278. Leave will not, in general, be granted to trustees to bid, unless all the *cestuis que trust* who are *sui juris* consent, and no other purchaser at an adequate price can be found: *Tennant* v. *Trenchard*, 4 L. R. Chy. 537, 547; *Farmer* v. *Dean*, 32 Beav. 327, and see *Ricker* v. *Ricker*, 27 Gr. 576; *S. C.* 7 App. R. 28; 183 C.L. J. 274; 2 C. L. T. 399, and a trustee who has obtained leave to bid, is not exonerated from his duty of protecting the interest of his *cestui que trust*: *Ib.*

Leave to bid, how obtained.

Leave for parties, not otherwise entitled, to bid, is sometimes contained in the order, or judgment, directing the sale, but an order for that purpose is usually obtained in Chambers on notice to the other parties interested. The Master has no power to grant such leave: *Re Laycock, McGillivray* v. *Johnson*, 8 P. R. 548, except when exercising jurisdiction in Chambers under *Rule S. C.* 422.

Effect of party not authorized to bid becoming purchaser.

When a party not authorized to bid, has bid without leave and become the purchaser, the sale will not necessarily be set aside, but the property may, on the application of the other parties interested, be ordered to be put up for sale again at the expense of the party so bidding, and if no more can be realized he may be held to his purchase: *Wilson* v. *Greenwood*, 10 Sim. 101; *Sidney* v. *Ranger*, 12 Sim, 118; *Crawford* v. *Boyd*, 6 P. R. 278.

Party having conduct of sale to advertise it as directed.

382. The advertisement is to be inserted by the party conducting the sale, at such times and in such manner as the Judge or Master appointed at the meeting before mentioned. (3rd June, 1853; Ord. 36, s. 6.)

Postponement of sale, how published.

When a sale is postponed, a note of such adjournment published at the foot of the original advertisement will suffice, without incurring the expense of an entirely fresh advertisement: *Thompson* v *Milliken*, 15 Gr. 197.

Sales not to be postponed, except in extreme cases.

Sales are not to be postponed except in extreme cases. Where pending the time appointed in a mortgage suit for redemption, the mortgagor made an assingment in insolvency, but the plaintiff proceeded with the suit without adding the assignee; a motion by the latter to stay the sale on the ground that he had had no notice of settling the advertisement was refused: *Hoskins* v. *Johnston*, 6 P. R. 257.

Master, clerk, or auctioneer may conduct sale.

383. The Master or his Clerk is to conduct the

sale where no auctioneer is employed. (3rd June, 1853; Ord. 36, s. 7.)

Auctioneer need not be licensed.

An auctioneer selling land is not required to be licensed under *The Municipal Act*, 46 Vict. c. 18, s. 495, ss. 2: *Regina* v. *Chapman*, 10. R. 582.

Biddings—agreement to be signed by purchaser.

384. Biddings need not be in writing, but a written agreement is to be signed by the purchaser at the time of sale. (3rd June, 1853; Ord. 36 s. 7.)

Sale without reserve.

Where the sale is to be without reserve, the vendor is not at liberty to refuse any bid, however small: *O'Connor* v. *Woodward*, 6 P. R. 223; *McAlpine* v. *Young*, 2 Chy. Ch. R. 85, 171.

Vendor, or puffer may not bid.

Neither, when the sale is without reserve, can the vendor, or a puffer, bid, unless the right to bid is expressly reserved in the conditions of sale. And, where the right to bid is limited to one or more bids, the vendor may not exceed it. And where the sale is subject to a reserved bid, a puffer cannot also be employed. See *Ord.* 378, note.

Where the sale is without reserve, but the vendor, after a bid has been made, withdraws the property from sale, the highest bidder may, nevertheless, apply to be declared the purchaser: *McAlpine* v. *Young*, *supra*. It would seem that such an application should be made in the first place to the Master to report on the sale, and if he refuse to report the highest bidder the purchaser, an appeal would lie from him to a Judge in Chambers in the ordinary way. In *McAlpine* v. *Young*, however, the application appears to have been made in Chambers in the first instance.

Acceptance of a bid from a person not entitled to bid.

Where the auctioneer has accepted the bid of a vendor, or puffer, who had no right to bid, and declared him the purchaser, it would seem that the highest bidder lawfully bidding, would be entitled to set aside the sale, and have himself declared the purchaser.

Contract.

The agreement to be signed by the purchaser should identify the property purchased, by reference to the particulars and conditions of sale, and should in other respects be a sufficient agreement to satisfy the requirements of the Statute of Frauds.

Contract, how to be signed.

The purchaser should sign his name, and his address and quality should also be stated. If his signature is not plain, or initials are used, it is desirable that a note of his full name should be written at the foot. Where any person purchases as agent for another, it should be so expressed in the signature, otherwise he will be treated

as the purchaser, unless an affidavit showing the fact to be otherwise, is produced on the settlement of the report on sale. See Danl. Pr. 4th ed. 1135.

Deposit at sale, how to be paid.

385. The deposit is to be paid to the vendor, if present or if not, to his solicitor, at the time of sale, and is forthwith to be paid by him into Court. (3rd June, 1853; Ord. 36, s. 7.)

Solicitor neglecting to pay in deposit, liability of.

If the solicitor for the vendor neglects to pay the deposit into Court, he may be compelled to do so by order, on application of the purchaser; *Crooks* v. *Glenn*, 1 Chy. Ch. R. 354. And where he neglected to pay in the deposit, and in consequence of his not having done so the judgment was not in the hands of the Accountant, so that the purchaser could not obtain a direction to pay in the balance of his purchase money, the solicitor was ordered to pay the interest which would have accrued on the whole purchase money, if the money had been duly paid into Court: *Smith* v. *Dunn*, 3 C. L. T. 217.

Where the deposit was paid by the auctioneer to one of a firm of solicitors having the conduct of the sale, who misappropriated it, the other members of the firm were held liable for it: *Biggs* v. *Bree*, 45 L. T. N. S. 648; 46 L. T. N. S. 8.

If sale goes off for default of purchaser, deposit is forfeited.

Where the sale is not completed through the default of the purchaser, he forfeits his deposit to the vendor: *Rosenberg* v. *Cooke*, 8 Q. B. D. 162; *Whelan* v. *Couch*, 26 Gr. 74; *Tilt* v. *Knapp*, 9 P. R. 314; even though there be no stipulation to that effect: *Ex parte Barrell, Re Parnell*, 10 L. R. Chy. 512; *Dunn* v. *Vere*; 19 W. R. 151. And this is so, even where the contract is invalid, and could not be legally enforced: *Thomas* v. *Brown*, 35 L. T. N. S. 247; (but see *Casson* v. *Roberts*, 31 Beav. 613); or where there is a defect in the vendor's title, which the purchaser is precluded, by the conditions, from objecting to: *Rosenberg* v. *Cooke*, *supra*.

Costs of paying in purchase money,

Though the vendor's solicitor is entitled to his costs of receiving the deposit on sale, and paying it into Court, out of the fund, he must look to the purchasers for his costs of receiving, and paying into Court any other instalments of the purchase-money, which it is their duty to pay into Court: *Re Robertson*, 24 Gr. 555.

Security for deposit.

In England the auctioneer, or solicitor, appointed to receive the deposits, is required to give security duly to account therefor: Danl. Pr. 4th ed., 1173. But this has not been customary in Ontario.

386. After the sale is concluded, the auctioneer, where one is employed is to make the usual affidavit according to the present practice; and where no auctioneer is employed, the Master or his Clerk is to certify to the same effect. (3rd June, 1853; Ord. 36, s. 7.)

Affidavit of auctioneer, or certificate of Master, of result of sale.

For form of affidavit of auctioneer see Leggo's Forms, 2nd ed., No. 947.

387. The report on sale is to be in the form set forth in schedule Q., or as near thereto as circumstances permit.

Report on sale, form of.

The solicitor having the conduct of the sale usually takes the necessary steps to procure the report on sale; but it would seem that a purchaser may himself take out the report on sale, and get it confirmed where he is the sole purchaser: *Crooks* v. *Glenn*, 1 Chy. Ch R. 354; or *semble*, he may take a separate report as to his own purchase where he is not the sole purchaser.

Report on sale, by whom to be procured.

The confirmation of a sale may be opposed before the Master, and the sale disallowed, on grounds which would justify a motion to set it aside: *Beaty* v. *Radenhurst*, 3 Chy. Ch. R. 344.

Opposing sale before Master.

A motion to confirm a sale, will not be entertained in Chambers, where an irregularity has occurred, unless the sale has been approved of by the Master: *Thomas* v. *McCrae*, 2 Chy. Ch. R. 456. Where the Master's directions have not been observed, the party having the conduct of the sale will have to shew, at his own expense, that no person interested has been injured by the non-observance of the direction, otherwise the Master will not confirm the sale; *Royal Canadian Bank* v. *Dennis*, 4 Chy. Ch. R. 68.

Opposing sale in Chambers.

Where some person not having authority to bid, has improperly bid and been declared at the auction the purchaser, the Master should not declare the sale void, but should report the sale, stating the facts as to the improper bid; and it is then open to the other parties to move to have the property again put up for sale, at the expense of the party so bidding improperly, and holding him to his purchase if no higher price is realised; *Crawford* v. *Boyd*, 6 P. R. 278, note p. 280; or the purchaser may, on notice to all parties interested, move to confirm the sale to him. When the person so bidding has also had the conduct of the sale, the sale will not as a general rule be confirmed, if any party object.

Where a party bidding, and becoming the purchaser, had no right to bid.

Until confirmation of report on sale, property at risk of vendor.

Until confirmation of the report on sale, the property is at the risk of the vendor, and in the event of fire, the loss occasioned thereby must fall on him; *Stephenson* v. *Bain*, 8 P. R. 166. 258; *S. C.* 16 C. L. J. 15 and 115; but see *Rayner* v. *Preston*, 43 L. T. N. S. 18; S. C. in Appeal 44 L.T. N. S. 787; 18 Ch. D. 1; *Gill* v. *Canada Fire and Marine Insurance Co.*, 1. O. R. 341; *Castellain* v. *Preston*, 8 Q. B. D. 613; 46 L. T. N. S. 569; 19 C. L. J. 143.

ale may be objected to on motion.

388. A sale must be objected to by motion to the Court to set aside the same; and notice of the motion must be served upon the purchaser, and on the other parties to the cause; but the biddings are only to be opened on special grounds, whether the application is made before or after the report stands confirmed. (3rd June, 1853; Ord. 36, s. 10; 20th Dec. 1865; Ord. 21.)

Notice to be served on purchaser and other parties to the cause.

Motion to "open biddings" may be made in Chambers, before confirmation of report.

Although the *Order* states that the motion must be to the Court, it was the constant practice before *The Judicature Act*, to make such applications in Chambers before the Referee. See cases cited below.

Grounds on which motion may be made.

The motion to set aside the sale, or open the biddings, must generally be made before the confirmation of the report, but see *Ricker* v. *Ricker*, 27 Gr. 576, and S. C. in appeal, 7 App. R. 282. Formerly, a mere offer to give an increased price was sufficient ground for opening the biddings, but this is no longer the case: *Roberts* v. *Durie*, 1 Chy. Ch. R. 211; now, special grounds affecting the validity of the sale, must be established: *Creswick* v. *Thompson*, 6 P. R. 52; and the fact that the purchaser is one of the parties to the suit makes no difference in the rule; *Mitchell* v. *Mitchell*, 6 P. R. 232; and it applies to sales by tender, or private contract: *Re Bartlett, Newman* v. *Hook*, 44 L. T. N. S. 17. Great delay, is an answer to such an application, unless misconduct is shown on the part of the purchaser; *Crooks* v. *Crooks*, 2 Chy. Ch. R. 29. The fact that property was suffered to be knocked down at an undervalue to a son of the testator, under the belief that he was bidding for himself, when in fact he had been employed by a third person to bid for him, was held sufficient to warrant a resale: *Rodgers* v. *Rodgers*, 13 Gr. 143, and see *Re Follis, Kilbourn* v. *Coulter*, 6 P. R. 160.

Purchaser as secret trustee.

But the fact that a defendant was prevented from bidding, by promises made by the purchaser to give him the benefit of the purchase, is no ground for opening the biddings, such fact, if established, would constitute the purchaser a trustee, and the trust must be established by action: *Brock* v. *Saul*, 2 Chy. Ch. R. 145.

Where a next friend of a plaintiff who had the conduct of the sale, had bid without authority, a re-sale was ordered, the next friend being held to his purchase in case a greater price could not be obtained, and he was ordered to pay the costs: *Crawford* v. *Boyd*, 6 P. R, 278, and see *Ramsay* v. *McDonald*, 8 P. R. 283.

Purchase by next friend of party having conduct.

The existence of mere irregularities in the proceedings prior to the sale, does not affect the validity of the sale as against a *bonâ fide* purchaser: *Dickey* v. *Heron*, 1 Chy. Ch. R. 149; *Gunn* v. *Doble*, 15 Gr. 655; *Shaw* v. *Crawford*, 4 App. R. 371: *McLean* v. *Grant*, 20 Gr. 76; *Collins* v. *Denison*, 2 Chy. Ch. R. 465.

Mere irregularity not sufficient ground to set aside sale.

Where a sale took place after an order had been made staying it, but of which the auctioneer, and the purchaser, had no notice, the Court refused, after confirmation of the report, to set aside the sale: *Freehold Building Society* v. *Choate*, 3 Chy. Ch. R. 440.

But where through a mis-statement in the advertisement, the property was knocked down at an undervalue, and less than the purchaser himself would have otherwise given, a re-sale was ordered: *Jones* v. *Clarke*, 1 Gr. 368. But it would seem that if the purchaser without any misrepresentation, or undue concealment, by the vendor, got a less benefit from his purchase than he expected, that would be no ground for relieving him from his contract: *James* v. *Freeland*, 5 Gr. 302; *Commercial Bank* v. *McConnell*, 7 Gr. 323. Misrepresentations in the advertisement as to facts visible to the eye, amounting to mere exaggeration, do not warrant a release of the purchaser from his contract; *Crooks* v. *Davis*, 6 Gr. 317, but see *Stammers* v. *O'Donohoe*, 28 Gr. 207: *Gale* v. *Hubert*, 6 Gr. 312; and see *post*, p. 206.

Misstatements in advertisement may be.

389. At any time after the confirmation of the sale the purchaser may pay his purchase money and interest, if any, or the balance thereof, into Court without further order, upon notice to the party having the conduct of the sale; and when he is entitled to be let into possession of the estate, he may, if possession is wrongfully withheld from him, proceed at his own expense to obtain an order against the party in possession for the delivery thereof to him, or may call upon the vendor to cause possession to be delivered to him. (3rd June, 1853; Ord. 36, s. 11.)

After confirmation of report, purchaser may pay his purchase money into Court.

And when entitled to possession may proceed to recover it himself, or may call on vendor to cause possession to be delivered.

Payment of Purchase Money.—Where the purchaser makes default in paying his purchase money into Court pursuant to the

On default in payment of purchase money, re-sale may be ordered.

conditions of sale, the vendors may move to compel him to pay in the amount overdue, and in default of payment, for a re-sale of the property.

Deposit at sale to be paid into Court.

The deposit paid at the sale, is to be paid into Court: see *Ord.* 385; if not paid in by the vendor, the purchaser must move to compel payment, before he can obtain a vesting order.

Payment of purchase-money to solicitor not a discharge, when.

Where, by the conditions of sale, the purchase money is payable into Court, payment to the solicitor of the party entitled to it, is not a good payment, and is therefore no ground for dispensing with payment of it into Court: *Blackburn* v. *Sheriff*, 1 Chy. Ch. R. 208; except upon the production of the written consent of all parties beneficially interested, duly verified. Where the vendor's solicitor receives purchase money, which the purchasers are bound to pay into Court, the expense of payment in, must be borne by the purchasers, the estate, or fund, is not chargeable with such costs: *Re Robertson*, 24 Gr. 555.

Costs of payment into Court.

Payment of purchase money not compelled until title accepted.

But the purchaser will not be compelled to pay in his purchase money unless he has accepted the title: *Crooks* v. *Street*, 1 Chy. Ch. R. 95; *Street* v. *Hallett*, 6 P. R. 312: *McDermid* v. *McDermid*, 8 P. R. 28; 15 C. L. J. 133; *Ellwood* v. *Pierce*, 7 P. R. 427; or, has waived the right to investigate the title, by delay: *Ontario Bank* v. *Sirr*, 6 P. R. 216; or by taking possession: *Patterson* v. *Robb*, 6 P. R. 114, and see *Crooks* v. *Glenn*, 8 Gr. 239; *O'Keefe* v. *Taylor*, 2 Gr. 305.

But possession may be taken in accordance with the contract, under circumstances not amounting to a waiver, or acceptance, of title, see *Micheltree* v. *Irvine*, 13 Gr. 537; *Darby Greenlees*, 11 Gr. 351; *Wardell* v. *Trenouth*, 24 Gr. 465. Merely obtaining the keys of a building for the purpose of viewing the premises, is not a taking possession: *Peoples' Loan Co.* v. *Bacon*, 27 Gr. 294.

Deposit forfeited, when.

In the the event of a re-sale being ordered by reason of the default of the purchaser, in the absence of any condition to the contrary, under the standing conditions of sale, his deposit is forfeited and cannot be recovered by him, even though the property should realise a larger price on the re-sale; *Tilt* v. *Knapp*, 9 P. R. 314; 2 C. L. T. 597; *Ex parte Barrell*, 10 L. R. Chy. 512; *Thomas* v. *Brown*, 35 L. T. N. S. 237; *Rosenberg* v. *Cook*, 8 Q. B. D. 162, and see *Whelan* v. *Couch*, 26 Gr. 74; but see *Casson* v. *Roberts*, 31 Beav. 613.

Costs of re-sale, and deficiency; how borne.

The costs of the re-sale, and also any deficiency on the subsequent sale, are also usually ordered to be borne by the defaulting purchaser: but when the land sold at an advance, and the profit was more than sufficient to cover the costs of the re-sale, the defaulting purchaser

was relieved from the payment of the latter costs: *Tilt* v. *Knapp*; *supra*, *Ontario Bank* v. *Sirr*, 6 P. R. 277.

Interest on Purchase Money—Rents, and Profits.—The liability of the purchaser for interest, depends on the terms of the contract of sale. In the absence of any special stipulation in the contract, it would seem that the liability to pay interest, commences on the day fixed by the contract for completion of the contract, from which time the purchaser also becomes entitled to possession, and to all rents, and profits, subsequently accruing: *Esdaile* v. *Stephenson*, 1 S. & S. 122; *People's Loan Co.* v. *Bacon*, 27 Gr. at p. 301; *Vanzant* v. *Burke*, 38 U. C. Q. B. 104; but see *Harrison* v. *Joseph*, 8 P. R. 293. But where the contract provided for payment of the purchase money by instalments, but was silent as to the time when possession should be given, the purchaser was held entitled to the rents, and profits, from the date of the contract: *Brady* v. *Keenan*, 6 P. R. 262. A purchaser is entitled to a proper proportion of all rents paid to the vendor in advance: *Liscombe* v. *Gross*, 6 P. R. 271. Interest on purchase money, from what time payable.

The liability of the purchaser to pay interest, may, in the absence of express stipulation as to the payment of interest: *Re Thompson*, *Biggar* v. *Dickson*, 2 Chy. Ch. R. 196, be qualified by delay on the part of the vendor, either in making title, or giving possession. In such a case, interest will not begin to run until the purchaser could safely have taken possession, and a difficulty respecting the conveyance, may justify his not taking possession: *Rae* v. *Geddes*, 3 Chy. Ch. R. 404. Where the property is unproductive, the purchaser may, where the completion of the contract is delayed by the vendor, be exonerated from payment of interest; where it is productive, but the rents, and profits, are less than the interest, the vendor may be allowed to retain the rents, &c., and the purchaser may be relieved from paying interest; and where the rents exceed the interest, the purchaser may, notwithstanding the delay, be ordered to pay interest from the date fixed for completion, taking the rents and profits: *Bank of Montreal* v. *Fox*, 6 P. R. 217; *The People's Loan Co.* v. *Bacon*, 27 Gr. 294. Liability of purchaser qualified by delay of vendor in making title.

Growing crops in the land at the time of sale, pass to the purchaser, unless expressly excepted in the conditions of sale: *McDowall* v. *Phippen* 1 O. R. 143. Growing crops, purchaser entitled to.

Where the purchaser pays his purchase money, and is let into possession, but upon a reference it is found a good title cannot be made, and the contract is rescinded, the purchaser is bound to redeliver possession on being repaid his purchase money, and if he insist on interest on the purchase money, he must submit to account When contract rescinded for defect in title, purchaser must deliver possession, and if he claim interest must account for rents.

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for the rents, and profits: *Simmers* v. *Erb*, 21 Gr. 289, and see *Turley* v. *Evans*, 13 C. P. 214.

Purchaser in possession before completion must pay interest.

Where a purchaser is let into possession, pending an investigation of title, he is bound to pay interest, although the possession extend beyond six years: see *Birch* v. *Joy*, 3 H. L. C. 565, where the purchaser was in possession forty years before completion, and the agreement provided that interest should not run until the completion of the contract, see also *Toft* v. *Stevenson*, 5 D. M. & G. 735; but it would seem no more than six years arrears can be recovered as against the land: *Airey* v. *Mitchell*, 21 Gr. 510, overruling on this point, *Great Western R. W. Co.* v. *Jones*, 13 Gr. 355; but when the purchaser dies, and no intervening incumbrance exists, in order to prevent circuity of action, the full amount may be recovered even against the land; *Airey* v. *Mitchell*, *supra*; *Howeren* v. *Bradburn*, 22 Gr. 96.

More than six years may be recovered, but not as against land. Exception to rule.

Parol evidence admitted to show terms of mortgage to be given by purchaser.

Where the contract provided for giving a mortgage to secure part of the purchase money, but omitted to state that the mortgage was to bear interest, parol evidence to show that that was the real understanding of the parties was admitted: *Gould* v. *Hamilton*, 5 Gr. 192.

Delivery of possession to purchaser. When not a waiver of reference as to title.

Delivery of Possession.—Where the conditions of sale provide that possession may be taken by the purchaser without waiving his right to investigate the title, he may take possession without waiving his right: *Bolton* v. *School Board*, 7 Ch. D. 766; but in the absence of any such condition, if a purchaser at a sale under a judgment, enter into possession without the sanction of the Court, he may be held to have accepted the title; Danl. Pr. 1171, and at any rate may be ordered to pay his purchase money into Court, notwithstanding his objecting to the title: *Patterson* v. *Robb*, 6 P. R. 114; but where, after a purchaser had taken possession, the vendor's solicitor delivered an abstract of title, and answered requisitions, it was held that the vendor had waived the right to treat the taking of possession as an acceptance of title: *Aldwell* v. *Aldwell*, 6 P. R. 183; and see *Gordon* v. *Harnden*, 18 Gr 231. Where, under the conditions of sale, a purchaser is entitled to possession, the letting him into the receipt of the rents and profits, is not a sufficient delivery of possession: *The People's Loan Co.* v. *Bacon*, 27 Gr. 294.

Letting into receipt of rents when not a sufficient delivery of possession.

Summary application for possession, against whom it may be made.

A summary application for delivery of possession under this *Order*, can only be made against parties to the action, or strangers who have obtained possession *pendente lite*: *Bank of Montreal* v. *Wallace*, 13 Gr. 184; *Trust & Loan Co.* v. *Start*, 6 P. R. 90; where a stranger is in possession who has not obtained possession *pendente lite* an action must be brought.

Purchaser accepting conveyance.

Where the purchaser accepts a conveyance, or vesting order,

knowing that a stranger to the suit is in adverse possession, he cannot afterwards claim compensation for delay in recovering possession: *Bull* v. *Harper*, 6 P. R. 36; *Joliffe* v. *Baker*, 48 L. T. N. S. 966; 11 Q. B. D. 255.

ing conveyance with knowledge of adverse possession, not entitled to compensation.

Incumbrances.—A purchaser before accepting a conveyance, or vesting order, or consenting to the payment out of his purchase money, should see that all incumbrances are paid off, which the vendors are bound to discharge. After conveyance, or vesting order, his right to have incumbrances discharged out of his purchase money is gone, and he must rely on his covenant if any: *Bull* v. *Harper*, 6 P. R. 36; *S. C.*, before Spragge, C., February 1, 1873: *Re Buck*, *Peck* v. *Buck*, 6 P. R. 98; *Kincaid* v. *Kincaid*, 6 P. R. 93; *Joliffe* v. *Baker*, 11 Q. B. D. 255; 48 L. T. N. S. 966; unless perhaps, where he was ignorant of such incumbrances when he accepted the conveyance; see *Re Turner & Skelton*, 13 Ch. D. 130; *Henning* v. *McDougall*, 8 P. R. 200; but see Law Times Journal (for 1880), 387; or unless no title at all has been conveyed, as where the land had been sold for taxes; *Turrill* v. *Turrill*, 7 Pr. R. 142; and see *Jones* v. *Clifford*, 3 Ch. D. 779. But a conveyance by the vendor to a third party, even though made at the purchaser's request, will not prevent the latter, after the conveyance, from claiming to have incumbrances discharged, to which the covenants in the deed may not extend, but which, under the contract of sale, the vendor was bound to pay off: *McLennan* v. *Cheguin*, 37 U. C. Q. B. 301.

Purchaser to see to discharge of incumbrances.

Acceptance of conveyance, how far a waiver of right to apply to have incumbrances discharged out of purchase money.

Ground rent and other outgoings, accruing whilst the purchaser is kept out of possession through the default of the vendor, are held to be payable by the latter: *People's Loan Co.* v. *Bacon*, 27 Gr. 294; and see *Fisken* v. *Wride*, 11 Gr. 248; *sed quaere*, if this is so, where the purchaser, on the completion of the contract, receives the rents, and profits, for the period during which such out-goings accrued.

Outgoings, how payable.

Taxes.—The vendor is bound to pay a proportionate part of all taxes accruing up to the time fixed for the completion of the contract, even though not actually imposed at the time: *Bank of Montreal* v. *Fox*, 6 P. R. 217; *People's Loan Co.* v. *Bacon*, 27 Gr. 294; unless the by-law imposing the taxes, expressly provides that they shall not form a charge on the land until a day after that when the title is made out: *Harrison* v. *Joseph*, 8 P. R. 293.

Where the purchaser pays taxes accrued before the time he is let into possession, he is entitled to be refunded out of his purchase money: *Yourex* v. *Alcombrack*, 13 C. L. J. N. S. 226.

Taxes, by whom payable.

Compensation.—Although a vendor is allowed great latitude in the statements, or exaggerations, he may make, as to the general qualities, and capabilities, of land he is about to offer for sale, still he

Compensation, when allowed, to purchaser.

will not be permitted to make direct misstatements, and misrepresentations, as to matters of fact, which would naturally have the effect of inducing parties resident at a distance to bid for the property.

Misrepresentation in advertisements.

Therefore, where an advertisement of sale described the property as being "a farm of eighty-four and a-half acres, twenty acres cleared and fenced," on the faith of which the plaintiff purchased, when, in fact, there was not any clearing or fencing, compensation for the misrepresentation was allowed: *Stammers* v. *O'Donohoe*, 28 Gr. 207; 8 App. R. 161; but see *Osborne* v. *Farmers & M. B. Soc'y.*, 5 Gr. 326.

Evidence of misrepresentation.

Where a material misrepresentation has been made by the vendors, it is not necessary for the purchaser to prove, that the representation was known by the vendors to be false, or was made recklessly; and in the absence of evidence to the contrary the purchaser will be presumed to have bought on the faith of such representation; *Redgrave* v. *Hurd*, 45 L. T. N. S. 485; 20 Ch. D, 1; *Jones* v. *Rimmer*, 43 L. T. N. S. 111; see however, *Joliffe* v. *Baker*, 11 Q. B. D. 255, 48 L. T. N. S. 966; but where it is shewn that the purchaser bought with knowledge that the statement was untrue, compensation will be refused; *Carmichael* v. *Ferris*, 8 P. R. 289; and see *Curran* v. *Little*, 8 Gr, 250; but see *Lett* v. *Randall*, 49 L. T. N. S. 71.

Compensation for delay in making title.

The purchaser may be entitled to compensation for delay in making out the title: *Dudley* v. *Berczy*, 3 Chy. Ch. R. 81, or for delay in delivering possession: *Thomas* v. *Buxton*, 8 L. R. Eq. 120; or for destruction of the property by fire before confirmation of the sale; see *Stephenson* v. *Bain*, 8 P. R. 258; but see *Rayner* v. *Preston*, 14 Ch. D. 297; 43 L. T. N. S. 18; 18 Ch. D. 1; 44 L. T. N. S. 787; 50 L. J. Ch. 472. So, also, for deficiency of land; thus, where 300 acres "more or less," was advertised, and the land only contained 244 acres, compensation was awarded: *Wardell* v. *Trenouth*, 24 Gr. 465; *Whittemore* v. *Whittemore*, 8 L. R. Eq. 603; and see *Canada Permanent L. & S. Co.* v. *Young*, 18 Gr. 566.

Or delivering possession.

Or losses by fire.

Or deficiency of land.

And purchaser's right cannot be barred by condition of sale where misdescription material.

And where the error in the description of the land is material, the right of the purchaser to compensation for the deficiency, is not defeated by a condition of sale to the effect that no compensation shall be made for any deficiency. Such conditions will be construed merely to apply to small defects: *Whittemore* v. *Whittemore*, *supra*. A purchaser may also be entitled to compensation for failure to make title to part of the property sold, although he may be precluded by the conditions of sale, from objecting to carry out the sale on that ground, *English* v. *Murray*, 49 L. T. N. S. 35.

Compensation for dilapidation.

A purchaser is also entitled to compensation for dilapidations committed by parties in possession, after sale, but before completion: *Fisken* v *Wride*, 11 Gr. 245. *Thomas* v *Buxton*, *supra*.

For suppression.

Compensation may also be awarded for the suppression of material

facts; thus, when the property offered for sale was a mill site, and mill, and the vendor had previously sold the right to take water for the purpose of floating logs, which fact was not communicated to the purchaser, it was held that this was a subject for compensation: *Wardell* v. *Trenouth*, 24 Gr. 465. — of material facts.

After conveyance, or vesting order, the purchaser's right to compensation for defects in title to which his covenants, if any, do not extend, is usually gone: *Allen* v. *Richardson*, 13 Ch. D. 524; *Manson* v. *Thacker*, 7 Ch. D. 620; *Egleson* v. *Howe*, 3 App. R. 566; *Kincaid* v. *Kincaid*, 6 P. R. 93; *Follis* v. *Porter*, 11 Gr. 442; *McCall* v. *Faithorne*, 10 Gr. 324; *Joliffe* v. *Baker*, 48 L. T. N. S. 966; but see *Bos* v. *Helsham*, 2 L. R. Ex. 72, *McLennan* v. *Cheguin*, 37 U. C. Q. B. 301. — After conveyance, right to compensation gone.

But misstatements, or suppression, in the advertisement of a sale by the Court, of material facts, may form the ground for compensation even after conveyance, so long as the fund remains in Court: *Cann* v. *Cann*, 3 Sim. 447; *Bull* v. *Harper*, 6 P. R. 36; *Turrill* v. *Turrill*, 7 P. R. 142; and see *Horner* v. *Williams*, Jo. & Ca. 274. — Exception where mistatements in advertisement.

The Court will not enforce specific performance of a contract, with compensation for misdescription, where the sale is made by a vendor in a fiduciary capacity, and any *cestui que trust* would have a right to complain of the sale, if so enforced, as a breach of trust: *Osborne* v. *Farmers & M. B. Socy.* 5 Gr. 326; *Mortlock* v. *Buller*, 10 Ves. 292; *Goodwin* v. *Fielding*, 4 D. G. M. G. 104; *Sneizely* v. *Thorn*, 1 Jur. N. S. 125. — Sales by trustees, specific performance with compensation when not enforced.

The misrepresentation of material facts may entitle the purchaser to have the contract rescinded: *Gale* v. *Hubert*, 6 Gr. 312, *Redgrave* v. *Hurd*, 20 Ch. D. 1. — Misrepresentations, ground for rescission

The purchaser is entitled to a conveyance with bar of dower by vendor's wife; if she refuse to bar dower, the purchaser is entitled to an abatement, or to rescind the contract: *Kendrew* v. *Shewan*, 4 Gr. 578; *VanNorman* v. *Beaupré*, 5 Gr. 599; or to have a portion of the purchase money, sufficient to answer the dower, set apart until the wife's death, and the interest thereon paid to the vendor during his wife's life: see *Skinner* v. *Ainsworth*, 24 Gr. 148; and *Loughead* v. *Stubbs*, 27 Gr. 387. — Dower, purchaser entitled to release of.

Reference as to Title.—The inclination of the Court is in favour of giving the purchaser a reference as to title, if he desire it. And it is only when the evidence is clear that the purchaser intended to waive, and has actually waived his right of examining the title, that a reference will be denied: *Micheltree* v. *Irwin*, 13 Gr. at p. 543; and see *Jackson* v. *Jessup*, 6 Gr. 157. — Reference as to title, when ordered.

On an application by the vendor to compel the purchaser to pay

his purchase money into Court, a reference as to title may be ordered, if the purchaser have neither accepted, nor waived his right to examine, the title: *Crooks* v. *Street*, 1 Chy. Ch. R. 95; *Street* v. *Hallett*, 6 P. R. 312; *McDermid* v. *McDermid*, 8 P. R. 28; 15 C. L. J. 136; *Ellwood* v. *Pierce*, 7 P. R. 427.

Waiver of right to reference, what constitutes.

WAIVER.—The right to a reference may be waived by long delay, in either demanding an abstract, or making any objection to the title: *Ontario Bank* v. *Sirr*, 6 P. R. 216; and see *Rae* v. *Geddes*, 18 Gr. 217; or by taking possession: *Denison* v. *Fuller*, 10 Gr. 498; *Commercial Bank* v. *McConnell*, 7 Gr. 323; *Patterson* v. *Robb*, 6 P. R. 114; *O'Connor* v. *Beatty*, 2 App. R. 497; but see *Wardell* v. *Trenouth*, 24 Gr. 465; *Darby* v. *Greenlees*, 11 Gr. 351; *Micheltree* v. *Irwin*, 13 Gr. 537; *Crooks* v. *Glenn*, 8 Gr. 239; *Morin* v. *Wilkinson*, 2 Gr. 157; *O'Keefe* v. *Taylor*, *Ib.* 305; *Jackson* v. *Jessup*, 6 Gr. 156. But if after possession taken, the vendor proceed with the investigation of title, and answer requisitions, the taking of possession will be no waiver: *Burroughs* v. *Oakley*, 3 Sw., 159; *Aldwell* v. *Aldwell*, 6 P. R. 183; *Gordon* v. *Harnden*, 18 Gr. 231.

Circumstances from which a waiver may be inferred.

The right of a purchaser to investigate the title may be also waived by his accepting a conveyance, or vesting order: *Bull* v. *Harper*, 6 P. R. 36. So also writing a letter apologising for non-payment of the purchase money, although making no reference to the title; or accepting a release of dower from a person interested in the estate; or the giving of a mortgage to secure the purchase money, are circumstances from which an acceptance of title may be inferred: *McDonald* v. *Garrett*, 8 Gr. 290; but see *Jackson* v. *Jessup*, 6 Gr. 157. But though the purchaser by taking possession and dealing with the property may waive his right to compel the vendor to make out a good title, he may yet be relieved from payment of his purchase money before completion, on showing that the vendor has no title at all: *Denison* v. *Fuller*, 10 Gr. 498.

Possession taken with knowledge of incurable defects; effect of.

In applying the doctrine of waiver, a distinction is to be observed between the case of a contract, providing that a good title shall be shown, and that possession may be taken before completion; and the case of a purchaser taking possession before completion without any express stipulation in that behalf. There is also a broad distinction between a purchaser going into, or remaining in, possession, and making structural alterations, knowing of the existence of an incurable objection; and one entering with knowledge of objections which are curable. In the former case he may, although entitled to have the title otherwise made out, be held to have waived the particular incurable objection: *Re Gloag*, 48 L. T. N. S. 629.

Abstract of title to be delivered by vendor on demand.

390. After a sale under an order is confirmed, the vendor is, forthwith upon demand, to deliver an

abstract of title to the purchaser; and if the purchaser does not serve objections within seven days, he is to be deemed to have accepted the abstract as sufficient. If objections are served, the vendor is to answer them within fourteen days; and if the purchaser is still dissatisfied, and if the parties cannot otherwise agree, either party may obtain from the Master a warrant to consider the abstract.

If no objection served abstract to be deemed sufficient.

Objections to abstract, how disposed of.

In sales by the Court, the solicitor of the party conducting the sale, is considered the vendor's solicitor, and it is from him the abstract must be demanded, and it is his duty to prepare, and deliver it.

Abstract, vendor's solicitor to deliver.

The vendor is only required to deliver an abstract on demand. The demand should be in writing: see 29 Vict. c. 28, s. 20, *R. S. O.* p. 951.

Demand of abstract.

The purchaser may if he please investigate the title, without making the demand. And where he made no demand of an abstract, and made no objection to the title, for twenty-three months, he was held to have waived his right to object to the title: *Ontario Bank* v. *Sirr*, 6 P. R. 276; and see *Rae* v. *Geddes*, 18 Gr. 217.

Neglect of purchaser to demand effect of.

When the vendor neglects, on demand, to deliver an abstract, the purchaser may move to compel him to do so. Or it would seem if the delay is unreasonable, he may apply to be discharged: see *Walton* v. *Armstrong*, 11 Gr. 379. The purchaser is entitled to a solicitor's abstract, and not merely a registrar's abstract, unless there be an express condition of sale to the contrary.

Neglect of vendor to deliver on demand.

Although the taking of possession by the purchaser, may amount to a waiver of title, yet if the vendor afterwards deliver an abstract, or proceeds with the investigation of the title, he cannot set up the waiver: *Aldwell* v. *Aldwell*, 6 P. R. 183; *Gordon* v. *Harnden*, 18 Gr. 251.

Proceeding with investigation of title after possession taken, effect of.

An abstract may be defined to be a brief statement of all material deeds, and facts, necessary to be proved, in order to establish a good title in a vendor.

Abstract, nature of.

After the receipt of the abstract, the purchaser may deliver objections to the abstract; *e. g.*, that assuming the chain of title therein set out to be proved, it does not show a good, or any title, in the vendors; or that the effect of any instrument is not sufficiently abstracted. This class of objections is confined to the sufficiency of the abstract, *per se*. The objections should be specific, and point out clearly the alleged defect.

Objection to abstract, how made.

Determination of.

As to the determination of questions thus raised, see *Ord.* 391, *infra*: *McManus* v. *Little*, 3 Chy. Ch. R. 263. After the abstract has been made perfect, or accepted as sufficient, the next step is its verification, and any defects in the proofs form the subject of objections to, or requisitions on, the title, as provided by *Ord.* 394, 395, 396, *infra*.

Objection to title should not be delivered till abstract complete.

The purchaser should not deliver objections, and requisitions, on title, until all objections to the abstract are disposed of, or he will be held to have waived all objection to the abstract: *McManus* v. *Little*, 3 Chy. Ch. R. 263.

Master to determine question as to sufficiency of abstract.

391. The Master is to determine all questions upon the abstract and the sufficiency thereof; and, if desired by the purchaser, may require the vendor to make the same as perfect as he can; and if the vendor neglects or refuses to do so, he may permit the purchaser to supply defects therein, at the vendor's expense.

Defects in, how to be remedied.

Objections to abstract may be referred to Master.

Where the objections to the abstract are not removed within fourteen days after service of the objections, it is not necessary to obtain any order of reference, in order to obtain the Master's decision; but the vendor, or purchaser, may carry the abstract, and objections, into the Master's office, and obtain a warrant to consider the abstract.

Vendor may supply defects in abstract.

If the Master hold the abstract to be insufficient, and the vendor neglect, or refuse, to supply the defects, the purchaser may be permitted to do so. This, of course, will not always be in the power of a purchaser; but where deeds are registered, the purchaser may frequently obtain the necessary information to perfect the abstract from the Registry office.

Verification of abstract.

The vendor is usually bound to verify the abstract, by the production of all documents abstracted, or by proper secondary evidence, where the non-production of the originals is sufficiently accounted for; and by producing affidavits of all facts necessary to be proved in order to make out title. See *Ord.* 394, *post*.

Good title, when shown.

A good title is not shown until it is both exhibited by the abstract, and the vendor is able and willing to verify it: *Granger* v. *Latham*, 14 Gr. 209; *Parr* v. *Lovegrove*, 6 Jur. N. S. 600.

Master is not to make a report, but is to mark objections allowed, or disallowed.

392. The Master is not to make a report on the abstract, but is to mark the objections as allowed or disallowed, as the case may be; and when he finds the

abstract perfect, or as perfect as the vendor can make it, he is to certify to that effect at the foot or on the back; and such finding is to be final unless appealed from within fourteen days thereafter.

When he finds abstract perfect he is to certify it on abstract.

Where the Master made a report on the title, instead of marking the objections "allowed," or "disallowed," the Court refused to entertain an appeal from his report, but referred the matter back to the Master, to be dealt with as provided by this *Order*: *Cockenour* v. *Bullock*, 12 Gr. 73.

Where Master omitted to follow *Ord.* case remitted to him.

This *Order* provides that the Master's finding is to be final, unless appealed from within fourteen days: see, however, *Ord.* 642, which practically extends the time for appealing for one calendar month.

Appeal from Master.

393. After an abstract is confirmed, or is accepted by the purchaser as sufficient, no objection to the abstract is to be allowed.

After abstract confirmed, no further objection allowed.

The abstract is accepted as sufficient, if the purchaser does not serve any objection within seven days after its delivery: *Ord.* 390. It is confirmed, if the Master disallow the objections, and no appeal is had from his finding within one month; see *Ord.* 392, 642.

Abstract when deemed sufficient.

394. After acceptance or confirmation of the abstract, the verification is to be proceeded with, and the vendor is with all diligence to afford the purchaser all the means of verification in his power, in the manner, and according to the practice usual with conveyancers; and after having done so, he may serve a notice on the purchaser to make his objections or requisitions, if any, within seven days, or that otherwise he will be deemed to have accepted the title.

Verification abstract.

Notice to deliver objections and requisitions.

Verification of Abstract.—The practice of conveyancers, is for the vendor's solicitor to give notice of a time and place, (usually his own office), where the abstract will be verified. Sometimes the deeds, and evidences of title, are sent to the purchaser's solicitor. So far as the title deeds are concerned, the abstract is verified by the production of the originals, or such of them as are in the vendor's possession, and by producing certified copies of the deeds, or registered memorials, where the originals are not in the vendor's possession. Sometimes, however, notarial copies are furnished, *e. g.*, where a deed covering other lands is in the hands of some third party. As

Verification of abstract.

Title deeds, how proved.

to how far registered memorials are evidence, and as to how far recitals in deeds are evidence of the facts recited, see *R. S. O.* c. 109, ss. 1. 2; *Sanders* v. *Malsburg*, 1 O. R. 178; 18 C. L. J. 206; *Allan* v. *McTavish*, 28 Gr. 539; *Reg.* v. *Guthrie*, 41 U. C. Q. B. 148; *Canada Permanent Loan and Savings Co.* v. *Ross*, 7 P. R. 79; for cases before the Statute, see *Wishart* v. *Cook*, 15 Gr. 237; *Gough* v. *McBride*, 10 C. P. 166; *Re Higgins*, 19 Gr. 303; S. C. 4 Chy. Ch. R. 128; *Russell* v. *Fraser*, 15 C. P. 375.

Other facts, how proved.

Facts necessary to be proved in order to make out the title, *e. g.*, death, intestacy, heirship, &c., are required to be proved by affidavit; but statutory declarations of such facts, taken on a former devolution of the title, are usually accepted as evidence, and need not be corroborated by affidavits made in the action.

Deeds must be registered at vendor's expense.

Where the title is a registered title, all instruments in the chain of title must be registered, and any unregistered deeds in the chain of title, must be registered at the expense of the vendor: *Kitchen* v. *Murray*, 16 C. P. 69; *Brady* v. *Walls*, 17 Gr. 699; *Fahner* v. *Ran*, 1 Chy. Ch. R. 246; *Sweetnam* v. *Sweetnam*, 6 P. R. 83.

Copies, when to be furnished by vendor.

In the absence of any express condition of sale to the contrary, the vendor is bound to furnish, at his own expense, to the purchaser, copies of all instruments relating to the title which are not of record: *Re Charles*, 4 Chy. Ch. R. 19. He is also bound to furnish copies of all deeds registered by memorial, but not of deeds registered in full: *Ib*; but see *Harrison* v. *Joseph*, 8 P. R. 293.

Liability of vendor to furnish deeds may be qualified by special condition.

The ordinary liability of a purchaser to produce all necessary evidence to make out a good title, and to deliver on completion the original deeds, or copies of such as are neither in his possession, nor registered in full, may be qualified by special conditions of sale. Where special conditions are imposed, they have to be set out in full in the advertisement: see *Ord.* 377, *ante*. Special conditions of this kind should not be unnecessarily stringent, as they are calculated to damp the sale. Thus where the proof of title was involved in no difficulty a condition of sale that "the vendor is not to be bound to give any evidence of title, or any title deeds or copies thereof, other than such as are in his possession, or produce any abstract," was held to be very objectionable, and one that should not be sanctioned by the Master, even by consent: *McDonald* v. *Gordon*, 2 Chy. Ch. R. 125.

Such condition should not be unnecessarily stringent.

Vendor may be bound, notwithstanding such conditions, to prove title.

But it seems that even such a condition would not exempt a vendor from otherwise showing a good title: *Canada Permanent Building Society* v. *Wallis*, 8 Gr. 368. *Secus*, where the vendor purports to sell only such title as he has, but even then if it can be shown by the purchaser that the vendor has no title at all, the contract will

not be specifically enforced against the purchaser: *Leslie* v. *Preston*, 7 Gr. 434; *Jones* v. *Clifford*, 3 Ch. D. 779; *Darlington* v. *Hamilton*, Kay 550; but see *Hume* v. *Pocock*, 1 L. R. Chy. 379; *Hume* v. *Bentley*, 5 D. G. & S. 520. The Court will not knowingly pass off a bad title, by the aid of special, or misleading conditions: *Else* v. *Else*, 13 L. R. Eq. 196; Seton 1300, 1395.

Court will not pass off a bad title, knowingly.

The vendor is bound to procure the discharge of Crown Bonds affecting the land: *Re Charles*, 4 Chy. Ch. R. 19. Crown Bonds of the Province of Ontario, are no longer a charge on land of the obligor, unless registered against it: *R. S. O.* c. 93; *Re Franklin*, 8 P. R. 470.

Crown bonds.

The vendor is not bound to give evidence, negativing the existence of arrears of taxes, or other encumbrances: *Thompson* v. *Milliken*, 9 Gr. 359. As to punishment for concealing encumbrances, or falsifying pedigree, &c., after written demand of abstract: see 29 Vict., c. 28, s. 20; *R. S. O.*, at p. 951.

Taxes and incumbrances.

As to execution of deeds, by the *Trust & Loan Co.*, see 25 Vict., c. 72; *Trust & Loan Co.* v. *Monk*, 14 Gr. 385; by Canada Company: *Woodhill* v. *Sullivan*, 14 C. P. 265; *Fell* v. *South*, 24 U. C. Q. B. 196.

Execution of deeds by T. & L. Co. & Canada Co.

The Canada Company is not exempted from giving ordinary covenants for title: see *Scarlett* v. *Canada Co.*, 1 Chy. Ch. R. 90.

Covenants by Canada Co.

As soon as the vendor's solicitor considers the verification of the abstract is complete, he should serve notice on the purchaser to deliver objections, and requisitions.

Notice to deliver objections, service of.

395. Upon being served with such notice, the purchaser if dissatisfied, is to serve his objections, or requisitions within the time thereby limited; and the like course is to be followed upon such objections or requisitions as is prescribed by Orders 390, 391, and 392, in relation to the abstract.

Objections, and requisitions, to whom to be delivered.

Requisitions on, and Objections to, Title.—If the purchaser is dissatisfied with the proofs of title adduced by the vendor, he must deliver his objections, and requisitions, within seven days after receipt of notice so to do, or he will be deemed to have accepted the title.

Requisitions on title, when to be delivered.

The existence of a public road across the land was held a valid objection to the title, although a resolution of the Municipal Council to close it, had been passed: *Kronsbien* v. *Gage*, 10 Gr. 572. So also is an outstanding claim to dower: *Gamble* v. *Gummerson*, 9 Gr. 193. So

Objections to title:
Road across land.
Outstanding dower.

Lunacy of previous owner.

also is the lunacy of a previous owner of the land: *Francis* v. *St. Germain*, 6 Gr. 636. So also is the fact that the vendor, an attorney,

Vendor claiming under will drawn by himself.

claimed through a will prepared by himself: *Grove* v. *Bastard*, 2 Phil. 621. So also is the fact that the title came through a will, whereby the testator purported only to devise a moiety: *Stapylton* v. *Scott*, 16 Ves. 273; and where the validity of the vendor's title

Or title depending on vendor taking "without notice."

depended on the fact of his having purchased *without notice*: *Freer* v. *Hesse*, 4 D. M. & G. 495; but a supposed equity in a person who died upwards of fifty years ago, where the possession since that time had been in another, and the vendor had a good legal title, was held no objection: *Dewitt* v. *Thomas*, 10 Gr. 21.

Possession, enquiry should be made as to.

Enquiry should always be made as to the possession. If a stranger be in possession, the purchaser should insist on his being ejected by the vendor. As to effect of possession, see *Attorney General* v. *McNulty*, 11 Gr. 281, 581: *Gray* v. *Coucher*, 15 Gr. 419; although it would seem that possession is no longer constructive notice of the

No longer constructive notice of title.

title of the person in possession as against a party claiming under a registered title: *Bell* v. *Walker*, 20 Gr. 569; *Gray* v. *Ball*, 23 Gr. 390; *Sherborneau* v. *Jeffs*, 15 Gr. 574; not even though there be actual notice of the possession: *Cooley* v. *Smith*, 40 U. C. Q. B. 543; *Roe* v. *Braden*, 24 Gr. 589.

Purchaser not bound to enquire as to regularity of proceedings.

In investigating the title, the purchaser at a sale by the Court, is not bound to enquire into the regularity of the proceedings in the action; if the judgment appear to be regular on its face, he will be protected: *Shaw* v. *Crawford*, 4 App. R. 371; *Gunn* v. *Doble*, 15 Gr. 655; *McLean* v. *Grant*, 20 Gr. 76. He must, however, ascertain

But must ascertain that all necessary parties are bound; and that sale is in accord with Judgment.

that all proper necessary parties are bound by the judgment: *Lechmere* v. *Brasier*, 2 J. & W. 287; *Calvert* v. *Godfrey*, 6 Beav. 97; *Bennett* v. *Hamill*, 2 Sch. & Lef. 577; and that the sale was in accordance with the judgment: *Colclough* v. *Sterum*, 3 Bli. 181; *Talbott* v. *Minnett*, 6 Ir. Eq. 83.

Requisitions, how adjudicated on.

Where the requisitions, and objections, or any of them, are not answered, either party may carry in the objections, or such of them as are not answered, before the Master, as provided by *Ord.* 390, and get his decision thereon.

Matters of conveyance, what are.

There are some objections which are not strictly objections to the title, but are considered "matters of conveyance." Thus, the existence of outstanding encumbrances, or satisfied mortgages—where the vendor is entitled to require the party appearing entitled thereto, to join in the conveyance to the purchaser, or to release or discharge his encumbrance—are not objections to the title. But where the vendor is unable to procure such conveyance, or release, such encumbrances then constitute an objection to the title.

On refusal of vendor to verify

396. In case of the refusal or neglect of the vendor

to verify any portion of the abstract to the best of his ability, or to furnish any necessary proof or documents in his power, the Master may authorize the purchaser to do so at the vendor's expense.

abstract, Master may authorize purchaser to verify at vendor's expense.

Costs of Reference as to Title.—In sales by the Court, the purchaser is entitled to his costs of the reference, where the title proves good, on grounds not appearing on the abstract: *Fielder* v. *Higginson*, 3 V. & B. 142; and will not be ordered to pay the vendor's costs though the title is proved according to the abstract: *Flower* v. *Hartop*, 8 Beav. 200; *Holland* v. *King*, 1 W. R. 80; Dart V. & P. 1210; unless the objections are frivolous and vexatious: *Thorpe* v. *Freer*, 4 Madd. 466: *Peers* v. *Sneyd*, 17 Beav. 151. Seton, 1312, 1313; *Platt* v. *Blizzard*, 29 Gr. 46; *Hurd* v. *Robertson*, 7 Gr. 42. A special application is necessary for an order for such costs: *Flower* v. *Hartop*, *supra*.

Costs of reference as to title, how borne.

A purchaser will be ordered to pay the costs of an unsuccessful application to be relieved from his purchase; *Osborne* v. *Osborne*, 18 W. R. 421.

Where a good title cannot be made, the purchaser is entitled to a lien on the land sold, for his deposit and costs: *Hurd* v. *Robertson*, 7 Gr. 142.

When title bad, purchaser's lien for costs.

Conveyance.—In all sales by the Court since *The Judicature Act*, the Master to whom the action is referred, may settle the conveyance in case the parties differ, or there be any parties not *sui juris* interested, other than married women, without any special reference: see *Rule S. C.* 331; and see *Ord.* 226, *ante*. But when infants are interested, the Master is not to settle the conveyance, until the evidence is produced, of the purchase money having been paid into Court, or of its payment having been dispensed with; and where the purchaser is required to give a mortgage, not until evidence is given that the mortgage has been registered, and deposited, with the Accountant: *Rule S. C.* 506.

Conveyance may be settled by Master without special order.

Where infants concerned, proof required of payment of purchase money.

It is the purchaser's duty to prepare, and tender, the conveyance for execution: *Stephens* v. *DeMedina*, 4 Q. B. 422; *Boulton* v. *Hugel*, 35 U. C. Q. B. 407; *Watt* v. *Parker*, 2 Chy. Ch. R. 33; *Mooney* v. *Prevost*, 20 Gr. 418, *Burns* v. *Boyd*, 19 U. C. Q. B. 547; but see *Parker* v. *Watt*, 25 U. C. Q. B. 115: *Harrison* v. *Livingston*, T. T. 1 & 2 Vict; *Mouck* v. *Stuart*, 4 U. C. Q. B. 203; *Prindle* v. *McCan*, *Ib.* 228; *Scott* v. *Reikie*, 15 C. P. 200: *McDonald* v. *Snitsinger*, 5 U. C. Q. B. 312; *Rogers* v. *Lake*, 9 U. C. Q. B. 264; *Smith* v. *Doan*, 15 U. C. Q. B. 634; *Thayer* v. *Street*, 11 C. P. 243; *Koster* v. *Holden*, 16 C. P. 331; and in the

Purchaser's duty to prepare and tender conveyance.

Settlement by Master when necessary.

event of the parties differing, or in case of infants, or lunatics, being interested, it must be settled by the Master, before engrossment, or tender for execution. The purchaser cannot require a covenant by *cestui que trust* for title: *Cottrell* v. *Cottrell*, 2 L. R. Eq. 330; nor where the legal estate is conveyed can he require parties to the action, having merely equitable estates to join in the conveyance. Therefore, upon a sale of mortgaged premises, he cannot require the mortgagor to join in the deed: *Ross* v. *Steele*, 1 Chy. Ch. R. 94; nor the wife of the mortgagor: *Moore* v. *Shinners*, 1 Chy. Ch. R. 59; nor the wife of the mortgagee: *Simpson* v. *Simpson*, 1 Chy. Ch. R. 265.

Covenant by c. q.t. cannot be required; nor conveyance by parties having only equitable interests.

Costs.

Where, in consequence of the infancy of some of the vendors, a settlement of the conveyance by the Master is rendered necessary, the purchaser's costs thereof will be ordered to be paid out of his purchase money; *Re McMorris*, 3 Chy. Ch. R. 430.

Purchaser may take vesting order in lieu of conveyance.

The purchaser is entiled to a conveyance with ordinary covenants, but he may, if he choose, take a vesting order. Wherever the Court has authority to order the execution of a conveyance, it may make a vesting order: *R. S. O.* c. 40 s. 101. The vesting order is granted in Chambers on production of the report on sale duly confirmed, and proof that the purchase money has been duly paid, or secured, according to the report. Where the purchase money is to be paid into Court, its payment must be proved by the production of the certificate of the Accountant, or his chief clerk. The vendor's solicitor is entitled to notice of the application, and where infants are interested, the guardian *ad litem* is usually notified also. Where the owner of the legal estate became the purchaser, a vesting order was refused: *Bowen* v. *Fox*, 1 Chy. Ch. R. 387.

Application for, how made.

Costs of vesting order.

Where, in consequence of the absence of one of the vendors from the jurisdiction, the execution of the conveyance prepared, and tendered, by the purchaser, could not be procured, and a vesting order was then obtained, the purchaser was held entitled to the extra costs so occasioned: *Re McMorris*, 3 Chy. Ch. R. 430, and see *Lawrason* v. *Buckley*, 3 Chy. Ch. R. 270.

Tender of conveyance.

The purchaser sufficiently tenders the conveyance for execution under the standing conditions of sale, by delivering the same to the vendor's solicitor: *Weiss* v. *Crafts*, 6 P. R. 151.

Ord. 390-396 apply to all references as to title, as well as sales by the Court.

397. The foregoing Orders, 390, 391, 392, 393, 394, 395, and 396, are to apply to all cases of reference to the Master as to title, as well as to sales by the Court.

XXX.—EXAMINATION PRO INTERESSE SUO.

Parties entitled to be examined

398. Any party who might under the former practice,

have moved to be examined *pro interesse suo* may apply to the Court, upon motion for such relief as he may think himself entitled to. (3rd June, 1853; Ord. 41, s. 2.)

pro interesse suo, may apply for relief on motion

An application to be examined *pro interesse suo*, under the former practice was necessary where any person claimed to be interested in property in the possession of an officer of the Court, *e. g* : a receiver, or sequestrator: Danl. Pr. 6th ed. 921; Kerr on Rec'r. 126-8. The claimant was required to submit to examination for the benefit of the party at whose instance the receiver was appointed, or the sequestration issued : *Prentiss* v. *Brennan*, 2 Gr. 587. Where the claimant, claimed adversely to a sequestration, the order was not granted until the sequestrator had made a return : *Pelham* v. *Duchess of New Newcastle* 3 Sw. 290. Under *Ord.* 398, which seems to be now in force in all the Divisions of the High Court, instead of applying to be examined *pro interesse suo*, any person claiming property adversely to a receiver, or sequestrator, may apply to the Court for relief. It would seem the application should be by petition, and that the motion cannot be entertained by the Master in Chambers : *Brown* v. *Dollard*, 6 Pr. R. 113.

Examination *pro interesse suo*, former practice as to.

Under present practice. application to be made to Court.

The application may be in the alternative for payment of the applicant's claim, or for leave to bring an action to try the alleged right.

399. Notice of the motion is to be served upon the defendant, or defendants, at least three weeks before the day fixed for the application.

Three weeks' notice of motion to be served.

The word defendant in this *Order*, must be understood to apply to the persons adverse in point of interest to the applicant, and not merely to the actual defendants in the action in which the proceeding is taken.

It will be observed that this *Order* requires, "at least, three weeks'" notice of the motion to be given. And although *Rule S. C.* 407 provides that at least two clear days' notice of motion is to be given, unless the Court or Judge give special leave to the contrary; that *Rule* does not necessarily conflict with this *Order*, because the *Rule* merely provides for a minimum notice, and does not provide that that notice shall be sufficient in all cases, where, by the former practice, a longer notice was necessary : see *Exchange Bank* v. *Newell*, 19 C. L. J. 253.

Three weeks' notice of motion still required.

The words "at least" seem to indicate that there must be three clear weeks' notice of the motion : *Rumohr* v. *Marx*, 19 C. L. J. 10.

Affidavits in answer to be filed within ten days.

400. Within ten days from the service of the notice the affidavits in answer must be filed. Within six days after the expiration of such ten days, the affidavits in reply are to be filed, and except so far as these affidavits are in reply, they are not to be regarded by the Court; unless upon the hearing of the motion the Court gives leave to answer them; and in that case the costs of such affidavits, and of the further affidavits consequent upon them, are to be paid by the party moving, unless the Court orders otherwise. No further evidence, on either side, is to be used upon the hearing of the motion, without the leave of the Court.

Affidavits in reply to be filed within six days.

Costs occasioned by affidavits not in reply.

Deponents liable to cross-examination.

Deponents making affidavits in support of, or in opposition to, the motion, may be cross-examined thereon, as in other cases: see *Rule S. C.* 283.

But whether order necessary, for taking oral evidence, *quære.*

But an examination of witnesses who have not made affidavits, in support of, or opposition to, the motion, it would seem can now only be had upon order obtained for that purpose: *Rule S. C.* 285; *Monaghan* v. *Dobbin*, 18 C. L. J. 180; 2 C. L. T. 260; Taylor & Ewart, 311; but see *ante*, *Ord.* 266, note.

Court may order examination of witnesses, or direct inquiry, or order an action.

401. On hearing the motion, the Court may, instead of either granting or refusing the motion, give such directions for the examination of parties or witnesses, or for the making of further inquiries, or for the institution of any suit or action, as the circumstances of the case may require. (3rd June, 1853; Ord. 41, s. 4.)

Persons interfering with receiver, may be restrained.

Where a person interferes with the possession of a receiver, or sequestrator, or brings an action against him, without the leave of the Court, he may be restrained by injunction order, which will usually provide in what method the claim of the person restrained, is to be determined.

XXXI.—COPIES.

Service of office copies of affidavits and other proceedings dispensed with in certain cases.

402. Office-copies of answers, affidavits, and other proceedings are dispensed with; and where service is required, true copies, instead of office-copies, are to be served; but this order is not to apply to bills, decrees,

or orders, of which office copies are by the practice of the Court required to be served. (6th Feb. 1865; Ord. 12.)

This *Order* would seem to be still in force as regards judgments, affidavits, and other proceedings; though, of course, as to bills, and answers, it is obsolete. Ord. 402, how far in force.

An "office copy" of a document is a copy authenticated by the proper officer, usually the one in whose custody the original record of the proceedings is deposited. But under *Ord.* 547, Local Registrars, Deputy Registrars, and Deputy Clerks of the Crown, would seem to have power to make office copies. Office copies of decrees were expressly required to be served in certain cases: see *Ord.* 60, 205, 244, *ante*; and where according to the former practice an office copy of a decree, or order, was required to be served, in like cases an office copy of the judgment, or order, would seem to be necessary under the present practice, except where a different practice is expressly provided. Office copies. When to be served.

Under the former Chancery practice, the first proceeding in the cause served upon a defendant was usually required to be an office copy; *e. g.*, bills, or decrees, or orders, served on parties added in the Master's office, and orders of revivor. But under the present practice, it would seem sufficient to serve a plain copy of an order adding parties upon a change of interest, instead of an office copy as formerly: see *Rule S. C.* 386.

Order 403 provided that no more than four copies of a pleading or other proceeding were to be allowed to any party exclusive of the draft, but inclusive of copies to serve, briefs, and other copies, that might be required or made in the progress of the cause, and is superseded by *Rule S. C.* 129, which is to the same effect. Ord. 403.

Order 404 provided for the scale of costs to be allowed for printing proceedings, and is superseded by *Rule S. C.* 130. Ord. 404.

Order 405 provided that every defendant appearing by a separate solicitor was to be entitled to demand two copies of any printed bill, paying therefor two cents per folio, and is now obsolete. Ord. 405.

XXXII.—TIME.

Order 406 provided that "when any limited time from, or after, any date or event, is appointed for doing an act or taking a proceeding, the computation of such time is not to include the day of such date, or of the happening of such event, but is to commence at the beginning of the next following day; and the act or proceeding is to Ord. 406.

be done or taken at the latest on the last day of such limited time, according to such computation."

Ord 407.

Order 407 provided, that when the last day for doing an act expired on a Sunday, or other day on which the offices were closed, it might be done on the next day the offices opened.

Orders 406-7, appear now to be superseded by *Rules S. C.* 455, 456, 457, which are as follows :

In periods of less than six days' holidays excluded.

"Where any limited time less than six days from, or after, any date or event is appointed or allowed for doing any act or taking any proceeding, holidays, as defined by *The Interpretation Act*, shall not be reckoned in the computation of such limited time :" *Rule S.C.* 455.

Days, how computed.

"In all cases in which any particular number of days not expressed to be clear days, is prescribed by the Act or the Orders, or practice of the Court, the same shall be reckoned exclusively of the first day and inclusively of the last day." *Rule S. C.* 456.

When last day is Sunday or holiday, it is excluded.

"When the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken, if done or taken on the day on which the offices shall next be open." *Rule S. C.* 457.

Holidays, what are, under *R. S. O.* c. 1, s. 8, ss. 16.

"The word 'Holiday' includes Sundays, New Year's Day, Good Friday, Easter Monday, and Christmas Day, the days appointed for the celebration of the birth-day of Her Majesty and of Her Royal Successors, and any day appointed by proclamation of the Governor-General, or Lieutenant-Governor, as a public holiday, or for a General Fast, or Thanksgiving." *R. S. O.* 1, c. s. 8, ss. 16.

Are included in periods of time exceeding six days, except when happening on the last day.

When the time exceeds six days, holidays are to be reckoned: *Ex. p. Viney*, 4 Ch. D. 794 ; except any holiday falling on the last day of the limited period, in which case it is excluded under *Rule S. C.* 457; *Taylor* v. *Jones*, 45 L. J. C. P. 110.

Rule S. C. 457 does not extend time for doing acts under statutes.

The provisions of *Rule S. C.* 457 have been held not to extend the time for registering an instrument under the Chattel Mortgage Act: *McLean* v. *Pinkerton*, 7 App. R. 490, nor for bringing an action where the time for doing so under the Statute of Limitations expires on a *dies non : Morris* v. *Richards*, 45 L. T. N. S. 210.

Time of vacation not to count in time for—

408. The time of vacation is not to be reckoned in the computation of the times appointed or allowed for the following purposes :

Answering.

1. Answering either an original or amended bill;

2. Amending or obtaining orders for leave to amend Bills ; — Amending,

3. Setting down demurrers ; — Setting down demurrers.

4. Filing replications, or setting down causes under the directions of Order 152, Order 153, Order 154, or Order 155 ; — Filing replications.

5. Master's reports becoming absolute ; — Masters' reports becoming absolute.

6. Moving to discharge an order of revivor ; — Moving to discharge order of revivor.

7. Moving to add to, vary, or set aside a decree, by any party served therewith. (3rd June, 1853 ; Ord. 5 s. 4 ; 30th June, 1858.) — Or to vary, or set aside a decree.

This *Order* though obsolete as regards clauses 1, 2, and 4, would seem to be still in force, and regulates the practice in all the Divisions as to clauses 3, 5, 6, and 7. — Ord. 408, how far in force.

Setting down Demurrers.—The long vacation is expressly excluded from the time allowed for setting down demurrers : *Rule S. C.* 461, and under this *Order* it would seem the Christmas vacation is also excluded. As to setting down demurrers, see *Rule H. C. J.* v. *Rules S. C.* 195 *a*. Holmested's Manl. Pr. 109, 275. — Vacations excluded, from time, for setting down demurrers

Masters' Reports.—In order to confirm a Master's report, it must be filed fourteen days : see *ante*, *Ord.* 252 ; and a calendar month (*Ord.* 7) must elapse from its making : *Ord.* 642 ; *Re Eaton*, *Byers* v. *Woodburn*, 8 P. R. 289. No part of these periods must fall in vacation. — Masters' reports, when confirmed.

The fourteen days may run concurrently with the month. But if the month elapse before the filing, then fourteen days further must elapse from the filing, before the report can be confirmed. The word "report" includes certificates of Masters.

As a general rule, any report, or certificate, of the Master, which may be the subject of appeal, requires confirmation before it can be acted on, or become absolute. — What reports require confirmation.

A certificate of a Master as to the insufficiency of accounts filed before him requires confirmation : *Foster* v. *Morden*, 9 P. R. 70 ; but not a certificate that no accounts at all have been filed. See further as to reports requiring confirmation : *Ord.* 252. *ante*.

Motions to discharge orders to continue proceedings.

Moving to Discharge Order of Revivor.—Where an order of revivor was formerly issued, the practice is now to issue an order to continue the proceedings.

Time for.

The long vacation is excluded from the time allowed for moving against an order to continue proceedings: see *Rule S. C.* 461. And under this *Order* the Christmas vacation would seem to be also excluded. Fourteen days were formerly allowed for moving against an order of revivor, under *Ord.* 33?; but now the time for moving against an order to continue proceedings is only twelve days from the service: *Rule S. C.* 387.

Motions to add to, or vary, judgments.

Moving to add to, or vary, Decrees.—This clause now applies to motions to add to, or vary, judgments, by parties served therewith, by direction of the Master, whether on being added as parties to an action, or merely for the purpose of binding them by, and enabling them to attend, the proceedings in the action. Under *Rule S. C.* 461, the long vacation is excluded from the time allowed for making such motions; and under this *Order* it would seem that the Christmas vacation is also excluded.

Power of Court, or judge, to enlarge, or abridge, time for doing act, unaffected by these Orders.

412. The power of the Court, and of a Judge in Chambers, to enlarge or abridge the time for doing an act, or taking a proceeding in any cause or matter, upon such (if any) terms as the facts of the case may require, or to give any special directions as to the course of proceeding in any cause or matter, is unaffected by these orders. (3rd June, 1853; Ord. 47.)

See *Rules S. C.* 462, 514.

XXXIII—SITTINGS OF THE COURT.

Ord. 413.

Order 413 prescribed the time for holding Rehearing Terms, and is now obsolete.

Chancery Division:—Sittings of Divisional Court.

The sittings of the Divisional Court of the Chancery Division now commence on the third Thursday in February, the first Thursday in September, and the first Thursday in December: see *Rule S. C.* 524, *post*. The length of the sittings depends on the business before the Court.

Q. B. & C. P. Division:—Sittings of Divisional Courts

The sittings of the Divisional Courts in the other two Divisions commence as follows;

The Hilary Sittings commence on the first Monday in February.

The Easter Sittings commence on the third Monday in May.

The Michaelmas Sittings commence on the third Monday in November.

The Hilary Sittings are to continue for two weeks, and the other two sittings for three weeks, but the Judges may extend the time in any case, and may shorten the Easter, and Michaelmas Sittings, to any period not less than two weeks: see *Rule S. C.* 480. Duration of sittings of Divisional Courts of Q. B. & C. P. Divisions.

Order 414 provided that there should be two terms annually for the examination of witnesses and hearing of causes. It is now superseded by the *Rules S. C.*: see Maclennan 255-7. Ord, 414.

Special sittings for the trial of actions in the Chancery Division may be appointed by the Judges whenever they consider the public convenience so requires: *Rule S. C.* 263.

Order 415 provided for the daily sitting of a Judge, and is superseded by *Rules H. C. J.*, III. IV.; and see *Ord.* 590-593, Ord. 415.

Order 416 was abrogated by *Ord.* 559. Ord. 416.

Order 417 prescribed the time for setting down causes for hearing *pro confesso*, and is now obsolete. Ord. 417.

418. Causes set down by way of motion for decree, or on bill and answer, or for hearing *pro confesso*, or for argument of demurrer, or upon further directions, or on appeal from Master's report, or for re-hearing, or upon petition under Order 330, or upon motion or petition to discharge an order of revivor, or to add to, vary, or set aside a decree, are to be entered with the Clerk of Records and Writs at least seven days before the day for which they are set down; and seven days' notice of the hearing or motion is to be served upon all parties entitled to notice thereof. Causes set down on motion for decree, or on demurrer, further directions, or rehearing, or to discharge order of revivor, when to be entered. Notice of hearing.

This *Order* is to a certain extent still in force. The words "at least" seven days, are construed to mean "clear days:" *Beard* v. *Gray*, 3 Chy. Ch. R. 104; *Rumohr* v. *Marx*, 19 C. L. J. 10.

Motions for Judgment, and Further Directions.—Causes set down to be heard on motion for judgment, or on further directions, in the Chancery Division, must now be set down for a Wednesday, and seven clear days before the motion is to be heard; and seven days' notice of the motion must be served: see *Exchange Bank* v. *Newell*, 19 C. L. J. 253; *Ord.* 642, under which that case was decided, however, is expressly continued in force by *Rule S. C.* 3, which is not the case with *Ord.* 418; and see *Rule S. C.* 407. Defendants who have not appeared, are now entitled to notice Motions for judgment, and hearing on F. D. Notice of motion.

of a motion for judgment: *Burritt* v. *Murdock*, 18 C. L. J. 59; 9 P. R. 191; the notice may in such cases be served on them, by posting it up in the office whence the writ issued: *Rule S. C.* 131; creditors who have proved claims, but who are not made parties, are not entitled to notice of a hearing on further directions: *Lavin* v. *O'Neil*, 13 Gr. 179.

Appeals from Masters' reports, when heard.

Appeals from Masters' Reports, are now required to be set down for hearing in the first instance before a Judge in Chambers, and the practice as to setting down such appeals, is now regulated by *Ord.* 642; and the Judge in Chambers may, if he see fit, adjourn the appeal into Court, in which case, in the Chancery Division, it is customary to place it on the paper for hearing on the following Thursday, without any further setting down, or giving any further notice of hearing.

Rehearings.

Rehearings.—*The Judicature Act* and *Rules S. C.* have discontinued the use of the term "rehearing," and in its place have substituted motions to a Divisional Court to set aside, or vary judgments, which, however, practically amount to the same thing. *Rules S. C.* 522, 523, now regulate the practice on such motions.

Appeals in Chy. Division to be set down.

"All appeals, proceedings, and matters, to be brought before the Divisional Court of the Chancery Division, are to be entered with the Clerk of Records and Writs, at least seven days before the day fixed for the sittings of the Court, and seven days notice thereof is to be served upon the parties entitled to notice." *Rule S. C.* 522.

Applications to Divisional Court Chy. Div., when to be made.

"An application to the Divisional Court of the Chancery Division, to change, or reverse, any judgment, shall be made at the first sittings of the Divisional Court, which begins not less than ten days after the pronouncing of the said judgment." *Rule S. C.* 523.

Order *nisi* when necessary.

Where the motion is for a new trial of an action, tried by a jury, an order *nisi* must be obtained: *Rule S. C.* 308; and it would seem that, in the Chancery Division, the cause must be entered seven days before the sittings, to be heard on motion for such order *nisi*, and seven days' notice of the motion served: *Rule S. C.* 522. *Rule S. C.* 309 provided that the motion must be made within the first four days of the sittings of the Divisional Court, which might take place next after the trial, etc.; but that *Rule* was rescinded by *Rule S. C.* 526, and no new provision has been made regulating the time for moving for new trials in actions tried by jury in the Chancery Division, except *Rule S. C.* 522, *supra.*

Motions for new trials, &c., in Q. B. &C. P. Divs.

Motions for new trials, or to reverse, or vary, judgments in the other Divisions, are regulated by *Rules S. C.* 527, *et. seq.*

Petitions under Ord 330.

Petitions under Order 330.—The practice as to setting down petitions under *Ord.* 330, would seem to be still governed by this

Order; and it would seem that seven days' notice of the motion must still be given: see *Exchange Bank* v. *Newell*, 19 C. L. J. 253; but see *Rule S. C.* 407.

Motions to discharge order to continue proceedings.—or to add to or vary judgments.

Motions to Discharge Orders of Revivor, or to add to, or set aside Decrees.—This *Order* would seem now to apply to setting down motions to set aside orders to continue proceedings, which under *The Judicature Act*, are substituted for orders of revivor; and seven days' notice of the motion would still appear to be necessary: *Exchange Bank* v. *Newell*, *supra*; but see *Rule S. C.* 407; and the same remark applies to motions to add to, or vary judgments, served upon parties added in the Master's office, or upon persons whom it is intended to bind by the proceedings, but who are not made parties to the action. These motions are properly made before a single Judge.

When to be made to a single Judge, &c.

When to be made to a Divisional Court.

Motions to vary judgments pronounced by a single Judge at the trial of an action, or on motion for judgment, by a party who at the time of the pronouncing of the judgment, was a party to the action, and represented at the trial, or motion, must be made to the Divisional Court: see *Rule S. C.* 522, 523. Formerly where a decree had been pronounced at the hearing by default, the motion to vary, or set it aside, might be made by the party in default, to a single Judge (usually the Judge who pronounced judgment): *Nelles* v. *Vandyke*, 17 Gr. 14; *Simmers* v. *Erb*, 21 Gr. 289; and this practice was followed since *The Judicature Act*, without question: *Trimble* v. *Parsons*, before Boyd, C., 27th Dec., 1882; but it is doubtful whether even in such a case the motion should not now be made to a Divisional Court. Where the judgment has been entered by default without motion, the motion to set it aside by the party in default, may be made in Chambers: *Kline* v. *Kline*, 3 Chy. Ch. R. 79, and see Rob. & Jos. Dig. 1931-1935, *Ryan* v. *Fish*, 9 P. R. 458.

When in Chambers.

419. Where further directions have been reserved, if the party having the conduct of the cause does not set the same down for hearing on further directions, and serve notice thereof within fourteen days after the confirmation of the report, any other party affected by the report may set the same down, and serve notice of the hearing.

If cause not set down on F. D. within 14 days after confirmation of report any party interested may set down and give notice.

Evidence taken in the Master's office cannot be read on a hearing on further directions: *Gould* v. *Burritt*, 11 Gr. 234; *Curling* v. *Austin*, 2 Dr. & Sm. 129; *McGill* v. *Courtice*, 17 Gr. 271. But on the question of costs reserved, the Court will look at an order made on appeal from the report, and also the pleadings, and other orders made in the cause: *Downey* v. *Roaf*, 6 P. R. 89.

Evidence taken in M. O. cannot be read on F. D. but on question of costs, Court may look at orders, &c.

Court on F. D., may refuse to act on report, or to carry out an erroneous judgment.

The Court may, on a hearing of the cause on further directions, refuse to act upon a report, although it be confirmed, if it shall appear to be improper, or unsatisfactory: *Taylor* v. *Craven*, 10 Gr. 488; *Baldwin* v. *Crawford*, 1 Gr. 202; and it may also refuse to carry out the original judgment pronounced in the action, if it shall appear to have been improvidently granted: see *Commercial Bank* v. *Graham*, 4 Gr. 419; *Mitchell* v. *Strathy*, 28 Gr. 80.

Causes not to be set down on demurrer, or on motion for decree, or appeal from Master's report, or further directions, in June, unless counsel certify reservation of judgment unnecessary.

420. No cause set down for argument of demurrer, or by way of motion for decree, or on further directions, or on any petition mentioned in Order 418, adjourned over from the day for which such cause was originally set down, is to be brought on for argument during the month of June; and, except on circuit, no cause is to be heard during the month of June unless counsel certify that no point is involved in it on which it may be necessary for the Court to reserve judgment.

This *Order* is still acted on in the Chancery Division.

XXXIV.—VACATIONS.

Ord. 421-423.

Orders 421-423, regulated the length of the vacations, and are now superseded by regulation of Supreme Court, of 17th March, 1882, and Ord. of Lieutenant-Governor in Council; see *Ontario Gazette*, 1882, p. 437.

Ord. 424.

Order 424, defined the holidays to be observed in the offices of the Court of Chancery, and is now superseded by *Rule S. C*, 535.

Order 425.

Order 425 related to the office hours to be kept in the offices of the Registrar, and Clerk of Records and Writs, of the Court of Chancery, during vacation, it is now superseded by *Rule S. C.* 532.

Vacation office hours of officers of High Court, and Court of Appeal,

By *Rule S. C.* 531, "It is ordered that the offices of the High Court of Justice, and of the Divisions thereof, and of the Court of Appeal, shall be kept open during the long and Christmas vacations, from ten of the clock in the forenoon until twelve o'clock noon."

This *Rule*, it will be observed, does not include the offices of the Supreme Court: *e. g.*, those of the Master in Chambers, the Master in Ordinary, or the Local Masters, and the Accountant.

Report made in vacation void.

A report made by a Master in vacation was, according to the former practice in Chancery, void: *Fuller* v. *McLean*, 8 P. R. 549; *Anderson* v. *Thorpe*, 12 Gr. 542; unless made by consent of all parties interested.

XXXV.—MORTGAGE SUITS.

426. Instead of foreclosure, the bill in any mortgage suit, may pray a sale of the mortgaged premises, and that any balance of the mortgage debt remaining due after such sale may be paid by the mortgagor, and the same may be decreed accordingly. (3rd June, 1853; Ord. 32, s. 3.)

Practice in mortgage actions governed by following Orders in all Divisions.

The practice in mortgage actions for sale, foreclosure, or redemption, continues to be regulated by most of the following *Orders*, which now appear to be in force so far as applicable at all, in all the Divisions of the High Court.

Order for payment of deficiency when granted.

The relief mentioned in *Ord.* 426, may now be claimed by indorsement on the writ. A mortgagee, however, is only entitled to an order for the payment of the deficiency, where there is an express or implied contract by the defendant, with the plaintiff, by covenant, or otherwise, to pay the mortgage debt. If there be no such contract the mortgagee is entitled to no personal remedy against the defendant: see *Christie* v. *Dowker*, 10 U. C. L. J. 161; *Turnbull* v. *Symmonds*, 6 Gr. 615; *Forbes* v. *Adamson*, 1 Chy. Ch. R. 117; *Clarkson* v. *Scott*, 25 Gr. 373; *Norris* v. *Meadows*, 28 Gr. 334; *Pierce* v. *Canavan*, *Ib.* 356; *Mathers* v. *Helliwell*, 10 Gr. 175; where, however, the mortgage deed contains no express covenant to pay, the law will imply a contract by the mortgagor to pay: see *Sutton* v. *Sutton*, 48 L. T. N. S. 95; provided there be evidence that the mortgage was made to secure a debt, or loan: *Hall* v. *Morley*, 8 U. C. Q. B. 584; *Pearman* v. *Hyland*, 22 U. C. Q. B. 202; *Jackson* v. *Yeomans*, 19 C. P. 394; 28 U. C. Q. B. 307; 39 U. C. Q. B. 280. The mere acknowledgement of the receipt of the mortgage money, is not sufficient to raise any presumption of a loan, or any implied promise of repayment: *London Loan Co.* v. *Smyth*, 32 C. P. 530. Where there is a contract for the payment of the mortgage debt, judgment may now be obtained if claimed by the writ, for the full amount with costs, and for which execution may issue at once, without waiting for a sale of the mortgaged property.

Not if there be no personal liability to pay.

Liability when implied.

Order for immediate payment may be made, when.

Where, however, a reference to the Master to enquire as to encumbrances, is necessary, then where relief is also sought on the contract, the judgment should refer it to the Master to take the account, and direct payment of the amount which he may find due forthwith, after the making of the Master's Report: see *Rules S. C.* Form No. 168, *North of Scotland* v. *Beard*, 19 C. L. J. 252.

Surety, rights of.

A surety against whom a judgment has been recovered, which by agreement is to stand as security for the payment of the deficiency, is entitled to have the security realised before he can be called on to pay anything: *Teeter* v. *St. John*, 10 Gr. 85. An assignee of the equity of redemption who covenants with the mortgagee to pay off the mortgage debt, becomes a principal debtor, and if time be given him by the mortgagee, the mortgagor may be discharged: *Mathers* v. *Helliwell*, 10 Gr. 172.

Legal mortgagee entitled to sale, or foreclosure, subject to right of defendants to have sale.

A mortgagee is now usually entitled to a sale, or foreclosure, at his option: *Meyers* v. *Harrison*, 1 Gr. 449. But a subsequent mortgagee cannot as plaintiff have a sale against a prior mortgagee without the latter's consent: *McDougall* v. *Campbell*, 6 S. C. R. 502; although he may as a defendant, under *Ord.* 453, *post.* Where infants are concerned, and the mortgagee claims foreclosure, the judgment usually directs a sale, or foreclosure, as the Master may find most beneficial for the infants.

Mortgagee of chattels.—municipal corporation,—and bank, entitled to foreclosure, but not a pledge of chattels.

A mortgagee of chattels: *Cock* v. *Flood*, 5 Gr. 463; a municipal corporation: *Orford* v. *Bailey*, 12 Gr. 276; and a chartered bank: *Bank of Upper Canada* v. *Scott*, 6 Gr. 451; are each entitled to foreclosure. But a mere pledgee of chattels is said to be only entitled to a sale: *Carter* v. *Wake*, 4 Ch. D. 605.

Mortgagee by deposit, not entitled to a sale unless he has agreement to execute a legal mortgage.

A mortgagee by deposit is said not to be entitled to a sale, but only to a foreclosure: *Pryce* v. *Bury*, 16 L. R. Eq. 153 n; *James* v. *James*, *Ib.* 153; *Backhouse* v. *Charlton*, 8 Ch. D. 444; but where the deposit is accompanied by an agreement to execute a legal mortgage, the mortgagee is entitled to either sale, or forclosure: *York Union Banking Co.* v. *Artley*, 11 Ch. D. 205; although an equitable mortgagee by deposit cannot insist on a sale, yet if a subsequent encumbrancer, or the mortgagor himself, desire a sale, it may be granted as in any other case: *Kerr* v. *Beebe*, 12 Gr. 204.

Crown cannot be foreclosed.

Form of judgment where equity of redemption in the Crown.

The Crown cannot be foreclosed, the only judgment that can be awarded where the equity of redemption is in the Crown, is one authorizing the mortgagee in default of payment to take possession until the Crown shall think proper to redeem; *Reeve* v. *Attorney General*, 2 Atk. 223; *Dunn* v. *Attorney General*, 10 Gr. 482; or until the debt should be satisfied: *Hodge* v. *Attorney General*, 3 Y. & C. 342: or, if the Crown consent, or do not object, a sale may be ordered: Seton, 1044; *Prescott* v. *Tyler*, 1 Jur. 470: 2 Jur. 870; *Rogers* v. *Maule*. 1 Y. & C. C. C. 4; *Hancock* v. *Attorney General*, 12 W. R. 569; *Bartlett* v. *Rees*, 12 L. R. Eq. 395.

Mortgagee of railway not entitled to sale, or foreclosure.

A mortgagee of a railway is not entitled to enforce payment of his mortgage, by either sale, or foreclosure of the Railway, he is only entitled to have a Receiver, or Manager, of the undertaking appointed:

Galt v. *Erie and Niagara R. W. Co.* 14 Gr. 499 : *Peto* v. *Welland R. W. Co.*, 9 Gr. 455 ; *Furness* v. *Caterham R. W. Co.*, 25 Beav. 614. But it seems a vendor is entitled to enforce a lien for unpaid purchase money, by sale, or rescission of the contract : *Walker* v. *Ware, H. & B. R. W. Co.*, 1 L. R. Eq. 195 ; *Martin* v. *London, Chatham & Dover R. W. Co.*, 12 Jur. N.S. 775 ; but see the *Bishop of Winchester* v. *Mid-Hants R. W. Co.*, 5 L. R. Eq. 17 ; *Pell* v. *Northampton & B. J. R. W. Co.*, 2 L. R. Chy 100, where the lien was enforced by Receiver.

Vendor, rights of

The right of a mortgagee to either a sale, or foreclosure, may be lost by his having sold, or parted with, part of the mortgaged property, without the concurrence of a person to whom the equity of redemption in the remainder has been conveyed. But this rule does not apply where the sale has been made under a power contained in the mortgage, or where the mortgage is of chattels which the mortgagee has a right to sell without any express power. But it applies to a sale under a decree in a suit to which the owner of the unsold portion was no party : *Gowland* v. *Garbutt*, 13 Gr. 578, and see *Crawford* v. *Armour*, *Ib.* 576 ; *Munsen* v. *Hauss*, 22 Gr. 279.

Right to sale, or foreclosure, may be lost by sale of part of property when,

Where the writ, or statement of claim, does not claim any personal remedy against the defendant, the judgment is erroneous, if it contain any personal order for payment of the mortgage debt, and such a defect was amended after the lapse of four years : *Cockenour* v. *Bullock*, 12 Gr. 138.

Where no personal relief sought, judgment should not direct it.

Where the judgment directs foreclosure, on default in payment, a final order may be made in Chambers, directing a sale in lieu of foreclosure, without appealing from the judgment : *Lasiett* v. *Cliffe*, 2 Sm. & G. 278 ; *Fish* v. *Carnegie*, D. B. 3 & 4 ; *Thompson* v. *Badgley*, 0. B. 25 ; but usually the sale will not be ordered until after the mortgagor has had the usual time to redeem : *Trust and Loan Co.* v. *Reynolds*, 2 Chy. Ch. R. 41; where the application is made by a defendant, he will be required to deposit $80 to meet the expense of the sale, and this deposit will not be dispensed with, although the security be ample : *Thompson* v. *Macaulay*, 3 Chy. Ch. R. 111. But if the plaintiff prefer it, the defendant may be required to conduct the sale in lieu of making the deposit. Formerly, the Court would not, after a decree for sale, direct a foreclosure without rehearing the cause : *McClelan* v. *Jacob*, 9 Gr. 50 ; except where the sale had been attempted, and proved abortive : *Goodall* v. *Burrows*, 7 Gr. 449 : *Odell* v. *Doty*, 1 Chy. Ch. R. 207 ; *Girdlestone* v. *Gunn*, *Ib.*, 212. In such a case, an order for foreclosure is granted in Chambers on motion : but the mortgagor must be allowed three months further time to redeem : *Ib.* ; but in *Goodhall* v. *Burrows*, only one month was allowed.

Where judgment for foreclosure, final order for sale may be made in Chambers.

On what terms.

But when judgment is for sale, order for foreclosure not granted, except after abortive sale.

After a judgment of foreclosure, an order for sale may be obtained, by a subsequent incumbrancer, under *Ord.* 456, *post.*

Surety may be joined with mortgagor, and relief obtained against both, in same suit.

427. Where any person is surety for the payment of a mortgage debt, such person may be made a party to a suit for the sale of the mortgaged property, and the relief specified in the last Order may be prayed against both the mortgagor and his surety, and the same may be decreed accordingly. (3rd June, 1853; Ord. 32, s. 4.)

Liability of assignee of mortgagor.

Of assignor of a mortgage on covenant for its payment.

Under this *Order* an assignee of the mortgagor who had covenanted with the mortgagor to pay the mortgage debt, could not formerly have been ordered to pay the mortgagee, to whom he was under no legal liability: *Turnbull* v. *Symmonds*, 6 Gr. 615; *Clarkson* v. *Scott*, 25 Gr. 373; and see other cases noted: *Ord.* 426. And where the original mortgagee had assigned the mortgage to the plaintiff, and covenanted for payment, it was held that he was not a surety within the meaning of this *Order*, but that the contract amounted merely to a guaranty, to enforce which, a separate action must be brought: *Clarke* v. *Best*, 8 Gr. 7. But in such cases, since *The Judicature Act*, the appropriate relief as between the plaintiff and defendants, and between the defendants *inter se*, may now be granted, without doubt, in the same action.

Relief now granted between defendants *inter se*.

Principal when a necessary party to action against surety.

Where the surety has given a mortgage on his own property, the principal debtor is a necessary party to an action for foreclosure, or sale thereof: *Seidler* v. *Sheppard*, 12 Gr. 456.

Liability of surety for deficiency.

A surety cannot be required to pay the amount of a judgment which it has been agreed shall stand as security for the deficiency on a mortgage, until the security has been realised, and the deficiency ascertained: *Teeter* v. *St. John*, 10 Gr. 85.

Sale may be ordered instead of foreclosure.

428. The Court may direct a sale of the property, instead of a foreclosure of the equity of redemption, on such terms as the Court thinks fit; and, if the Court thinks fit, without previously determining the priorities of incumbrancers, or giving the usual or any time to redeem. (3rd June, 1853; Ord. 32, s. 2.)

The jurisdiction under this *Order* to direct a sale, is now vested in the High Court, and it may be exercised in any Division thereof.

Special grounds necessary to deprive defendant of ordinary time for redemption.

Some special ground must be shown, in order to deprive the mortgagor of the ordinary six months time to redeem: *Rigney* v. *Fuller*, 4 Gr. 198; *Swift* v. *Minter*, 27 Gr. 217; *Newman* v. *Selfe*, 33 Beav. 522; and even where an application for sale, was made

n a foreclosure suit, by subsequent incumbrancers, after the time allowed them for redemption had expired, it was held that the mortgagor was entitled to an opportunity to redeem, before a final order for sale could be made: *Trust & Loan Co.* v. *Reynolds.* 2 Chy. Ch. R. 41.

In action for foreclosure, defendants entitled to have a sale.

Where the writ claims foreclosure, the defendant is entitled to have the judgment drawn up for sale, on making a deposit of $80; and where a judgment has been entered for foreclosure, a subsequent incumbrancer may also, on being made a party, at any time before the report is settled, on making a like deposit, obtain on *præcipe* an order for sale in lieu of foreclosure: see *Ord.* 456, *post.*

Judgment for immediate sale cannot be awarded on *præcipe*,

A judgment for an immediate sale, without appointing any day for redemption, can only be granted on motion for judgment, it cannot be awarded on *præcipe.* The motion may be made in Chambers, where infants are concerned: see *Ord.* 434; but in other cases, the motion must be to the Court. An immediate sale has been granted on the consent of the mortgagor, and without requiring the consent of the subsequent incumbrancers: *Township of Hamilton* v. *Stevenson*, 25 Gr. 198; but Blake, V. C., repeatedly refused to make such a decree without the consent of the subsequent incumbrancers, on the ground that the equity of redemption might be worthless, and the mortgagor might have really no interest in the mortgaged property.

Whether consent of mortgagor alone is sufficient *quære.*

After a decree for sale, final order before time for redemption had expired, refused.

Where a decree for sale was pronounced in Court, the Referee in Chambers refused to entertain a motion for a final order for sale, before the time for redemption had expired: *Buell* v. *Fisher*, 6 P. R. 51.

Where sale is asked by the mortgagor or incumbrancer, deposit to be made.

429. If the request for a sale is made by a subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the party making the request is to deposit in Court a reasonable sum of money, to be fixed by the Court, for the purpose of securing the performance of such terms as the Court thinks fit to impose. (3rd June, 1853; Ord. 32, s. 2.)

The provisions of this *Order* are still in force.

Deposit to secure sale in mortgage cases.

By the form of indorsement on the writ in mortgage actions, the amount of the deposit to be made by a defendant served with the writ, in order to secure a sale, is $80: see *Rules S. C.*, Form 9 *e.* When the sale is applied for by an original defendant to the action, an application to increase the amount of the deposit cannot be enter-

tained, even though the costs of the sale will exceed $80 : *Cruso* v. *Close*, 8 P. R. 33 ; but the plaintiff may notify the defendant desiring the sale, to take the conduct of it : see *post Ord.* 430.

When it may be increased.

Where the application for sale, is made by a subsequent incumbrancer added in the Master's office, the amount of the deposit required is also $80, but in such a case, the amount not being fixed by any *Order*, it seems the plaintiff, if he deem it insufficient, may move at once, before the order for sale is acted on, to increase the deposit : *London & C. L. & A. Co.* v. *Morrison*, 7 P. R. 450 ; 15 C. L. J. 57. An application after the sale has taken place to increase the deposit cannot be entertained, even though the sale has failed to realise the amount of the plaintiff's claim : *London & C. L. & A. Co.* v. *Pulford*, 7 P. R. 432 ; 15 C. L. J. 55.

Deposit cannot be dispensed with.

The deposit will not be dispensed with, even though the security be ample : *Thompson* v. *Macaulay*, 3 Chy. Ch. R. 111 ; or the applicant be a trustee : *Machell* v. *Campbell*, 5 U. C. L. J. 117 ; and a defendant cannot claim a sale against the consent of the mortgagee without making the deposit : *Taylor* v. *Walker*, 8 Gr. 506, except in the case of infant defendants, who are entitled to a sale, without the usual deposit : *Bank of Upper Canada* v. *Scott*, 6 Gr. 451 ; *Lawrason* v. *Fitzgerald*, 9 Gr. 371. Where the sale is abortive, the deposit is applicable to the payment of the plaintiff's costs thereof : *Corsellis* v. *Patman*, 4 L. R. Eq. 156 ; and where the deposit was paid in by the mortgagor, and the sale realised enough to pay the claim of the plaintiff, but not all the subsequent incumbrances, the mortgagor was held not to be entitled to get back the deposit, but it was directed to be applied in payment of the claim of a subsequent incumbrancer : *Gzowski* v. *Beaty*, 8 P. R. 146.

Except in case of infant defendants.

Application of deposit.

Plaintiff may require defendant asking sale to conduct it. Notice to be filed.

430. If before, or upon the deposit to obtain a sale being made, the plaintiff prefers that the sale be conducted by the defendant desiring the sale, he may so elect ; and he is thereupon to notify the defendant of such election. The notice may be to the effect set forth in schedule R.

Plaintiff may have reserved bid fixed.

Where the defendant claims a sale contrary to the wish of the plaintiff, the latter may protect himself against the mortgaged property being sold for less than his claim by getting a reserved bid fixed, and in the event or the sale proving abortive, he may obtain a final order for foreclosure : See note to *Ord.* 426.

As to when the plaintiff may apply to increase the deposit, see note to *Ord.* 429.

431. Upon the plaintiff's filing with the Registrar a note of such election, and proof of service of such notice, the defendant making the deposit is to be entitled to a return thereof. (20th Dec. 1865; Ord. 10.)

On filing notice, deposit to be returned to defendant.

It is doubtful whether the notice here referred to must now be filed with the Registrar of the Division in which the action is pending, or with the Accountant of the Supreme Court. At the time the *Order* was passed, the Registrar of the Court of Chancery was also practically, though not in name, the Accountant of the Court of Chancery: see *Ord.* 352. It would seem that the notice was intended to be filed with him in the latter capacity, and that, therefore, it should now be filed with the Accountant of the Supreme Court, who now discharges this branch of the duty formerly discharged by the Registrar of the Court of Chancery. The intention being, that the notice should be filed with the officer whom the deposit has been made in order to get it back again.

Notice with whom now to be filed.

Semble, notice should be filed now with Accountant

432. Where the cause is heard upon an order to take the bill *pro confesso*, in a suit for foreclosure or sale, and no reference as to incumbrances is required, the plaintiff is to produce at the hearing:

Documentary evidence required on hearing *pro confesso*.

1. The mortgage deed, and the assignments thereof, if any.

2. An affidavit which is to state the amount advanced upon the security; the amount paid, whether by receipt of rents or otherwise; and the amount remaining due for principal and interest, distinguishing how much for principal and how much for interest. The affidavit is to state whether the mortgaged premises, or any part of them, have been in the occupation of the mortgagee, or of any one under whom he claims; and, when there has been any such occupation, the affidavit is to state its nature the time it continued, and the fair rentable value of the property. (3rd June, 1853; Ord. 32, s. 27.)

Affidavit, contents of.

This *Order* would seem to be still in force in all the Divisions of the High Court, and to regulate the practice in all actions for foreclosure, or sale, where motion for judgment is made in default of defence, and no reference as to incumbrancers is required.

Motion for judgment in mortgage action when necessary.

Ordinarily, a motion for judgment, in default of defence, is not necessary in actions for foreclosure, or sale, but the judgment may be obtained on *præcipe Rules S. C.* 78, 520. Except where infants are defendants, in which case, judgment may be obtained on a motion in Chambers, when the evidence required by this *Order* must be produced wherever the account is to be taken by the officer awarding the judgment.

Upon production of evidence required by Ord. 432 Court may take account.

433. Upon production of such proofs and documents, the Court may at once determine the amount due, and appoint the time and place for the payment of the mortgage money, by the decree, without a reference to the Master, or any further enquiry. (3rd June, 1853; Ord. 32, s. 7.)

The same practice as is provided in this *Order* in actions for foreclosure or sale, may also be adopted in other actions under *Ord.* 540 *post*, where it is desirable to have an account taken in a summary way without the expense of a reference.

Decree for foreclosure, or sale, against infant defendants may be made in Chambers.

434. In an ordinary suit of foreclosure or sale against an infant heir or devisee of the mortgagor, or of the assignee of the mortgagor, where no defence is set up in the infant's answer, the cause is not to be set down to be heard in Court by way of motion for a decree; but after the infant's answer is filed, or after the time for filing the same has expired, the plaintiff is to file affidavits of the due execution of the mortgage and of such other facts and circumstances as entitle him to a decree, and is to apply for the decree in Chambers, upon notice to the infant's solicitor. (1st April, 1867; Ord. 2.)

Construction of Order 434.

It was held that this *Order* only applied where all the defendants were infants: *Fullerton* v. *Keely*, 9 C. L. J. 54; but *Ord.* 645 extended the provisions of this *Order* to cases where adults were also parties, and by *Rule S. C.* 3, the practice under *Ord.* 645 is continued in force under *The Judicature Act.*

In judgments for foreclosure against infants, a day to shew cause must still be inserted : *Gray* v. *Bell*, 46 L. T. N. S. 521 ; *London & C. L. & A. Co.* v. *Everitt*, 8 P. R. 489 ; *Mair* v. *Kerr*, 2 Gr. 223 ; and the final order must also reserve a day to shew cause. The formal words usually inserted in Ontario are, "and this judgment [*or* order] is to be binding upon [*name of infants*] unless on being served with a copy hereof on obtaining the age of twenty-one years, they do, within six months after such service, shew unto this Court good cause to the contrary." See Seton 711.

Day to show cause, when to be reserved.

No day to shew cause is reserved in judgments for sale ; nor in judgments against infant trustees of real estate. Thus, in a redemption suit against an infant for redemption of land conveyed to the infant's ancestor by deed absolute in form, it was held that no day to shew cause should be reserved in the decree directing a re-conveyance : *Lake* v. *McIntosh*, 7 Gr. 532. As to defences open to an infant shewing cause : see Seton 712, 1114, and 1115.

When unnecessary.

Where the judgment of foreclosure has been obtained against the ancestor, who dies before a final order is obtained, it is unnecessary to reserve a day to shew cause in favour of infant heirs of the mortgagor, as to whom, an order is made to continue the proceedings : *Sutherland* v. *Dickson*, 2 Chy. Ch. R. 25 ; and infant parties under such circumstances cannot set up a defence which their ancestor had not set up, unless he had been prevented, by fraud, or mistake, from pleading it : *Burke* v. *Pyne*, 2 Chy. Ch. R. 193.

Where infants are defendants in an action for foreclosure before judgment, the Court will direct a reference to the Master, as of course, to inquire whether a sale, or foreclosure, would be the more beneficial for the infants, and direct a sale, or foreclosure, accordingly, or it may determine the question, on the motion for judgment, if affidavits are produced, or the Official Guardian consents to dispense with the reference on that point : *Dudley* v. *Berczy*, 13 Gr. 141 ; but see *Graham* v. *Davis*, 2 Chy. Ch. R. 24, and if a sale is directed on the application of infant defendants, no deposit will be required from the infants ; *Bank of Upper Canada* v. *Scott* 6 Gr. 451 ; *Lawrason* v. *Fitzgerald*, 9 Gr. 371.

Inquiry whether sale or foreclosure more beneficial for infant, directed as of course.

Deposit for sale not necessary.

Where the judgment directs an enquiry whether a sale, or foreclosure, would be more beneficial for infant defendants, if the Master omits to report on that point, no final order can be granted : *Edwards* v *Burling*, 2 Chy. Ch. R. 48.

When judgment directs inquiry as to whether sale, or foreclosure better, F. O. cannot be granted if Master omit to report.

435. Where the defendant answers the bill, admitting the execution of the mortgage and other facts, if any, entitling the plaintiff to a decree, or where the

Decree, when to be granted on *præcipe* in mortgage case.

defendant disclaims any interest in the mortgaged premises, or where no answer is put in to the bill, the plaintiff is, on *præcipe* to the Registrar, to be entitled to such a decree as would under the practice of the Court have been made upon the hearing of the cause *pro confesso*. (20th Dec. 1865; Ord. 11.)

Statement of defence filed, admitting mortgage and other facts entitling plaintiff to judgment.

This *Order* appears to be still in force. The *Rules S. C.* have to a certain extent adopted the practice here provided; but there are cases covered by this *Order* which do not appear to be provided for by the *Rules S. C.* It will be seen that this *Order* covered three classes of cases:

(*a.*) Where an answer had been filed admitting the facts entitling the plaintiff to a decree:—

(*b.*) where the defendant disclaimed; and

(*c.*) where no answer was filed.

Rule S. C. 78 seems to cover the simple case of non-appearence: *Ord.* IX, of which it is part, being headed "DEFAULT OF APPEARANCE;" and though *Rule S. C.* 78, is itself wide enough in its terms to cover all the cases covered by *Ord.* 435, yet, by reason of the heading, its meaning would be restricted to cases of non-appearance simply. *Rule S. C.* 520 applies to cases where an appearance has been entered, but no defence has been put in. Consequently the case of a defence admitting facts entitling the plaintiff to a judgment, or an appearance accompanied by a note disputing the plaintiff's claim under *Rules S. C.* 68, do not seem to be covered by either *Rule S. C.* 78 or 520.

In such cases it has been held this *Order* still applies, and judgment may be obtained on *præcipe*: *Trust and Loan Co.* v. *McCarthy*, 19 C. L. J. 188; 3 C. L. T. 266; Maclennan, 129, note to *Rule* 78; and see Holmested's Manl. Pr. 81.

***Præcipe* judgment, form of.**

Under *Ord.* 435 it was held that the Registrar was bound to issue on *præcipe* the decree which the Court would itself make upon a hearing of the cause *pro confesso*, *Kirkpatrick* v. *Howell*, 22 Gr. 94; *Buell* v. *Towns*, *Ib.* 95; but extraordinary relief cannot be granted by judgment on *præcipe*, *e. g.*, in immediate sale, or foreclosure, without appointing any day for redemption, cannot be granted, even though the relief be claimed by the writ, or statement of claim: *Patey* v. *Flint*, 48 L. J. Chy. 696. To obtain such relief, a motion for judgment is necessary. Where the plaintiff had obtained an interlocutory injunction, it was held that the Registrar could not issue on *præcipe* a decree continuing it: *King* v. *Freeman*, 1 Chy. Ch. R

Extraordinary relief not granted.

Interlocutory injunction cannot be continued by.

350; the Registrar's power to issue decrees being confined to simple cases, were the ordinary decree for foreclosure, or sale, with order for payment and delivery of possession, were all that was required. Thus, when the defendant answered admitting the mortgage, but denying an alleged agreement to pay an increased rate of interest, and setting up a tender, and claiming costs, it was held a decree could not be granted on *præcipe*. Not could a decree issued on *præcipe* in such a case, be amended in Chambers, by inserting a direction to the Master to enquire as to the alleged tender: *Ross* v. *Vader* 3 Chy. Ch. R. 236.

Nor can further directions, or costs be reserved, or special directions be inserted.

A decree pronounced *pro confesso*, or on *præcipe*, might be varied, or set aside, on motion in Chambers, without rehearing the cause: see *Kline* v. *Kline*, 3 Chy. Ch. R., 79; *Nelles* v. *Vandyke*, 17 Gr. 14.

As to cases in which a decree for foreclosure cannot be granted, see note to *Ord.* 426, *ante* p. 228.

Order 436, provided that "where no answer is filed, the decree is to be drawn up upon produc ion of an office-copy of the bill and an affidavit of the service thereof, shewing the same to have been endorsed with the notice set forth in schedule S, hereunder written." Ord. 436.

This *Order* is obviously effete. See *Rule S. C.*, Form No. 9, *d. e.*

Order 437, provided "that the notice under Order 436, is to specify whether the plaintiff desires a foreclosure of the equity of redemption, or a sale of the mortgaged premises." Ord. 437.

This *Order* is now effete. See *Rule S. C.*, Form No. 9, *d. e.*

438. Where it appears conducive to the ends of justice that parties interested in the equity of redemption should be allowed to be made parties in the Master's office, by reason of the parties so interested being numerous or otherwise, the Court may direct that parties so interested be made parties in the Master's Office, upon such terms as to the Court seems fit; such order to be made only where one or more parties interested in the equity of redemption are already before the Court. (29th June, 1861.) Parties interested in equity of redemption may be allowed to be added in the Master's office.

This *Order* is now in force in all the Divisions of the High Court.

The words "parties interested in the equity of redemption" in this *Order* are intended to apply to persons interested in the ultimate equity of redemption, *i. e.*, the mortgagor or any one Parties to whom Order applies.

standing in his place. As a general rule, all parties interested in the ultimate equity of redemption in mortgaged property, ought to be made original defendants in an action to enforce the mortgage, by sale, or foreclosure: *Paterson* v. *Holland*, 8 Gr. 238; *Buckley* v. *Wilson*, 8 Gr. 566; but not *mesne* incumbrancers, or execution creditors, who are always added in the Master's office. See *Ord.* 442.

This *Order* makes an exception to the general rule, and enables the Court to direct, that parties interested in the ultimate equity of redemption, may be made parties in the Master's office. This may be done, either upon a motion for judgment: *Jones* v. *Bank of Upper Canada*, 12 Gr. 429; or upon a subsequent application for the purpose in Chambers, see cases *infra*.

Order to add parties not to be inserted in *præcipe* judgment.

Such a direction, however, cannot be inserted in a judgment obtained on *præcipe*.

When order to add parties interested in the equity of redemption, in the M. O. may be obtained.

Where the grounds upon which it is sought so to add parties interested in the equity of redemption in the Master's office, appear in the statement of claim, it may possibly be still the proper course to move for judgment, in order to obtain the direction of the Court to add the parties: but where the necessity for the order does not appear until after judgment has been obtained on *præcipe*, then the motion may be made in Chambers. The parties already before the Court are entitled to notice, but not those intended to be added: *Penner* v. *Cannif*, 1 Chy. Ch. R. 351; *Harrison* v. *Greer*, 2 Chy. Ch. R. 440; *Rumble* v. *Moore*, 1 Chy. Ch. R. 59; but see *Cummins* v. *Harrison*, 1 Chy. Ch. R. 369, where the order was granted *ex parte*. But after a final order of foreclosure, or sale, the application is in general too late: see *Orford* v. *Bayley*, 1 Chy. Ch. R. 272; *Street* v. *Dolan*, 3 Chy. Ch. R. 227. And where the plaintiff had not acted with reasonable diligence in framing his suit, the order was refused: *Portman* v. *Paul*, 10 Gr. 458.

Setting aside orders.

When an order of this kind had been obtained in Chambers any motion to set it aside must be made to the Court upon petition: *Tice* v. *Myers*, 3 C. L. J. N. S. 102.

Wherever the party added, claims paramount to the plaintiff, he should move to discharge the order adding him as a party: *Montgomery* v. *Shortis*, 3 Chy. Ch. R. 69; but see note to *Ord.* 445, *post*.

Conflict between co-defendants as to equity of redemption, how determined.

Occasionally it happens that the plaintiff is unable to determine which of the defendants is entitled to the equity of redemption, or there may be a conflict between defendants on this point *inter se*. The Court will not however determine such questions *ex parte*, even against defendants who have not appeared, but will pronounce the

usual judgment directing all the defendants to redeem, leaving them to settle their rights *inter se*, by a separate proceeding: *Robinson* v. *Dobson*, 11 Gr. 357, and see *Rumsey* v. *Thompson*, 8 Gr. 372; or may direct the Master to enquire as to the point: *Cayley* v. *Hodgson*, 13 Gr. 432. But latterly any such reference if ordered has been directed as a separate reference from the general reference in the cause, and so as the plaintiff may not be put to expense, or delay, thereby: see decree in *Johnson* v. *Neezer*, D. B. 27, fo. 150. Under the *Rules S. C.* it would seem that whenever any question arises between co-defendants, the defendant raising the question must deliver his statement of defence both to the plaintiff, and defendant as to whom the question is raised; and on the plaintiff moving for judgment, the defendant claiming relief against the co-defendant should be prepared to show that the action is also ripe for trial on the question raised between himself and co-defendant: *Rule S. C.* 109; and see *Steel* v. *Dickson*, 42 L. T. N. S. 765; *Furness* v. *Booth*, 4 Ch. D. 586.

439. Where the bill is filed by a subsequent incumbrancer seeking relief against a prior mortgagee, such mortgagee must be made a party previous to the hearing of the cause.

To suit by subsequent incumbrancer for relief against prior mortgagee, the latter must be made an original defendant.

This *Order* is in force in all the Divisions of the High Court.

Action for redemption by subsequent incumbrancer when it lies.

An action for redemption by a subsequent, against a prior, mortgagee, will not lie unless the prior mortgage, and that of the plaintiff, are both overdue. *Parsons* v. *Bank of Montreal*, 15 Gr. 411; *Long* v. *Long*, 16 Gr. 239. The owner of the equity of redemption is a necessary party to such an action. *Ib.*

Subsequent incumbrancer not entitled to a sale.

A subsequent incumbrancer, bringing an action against a prior mortgagee, is not entitled to a sale: *McDougall* v. *Campbell*, 6 S. C. R. 502; unless the prior incumbrancer consent, or do not object, to a sale: *Grange* v. *Barber*, 2 Chy. Ch. R. 189; he is only entitled to judgment for redemption, and in default of redemption he is foreclosed: see *Rules S. C.* 333-335, or the action is dismissed, which is equivalent to a foreclosure of the plaintiff: *Cornwall* v. *Henriod*, 12 Gr. 338: *Inman* v. *Wearing*, 3 D. G. & Sm. 734; except in the case of an equitable mortgage by deposit: *Marshall* v. *Shrewsbury*, 10 L. R. Chy. 250.

In default of payment he is foreclosed except as against equitable mortgagee by deposit.

Bill by subsequent incumbrancer for redemption, but not offering to redeem, not demurrable.

A bill, by a subsequent incumbrancer, against a prior mortgagee, claiming the right of redemption, but not offering to redeem him, was not demurrable: *Pearson* v. *Campbell*, 2 Chy. Ch. R. 12; but see *Rogers* v. *Lewis*, 12 Gr. 257, and it would probably be held that a statement of claim, omitting an offer to redeem, would not be demurrable under the present practice.

Where prior mortgagee claims under absolute deed, he may be made a defendant to suit by subsequent incumbrancer.

Although a prior mortgagee can, ordinarily, only be made a party to an action by a subsequent incumbrancer, for the purpose of redeeming him, yet where the prior security is created by a deed absolute in form, a subsequent incumbrancer is at liberty to bring him before the Court, for the purpose of showing his interest to be redeemable, without offering to redeem him: *Moore* v. *Hobson*, 14 Gr. 703; and see *Rogers* v. *Wills*, 2 Chy. Ch. R. 13. To such an action the execution creditors of the alleged mortgagee are necessary parties: *Glass* v. *Freckleton*, 10 Gr. 470; and see *Darling* v. *Wilson*, 16 Gr. 255, 257.

Or where transactions by prior mortgagee are impeached.

In an action by a subsequent encumbrancer, to redeem, he may also impeach transactions by the prior mortgagee in reference to the mortgaged estate: *McLaren* v. *Fraser*, 15 Gr. 239.

Where sale ordered in suit by a subsequent incumbrancer, he has no priority for costs.

Where a prior incumbrancer is made a party to any action by a subsequent incumbrancer, and a judgment for sale is obtained by consent, or without objection on the part of the prior incumbrancer, the proceeds of the sale must be distributed in payment of the claims of the incumbrancers according to their priorities, and in such a case the plaintiff is not entitled to any priority in respect of his costs, even though the fund prove insufficient: *Grange* v. *Barber*, 2 Chy. Ch. R. 189.

Assignment of equity of redemption, when it entitles assignee to attack prior mortgage for fraud.

Where the equity of redemption was valueless, and an assignment thereof was made merely for the purpose of enabling the assignee to impeach a prior mortgage on the ground of fraud for the benefit of the assignor, the assignment was held to savour of champerty, and no relief was granted to the assignee, even though he asked in the alternative for redemption: *Muchall* v. *Banks*, 10 Gr. 25; and see *Little* v. *Hawkins*, 19 Gr. 267; *Wigle* v. *Setterington*, *Ib.* 512; *Bell* v. *Walker*, 20 Gr. 558; *Hilton* v. *Woods*, 4 L. R. Eq. 432. But where the assignee takes beneficially, and the assignment is not made merely to enable him to sue in respect of the alleged fraud, it would seem that he may maintain the action. *Sears* v. *Lawson*, 15 Ch. D. 426; *Dickinson* v. *Burrell*, 1 L. R. Eq. 337.

Subsequent incumbrancer redeeming may obtain relief against incumbrancers subsequent to himself.

A subsequent incumbrancer may, in the same action, obtain relief against the mortgagor, and incumbrancers subsequent to himself—consequent on his redeeming the prior mortgagee. *Rogers* v. *Lewis*, 12 Gr. 257; *McLaren* v. *Fraser*, 15 Gr. 239.

Prior mortgagee owning equity of redemption, how far liable to account for rents.

A prior mortgagee in possession, who is also the owner of the equity of redemption, is only bound to account to a subsequent incumbrancer for rents, and profits, on the footing of a mortgagee in possession, until his mortgage is paid off, any subsequent receipts he is entitled to retain without account as owner: *Steinhoff* v. *Brown*, 11 Gr. 114.

Where relief is sought subject to prior mortgage,

440. Where the plaintiff prays a sale or foreclosure, subject to a prior mortgage, the prior morgagee is not

to be made a party either originally or in the Master's office, except under special circumstances to be alleged in the bill. (6th Feb. 1858.)

prior mortgagee an unnecessary party.

For cases in which a prior mortgagee may be made a party see note to preceding *Order*.

441. Decrees for foreclosure or sale, where a reference is required, are, after the proper recitals hitherto in use, to direct, in general terms, that all necessary enquires be made, accounts taken, costs taxed, and proceedings had for redemption or foreclosure, (*or* for redemption or sale, *as the case may be*) and that for these purposes the cause is referred to (*naming the Master*;) and a decree so expressed is to be read and construed as if the same set forth the particulars contained in the next thirteen Orders.

Decrees for foreclosure or sale, form of.

This *Order*, though to a certain extent obsolete, is yet apparently in force in all the Divisions of the High Court, for the purpose of defining the meaning of judgments issued in the form provided by the *Rules S. C.* in actions for foreclosure, or sale, of mortgaged property.

Order 441, how far in force.

Judgments for foreclosure, or sale, under *The Judicature Act* are authorized to be drawn in a similar form to that prescribed by this *Order*. See Forms 168, 169. But the *Rules S. C.* do not expressly state that judgments so worded are to have the effect which this *Order* states they shall have, it seems however clear that such is the case, and in addition to the provisions of the next thirteen *Orders*, there is also now incorporated in all such judgments the further provisions contained in *Rules S. C.* 331, 336, so far as applicable to each particular case. When a sale is ordered, *Rule S. C.* 331 provides that the Master may sell by public auction, private contract, or tender, as he may think best. He may also, at the meeting held for settling the advertisement, fix a reserved bid which must be notified in the conditions of sale. The Master is also to settle all necessary conveyances, in case any infants, or lunatics, are interested, or the parties differ, *Rule S. C.* 336 also provides for reconveyances, and delivery of documents, by any party redeemed.

Judgments under *Judicature Act* for foreclosure or sale, effect of.

Where the circumstances of the case are special, a judgment in the ordinary form prescribed by the *Rules S. C.*, and this *Order* would not be appropriate. Thus, where a tender was pleaded a special

In special cases, further directions, or costs, should be reserved.

inquiry was directed on this point, and further directions, and costs, were reserved: *Peers* v. *Allen*, 19 Gr. 98. So also where the defendant pleaded payment in full, costs were reserved: *Gooderham* v. *DeGrassi*, 2 Gr. 135. In such cases, this must still be done, or the judgment must provide for the dismissal of the action in case the Master shall find in the defendant's favour. So also, where the defendants were rival claimants to the equity of redemption special directions were inserted in the decree. *Rumsey* v. *Thompson*, 8 Gr. 372.

Or provision made for dismissal of action.

Day to show cause.

When infants are defendants, a judgment of foreclosure must also reserve a day to show cause. See *ante Ord.* 434 note.

Reference to take account, costs when necessary.

Where there are no subsequent incumbrancers, the account should be taken on entering the judgment, if the plaintiff take a reference to the Master unnecessarily, he cannot recover the extra costs so occasioned: *Hamilton* v. *Howard*, 4 Gr. 581; *Purdy* v. *Parks*, 9 P. R. 424.

Reference, where to be directed.

The reference, if directed, should be made to a Master in the county where the writ issued. *McCara* v. *Gwynne*, 3 Gr. 310. But the reference may afterwards be changed on motion, for sufficient cause.

Master to inquire as to incumbrances.

442. Upon such reference the Master is to inquire and state, whether any person or persons, and who other than the plaintiff, has or have any lien, charge, or incumbrance upon the land and premises embraced in the mortgage security of the plaintiff, in the bill mentioned, subsequent thereto.

This *Order* is in force in all the Divisions, and under the ordinary judgments for sale or foreclosure, the procedure here laid down is to be followed.

The *Order* in its terms applies only to the case of mortgages of lands, but a similar procedure is followed upon a judgment for the sale, or foreclosure of chattels.

Master to inquire only as to incumbrancers subsequent to plaintiff.

The inquiry is confined to subsequent incumbrancers; persons against whom relief is sought, whose claims, if any, are prior to the plaintiff's, must be made parties to the writ: see *Ord.* 439, *supra*; *Glass* v. *Freckleton*, 10 Gr. 470; and see *White* v. *Beasley*, 2 Gr. 662. Where the mortgagor was the only defendant, and a decree, by consent, for immediate foreclosure was taken against him, a reference as to incumbrances was refused: *Taylor* v. *Ward*, 13 Gr. 590; but it seems doubtful whether the rule laid down in that case would be followed under the present practice.

The incumbrancers are ascertained by the production of the certificates mentioned in the following *Order* :

443. The plaintiff is to bring into the Master's office certificates from the Registrar, and Sheriff, of the County wherein the lands lie, setting forth all the incumbrances which affect the property in the pleadings mentioned, and such other evidence as he may be advised.

Plaintiff to bring into M. O Sheriff's and Registrar's certificates.

The certificates should be brought down to, at least, the day subsequent to the issue of the writ in the action.

It is not necessary to add as parties, those who acquire title *pendente lite* : *Robson* v. *Argue*, 25 Gr. 407 ; *Walbridge* v. *Martin*, 2 Chy. Ch. R. 275 ; *Bellamy* v. *Sabine*, 3 Jur. N. S. 943 ; *Tyler* v. *Thomas*, 25 Beav. 47.

Parties acquiring title *pendente lite* need not be added.

Sheriff's Certificate.—Where the mortgage is of freehold lands, the certificate of the Sheriff must relate to executions against lands, but where the property mortgaged is leasehold, or chattels, it should relate to executions against goods : *Sparrow* v. *Champagne*, 5 C. P. 394. The certificates are usually confined to executions against the mortgagor, or other owner of the equity of redemption. But when the practice of registration of judgments was in force, it was held to be necessary to make the judgment creditors of the mortgagee parties also : *Sanderson* v. *Ince*, 7 Gr. 383 ; but in a later case it was held that a creditor of the mortgagee who had obtained an order attaching the mortgage debt, but not an order to pay over, was not an incumbrancer, and ought not to be made a party : *Crosbie* v. *Fenn*, 26 Gr. 283. The Sheriff's certificate should be so worded as to include writs which have been withdrawn for renewal, this may be done by making the certificate cover any writ which have been in the Sheriff's hands within thirty days preceding its date : See form of such a certificate, Taylor on Titles, 2nd ed. 197.

Sheriff's certificate, form of.

The withdrawal of a writ for renewal is not an abandonment of its priority, but on being returned to the Sheriff renewed, it retains the same position it held prior to its withdrawal for renewal : *Rowe* v. *Jarvis*, 13 C. P. 495 ; *Muir* v. *Munro*, 23 U. C. Q. B. 139. The day of the teste of a *fi. fa.* is inclusive, so that a writ issued on the 15th day of a month expires on the 14th day of the same month in the following year : *Bank of Montreal* v. *Taylor*, 15 C. P. 107. A writ withdrawn for renewal, and not returned for fifteen days thereafter, when a year from the teste had expired, was held, nevertheless, to be re-delivered in sufficient time : *Meneilly* v. *McKenzie*, 3 E. & A.

Withdrawal of writ for renewal is not an abandonment.

But a direction to the sheriff to stay, is.

209. A direction by the execution creditor to the Sheriff to stay proceedings is tantamount to a withdrawal of the writ, and any subsequent execution then in the Sheriff's hands, or thereafter, and during the stay, coming to his hands, will take priority : *Trust & Loan Co.* v. *Cuthbert*, 13 Gr. 412.

Registrar's certificate.

Registrar's Certificate.—The Registrar's certificate is usually confined to registrations on the particular parcel of land included in the plaintiff's mortgage. But it is well to bear in mind, that judgments for alimony registered against a defendant, bind *all* his lands situate within the county, or counties, in which the registration is made, without any local description : see *R. S. O.* ch. 40 sec. 44.

C. C. Clerk's certificate, when necessary.

Where the mortgaged property consists of chattels, the certificate of the clerk of the proper County Court should be produced, as to subsequent mortgages.

It is to the interest of the plaintiff to take care that all persons, having any claim as subsequent incumbrancers, are made parties ; as the omission to make them parties at the proper time, may lead to difficulty in carrying out any subsequent sale which may be had in the action.

Master is to add parties.

444. The Master is to direct all such persons as appear to him to have any lien, charge, or incumbrance, upon the estate in question, to be made parties to the cause, and to be served with a notice in the form set forth in schedule T hereunder written. (6th Feb. 1858.)

This *Order* is in force in all the Divisions.

Rights of parties, whose claims appear doubtful, not to be decided in their absence.

Where it is doubtful whether persons, appearing to have claims, have any valid right, the question should not be determined against them in their absence, but they should be added as parties, and an opportunity given them to maintain their claims : *Canada Landed Credit Co.* v. *McAllister*, 21 Gr. 593. Persons whose claims, if any, would be prior to the plaintiff, should be made parties to the writ, and not added in the Master's office : *Glass* v. *Freckleton*, 10 Gr. 470. Persons having mechanic's liens subsequent to the plaintiff, should be added under this *Order*, and not made parties by the writ : *Jackson* v. *Hammond*, 8 P. R. 157. A creditor of a mortgagee who has obtained an attaching order against the mortgage debt, but who has not obtained an order to pay over, is not an incumbrancer within the meaning of the *Order : Crosbie* v. *Fenn*, 26 Gr. 283.

Mechanics' liens, attaching creditor of mortgagee

Parties added, become parties from date of notice T.

Persons added as parties under this *Order* become parties from the date of the notice T, not merely from the date of its service : *Sterling* v. *Campbell*, 1 Chy. Ch. R. 147.

Where a subsequent mortgagee is dead his real representatives should not be made parties, it is only necessary to add his personal representatives: *Whitla* v. *Halliday*, 4 D. & W. 267; *Taylor* v. *Stead*, 1 Chy. Ch. R. 74; *Grimshawe* v. *Parks*, 6 U. C. L. J. 142; *Lawrence* v. *Humphries*, 11 Gr. 209; *R. S. O.* ch. 107, sec. 15; *Dilk* v. *Douglas*, 26 Gr. 99; *Robinson* v. *Byers*, 9 Gr. 572. And where a mortgage is taken in the name of one partner to secure a partnership debt, it is not necessary to add the real, or personal, representative of a deceased partner: *Stephens* v. *Simpson*, 12 Gr. 493.

Deceased mortgagee—representatives to be added.

Where a person is entitled to rights in two different capacities, if he be made a party to an action distinctly as regards his rights in one capacity, he may not be bound as to his rights in the other capacity; *e. g.*, a person made a defendant as a judgment creditor, was held not to be bound in his character of mortgagee: *Crooks* v. *Watkins*, 8 Gr. 340.

Person filling two capacities should be added in both, or may not be bound.

445. Any party served with a notice under Order 444 may apply to the Court at any time within fourteen days from the date of the service, to discharge the order making him a party, or to add to, vary, or set aside the decree.

Parties added may move to discharge order adding them, or to vary or set aside decree.

This *Order* is in force in all the Divisions.

Where a party added by the Master, claims to be prior to the plaintiff, he should move to discharge the Master's order.

In *Montgomery* v. *Shortis*, 3 Chy. Ch. R. 69, the motion to discharge an order adding a party, appears to have been entertained in Chambers; and in *McDonald* v. *Rodger*, 9 Gr. 75, the question was raised on an appeal from the Master's report; and in *Kline* v. *Kline*, 3 Chy. Ch. R. 161, an application was made to the Master himself, to discharge his order adding a party under *Ord.* 244 *ante*, on grounds disclosed subsequent to the making of the order.

Motion to discharge order adding parties in M. O. how made.

Motions to discharge the order adding the applicant as a party, must be brought on to be heard within fourteen days from the service of the notice T.

Where the party added, desires to move to vary, or set aside the judgment, the motion must be made to the Court—and in the Chancery Division it must be set down to be heard on a Wednesday, and the motion must be returnable within the fourteen days from service of the notice T on the party moving: *Miller* v. *Brown*, before Proudfoot, V. C., 23rd November, 1880; *Wright* v. *Wright*, before Blake, V. C. 29th March, 1881; *Ord.* 418; and see *McIlroy* v.

Motion to vary judgment must be made to the Court.

Time for moving

Hawke 3 Chy. Ch. R. 66; *Harris* v. *Meyers*, 16 Gr. 117; *Jackson* v. *Gardiner* 2 Chy. Ch. R. 385. In the other Divisions, the motion should be made before the Judge in Court, on a Tuesday, or Wednesday.

Leave to move when necessary.

Where the fourteen days is suffered to elapse, before the motion is made returnable to discharge the order, or to vary, or set aside, the judgment, the party added must first obtain leave to move, before he can move to vary, or set aside, the judgment, or set aside the order adding him as party: *Roe* v. *Stanton*, 15 Gr. 137; *McIlroy* v. *Hawke*, 3 Chy. Ch. R. 66. This leave, in a proper case, may be obtained on motion in Chambers, but where the applicant failed, to show a *prima facie* case, leave was refused: *Box* v. *Bridgman*, 6 P. R. 234.

Incumbrancers made parties before judgment, to be served with appointment.

446. The Master, before he proceeds to hear and determine, is to require an appointment to the effect set forth in schedule T to be served upon incumbrancers made parties before the hearing, whether the bill has been taken *pro confesso* against such persons or not (6th Feb., 1858.)

This *Order* is in force in all the Divisions.

Defendant who has not appeared when entitled to notice of proceedings in M. O.

Under the former practice in Chancery, it was held that notwithstanding a bill might have been taken *pro confesso* against a defendant, he was, nevertheless, entitled under certain circumstances, to notice of proceedings in the Master's office: *Robinson* v. *Whitcomb*, 20 Gr. 415; *McCormick* v. *McCormick*, 6 P. R. 208; *Buchanan* v. *Tiffany*, 1 Gr. 98; *Walsh* v. *Bourke*, *Ib.* 105; *Hawkins* v. *Jarvis*, *Ib.* 257; 1 E. & A. 246; *Strachan* v. *Murney*, 6 Gr. 284; but see *Perrin* v. *Davis*, 3 Gr. 161. In mortgage cases it was customary to notify not only subsequent incumbrancers who were parties to the bill as required by this *Order;* but also the mortgagor, whenever the plaintiff proved any other claim in addition to that alleged in his bill, or where subsequent incumbrancers were added, even though the bill had been taken *pro confesso*: see *McCormick* v. *McCormick*, *supra*; but see *Baby* v. *Woodbridge*, 5 U. C. L. J. 67.

Under the new practice there is no equivalent proceeding to an order or note *pro confesso*; nor any *Rule S. C.* expressly authorizing all subsequent proceedings to be taken *ex parte* against defendants who do not defend; but by *Rule S. C.* 131, it is provided that if no appearance be entered for a defendant "every pleading or document," required to be delivered to such party, may be delivered, by being posted up in the office from which the writ of summons issued. Whether this *Rule* will be construed to cover proceedings required

Service of, how to be effected.

to be served on any non-appearing defendant *after* judgment, appears to be open to question.

447. Where any person who has been duly served with a notice under Order 444, or with an appointment under Order 446, neglects to attend at the time appointed, the Master is to treat such non-attendance as a disclaimer by the party so making default; and the claim of such party is to be thereby foreclosed, unless the Court order otherwise, upon application duly made for that purpose. (6th Feb., 1858.)

Parties not attending, who have been duly served to be foreclosed.

This *Order* is in force in all the Divisions.

Notwithstanding a subsequent incumbrancer has been foreclosed under this *Order*, he may in some cases obtain leave to prove his claim. Applications for leave to be let in, after the time has expired must be obtained from the Master, if no report has been made and where the report has issued, then upon motion in Chambers. In *Becher* v. *Webb*, 7 P. R. 445, relief was given on the terms of postponing the applicant to a subsequent incumbrancer, who had duly proved his claim: and see *Catell* v. *Simons*, 8 Beav. 243; *Hull* v. *Falconer*, 11 Jur. N. S. 151; *Cameron* v. *Wolfe Island R. W. Co.*, 6 P. R. 91; but in *Ross* v. *Stevenson*, 7 P. R. 126; *Sterling* v. *Campbell*, 1 Chy. Ch. R. 147, relief was granted, without postponing the applicant.

Application of incumbrancer to be let in to prove after foreclosure.

Terms on which motion granted.

Where an incumbrancer had proved his claim on one mortgage, he was afterwards let in after report, on payment of costs, to prove a claim on another mortgage with a view to consolidating them: *Ross* v. *Stevenson*, *supra*.

Where a person added as a subsequent incumbrancer, appears and disclaims he is not entitled to costs: *Hatt* v. *Park*, 6 Gr. 553.

Incumbrancer disclaiming, not entitled to costs.

448. When all parties have been duly served, the Master is to take an account of what is due to the plaintiff, and to such other incumbrancer or incumbrancers (if any), for principal money and interest; and to tax to them their costs, and settle their priorities; and also to appoint a time and place, or times and places, for payment according to the practice of the Court.

Master to take accounts of plaintiff, and incumbrancers.

This *Order* is in force in all the Divisions.

Proof of service of notice requisite before proceeding with reference.

Proof of Service.—It is the duty of the Master, before proceeding to take the accounts, to require due proof to be adduced of service of the necessary proceedings on all parties not attending before him who are entitled to notice. All subsequent incumbrancers, are entitled to attend the taking of the account, and it would seem also necessary that the defendants named in the writ, should also be notified, even though they have not appeared: see note to *Ord.* 446.

Taking accounts, *prima facie* proof, what is.

Affidavit of claimant.

Taking Account.—The production of the mortgage, and affidavit of the incumbrancer proving his claim is *prima facie* sufficient proof of the claim: *Court* v. *Holland*, 8 P. R. 213: *Elliott* vs. *Hunter*, 24 Gr. 430; *Pollock* v. *Perry*, 5 Gr. 591; *Hancock* v. *Maulson*, 10 Gr. 483; *Warren* v. *Taylor*, 9 Gr. 59; where the bill was *pro confesso*, the mortgagee was bound to state the amount actually advanced: *Sterling* v. *Riley*, 9 Gr. 343; and in every case it is competent for the parties, if the mortgage has not been made for the purpose apparent on the face of it, to shew in the Master's office, the real purpose for which it was executed: *Ib*; *Penn* v. *Lockwood*, 1 Gr. 547; *Brownlee* v. *Cunningham*, 13 Gr. 586; *Morrison* v. *Robinson*, 19 Gr. 480: or for which it is held as security: *Inglis* v. *Gilchrist*, 10 Gr. 301. But to reduce the amount below the amount apparently secured, the evidence must be clear: *Fraser* v. *Locie*, 10 Gr. 207.

Stated account may be relied on in M. O. when.

The plaintiff or defendant may rely in the Master's office, on a stated account set up in the pleadings, although no evidence was given of it on the trial: *Edinburgh Life Assurance Co.* v. *Allen*, 23 Gr. 238; and see *Inglis* v. *Gilchrist*, 10 Gr. 301; *Neil* v. *Neil*, 15 Gr. 110.

Mode of taking, when equity of redemption divided.

As to the proper method of taking the account, where the mortgagor has sold the equity of redemption in part of the mortgaged lands, and has agreed to indemnify the grantee against the mortgage: see *Perkins* v. *Vanderlip*, 11 Gr. 488.

Consolidation of mortgages when allowed.

Consolidation of Mortgages.—A mortgagee has a right in actions for redemption, or foreclosure, to consolidate his mortgage with any other mortgage held by him and made by the same mortgagor. *Watts* v. *Symes*, 1 D. M. & G. 240; *Selby* v. *Pomfret*, 1 J. & H. 336; 3 D. G. F. & J. 595; *Johnston* v. *Reid*. 29 Gr. 296. A subsequent incumbrancer added in the Master's office has the same right. *Merritt* v. *Stephenson*, 7 Gr. 22; *Ross* v. *Stevenson*, 7 P. R. 126.

Not against a registered purchaser without notice.

But the right to consolidate cannot be enforced against a subsequent registered purchaser, or encumbrancer, without actual notice: *Brower* v. *Canada Permanent Building Society*, 24 Gr. 509; *Johnston* v. *Reid*, 29 Gr. 296; *Miller* v. *Brown*, 19 C. L. J. 54. Nor can it be enforced, where prior to the creation of the second mortgage, the mortgagor had assigned, or mortgaged, his equity of redemption in the first mortgage, as against such assignee, or mortgagee: *Jennings* v. *Jordan*,

Nor against assignee of equity of redemption, who takes prior to creation of second mortgage.

6 L. R. App. C. 698; 45 L. T. N. S. 593; *Harter* v. *Colman*, 19 Ch. D. 630; 46 L. T. N. S. 154; and see *Baker* v. *Gray*, 1 Ch. D. 491; nor where one of the mortgaged estates has ceased to exist, *e.g.*, when it was a leasehold, or life estate, *Re Raggett, ex parte Williams*, 44 L. T. N. S. 4; 50 L. J. Chy. 187: nor can a mortgage of realty be consolidated with a mortgage of chattels, so as to throw the debt secured by the realty, on the chattels: *Chesworth* v. *Hunt*, 5 C. P. D. 266; 42 L. T. N. S. 774; 49 L. J. C. P. 507; nor can it be allowed in favor of the plaintiff in an action for foreclosure, where one of the mortgages is not in default. *Cummins* v. *Fletcher*, 42 L. T. N. S. 859; 49 L. J. Chy. 117, 563.

Nor when one of mortgaged estates has expired.

Nor with chattel mortgage.

Nor in favour of plaintiff where one of mortgagees is not in default.

When an intending purchaser of the equity of redemption, inquires of the mortgagee the amount due on a prior mortgage, and the mortgagee neglects to notify him of the claim to consolidate the security with another, the mortgagee is deprived of the right of consolidation as against such person. *Dominion Savings & Investment Company* v. *Kittridge*, 23 Gr. 631.

Mortgagee may be estopped from consolidating.

Tacking.—The mortgagee cannot tack to his mortgage debt a simple contract debt due from the mortgagor: *Ferguson* v. *Frontenac*, 21 Gr. 188; but he may as against his representatives, in case of his death; and he may tack all prior charges, or encumbrances, paid off by him: *Trust & Loan Co.* v. *Cuthbert*, 14 Gr. 410; *Teeter* v. *St. John*, 10 Gr. 85; and he is entitled to claim as against subsequent incumbrancers, or the mortgagor, the full amount due thereon, on matter how advantageous the terms on which he may have acquired them: *Watkins* v. *McKellar*, 7 Gr. 586; *Dobson* v. *Land*, 8 Ha. 216.

Tacking,—what claims may be tacked to mortgage debt.

Incumbrances paid off.

Tacking a subsequent, to a prior incumbrance, so as to cut out an intervening registered incumbrance, can no longer be done: *R. S. O.* c. 111, s. 81.

The mortgagee is also entitled to tack to his mortgage debt, any costs occasioned by part of the mortgaged estate being expropriated under any statute: *Rees* v. *Metropolitan Board of Works*, 42 L. T. N. S. 685; 14 Ch. D. 372; 49 L. J. Ch. 620; and also any costs incurred in protecting, or endeavouring to realise, his security: *Wilkes* v. *Sanion*, 7 Ch. D. 188.

Costs.

Merger.—Where an incumbrancer obtains a release of the equity of redemption, a question whether his encumbrance is merged arises. This is a question of intention, and where it is obviously not for his benefit, the Court will not presume any such intention: *Hart* v. *McQuesten*, 22 Gr. 133; *North of Scotland Mortgage Company* v. *German*, 31 C. P. 349: *Elliott* v. *Jayne*, 11 Gr. 412; *Weaver* v. *Vandusen*, 27 Gr. 477.

Merger, a question of intention.

Improvements.—Where a sale of the mortgaged property under execution is set aside the vendee is entitled to improvements: *Shaw* v. *Tims*, 19 Gr. 496; and also when a sale made by the mort-

Improvements. What allowed mortgagee into possession.

gagee proves invalid: *McLaren* v. *Fraser*, 17 Gr. 567; *Carrol* v. *Robertson*, 15 Gr. 173. The expense of erecting a carding mill was disallowed: *Kerby* v. *Kerby*, 5 Gr. 587. Expenses of planting and tending fruit, and ornamental trees, suitable for carrying out improvements commenced by the mortgagor were allowed, but not their value at the time of redemption: *Paul* v. *Johnson*, 12 Gr. 474. Where the mortgagee is charged with rents arising from improvements made by himself, he should be allowed the expenses of such improvements, to a corresponding amount: *Constable* v. *Guest*, 6 Gr. 510; and see further as to allowances to mortgagees in possession: notes to *Ord.* 220 *ante*.

Interest, arrears of, how far recoverable against mortgaged land.

Interest.—Although no arrears of interest which have accrued more than six years before the commencement of the action, can ordinarily be recovered against the land, during the lifetime of the mortgagor, yet where the action is brought against the representative of a deceased mortgagor who had covenanted for payment, the mortgagee may tack all the interest recoverable on the covenant: *Carroll* v. *Robertson*, 15 Gr. 173; but where there is no covenant, even in such a case, no more than six years' arrears can be recovered: *Taylor* v. *Hargrave*, 19 Gr. 271; and see *Airey* v. *Mitchell*, 21 Gr. 510; *Howeren* v. *Bradburn*, 22 Gr. 96; *Weaver* v. *Vandusen*, 27 Gr. at p. 481.

Rate of interest recoverable.

RATE OF INTEREST.—Since the repeal of the usury laws, the Court will not refuse to enforce any contract, which parties, competent to contract, may make for the payment of interest, provided it is understood: *Teeter* v. *St. John*, 10 Gr. 85.

Stipulation for increased rate on default may be enforced.

Where a mortgage stipulated that up to a certain day the interest to be charged should be eight per cent., and if the principal were not then paid twelve per cent., it was held the mortgagee was entitled to recover the twelve per cent. on default: *Waddell* v. *McColl*, 14 Gr. 211.

Mortgage payable without interest. After default, interest chargeable.

Where a mortgage is made payable without interest, or no interest is reserved, interest may nevertheless be recovered at six per cent. from the time of default: *McDonell* v. *West*, 14 Gr. 492: *Reid* v. *Wilson*, 18 C. L. J. 58. Compound interest may now be stipulated for, and recovered: *Clarkson* v. *Henderson*, 14 Chy. D. 348; 43 L. T. N. S. 29: *Henderson* v. *Dickson*, 9 Gr. 379; or an increased rate in case of default, *Downey* v. *Parnell*, 2 O. R. 82; 18 C. L. J. 241; but a mortgagee is *prima facie* only entitled to simple interest, and where an account charging compound interest was assented to by the mortgagor in ignorance of his rights it was re-opened: *Daniell* v. *Sinclair*, 6 L. R. H. L. 181; 44 L. T. N. S. 257; and a bargain for an exorbitant rate of interest will not be enforced if it is shown not to have been understood by the mortgagor: *Teeter* v. *St. John* 10 Gr. 85.

Prima facie simple interest only chargeable.

Bargain for exorbitant interest.

Where the incumbrancer has redeemed a prior incumbrance, he is entitled to recover interest on the aggregate amount of principal, interest, and costs, so paid; on the principal, at the rate reserved in his own mortgage, and on the interest, and costs, at six per cent.: *McMaster* v. *Hector*, 8 C. L. J. N. S. 284; and he has a lien on the land therefor as against subsequent incumbrancers: *Trust & Loan Company* v. *Cuthbert*, 14 Gr. 410; *Teeter* v. *St. John*, 10 Gr. 85. Interest on prior incumbrances paid off by mortgagee.

The rate of interest reserved by the mortgage, is not necessarily payable after default, unless the mortgage expressly so provides: *Cook* v. *Fowler*, 7 L. R. H. L. 27; *Dalby* v. *Humphrey*, 37 Q. B. 514. But such rate may be allowed after default, by way of damages, unless it is expressly shown by evidence that it is excessive: *Simonton* v. *Graham*, 8 P. R. 495. Where an instrument provided for payment of interest at a given rate, until the principal money should be paid, it was held that the rate contracted for could not be recovered after judgment had been obtained on the instrument; but only legal interest at six per cent. on the amount of the judgment: *St. John* v. *Rykert*, 4 App. R. 213; but see *contra*, *Popple* v. *Sylvester*, 22 Ch. D. 98; 47 L. T. N. S. 329; and see 19 C. L. J. 21; *Re Atkinson* before Boyd, C., 4th May, 1883. Rate of interest reserved by contract, not necessarily payable after time fixed for payment, unless so stipulated. But may be allowed as damages

Where the interest is payable in advance, the mortgagee is nevertheless not entitled to have interest allowed for a period subsequent to that appointed for redemption: *Trust & Loan Co.* v. *Kirk*, 8 P. R. 203. Interest payable in advance.

Tender.—Where a tender is relied on, it should be set up by statement of defence. Where such a defence is pleaded, it is sometimes specially referred to the Master to inquire as to the tender, or whether the amount tendered was sufficient: *Knapp* v. *Bower*, 17 Gr. 695. *Prima facie* a tender stops interest; but if the mortgagee shews that the money was subsequently used by the mortgagor, and a profit made, subsequent interest is nevertheless chargeable: *Ib.*; and see *Pearce* v. *Morris*, 5 L. R. Chy. at p. 231. Tender should be pleaded. *Prima facie* it stops interest, but not if money subsequently used.

Parol Agreements affecting mortgage.—A written agreement, for value, by mortgagor to pay additional interest, is enforceable against mortgagor, though not under seal: *Brown* v. *Deacon*, 12 Gr. 198; and see *Alliance Bank* v. *Brown*, 10 Jur. N. S. 1121. But a verbal agreement to that effect will not bind the lands, as against a subsequent purchaser of the equity of redemption: *Totten* v. *Watson*, 17 Gr. 233; or even as against a devisee, or heir-at-law, of the mortgagor: *Re Houston*, *Houston* v. *Houston*, 2 O. R. 84. Parol agreements affecting mortgage debt, how far enforceable.

An agreement for extra interest between a derivative mortgagee and the mortgagor enures to the benefit of the original mortgagee: *Grahame* v. *Anderson*, 15 Gr. 189. Agreement made with derivative mortgagee.

Mortgagor may be estopped from setting up payments.

Where, after the mortgage debt was partly paid off, the mortgagor reborrowed the money and returned the receipts given for his previous payments, it was held that he was estopped from disputing that the amount so readvanced was still secured by the mortgage: *Inglis* v. *Gilchrist*, 10 Gr. 301.

Statute of Limitations must be pleaded when.

Statute of Limitations.—Under a dispute note, the Statute may be set up as a bar to the recovery of more than six years' arrears of interest; but where it is relied on as a defence to the whole claim, a statement of defence must be filed: *Wright* v. *Morgan*, 1 App. R. 613; *Cattanach* v. *Urquhart*, 6 P. R. 28.

How far a bar to recovery of interest.

Although ten years is now a bar to the recovery of money charged on land, as against the land, *R. S. O.* c. 108, s. 4; yet it was held that the right of action on the covenant was not barred until the lapse of twenty years under *R.S.O.* c. 16, ss. 1, 6: *Allan* v. *McTavish*, 2 App. R. 278: but see *contra*, *Sutton* v. *Sutton*, 48 L. T. N. S. 95; *Fearnside* v. *Flint*, 48 L. T. N. S. 154.

No bar to account for rents against mortgagee in possession.

The Statute is no bar to an account for more than six years' rent, as against a mortgagee in possession: *Coldwell* v. *Hall*, 9 Gr. 110; affirmed in appeal, 7 U. C. L. J. 42; 8 U. C. L. J. 93.

Subsequent incumbrancer entitled to recover more than six years' of interest, where prior incumbrancer has been in possession.

Where a prior mortgagee, or other incumbrancer, has been in possession of any land, or in the receipt of the profits thereof, within one year next before an action is brought by any person entitled to a subsequent mortgage, or other incumbrancer, on the same land, the person entitled to the subsequent mortgage, or incumbrance, may recover in such action the arrears of interest which have become due during the whole time that such prior mortgagee, or incumbrancer, was in possession, or receipt, as aforesaid, although such time may have exceeded the term of six years: see *R. S. O.* c. 108, s, 18.

Action for foreclosure stops statute running.

An action for foreclosure, or sale, is an action to recover land, and the commencement of an action for foreclosure, or sale, by a mortgagee out of possession stops the running of the statute: *Harlock* v. *Ashberry*, 19 Ch. D.539; 46 L. T. N. S. 356; *Pugh* v. *Heath*, 7 App. C. 235; 46 L. T. N. S. 321; but see *Barwick* v. *Barwick*, 21 Gr. 39.

Any tenant in common entitled to redeem is entitled to redeem whole estate, though some of his co-tenants are barred.

Where some of several tenants in common, are barred by the Statute of Limitations, and others of them are not; the latter are entitled to redeem the whole mortgaged estate, and not merely an aliquot part: *Faulds* v. *Harper*, 2 O. R. 405; this case is now pending in appeal; see also *Martin* v. *Miles*, before Divisional Court, Chancery Division, 29th Sept. 1883.

Payments to one of several executors, or trustees.

Payments.—Payment to one of several executors, is a good payment on account of a mortgage held by two of them as executors: *Ewart* v. *Dryden*, 13 Gr. 50, but payment to one of several trustees,

who held a mortgage, is not good as to the other trustees: *Ewart* v. *Snyder*, 13 Gr. 55.

When mortgagee liable for moneys not received.

Where a mortgagor requested his mortgagee to release a part of the mortgaged property on payment of £100, and he released it on payment of £50 only, he was held liable for the difference: *Ball* v. *Jarvis*, 10 Gr. 568. But when a mortgagee refused to accept £100 offered as the price of part of the mortgaged property, which was expropriated, and upon an arbitration only £30 was awarded, the mortgagee was held not to be liable for the difference: *Gunn* v. *McDonald*, 11 Gr. 140.

Appropriation of payments.

Appropriation of Payments.—A mortgagee in possession, and in receipt of rents, and profits, may sell under the power of sale, if the mortgage be in default, even though the rents are sufficient to keep down the interest; as in the absence of any agreement there is no appropriation of payments until the taking of the account: *Cockburn* v. *Edwards*, 18 Ch. D. 449; 45 L. T. N. S. 500; 51 L. J. Ch. 46: and see *Harlock* v. *Ashberry*, 19 Ch. D. 539.

Appropriation of purchase money, on sale by mortgagee.

Where a mortgagee sells under a power of sale, he is bound to apply the proceeds, first, in payment of interest, and costs, and then either pay the balance to the mortgagor, or apply it in reduction of principal *Thompson* v. *Hudson*. 10 L. R. Eq. 497.

Payments, how to be appropriated.

If money is not expressly appropriated by the party paying it, the party receiving it may appropriate it, even upon a claim which he cannot enforce by suit; but an appropriation cannot be made by the creditor after action brought, on bringing in his account: *Fraser* v. *Locie*, 10 Gr. 207; *Hagerman* v. *Smith*, Tay. 123; *Armour* v. *Carruthers*, 4 U. C. L. J. 210; *Fuller* v. *Parnall*, 8 U. C. L. J. N. S. 86; and where a mortgagee held as security for a partnership debt the mortgage of one partner, and the note of the other, it was held that he could not, as against an assignee of the equity of redemption, appropriate all payments on account of the note, but that he was bound to apply one half of the sums paid out of the partnership assets, on account of the mortgage: *Moore* v. *Riddell*, 11 Gr. 69.

Where two securities held for same debt.

Where no appropriation by payer, payments how to be applied.

In taking the account, payments on account, should be applied first, in payment of overdue interest, and costs, and then of overdue principal, and where there are several items, the appropriation should be made in discharge of those earliest in date: *McGregor* v. *Gaulin*, 4 U. C. Q. B. 378; *Cummings* v. *Usher*, 1 P. R. 15; *Ross* v. *Perrault*, 13 Gr. 206; *Clayton's Case*, *Devaynes* v. *Noble*, 1 Mer, 530, 604.

Appropriation of payments, where mortgage given to secure a floating balance.

A mortgage given to secure a floating balance, however, is not discharged by payments made on account, so long as the dealings between the parties continue, and any balance remains due in respect thereof; even though the payments exceed in amount the debt due

when the mortgage was given, or the amount of the debt mentioned in the mortgage: *Cameron* v. *Kerr*, 3 App. R. 30; *Russell* v. *Davey*, 7 Gr. 13; *The City Discount Company* v. *McLean*, 9 L. R. C. P. 692; *Fenton* v. *Blackwood*, 5 L. R. P. C. 167: but see *Re Brown*, 2 Gr. 111, 590; *Buchanan* v. *Kerby*, 5 Gr. 332.

Payments by guarantor, lien for.

PAYMENT BY GUARANTOR—A mortgagee who has assigned the mortgage, and covenanted for its payment, is entitled to a lien as against the mortgagor for all payments so made: *Fleming* v. *Palmer*, 12 Gr. 226.

Insurance money, how applicable.

Insurance Money.—When the mortgage contains no provision for the application of insurance money, the mortgagee is not bound to apply it in reduction of his debt before the time appointed for payment, or on the interest to accrue thereon, until it is actually due. In such a case, where the mortgagee declines to apply the money on his debt, or interest, the mortgagor is entitled to have the moneys laid out in rebuilding, and restoring, the premises to the *status quo*: *Austin* v. *Story*, 10 Gr. 306.

42 Vict. c. 20, s. 1 (O.).

In mortgages executed after 11th March, 1879, after default, there is a statutory power to insure, and the mortgagee may recover premiums paid, with interest, at the rate reserved by the mortgage: 42 Vict., c. 20, s. 1 (O). Where the mortgagor insures, though there be no covenant, in the event of a loss the mortgagee may have the insurance money laid out in re-building; 14 Geo. III., c. 78, s. 83: *Stinson* v. *Pennock*, 14 Gr. 604.

Mortgagee may have money applied in rebuilding.

Mortgagee insuring whether he can recover both, insurance and debt, *quære?*

A mortgagee insuring out of his own funds, is not bound to give the mortgagor credit for the moneys received in the event of a loss: *Russell* v. *Robertson*, 1 Chy. Ch. R. 72. But whether a mortgagee can now recover both the insurance money, and also the mortgage debt seems doubtful: see *Castellain* v. *Preston*, 8 Q. B. D. 613; 46 L. T. N. S. 568; 19 C. L. J. 143

Insurance by mortgagor, in favour of mortgagee, arson by mortgagor; insurance company taking assignment of mortgagor not bound to credit insurance. *Secus*, if mortgagor could have recovered.

Where the mortgagor had insured in pursuance of a covenant, loss, if any, being payable to the mortgagee, and the buildings were burnt by the mortgagor, and insurance money paid to the mortgagee, who assigned the mortgage to the insurance company; it was held, that inasmuch as the mortgagor could not have recovered on the policy, the insurance company were not bound to give credit on the mortgage debt for the amount of the insurance money, as against a *puisne* incumbrancer: *Westmacott* v. *Hanley*, 22 Gr. 382; *Livingstone* v. *The Western Assurance Company*, 14 Gr. 461; *S. C.* 16 Gr. 9. *Secus*, if the mortgagor had not been debarred from recovering: *Howes* v. *Dominion Insurance Company*, 2 O. R. 89; *Austin* v. *Story*, 10 Gr. 306; and see *Provincial Insurance Company* v. *Reesor*, 21 Gr. 296; *Burton* v. *Gore District M. F. I. Co.* 12 Gr. 156; affirmed in appeal, January 21,

1875: see R. & J. Dig. 1819, and *per* Proudfoot, V. C., 22 Gr. 384; *Green* v. *Hewer*, 21 C. P. 531.

Rent, chargeable against mortgagee.

Rents.—A mortgagee in possession may be charged with rents actually received, or which, but for wilful neglect and default, he might have received; or he may be charged with an occupation rent when he has been in actual occupation, using and enjoying the mortgaged property in the place of a tenant; in the latter case, he is charged with a fair rental, such as a tenant might be expected to give, unless it is shown that he actually made a larger profit: *Truelock* v. *Robey*, 15 Sim. 265; *S. C.* 2 Phill. 395. *Coldwell* v. *Hall*, 9 Gr. 110.

A mortgagee in possession, but not in actual occupation, will not be held liable for any greater rent than he actually received, unless it is clearly established in evidence, that he knew a greater rent might and could have been obtained, and that he refused, or neglected, to obtain the same: *Merriam* v. *Cronk*, 21 Gr. 60; *Waddell* v. *McColl*, 14 Gr. 211; *Penn* v. *Lockwood*, 1 Gr. 547.

Mortgagee in possession by arrangement with mortgagor, how far liable to subsequent incumbrancer.

A mortgagee receiving rents, or going into occupation, by consent of the mortgagor, must account as a mortgagee in possession to a subsequent incumbrancer, or purchaser of the equity of redemption, although the mortgagor has directed the rents to be applied in payment of another debt due by him to the mortgagee: *Gilmour* v. *Roe*, 21 Gr. 284: *Court* v. *Holland*, 29 Gr. 19. But when a mortgagee suffers the mortgagor to resume possession he ceases to be liable to account for rents: *Rice* v. *George*, 19 Gr. 174. Where the mortgage provided for payment of five per cent. interest, reducible, if punctually paid, to four-and-a-half per cent, a mortgagee, on going into possession, after default, is not bound to accept the lower rate: *Union Bank* v. *Ingram*, 16 Ch.D. 53 (overruling *Stains* v. *Banks*, 9 Jur. N.S. 1049.) A mortgagee in possession is entitled to be allowed a commission paid for collecting the rents: *Union Bank* v. *Ingram*, 16 Ch. D. 53; but see *Eyre* v. *Hughes*, 2 Ch. D. 148.

Rests, where chargeable.

A mortgagee in possession, should not be charged with rests on rents received by him, until he has been paid in full, when his money was in arrear when he entered: *Coldwell* v. *Hall*, 9 Gr. 110; affirmed in appeal, 7 U. C. L. J., 42; 8 U. C. L. J. 93.

Mortgagee in possession bound to account for more than six years' rent or occupation.

Notwithstanding the Statute of Limitations, a mortgagee in possession may be compelled to account to the mortgagor for more than six years' rent: *Ib.*; although if the mortgagee have been overpaid, the statute would doubtless be a bar to the mortgagor recovering payment of more than six years' arrears.

Occupation rent to be charged up to day of payment.

Where the mortgagee is in occupation, he should be charged with an occupation rent up to the day appointed for payment: *Pipe* v. *Shafer*, 1 Chy. Ch. R. 251.

Attornment clause does not render mortgagee liable to account as a mortgagee in possession.

The mere existence of an attornment clause in a mortgage, does not make the mortgagee liable to account to a subsequent incumbrancer, as a mortgagee in possession: *Stanley* v. *Grundy*, 48 L. T. N. S. 106; but see *Re Stockton Iron Company*, 10 Ch. D. 335; 40 L. T. N. S. 19; *Ex parte Jackson*, 14 Ch. D. 725; 43 L. T. N. S. 272; *Ex parte Punnett*, 16 Ch. D. 226; 44 L. T. N. S. 226; *Ex parte Harrison*, 18 Ch. D. 127; 45 L. T. N. S. 290.

Estoppel arising from representation to persons dealing with equity of redemption.

Estoppel.—A mortgagee may be estopped as against a person inquiring of him the amount due on his mortgage, with a view to purchasing the equity of redemption, from claiming more than the amount then claimed: *Dominion Savings & Investment Co.* v. *Kittridge*, 23 Gr. 631. But if such representations are made to a person not known to be intending to purchase, or deal in respect of, the equity of redemption, they are not binding on the mortgagee, although actually acted upon: *Moffatt* v. *Bank of Upper Canada*, 5 Gr. 374.

The mortgagor may, by his conduct, be also estopped from setting up payments on account of the mortgage: *Inglis* v. *Gilchrist*, 10 Gr. 301.

Vendor's lien may be enforced, where mortgage taken for purchase money, is invalid.

Vendor's Lien,—Void Mortgage for Purchase-money.—Where a mortgage was given by an infant for purchase money, and the infant on coming of age adopted the purchase but repudiated the mortgage; an assignee of the mortgage was held nevertheless entitled to a lien for the purchase money: *Grace* v. *Whitehead*, 7 Gr. 591.

Where land is conveyed in consideration of maintenance, the vendor has a lien for the consideration: *Paine* v. *Chapman*, 6 Gr. 338; 7 Gr. 179.

Mortgage payable in foreign currency.

Mortgage payable in Foreign Currency.—Where the mortgage debt is payable in lawful money of the United States, the mortgagee is entitled, at his option, to claim the amount in the current money of that country, or its equivalent in Canadian currency, at the time of default made in payment: *Morrell* v. *Ward*, 10 Gr, 231: *Crawford* v. *Beard*, 14 C. P. 87.

Priorities, as to executions.

Priorities.—Usually the priorities are determined in the case of executions, by the date of the delivery of the writs to the sheriff for execution: and for this purpose a fraction of a day is regarded *Beekman* v. *Jarvis*, 3 U. C. Q. B. 280; *Converse* v. *Michie*, 16 C. P. 167. But an execution creditor directing the sheriff to stay execution, may thereby lose his priority as against any subsequent execution then in, or thereafter coming into, the sheriff's hands, before the stay is removed: *Ross* v. *Hamilton*, E. T. 3 Vict.; *Foster* v. *Smith*, 13 U. C. Q. B. 243; *Re Ross*, 3 P. R. 394; *Bank of Montreal* v. *Munro*, 23 U. C. Q. B. 414; *Kerr* v. *Kinsey*, 15 C. P. 531; *Trust &*

Stay of execution, effect of.

Loan Co. v. *Cuthbert*, 13 Gr. 412. But the sheriff, after being stayed, may make a second seizure during the currency of the writ: *Gates* v. *Smith*, 13 C. P. 572.

Priority of Mortgagees

Mortgagees for value are usually entitled to priority, according to the date of registration of their mortgages; and the omission of the Registrar to index a registered instrument will not deprive it of its priority: *Lawrie* v. *Rathburn*, 38 U. C. Q. B. 255.

Voluntary mortgagees cannot get priority by registration.

Voluntary mortgagees, and mortgagees with actual notice of a prior unregistered instrument, however, are not within protection of the Registry Act: *R. S. O.* c. 111, s. 74: and see *Greaves* v. *Tofield*, 43 L. T. N. S. 100: *Kettlewell* v. *Watson*, 46 L. T. N. S. 83; 51 L. J. Chy. 281, *Clarke* v. *Palmer*, 48 L. T. N. S. 857.

Nor execution creditors, but purchasers at sheriff's sale may

An execution creditor cannot get priority over a prior unregistered deed: *Russell* v. *Russell*, 28 Gr. 419: but it would seem that a purchaser at a sheriff's sale may: *Van Wagner* v. *Findlay*, 14 Gr. 53.

Absconding debtor, inquiry as to.

When it is necessary, for the purpose of settling the priority of incumbrancers, to inquire whether a person who has been sued was, or was not, an absconding debtor within the meaning of the Act, the Master may do so, although the party sued may have taken no proceedings to set aside the attachment: *Montreal Bank* v. *Baker*, 9 Gr. 97, 298; but see *Martin* v. *Boulanger*, 8 App. Ca. 296: 49 L. T. N. S. 62.

Creditor, when postponed, by conduct to prejudice of other creditors.

Where a creditor who had obtained security by an assignment from his debtor of his chattels, and other assets, by way of mortgage, was notified by a subsequent execution creditor of his claim, and informed that he would be held answerable for his dealing with the assets assigned, but negligently allowed the debtor to use, and deal with them, so that they were lost: it was held that the first creditor was thereby postponed to the second, as regards other property liable for the payment of their debts: *Huntingdon* v. *VanBrocklin*, 8 Gr. 421.

Two deeds on same day, priority how settled.

For the purpose of determining priorities between two deeds executed the same day, the Master may inquire which was in fact first executed, and may have regard to the internal evidence of the deeds themselves, for the purpose of ascertaining the intention of the parties upon the question of priority: *Gartside* v. *Silkstone, D.C & I. Co.* 21 Ch. D. 762; 47 L. T. N. S. 76.

Disputes between incumbrancers, how determined

Disputes Between Incumbrancers.—Where there is a dispute between two persons, as to which of them is entitled to an incumbrance, the Master may determine the question himself, or he may report the incumbrance, and its priority as regards other incumbrances, and the dispute between the claimants, so that the Court may give proper directions for determining the question: *McDonald* v. *Wright*, 12 Gr, 552,

Place of payment.

Place of Payment.—The Master, in appointing the place, and manner of payment, must proceed under *Ord.* 255 *ante*. The officer

of the Court to be named, should be Registrar of the Division in which the action is pending.

Day of payment not to be a *dies non*.

Persons to Redeem, and Day for Redemption.—The Master is to appoint a day for redemption. He should be careful to see that the day appointed is not a Sunday, nor a bank holiday, otherwise a new day will have to be appointed, before a final order can be obtained: *Holcumb* v. *Leach*, 3 Gr. 449. The omission of the Master to appoint a day for redemption may be remedied by order in Chambers: *King* v. *Connor*, 10 Gr. 364.

Omission to appoint a day.

Sale,—redemption, how directed.

When the judgment is for sale, one day is appointed six calendar months from the making of the report, for the mortgagor to redeem the plaintiff, and all subsequent incumbrancers who have proved claims; in default of payment a final order for sale is made: see *Ord.* 451, 453. Where the judgment is for foreclosure, the subsequent incumbrancers are ordinarily entitled to successive rights of redemption in the order in which they acquired their charges; six calendar months being given to the first in priority, and three calendar months to each of the others in succession: Seton 1085. But the Court may specially direct that one day only be given to all the defendants to redeem the plaintiff, without prejudice to their priorities *inter se*: *Bartlett* v. *Rees*, 12 L. R. Eq. 395; *The General Credit & D Co.* v. *Glegg*, 48 L. T. N. S. 182. A *puisne* incumbrancer, and all persons claiming under him are entitled to but one day for redemption: *Loveday* v. *Chapman*, 32 L. T. N. S. 689; *Beevor* v. *Luck*, 4 L. R. Eq. 537, and so are judgment creditors, where there are no intermediate incumbrances: *Bates* v. *Hillcoat*, 16 Beav. 139; *Stead* v. *Banks*, 5 D. & S. 560; *Ardagh* v. *Wilson*, 1 Chy. Ch. R. 389; Seton, 1085; Taylor & Ewart, 228: but see *Carroll* v. *Hopkins*, 4 Gr. 431.

Foreclosure,—redemption, how directed.

A party making default in redemption at the time appointed may be foreclosed: *Ord.* 451, and new accounts may, from time to time, be taken without further order: *Ord.* 452. When all the subsequent incumbrancers have been foreclosed, three calendar months are given to the mortgagor to redeem, and in default he may be foreclosed. An incumbrancer redeeming, may proceed to foreclose the subsequent incumbrancers and the mortgagor, as if he were the original plaintiff in the action. A subsequent incumbrancer redeeming out of his order of priority may add the amount paid to his own claim as against all incumbrancers subsequent to himself, but not as against any that are prior; as against the latter he may claim to be redeemed in respect of any claim he has paid which had priority over the latter's claim But, inasmuch as a prior incumbrancer on redeeming a subsequent incumbrancer, in respect of a prior claim paid off by the latter, would be entitled, to add the amount so paid to his own debt, and to be redeemed by the latter, it will generally be found inexpedient to claim the right to be redeemed, and the incumbrancer next in priority to the plaintiff should be appointed to

Subsequent incumbrancer redeeming out of his order.

be redeemed as to his claim, without first requiring him to redeem a subsequent incumbrancer in respect of any prior claim paid by the latter. Where the mortgagor redeems after *puisne* incumbrancers have been foreclosed he thereby opens the foreclosure as to them : see *Box* v. *Bridgman*, 6 P. R. 234 ; *Otter* v. *Lord Vaux*, 2 K. & J. 650 ; 6 D. G. M. & G. 638 ; *Read* v. *Smith*, 14 Gr. 250 ; 16 Gr. 52.

Mortgagor redeeming, after *puisne* incumbrancer foreclosed, opens foreclosure as to him

Where portions of an estate under mortgage are conveyed away by the mortgagor, one day should be given to all the persons interested in the equity of redemption to redeem : *Hill* v. *Forsyth*, 7 Gr. 461 ; so also where there is any dispute between co-defendants as to their priorities, one day is given to all to redeem without prejudice to their rights *inter se : General Credit & D. Co.* v. *Glegg*, 48 L. T. N. S. 182 ; but where there is a stipulation in the mortgage that in case of sales by the mortgagor, the mortgagee shall, on payment of a certain portion of the purchase money, release the part sold, each purchaser is entitled to redeem his own part on payment of the stipulated portion of money, and the Master should, in such a case, appoint one day for each of the several persons so entitled, to redeem his respective portion accordingly : *Davis* v. *White*, 16 Gr. 312.

Redemption how directed where equity of redemption divided.

As to the rights of purchasers of different portions of the mortgaged estate *inter se :* see *Barker* v. *Eccles*, 17 Gr. 277 ; *Jones* v. *Beck*, 18 Gr. 671 ; *Pierce* v. *Canavan*, 28 Gr. 356, affirmed on appeal 18 C. L. J. 165 ; *Buckler* v. *Bowman*, 12 Gr. 457 ; *Norris* v. *Meadows*, 28 Gr. 334, affirmed on appeal 18 C. L. J. 165 ; *Clark* v. *Bogart*, 27 Gr. 450.

Right of purchasers of different parts of mortgaged estate.

Where the day appointed for redemption is uncertain a new day must be appointed : *Scott* v. *McKeown*, 1 Chy. Ch. R. 186.

Master's Report.—The Master's report should bear date the day it is signed, and not before : *Waddell* v. *McColl*, 14 Gr. 211. It must be confirmed before the day appointed for redemption, or a final order will be refused : *Mountain* v. *Porter*, 1 Chy. Ch. R. 207 ; *Mills* v. *Dixon*, 2 Chy. Ch. R. 53. In the latter case a month further time to redeem was allowed.

Master's report, date of ; should be confirmed.

As to confirming report see *ante Ord.* 252 and notes. The omission to appoint a day for redemption may be remedied by application in Chambers : *King* v. *Connor* 10 Gr. 364.

Where the Master had omitted to allow the plaintiff two items of interest, an order was made to correct the mistake, after a final order for sale, without appointing any new day for payment : *Bessey* v. *Graham*, 9 U. C. L. J. 82 ; and see *Morley* v. *Matthews*, 12 Gr. 453 ; but the Master cannot, of his own motion, in a subsequent report, correct a mistake in a prior report : *Crooks* v. *Street*, 1 Chy. Ch. R. 78 ; and see further *Ord.* 253 note.

Correcting mistake in.

Extension of time for payment when granted

Extending time for Payment.—Application to extend the time for payment should be made in Chambers: *Anon*, 4 Gr. 61: where the defendant showed that he had sold for £300, and the mortgage debt was only £250, and that he expected to receive payment in full in two or three months, the time was extended: *Ford* v. *Steeples*, 1 O. S. 282. So also where the mortgage was for purchase money, and the vendor had neglected to pay off a prior mortgage, pursuant to his covenant, and it appeared that the existence of the first mortgage prevented the defendant from raising money to pay off the second, the time was extended: *G.* v. *V.*, 2 Chy, Ch. R. 33. So also six months' further time was given, where the defendant was prevented from raising the money by reason of an improper advertisement published by the plaintiff's solicitors: *Gilmour* v. *Myers*, 2 Chy. Ch. R. 179. So also where it was shown that the value of the property would be enhanced in the meantime, by the construction of a railway: *Cameron* v. *Cameron*, 2 Chy. Ch. R. 375; and where a reasonable prospect of payment at the extended time was shown, the time was extended: *Cahuac* v. *Durie*, 2 Chy. Ch. R. 394; *Street* v. *O'Reilley*, 2 Chy. Ch. R. 270; but an affidavit of the solicitor, that he believed his clients had exerted themselves, and were endeavouring to raise the money, and that the property was worth much more than the debt, was held insufficient: *Anon*, 4 Gr. 61.

Application after day appointed has elapsed. Terms imposed.

Where the application is made after the day fixed for redemption, the applicant is usually required to pay interest for the extended time, on the whole amount found due for principal, and interest: *Street* v. *O'Reilley*; *Cahuac* v. *Durie*; *Cameron* v. *Cameron*, *supra*; and the payment of the whole costs, or at all events the costs of the application, is also usually made a condition precedent: *Ib.*; and see *Holford* v. *Yate*, 1 K. & J. 677; *Whitfield* v. *Roberts*, 7 Jur. N. S. 1268: and where the mortgagee swore that he had been compelled, in consequence of the mortgagor's default, to contract a loan to meet his liabilities, at a higher rate of interest than that reserved by the mortgage; on extending the time, the mortgagor was required to pay such a sum as would cover the excess of interest payable by the mortgagee: *Howard* v. *Macara*, 1 Chy. Ch. R. 27. It is probable, that where the application is made before a final order has been obtained, however, the application would be more readily granted, and on less stringent terms, than where it is made after the final order has issued: *Patch* v. *Ward*, 3 L. R. Chy. 212.

See further as to applications to open foreclosure, and extend the time for payment: *Ord.* 451, note.

Master's report, contents of.

449. The Master's report must state the names of all persons who have been made parties in his office, and who have been served with the notice or appointment

hereinbefore provided, the names of such as have made default, and must settle the priorities, &c., of such as have attended, and these latter are to be certified as the only incumbrancers upon the estate. (6th Feb., 1858; Ord. 6.)

This *Order* is now in force in all the Divisions of the High Court.

For forms of reports in mortgage cases : see Leggo's Forms, 2nd ed., Nos. 967, 968, 969, 972, 977.

450. In case of payment by any party according to the report, the party to whom payment is made, is to convey the premises, free and clear of all incumbrances, done by him, and deliver up all deeds and writings in his custody or power, relating thereto, upon oath, to the party making the payment, or to whom he may appoint.

On redemption conveyance to be made.

Deeds to be delivered up.

This *Order* is now in force in all the Divisions of the High Court.

Ord. 450, how far embodied in *Rule S. C.* 336.

The provisions of this *Order* are, however, to some extent embodied in *Rule S. C.* 336, which is as follows :

"In a suit for foreclosure, or sale, upon payment by the defendant, or in a suit for redemption, upon payment by the plaintiff, [or payment] of the amount found due, the plaintiff or defendant shall, unless the decree otherwise directs, assign and convey the mortgaged premises in question to the defendant, (or plaintiff as the case may be) making the payment, or to whom he may appoint, free and clear of all incumbrances done by him, and deliver up all deeds and writings in his custody, or power, relating thereto, upon oath, and in case of a corporation, the affidavit shall be made by the officer thereof, having the custody of such deeds and writings."

The words "or payment," within brackets in this *Rule*, appear to have slipped in by mistake.

Judgment creditor.

A judgment creditor is bound to assign his judgment to the party redeeming him : *Bank of British North America* v. *Moore*, 8 Gr. 461.

When incumbrancer and mortgagor redeem, who entitled to conveyance.

Where both the mortgagor, and a subsequent incumbrancer, pay the money due to the plaintiff into the bank, the subsequent incumbrancer has the right to a conveyance in preference to the mortgagor, and as between two incumbrancers, the one who is prior is entitled to the conveyance : see *Teevan* v. *Smith*, 20 Ch. D. 724.

Redemption by

Where there are other persons interested in the equity of redemp-

one of several interested in equity of redemption.

tion, besides the person redeeming, the mortgagee should convey to the party redeeming, subject to the equities of such other persons: *Pearce* v. *Morris*, 5 L. R. Chy. 227; and see further as to form of conveyance; *Hartley* v. *Burton*, 3 L. R. Chy. 365.

Reconveyance.

A mortgagor redeeming is entitled to a reconveyance, or vesting order, and is not obliged to accept a certificate of discharge of the mortgage: *Ellis* v. *Ellis*, 1 Chy. Ch. R. 257.

Redemption money how paid out of bank.

In order to get the money out of the bank, it is necessary to produce to the officer required to sign the cheque, the consent of the party paying it in, duly verified, or that of his solicitor, if any. If this consent cannot be procured, an order must be obtained in Chambers, on notice to such party, and the costs of such motion will not be ordered to be paid by the latter: *Bernard* v. *Alley*, 2 Chy. Ch. R. 91: *Weeks* v. *Stourton*, 11 Jur. N. S. 278. The party paying in the money, is entitled to receive his conveyance, and deeds, before the money is paid out.

Lost mortgage, indemnity required,

Where the mortgagee has lost the mortgage deed, he is bound at his own expense to furnish the mortgagor, or any incumbrancer redeeming him, with proof of the loss, and with an indemnity against any demand of third persons: *McDonald* v. *Hime*, 15 Gr. 72.

In default of redemption final order may be granted in Chambers.

451. In default of payment being made according to the report, the plaintiff is to be entitled, on an *ex parte* application, to a final order of foreclosure against the party making default.

This *Order* is now in force in all the Divisions of the High Court.

Final order, when necessary.

By the terms of the *Order*, it is limited to cases of foreclosure; but it has always been the practice in cases where a sale is directed in default of redemption, in like manner to obtain a final order for sale, and see *Ord.* 453 *post.*

A final order is, generally speaking, necessary in all cases where a judgment directs anything to be done, upon the default of a party in doing a given act by a future day; the final order being the judicial determination that the default has in fact taken place.

Application for, to whom to be made.

Application for Final Order.—The application may be made to the Master in Chambers, or to any local officer having like jurisdiction.

Affidavit of non-dayment to be produced.

In order to obtain a final order for default of redemption in a mortgage suit, it is necessary to produce an office copy of the judgment, an office copy of the report, if any, the affidavit of the party to be redeemed of non-payment, and non receipt of rents, and negativing his being in possession: *Scott* v. *McDonnell*, 1 Chy. Ch. R. 193;

Burford v. *Lymburner*, *Ib.* 275; *Prees* v. *Coke*, 6 L. R. Chy. 645; or in case any sum has been paid since the account was taken, and before the day appointed for redemption, showing that notice has been given pursuant to *Ord.* 457, *post*; or in case the party is in possession showing no receipts, beyond those for which credit has been given in the account. For forms of affidavits, see Leggo's Forms, 2nd ed., No. 684-686.

Certificate of bank officer.

There must also be produced a certificate of the cashier, or other like officer: *Campbell* v. *Garrett*, 1 Chy. Ch. R. 255, of the Bank, where the money is appointed to be paid, of non-payment of the money, before, on, or since, the day appointed for payment: *Farrell* v. *Stokes*, 1 Chy. Ch. R. 201: duly verified by affidavit.

Affidavit of non-payment, by whom to be made.

Affidavit of Non-payment.—Where there are several parties entitled to the money directed to be paid, the affidavit of non-payment should be made by all: *Annis* v. *Wilson*, 1 Chy. Ch. R. 217; but where one of the parties is out of the jurisdiction, his affidavit may be dispensed with: *Lyman* v. *Kirkpatrick*, 2 Gr. 625; *Counter* v. *Wylde*, 1 Gr. 538; and where a sole plaintiff resides out of the jurisdiction, the affidavit of his agent will be accepted, and in such case the affidavit should show where the custody of the mortgage has been: *Rae* v. *Shaw*, 1 Chy. Ch. R. 209; and where, in such a case, the affidavit is made by the solicitor of the plaintiff, it should show that the plaintiff has no other agent within the jurisdiction; authorised to receive the money: *Taylor* v. *Cuthbert*, 1 Chy. Ch. R. 240; but see *Moody* v. *Tyrrell*, 6 P. R. 313. An agent should state that he is authorized to receive the money: *Powers* v. *Merriman*, 1 Chy. Ch. R. 225; but it is not, however, necessary to produce the agent's authority: *Radclyffe* v. *Duffy*, 1 Chy. Ch. R. 302; and where the party to receive the money is a corporation aggregate, the affidavit of an officer of the company, must show that he is the proper officer to receive the mortgage money: *Western Assurance Co.* v. *Capreol*, 1 Chy. Ch. R. 227.

To be made after day for payment

The affidavit of non-payment must be made after the day appointed for redemption: *Blong* v. *Kennedy*, 2 Ch. Ch. R. 453.

Notice of motion when necessary.

When Notice Necessary.—The motion for a final order is usually *ex parte*, *Henderson* v. *Cowan*, 1 Chy. Ch. R. 297. But where two years had elapsed since the default, before the motion was made, notice was required to be served: *Kirkchoffer* v. *Stafford*, 2 Chy. Ch. R. 52; *Ardagh* v. *Orchard*, 2 C. L. J. N. S. 303; and where it appeared by the report, that the defendant had not received notice of the proceedings in the Master's office, in a case in which he was entitled to notice, notice of the motion, was required to be served: *McCormick* v. *McCormick*, 6 P. R. 208; and where the

account has been changed even *after* the day appointed for redemption, notice should be served: *Portman* v. *Smith*, 2 C. L. J. N. S. 167.

Final order refused, where account changed before day fixed for redemption.

On what Grounds Final Order Refused.—The order may be refused where the account is changed by the receipt of money before the day fixed for redemption: *Prees* v. *Coke*, 6 L. R. Chy. 645 *Garlick* v. *Jackson*, 4 Beav. 154.

Where the mortgagee is in occupation, or receipt of rents, he should be charged with rents up to the day fixed for redemption, or a new account must be taken, and a new day appointed for payment: *Pipe* v. *Shafer*, 1 Chy. Ch. R. 251; and it was held that this must be done even where the plaintiff swore he was in occupation merely as a caretaker: *Cummer* v. *Tomlinson*, 1 Chy. Ch. R. 235; but see *ante*, *Ord.* 448, note.

Not when changed afterwards.

But the plaintiff's going into possession and receiving rents, *after* the day appointed for payment, does not affect his right to a final order: *Portman* v. *Smith*, 2 C. L. J. N. S. 167; *Greenshields* v. *Blackwood*, 1 Chy. Ch. R. 60; *Constable* v. *Howick*, 5 Jur. N. S 331.

Refused, where bank closed, or *dies non* appointed for payment.

Where before the day appointed for payment, the office of the bank, at which the money is made payable, is closed, a new day must be appointed: *King* v. *Connor*, 1 Chy. Ch. R. 274. So where a Sunday was appointed for payment, the final order was refused: *Holcumb* v. *Leach*, 3 Gr. 449.

Or judgment erroneous.

Where it appeared that the decree was erroneous, a final order was refused: *Commercial Bank* v. *Graham*, 4 Gr. 419; and see *Mitchell* v. *Strathy*, 28 Gr. 80.

Death of mortgagee before day of payment, effect of.

Where a sole mortgagee, or one of several joint mortgagees, dies before the day appointed for payment, unless the judgment provides in the latter case for payment to the survivors, a new account must be taken, and a new day appointed: *Blackburn* v. *Caine*, 22 Beav. 614; *Kingsford* v. *Poile*, 8 W. R. 110.

Crown cannot be foreclosed.

Where the Crown is entitled to the equity of redemption, a final order of foreclosure cannot be obtained, but merely an order authorizing the mortgagee to take possession until the Crown may see fit to redeem; *Dunn* v. *Attorney-General*, 10 Gr. 482, or the security be satisfied: *Hodge* v. *Attorney-General*, 3 Y. & C. 342: Seton, 1044.

Effect of final order. A bar to right of redemption.

Effect of Final Order.—The final order of foreclosure, so long as it remains in force, is an absolute bar to the parties foreclosed from claiming the right to redeem. But it is no bar to the mortgagee, as long as he is in a position to restore the mortgaged property, from seeking to enforce payment of the mortgage debt: *Lockhart* v. *Hardy*, 9 Beav, 349; *Munsen* v. *Hauss*, 22 Gr. 279. But if, after

a final order of foreclosure, he takes proceedings to enforce payment of the debt, that *ipso facto* operates as an opening of the foreclosure, and entitles the mortgagor to bring an action to redeem, *Ib.*

Unless mortgagee enforce payment of mortgage debt.

Opening of Foreclosure at the Instance of the Mortgagor.—Even after a final order has been obtained, the mortgagor may apply to set aside the order, and to be let in to redeem; and this relief was granted even as against a purchaser from the mortgagee after the final order of foreclosure: *Campbell* v. *Holyland*, 7 Ch. D. 166; 26 W. R. 160; *Johnston* v. *Johnston*, 9 P. R. 259; but it has been said that this relief can only be granted where the final order has been obtained by actual, positive fraud, or under circumstances of oppression: *Patch* v. *Ward*, 3 L. R. Chy. 203, 212; and in *Trinity College* v. *Hill*, 2 O. R. 348; 18 C. L. J. 387, the relief was refused as against a purchaser from the mortgagee after the final order, there being no such circumstances. When the rights of third parties do not intervene, and the plaintiff can be replaced in the same position he occupied before the default, and recompensed for any damages he may have suffered, and there is a reasonable prospect of payment shewn, the foreclosure may be opened and the time for payment extended: *Waddell* v. *McColl*, 2 Chy. Ch. R. 62; but some reasonable excuse must be shewn for not redeeming at the time appointed, and the fact that the property is of much greater value than the amount due should be established: *Johnson* v. *Ashbridge*, 2 Chy. Ch. R. 251. The fact that the property has increased in value, is not alone a sufficient ground for opening the foreclosure: *Miles* v. *Cameron*, 19 C. L. J. 235; 3 C. L. T. 361. In *Platt* v. *Ashbridge*, 12 Gr. 105, the foreclosure was opened after the lapse of eighteen months, the mortgagor being illiterate, and having no solicitor, and not understanding the proceedings, and the property appearing to be worth three times the amount of the incumbrance. Where, after a final order of foreclosure against subsequent incumbrancers, the mortgagor redeems that has the effect of opening the foreclosure as against the subsequent incumbrancers: *Read* v. *Smith*, 14 Gr. 250; *S. C.* 16 Gr. 52; *Box* v. *Bridgman*, 6 P. R. 234; *Otter* v. *Lord Vaux*, 2 K. J. 650; 6 D. M. & G. 638. In *Hilliard* v. *Campbell*, 7 Gr. 96; a final order of foreclosure was set aside at the instance of a purchaser of the equity of redemption *pendente lite* but without notice of it, but in *Robson* v. *Argue*, 25 Gr. 407, such relief was refused.

Opening foreclosure at the instance of the mortgagor.

Not opened as against purchaser from mortgagee except where fraud shown.

When rights of third parties do not intervene, it may be opened.

Evidence required.

Mortgagor redeeming after *mesne* incumbrancers have been foreclosed.

Opens foreclosure as to them.

Purchaser of equity of redemption.

Terms on which Foreclosure Opened at the Instance of the Mortgagor.—The terms on which a foreclosure is opened are in the discretion of the Court. Where the security is not ample, the mortgagor may be required to pay the interest and costs by an early day, and six months may be allowed for payment of the principal. Fisher on Mortges. 3rd ed. 1053. But where the security is ample, the costs of the action, and of the application, may be ordered to be paid

Terms on which foreclosure opened.

forthwith, and the time extended for payment of the principal and interest, the defendant being charged with interest on the gross amount of principal and interest, for the period of the extension see *Holford* v. *Yate*, 1 K. & J. 677; *Whitfield* v. *Roberts*, 7 Jur. N. S. 1268; and see *Howard* v. *McCara*, 1 Chy. Ch. R. 27, and other cases cited in note to *Ord.* 448.

Opening foreclosure by mortgagee.

Opening of the Foreclosure by the Mortgagee.—So long as the mortgagee is in a position to restore the mortgaged property, he may, at any time, open the foreclosure by enforcing payment of the debt. But, if after he have obtained a final order, he has parted with the mortgaged estate, or any part of it, so that he is not in a position to re-convey, he will be restrained from recovering the debt: *Lockhart* v. *Hardy*, 9 Beav. 349; *Gowland* v. *Garbutt*, 13 Gr. 583; *Burnham* v. *Galt*, 16 Gr. 417; (but see *Bald* v. *Thompson*, 16 Gr. 177;) but the making of a mortgage by the mortgagee on the mortgaged estate, will not prevent him from opening the foreclosure by suing for the mortgage debt, if at the time of his bringing the action, he has paid off the mortgage, and is in a position to re-convey: *Munsen* v. *Hauss*, 22 Gr. 279.

Cannot be opened by mortgagee if not in a position to re-convey.

Subsequent accounts to be taken by Master.

452. All subsequent accounts are, from time to time, to be taken, subsequent costs taxed, and necessary proceedings had, for redemption by, or foreclosure of, the other party or parties entitled to redeem the mortgaged premises, as if specific directions for all these purposes had been contained in the decree.

This *Order* is in force in all the Divisions of the High Court.

Mortgagor paying off incumbrance, cannot keep it alive as against an incumbrancer whom he is bound to indemnify against it.

If the mortgagor, or owner of the equity of redemption, or any incumbrancer, redeems any prior charge which was his own debt, or which, by contract, express or implied, he was bound to discharge, he cannot keep such charge alive as against a *mesne* incumbrancer, whose incumbrance he is also expressly, or impliedly, bound to discharge: *Blake* v. *Beaty*, 5 Gr. 359.

Insurance allowed in subsequent account.

In taking the subsequent, account the Master may allow a sum paid for insurance since the last account, under a provision in the mortgage: *Bethune* v. *Calcutt*, 3 Gr. 648.

Interest on taking subsequent account, how allowed.

In England, it is the practice on taking the subsequent account, to allow interest on the gross amount of principal, interest, and costs, found due by the last report: *Elton* v. *Curteis*, 19 Ch. D. 49; 45 L. T. N. S. 435; and see *Jacob* v. *Earl of Suffolk*, Mos. 27; but in Ontario, it has not been customary to allow interest upon interest in respect of an incumbrancer's own proper debt, unless the mort-

gage expressly provides therefor. But where a subsequent incumbrancer pays off a prior incumbrance, he is entitled to interest on the aggregate amount paid by him for principal, interest, and costs; the interest on the principal being computed at the rate reserved in his own security, but on the interest, and costs, at six per cent only: *McMaster* v. *Hector*, 8 C. L. J. N. S. 284.

Sale,—proceedings on

453. If the decree directs a sale instead of foreclosure on default in payment, then on default being made, and an order for sale obtained, the premises are to be sold, with the approbation of the Master, and he is to settle the conveyance to the purchaser in case the parties differ about the same; and the purchaser is to pay his purchase money into Court, to the credit of the cause, subject to the further order of the Court.

This *Order* is in force in all the Divisions of the High Court. Its provisions are extended however by *Rules S. C.* 331 and 337.

Master may, under *Rule S. C.* 331, sell by tender, or private contract, fix reserved bid, or upset price.

By *Rule S. C.* 331, where a sale is ordered, the Master may cause the property, or a competent part thereof, to be sold, either by public auction, private contract, or tender; or part by one mode, and part by another, as he may think best for the interest of all parties; and he may fix an upset price, or reserved bidding, but such price, or bidding, must be so fixed at the meeting held by him for the purpose of settling the advertisement, and making the other arrangements preparatory to the sale, and must be notified in the conditions of sale. The Master is to settle all necessary conveyances for the purpose of carrying out the sale, in case the parties differ; or in case there shall be any persons under any disability (other than coverture) interested in such sale.

Settle all conveyances.

Before a sale can take place, a final order must be obtained. See *Ord.* 451 *ante* note.

Whole should not be sold where part sufficient.

It is the Master's duty not to sell the whole, when it is clear that a sale of part would suffice for the payment of the incumbrances. When the mortgagor thinks more land is offered for sale than is necessary, he should object at the settlement of the advertisement. It is too late to take the objection after the sale: *Beaty* v. *Radenhurst*, 3 Chy. Ch. R. 344.

Purchase money, application of.

454. The purchase money, when so paid in, is to be applied in payment of what has been found due to the plaintiff and the other incumbrancer or incumbrancers

(if any), according to their priorities, together with subsequent interest, and subsequent costs, when computed and taxed by the Master.

This *Order* is in force in all the Divisions of the High Court.

Even after a sale, a dowress was allowed to come in and prove her claim : *Hyde* v. *Barton*, 8 P. R. 205.

Residue of purchase money, how disposed of.

This *Order* makes no provision for the disposition of the residue, after payment of the claims of the plaintiff, and other incumbrances. A motion may be made by the mortgagor, before a Judge in Chambers, for payment of the residue. Since 11th March, 1879, a wife barring dower in a mortgage, does so only for the purpose of the mortgage, and is consequently dowable out of any surplus after satisfying the mortgage debt. It will therefore be necessary whenever this right exists, that the wife should be notified, and provision made for her protection, in any order directing payment out of the surplus : 42 Vict. c. 22 (O) ; *Martindale* v. *Clarkson*, 6 App. R. 1.

Order for payment of deficiency may be obtained, when.

455. In the event of the purchase money being insufficient to pay what has been found due to the plaintiff for principal, interest, and costs, subsequent interest and subsequent costs, the plaintiff is to be entitled (where the mortgagor is a defendant, and such relief is prayed by the bill,) to an order *ex parte* for the payment of the deficiency.

This *Order* is now in force in all the Divisions of the High Court.

Judgment on covenant may be granted on *præcipe*.

Where a personal order for payment is claimed by indorsement on the writ, that relief may now be awarded by the judgment in the first instance, without waiting for the ascertainment of the deficiency : see *Rules, S. C.*, Forms Nos. 168, 169.

If, after foreclosure, judgment on covenant enforced, foreclosure opened.

Where the judgment is for foreclosure, accompanied by a personal remedy for payment of the mortgage debt, if the mortgagee, after obtaining a final order for foreclosure, enforce the judgment for payment, by issuing execution, or otherwise, he thereby opens the foreclosure. If he have, in such a case, parted with the mortgaged property after obtaining the final order, any further proceedings to enforce the payment of the debt will be restrained on motion : e *ante*, *Ord.* 451, note.

Order for payment of defi-

The order for payment of deficiency can only be granted where there is a personal liability to pay. Where there is no contract to

pay the debt between the plaintiff and defendant, or no privity between them, the order will not be granted, even though the defendant have agreed with some third party who is liable to the plaintiff, to assume and pay the mortgage debt : *Christie* v. *Dowker*, 10 Gr. 199; 10 U. C. L. J. 161; *Clarkson* v. *Scott*, 25 Gr. 373; *Norris* v. *Meadows*, 28 Gr. 334; and other cases cited in note to *Ord.* 426. In the absence of an express covenant in the mortgage, the law will imply a contract to repay : *Sutton* v. *Sutton*, 48. L. T. N. S. 95; but there must be evidence of a debt, or loan : *Hall* v. *Morley*, 8 U. C. Q. B. 584; *Pearman* v. *Hyland*, 22 U. C. Q. B. 202 : *Jackson* v. *Yeomans*, 19 C. P. 394; *Jackson* v. *Yeomans*, 28 U. C. Q. B. 307; *S. C.* 39 U. C. Q. B. 280.

Deficiency, only granted when there is a personal liability.

456. An incumbrancer made a party in the Master's office, and entitled to, and desiring a sale of the mortgaged premises, is to make the necessary deposit therefor before the Master's report is settled, whereupon the Registrar is to issue an order on *præcipe* directing a sale of the mortgaged premises instead of a foreclosure, and thereupon the Master is to compute subsequent interest, and appoint a time and place, or times and places, for payment; and all subsequent proceedings are to be taken and had as if the decree had been in the first instance a decree for sale.

Incumbrancer made a party to a foreclosure suit, in the M.O., may apply for a sale.

This *Order* is now in force in all the Divisions of the High Court.

The powers conferred by this *Order* were not extended under the former practice to the Deputy Registrars; and there appears to be nothing in the *Rules S. C.* to extend the powers hereby conferred to Local Registrars, Deputy Registrars, or Deputy Clerks of the Crown. All applications under this *Order* therefore should be made to the Registrar of the Division in which the action is pending.

Powers conferred by Ord. 456 not extended to local officers.

The *præcipe* should show on whose behalf the application is made, and should also state that the applicant, is an incumbrancer, made a party in the Master's office, who has proved a claim; and that the Master's report has not been settled; and should be accompanied by the certificate of the Accountant of the payment into Court of the requisite deposit of $80.

Præcipe for order for sale in lieu of foreclosure, form of.

An application, after the sale has taken place, to increase the amount of the deposit is too late: *London & Canadian Loan & Agency Co.* v. *Pulford*, 7 P. R. 432. Such an application should be made before the order for sale has been acted on: *London & Canadian Loan & Agency Co.* v. *Morrison*, 7 P. R. 450.

Application to increase deposit.

Plaintiff may require defendant to conduct sale.

If the plaintiff deem the deposit inadequate he may require the incumbrancer obtaining the order for sale, to conduct the sale: see *Ord.* 430.

Deposit, how applied.

Where the sale realises sufficient to pay the plaintiff's claim, but not the claims of subsequent incumbrancers, the deposit will be ordered to be applied on account of the claims of the latter, according to their priorities: *Gzowski* v. *Beaty*, 8 P. R. 146. And where the sale proved abortive, except as to one parcel, which did not realise sufficient to pay the plaintiff's claim, the deposit was applied on account of plaintiff's costs of sale: *Corsellis* v. *Patman*, 4 L. R. Eq. 156.

In action by equitable mortgagee by deposit, sale may be had by a defendant under Ord. 456.

Although a mortgagee by deposit is not entitled to a sale: see *Ord.* 426, note; yet a subsequent legal mortgagee made a party to the suit by the equitable mortgagee, is entitled to apply for a sale under this *Order*: *Kerr* v. *Beebe*, 12 Gr. 204.

Where account changed after order, or, report, notice of credit may be given.

457. Where the state of the account ascertained by an order, or by the report of the Master, is changed by payment of money, by receipt of rents and profits, by occupation rent, or otherwise, before the final order for foreclosure or sale is obtained, the plaintiff, or other party to whom the mortgage money is payable, may give notice to the party by whom the same is payable, that he gives him credit for a sum certain, to be named in the notice, and that he claims that there remains due in respect of such mortgage money a sum certain, to be also named in the notice. (29th June, 1861.)

This *Order* is in force in all the Divisions of the High Court.

Notice of credit must be served before day of payment.

The notice of credit must be given before the day for payment arrives: *Knottinger* v. *Barber*, 1 Chy. Ch. R. 258. Notice of credit for payments, or rents, which have been received after the day fixed for redemption, need not be given: see *Ord.* 451 note. Such payments do not affect the plaintiff's right to a final order, unless indeed they amount to a total extinguishment of the debt.

When notice has been duly given under this *Order*, the final order may be obtained notwithstanding the alteration in the state of the account, without appointing any new day.

Final order may be granted

458. Upon the final order for foreclosure or sale being applied for, if the Judge thinks the sums named in such

notice proper to be allowed and paid under the circumstances, the order for final foreclosure is to go without further notice, unless the Judge directs notice to be given. (29th June, 1861.)

This *Order* is in force in all the Divisions of the High Court: See notes to *Ord.* 451. In practice the *Order* has been construed as authorizing a final order for sale, or foreclosure, according as the decree, or judgment, might be for sale, or foreclosure.

Party receiving sums after report, &c, may apply for reference.

459. The party to whom the mortgage money is payable, may apply in Chambers for a reference to a Master, or for an appointment, to fix such sums respectively; and in the latter case either upon notice, or *ex parte*, as the Judge thinks fit; and the order to be made thereupon is to be served, or service thereof dispensed with, as the Judge directs. (29th June, 1861.)

This *Order* is in force in all the Divisions of the High Court: See notes to *Ord.* 451.

Party served with notice of credit, may apply for reference, &c.

460. The party to whom such notice is given may apply in Chambers for an appointment to ascertain and fix the amounts proper to be allowed and paid, instead of the amounts mentioned in such notice; or for a reference to a Master for the like purpose; and in case the Judge thinks a reference to a Master proper, the same may be made *ex parte* unless the Judge otherwise directs. (29th June, 1861.)

This *Order* is in force in all the Divisions of the High Court: See notes to *Ord.* 451.

Action of foreclosure, or sale, brought for default in payment of instalment of principal, or interest may be dismissed on payment of arrears and costs.

461. Where a suit has been instituted for the foreclosure or sale of the equity of redemption in any mortgaged property, for default in the payment of interest, or of an instalment of the principal, defendant may move to dismiss the bill upon paying into Court the amount then due for principal, interest, and costs. (3rd June, 1853; Ord. 32, s. 5.)

The *Order* is now in effect in force in all the Divisions of the High Court, but the motion must of course now be to dismiss the action, not "the bill."

Order 461 applies, to actions for redemption.

The *Order* in terms is confined to actions for foreclosure, or sale, but it has been held that a mortgagor bringing an action for redemption, is within the equity of this *Order*: *Moore* v. *Merritt*, 6 Gr. 550; *Dornyn* v. *Fralick*, 21 Gr. 194; but see *contra*, *Tylee* v. *Hinton*, 3 App. R. 53; but a plaintiff claiming the benefit of this *Order* is not entitled to six months for payment of the instalment in default: *Dornyn* v. *Fralick*, *supra*.

Mortgagee bringing action cannot claim 6 months' notice, or 6 months' interest

A mortgagee bringing an action for sale, or foreclosure, cannot insist on getting six months' notice of payment, or in default thereof, six months' interest: *Letts* v. *Hutchins*, 13 L. R. Eq. 176.

In default of payment of instalment, whole amount secured becomes due

Upon default in payment of any instalment of principal, or interest, the mortgagee has a right, without any express stipulation to that effect, to call in the whole amount secured by the mortgage: *Cameron* v. *McRae* 3 Gr. 311: but this right may be qualified by the express stipulation of the parties, as, for instance, where there was an express proviso that in default of payment of any instalment of interest for six months, the whole principal money should become payable, it was held that a suit for foreclosure would not lie until the lapse of the six months: *Parker* v. *The Vine Growers' Association*, 23 Gr. 179. Where there was a proviso accelerating payment of principal and interest in the event of the mortgagor mortgaging, or otherwise incumbering, the property, or suffering it to become liable to sale for taxes, it was held that a voluntary assignment in insolvency was not within the proviso: *McKay* v *McFarlane*, 19 Gr. 345. Under a clause accelerating payment of mortgage money in the event of default, a mortgagee who neglects to call in the mortgage money pursuant to the proviso, cannot in a redemption suit treat the sums, of which the payment is accelerated as overdue, and claim interest thereon: *McLaren* v. *Miller*, 20 Gr. 637.

Exception to rule.

Proviso accelerating payment, how construed.

How far Court can relieve against express proviso for accelerating payment in event of default, *quære?*

It was held by Spragge, C., that even though there be an express stipulation in the mortgage, that in default of payment of any instalment the whole mortgage money shall become payable, that the mortgagor may, nevertheless, after default, claim the benefit of this *Order*: *Gemmell* v. *Burn*, 7 P. R. 381; and see *Knapp* v. *Cameron*, 6 Gr. 559; but in *Tylee* v. *Hinton*, 3 App. R. 53, Moss, C. J. A., expressed a doubt whether the Court had any power to relieve against such a stipulation, either under this *Order*, or under its inherent jurisdiction to relieve against penalties, and forfeitures; and see *General Credit & Discount Company* v. *Glegg*, 48 L. T. N. S. 182. It cannot, therefore, be said to be clear that the *Order* applies to cases where there is an express proviso accelerating the payment of the mortgage debt in the event of default.

Where a defendant moves to stay proceedings under this *Order*, he may obtain the stay, on payment of the interest calculated up to the last gale day, and is not obliged to pay it, up to the time of making the application: *Strachan* v. *Murney*, 6 Gr. 378; but, if the defendant desires to pay off the whole amount of the mortgage debt, the mortgagee cannot refuse to accept it: *Cruso* v. *Bond*, 9 P. R. 111; 1 O. R. 384, (overruling *Green* v. *Adams*, 2 Chy. Ch. R. 134.) Although in a redemption suit he might not be bound to accept more than the instalments in arrear.

Interest to be paid up to last gale day.

Mortgagee plaintiff cannot refuse to accept payment of whole debt. *Secus* defendant in redemption suit,

An application may be made after judgment has been obtained to stay proceedings on payment of the arrears: see next *Order*.

462. Where a suit has been instituted for the purpose and under the circumstances specified in the last Order, a defendant may move to stay the proceedings in the suit, after decree, but before sale or final foreclosure, upon paying into Court the amount then due for principal, interest, and costs. (3rd June. 1853; Ord. 32, s. 6.)

After decree in suit for foreclosure, or sale, proceedings may be stayed on payment of arrears, and costs

This *Order* is in force in all the Divisions of the High Court.

See notes to preceding *Order*.

After payment has been made, under this *Order*, of the instalments in arrear, it is irregular for the plaintiff to take any further proceedings in the action, until another instalment falls due: *Carroll* v. *Hopkins*, 4 Gr. 431; and see *post Ord.* 463.

Stay of proceedings under Ord. 461, effect of.

463. Where an application is made to stay the proceedings under Order 462, the decree may afterwards be enforced, by order of the Court, upon subsequent default in the payment of a further instalment of the principal, or of the interest. (3rd June, 1853; Ord. 32, s. 6.)

Where proceedings stayed under Ord. 462, on subsequent default decree may be enforced.

This *Order* is in force in all the Divisions of the High Court.

Where, after a decree of foreclosure, the proceedings were stayed under *Ord.* 462; on a subsequent default being made, the plaintiff applied to enforce the decree, and the defendant asking for a further stay on payment of the arrears, an order was made directing payment of the whole sum in six months, and in default foreclosure, with liberty to the defendant to pay the arrears forthwith, and in that event staying the proceedings, *Strachan* v. *Devlin*, 1 Chy. Ch. R. 8.

Where subsequent default made after stay, form of order.

Order for possession may be granted in foreclosure or redemption suit.

464. In a suit for foreclosure or for redemption, the mortgagor or other person entitled to the equity of redemption, being in possession of the premises foreclosed, may be ordered to deliver up possession of the same upon or after final order of foreclosure, or for the dismissal of the bill, as the case may be. (29th June, 1861.)

This *Order* is in force in all the Division of the High Court.

Order for possession may now be included in judgment.

The order for delivery of possession may now, if claimed by the writ, be included in a judgment of foreclosure, or sale, in the first instance: see *Imperial Loan & Investment Co.* v. *Boulton*, 22 Gr. 121; *Rules S. C.*, Forms, Nos. 168, 169; but where the relief has not been given by the judgment, it may still be obtained after the final order has been granted, upon application in Chambers, under this *Order*. The *Order* has always been construed as applying to mortgage cases, where a final order for sale has been granted, as well as to foreclosure suits.

Order may be granted where writ claims a sale.

Order for possession not granted under the *Order* in specific performance cases.

The *Order* has been held only to apply to mortgage cases, and not to actions for specific performance against a purchaser in possession, against whom a final order for rescission of the contract has been obtained: *Mavety* v. *Montgomery*, 1 Chy. Ch. R. 21: *Chisholm* v. *Allen*, 2 Chy. Ch. R. 411. Formerly the order could only be made against a party to the action, or persons who had acquired possession *pendente lite*, from a party to the action, and having no pretence to a paramount title: *Bank Upper Canada* v. *Wallace*, 13 Gr. 184; *McKenzie* v. *Wiggins*, 2 Chy. Ch. R. 391; *Scott* v. *Black*, 3 Chy. Ch. R. 323; *Trust & Loan Co.* v. *Start*, 6 P. R. 90. Such an order was not granted against a tenant of the mortgagor, though the tenancy were created after the mortgage: *Bank Montreal* v. *Ketchum*, 1 Chy. Ch. R. 117; nor even against the mortgagor if he were in as a trespasser: *Irving* v. *Munn*, 1 Chy. Ch. R. 240; but under *The Judicature Act*, it is probable that a more liberal construction may be placed upon the *Order*: see *Mason* v. *Seney*, 2 Chy. Ch. R. 30.

Order formerly granted only against parties, or purchaser *pendente lite*.

Not against tenant of mortgagor.

Order for possession, when it may be obtained.

The motion may be made on applying for a final order, or at any time afterwards. Notice must be given of the application, but a demand of possession need not be shown: *Hodkinson* v. *French*, 1 Chy. Ch. R. 201; *Buckley* v. *Ouillette*, 2 Chy. Ch. R. 439; and see *Walker* v. *Mathews*, 1 Chy. Ch. R. 232; but it must be shown that the mortgagor is in actual possession: *Hodkinson* v. *French*, 1 Chy. Ch. R. 223; and where a considerable time has elapsed since the final order was granted, it should be shown that the mortgagor has not since relinquished possession: *Irving* v. *Munn*, *Ib.* 240.

It should be shown that mortgagor is in possession.

The bringing of an action of ejectment is no bar to the application, but the applicant may be required to discontinue the ejectment, and pay the costs: *Moffatt* v. *White*, 1 Chy. Ch. R. 227. Ejectment action no bar to application.

On the motion, the Court will not, as a general rule, look behind the final order: *Mills* v. *Choate*, 2 Chy. Ch. R. 374. Final order conclusive on motion.

The plaintiff is entitled to the costs of the application: *Lazier* v. *Ranney*, 6 Gr. 323; but where they were not asked for by the notice of motion, nor on the argument, and no demand of possession was proved, the order was made without costs: *Mills* v. *Choate*, 2 Chy. Ch. R. 374. Costs of application.

On disobedience of the order for possession, a writ of possession may now issue: see *Ord.* 294, *ante*; and see *Rules S.C.* 341, 379–381. Order, how enforced.

The mortgagee may also obtain an order for the delivery of the title deeds, as against the mortgagor, or any one claiming under him subsequent to the foreclosure: *Stennett* v. *Aruyn*, 2 Chy. Ch. R. 218. Delivery of title deeds may be ordered.

Order 465, provided that where a mortgagee has proceeded at law upon his security, he shall not be entitled to his costs both at law and in equity, unless the Court sees fit to order otherwise. Ord. 465.

This *Order* is obviously now effete, but the principle of the *Order* would appear to be still in force.

466. In a redemption suit, if the plaintiff does not redeem the defendants, or such of them as he is ordered to redeem, the bill need not be dismissed; but where there are other defendants, in lieu of the bill being dismissed the plaintiff may be declared foreclosed, and directions may be given, either by the decree or by subsequent orders, as to the relative rights and liabilities of the defendants as amongst themselves; and such proceedings are in such case to be thereupon had, and with the same effect, as in a foreclosure suit. (6th Feb. 1865; Ord. 24.) In suit for redemption, where plaintiff fails to redeem, suit may be continued to foreclose subsequent incumbrancers.

The provisions of this *Order* seem to be virtually covered by *Rules S. C.* 333, 334, 335. *Rules S. C.* 333-5.

"In a redemption suit, in default of payment being made according to the report, the defendent is to be entitled on an *ex parte* application in Chambers, to a final order of foreclosure against the plaintiff, or to an order dismissing the bill [*sic.*] with costs to be paid by the plaintiff to the defendant forthwith after taxation thereof." *Rule S. C.* 333. On default in redemption action plaintiff foreclosed, or action dismissed.

Subsequent accounts to be taken in redemption action, where plaintiff is foreclosed.

"In a redemption suit where the plaintiff is declared foreclosed, directions may be given, either by the final order foreclosing the plaintiff, or by subsequent orders, that all necessary inquiries be made, accounts taken and proceedings had for redemption or foreclosure, or redemption or sale, as against any subsequent incumbrancers, or for the adjustment of the relative rights and liabilities of the original defendants as among themselves, and such order shall have the same force and effect as a judgment obtained at the suit of the original defendant." *Rule S. C.* 334.

"Where the order is for redemption or foreclosure, or redemption or sale, such proceedings are, in such case, to be thereupon had, and with the same effect as in a suit for foreclosure, or sale, and in such case the last incumbrancer is to be treated as the owner of the equity of redemption." *Rule S. C.* 335.

Dismissal of action for redemption operates as a foreclosure.

The dismissal of an action for redemption by a mortgagor usually operates as a foreclosure; and where a bill did not pray redemption, but a decree for redemption was granted, it would seem a subsequent dismissal operated as a foreclosure: *Cornwall* v. *Henriod*, 12 Gr. 338; but this is not the case where the mortgage is by deposit of title deeds, because in such a case a judgment of foreclosure would provide for the execution of a legal mortgage, but the mere dismissal of an action to redeem, cannot have that effect, though it may preclude the mortgagor from bringing another action to redeem: *Marshall* v. *Shrewsbury*, 10 L. R. Chy. 250.

Exception, when mortgage is by deposit of deeds.

On dismissal of action for redemption by a subsequent incumbrancer mortgagor may be ordered to redeem.

Where an action for redemption is brought by a second mortgagee and he is foreclosed, the mortgagor, as well as the first mortgagee, has a right to have a day appointed for the redemption of the first mortgage by the mortgagor: *McKinnon* v. *Anderson*, 18 Gr. 684.

XXXVI.—ADMINISTRATION SUITS.

Creditors, legatees, next of kin, heirs, or devisees, may apply on motion, in Chambers for administration.

467. Any person claiming to be a creditor, or a specific, pecuniary, or residuary legatee, or the next of kin, or one of the next of kin, or the heir, or a devisee interested under the will of a deceased person, may apply to the Court upon motion, without bill filed, or any other preliminary proceeding, for an order for the administration of the estate, real or personal, of such deceased person. (3rd June, 1853; Ord. 15, s. 1.)

Orders from 467 to 487, apply to all the Divisions of the High Court. *Rule S. C.* 3.

Applications for administration under Ord. 467

It was formerly considered that applications for administration by motion, under this *Order*, should be confined to simple cases, and

wherever misconduct was charged, a bill should be filed : *Re Babcock*, 8 Gr., at p. 410 ; *Eberts* v. *Eberts*, 25 Gr. 565 ; *Acaster* v. *Anderson*, 19 Beav. 161 ; *Rump* v. *Greenhill*, 20 Beav. 512 ; and it was considered that under an administration order obtained on motion against an executor, no inquiry could be made as to wilful neglect and default : *Harrison* v. *McGlashan*, 7 Gr. 531 ; although such an inquiry could be directed where the personal representative himself obtained the order : *Ledgerwood* v. *Ledgerwood* 7 Gr. 584. It is, however, now settled, that the enquiry as to wilful neglect and default, may be made in all cases under an administration judgment granted on motion : *Re Allen*, *Pocock* v. *Allen*, 9 P. R. 277 ; 18 C. 242 ; *Carpenter* v. *Wood*, 10 Gr. 354 ; *Sullivan* v. *Harty*, 19 C. L. J. 234 ; and it would seem that any breach of duty which is practically a matter of account, may be effectually inquired into, and dealt with, under a judgment obtained under this *Order*. Where, however, there is any question to be determined, before a judgment for administration can properly be pronounced, the action should be commenced by writ. Thus, where the construction of a will was necessary : *Heywood* v. *Sievwright*, 8 P. R. 79 ; and where the plaintiff claimed to be a creditor, and his claim appeared to be barred by the Statute of Limitations, but he claimed to avoid the operation of the Statute, on the ground of fraud on the part of the testator : *Re McDonald*, *Cameron* v. *McDonald*, 2 Chy. Ch. R. 29 ; it was held a bill must be filed ; and when a legatee claimed administration, and it appeared that an award had been made respecting the applicant's claim, but the applicant denied being party to the reference, it was also held a bill must be filed : *Nudel* v. *Elliott*, 1 Chy. Ch. R. 326 ; and see *Groom* v. *Darlington*, 9 P. R. 298 ; 18 C. L. J. 241.

formerly held proper in simple cases only.

Now settled that wilful neglect and default may be inquired into under judgment obtained under Ord. 467.

Where any question to be determined before administration can properly be granted, writ must issue.

Where the application is made on motion, in a case in which the Court is of opinion that a writ should be issued, an order is usually made giving the applicant a day to commence his action, in default, the motion to be dismissed ; but if the action be commenced, reserving the costs of the motion until the trial of the action : *Re McDonald, Cameron* v. *McDonald, supra*. But where the plaintiff commences an action, instead of applying on motion, where the latter course is proper, he will be disallowed the extra costs occasioned thereby : *Sovereign* v. *Sovereign*, 15 Gr. 559 ; or if it is not clear that the action was unnecessary, the question of the additional costs will be reserved until after the Master has made his report : *Eberts* v. *Eberts*, 25 Gr. 565.

Application made under Order 467 in a case in which writ should issue, or *vice versa*, order as to costs.

Applications under this *Order* are made in Chambers, *Ord.* 197 ; if, however, the motion is contested, the jurisdiction of the Master in Chambers is excluded, and the motion must be adjourned before a Judge in Chambers : see *Ord.* 560, ss. 8 ; *Rule S. C.* 420.

Jurisdiction of Master in Chambers ousted, if motion contested.

ocal Masters.

Applications by adults may be made for the like purpose to the Local Master having jurisdiction in the county where the deceased died: *Ord.* 638: *Rule S. C.* 3. A Local Master's jurisdiction is not ousted by the motion being opposed.

Fourteen days' notice of motion to be given.

Ord. 552 provides that, at least, fourteen days' notice of the motion must be given. This latter *Order* is not expressly kept in force by the *Rules S. C.*; but *Rule S. C.* 88, seems by implication to keep it in force as regulating the procedure for obtaining judgment for administration. Motions for administration seem, therefore, to constitute an exception to ordinary motions which only require two clear days' notice: *Rule S. C.* 407; and see *Exchange Bank* v. *Newell*, 19 C. L. J. 253. The words "at least" require that the fourteen days be clear days: see *Rumohr* v. *Marx*, 19 C. L. J. 10.

Parties.

Parties.—The provisions of *Ord.* 58, 59, 60, 61 apply to proceedings under this *Order*. All parties from whom an account is sought, should be served with notice: see *Ord.* 58 *r.* 1 note.

Applications for administration by creditors.

Creditors.—A creditor whose debt is payable, may make application for administration of his deceased debtor's estate, without waiting a year from his decease. To an application by a creditor for the administration of the personal estate, no one but the personal representative need be made a defendant: but where an administration of the realty is also sought, unless the personal representative is also interested in the realty,—some one must also be made a party who is interested in the realty: *Ord.* 472.

Personal representative must be served.

If more than one, all must be served.

Judgment not granted against executor *de son ort.*

Where there are several personal representatives all must be served, even though some be resident out of the jurisdiction: *Re Freeborn, Freeborn* v. *Carroll*, 6 P. R. 188; *Latch* v. *Latch*, 10 L. R. 464. The judgment for administration cannot be granted as against an executor *de son tort* where there is no legal personal representative before the Court: *Rowsell* v. *Morris*, 17 L. R. Eq. 20. Nor against an executor named in the will who has not proved the will: *Outram* v. *Wyckhoff*, 6 P. R. 150. See further as to parties *ante Ord.* 58 *r.* 1 note,

Evidence required on application. Proof of grant of probate, or administration.

On the motion, the applicant must be prepared with proof that the defendant is the personal representative: ordinarily, the letters of administration, or letters probate, should be produced: *Re Marshall, Fowler* v. *Marshall*, 1 Chy. Ch. R. 29; *Re Israel*, 2 Chy. Ch. R. 392. But, where the plaintiff swore that the defendant was administrator, and the fact was not disputed, production of the letters, was dispensed with: *Re Bell, Bell* v. *Bell*, 3 Chy. Ch. R. 397. It is sufficient if the letters of administration be granted at any time before the hearing of the motion, even though subsequent to giving the notice: *Edinburgh Life Assurance Company* v

Allen, 19 Gr. 593. Where the motion was refused on the ground that the personal representative was not a party, only the costs necessary to raise that objection were allowed: *Irwin* v. *Buck*, 6 P. R. 183. The creditor applying must also give, *prima facie* evidence of his claim as creditor: *Re Clarke*, 2 Chy. Ch. R. 57; and where his claim is disputed, he must establish his claim by proper evidence—his own uncorroborated evidence, is insufficient; *Vivian* v. *Westbrooke*, 19 Gr. 461; see *R. S. O.* c. 62, s. 10: and as to nature of corroboration required see *Stoddart* v. *Stoddart*, 39 U. C. Q. B. 203; *Sugden* v. *Lord St. Leonards*, 1 L. R. P. D. 154, 179; *McDonald* v. *McKinnon*, 26 Gr. 12; *McKay* v. *McKay*, 31 C. P. 1; *Adamson* v. *Adamson*, 28 Gr. 228; *Brown* v. *Capron*, 24 Gr. 91; *Halleran* v. *Moon*, 28 Gr. 319; *Re Laws, Laws* v. *Laws, Ib.*, 382; *Re Robbins*, 23 Gr. 162; *Re Ross*, 29 Gr. 385; 18 C. L. J. 11: *Parker* v. *Parker* 32 C. P. 113; *Watson* v. *Severn*, 6 App. R. 559; *Watson* v. *Bradshaw, Ib.*, 666; *Cook* v. *Grant*. 32 C. P. 511; *Re Murray*, 29 Gr. 443.

Proof of applicants' claim.

Corroboration must be given if contested.

The creditor must be a creditor of the deceased person whose estate is sought to be administered. Where the applicant was merely a creditor of the personal representative for advances made to him as such, the application was refused: *Campbell* v. *Bell*, 16 Gr. 115, *Farhall* v. *Farhall*, 7 L. R. Chy. 123; *Re Pettee, McKinley* v. *Beadle*, 6 P. R. 157; *Owen* v, *Delamere*, 15 L. R. Eq. 134; *Ewart* v. *Steven*, 18 Gr. 35; Seton, 916; and see *Henry* v. *Sharp*, 18 Gr. 16. Creditors, whose debts are incurred by the executor, in carrying on a business of his testator, are entitled to indemnity out of the deceased's estate to the extent, if any, which the executor is entitled: *Re Johnson, Shearman* v. *Robinson*, 15 Ch. D. 548; 43 L. T. N. S. 372; and a plaintiff, who had made advances to pay the debts of a deceased person, to save the estate the costs of suits to recover them, was held entitled to administration: *Glass* v. *Munsen*, 12 Gr. 77; see also, *Mills* v. *Cottle*, 17 Gr. 335; *Strickland* v. *Symons*, 48 L. T. N. S. 188; which were cases of advances to trustees.

Applicant must be creditor of the deceased, and not merely of his personal representative.

Creditor of personal representative, when entitled to resort to estate for payment.

A judgment for administration, is equivalent to a judgment in favour of all the creditors of the estate, but creditors who are not parties to the action, can only claim the benefit of it from its date, as to the claims of the latter, the running of the Statute of Limitations is not stopped, until the judgment is obtained: *Re Greaves, Bray* v. *Tofield*, 18 Ch. D. 551; 45 L. T. N. S. 404; *Manby* v. *Manby*, 3 Ch. D. 101: but see *Crooks* v. *Crooks*, 4 Gr. at p. 619.

Effect of judgment for administration as to claims of other creditors.

The personal representative is not bound to set up the Statute of Limitations as a bar to a creditor's claim: *Lewis* v. *Rumney*, 4 L. R. Eq. 451; and if the personal representative, and such of the parties beneficially interested, as are parties to the suit, or who have

Statute of Limitations need not be set up by personal representatives.

come in under the judgment, do not set up the Statute, the Court is not bound on behalf of absent parties beneficially interested, to disallow claims against the estate which are barred by the Statute: *Alston* v. *Trollope*, 2 L. R. Eq. 205. An order for the administration of the estate of the owner of the equity of redemption, does not stop the running of the Statute in favour of the mortgagee in possession: *Crooks* v. *Watkins*, 8 Gr. 340. Where a cause of action accrues in the lifetime of the creditor the Statute begins to run against him, and continues to run against his estate, notwithstanding there is no executor, or administrator; but where the cause of action does not accrue until after his death, then the time does not begin to run until there is a personal representative: *Grant* v. *McDonald*, 8 Gr. 468; *Stevenson* v. *Hodder*, 15 Gr. 570. A claim cannot be kept alive by any acknowledgement or payment by an executor *de son tort*, *Ib.*, *Boatwright* v. *Boatwright*, 17 L. R. Eq. 71.

Where right of action accrues in lifetime of debtor statute runs, though no personal representative appointed: *Secus.* if it did not accrue until after his death.

Proceedings may be stayed, on application of any person interested in estate.

Proceedings by a creditor may be stayed on the application of any person interested in the estate, on payment of his claim and costs: *Fitten* v. *Dawson*, 3 Chy. Ch. R. 461; *Re Henderson*, 26 Gr. 297; 15 C. L. J. 132.

Applications for administration by legatees, or next of kin, cannot be made until lapse of a year from death.

Legatees, Next of Kin, &c.—Applications by legatees, or next of kin, for administration, cannot be made until the lapse of a year from the death of the deceased: 33 Geo. III.. c. 8 (Imp.) *Slater* v. *Slater*, 3 Chy. Ch. R. 1; *Vivian* v. *Westbrooke*, 19 Gr. 461. When the action is brought unnecessarily, the legatee may be ordered to pay the costs of all parties: *Re Woodhall*, *Garbutt* v. *Hewson*, 20 R. 456. Wherever a legatee, if alive, may apply, his personal representative, in case of his death, can also apply: *Simpson* v. *Horne*, 28 Gr. 1: As to parties to applications by legatees: see *Ord.* 58 note.

Personal representatives of deceased legatee may apply.

An application for administration by an infant, by his next friend, was granted on the mere suggestion that it would be for his benefit: *Re Wilson*, *Lloyd* v. *Tichborne*, 9 P. R. 89. But where it turned out that a suit had been brought unnecessarily by an infant, his next friend was ordered to pay the costs of it: *Hutchinson* v. *Sargent*, 17 Gr. 8; *McAndrew* v. *Laflamme*, 19 Gr. 193; *Moodie* v. *Leslie*, 12 Gr. 537; and see *Re Johnston*, *Johnston* v. *Hogg*, 25 Gr. 261; *Carroll* v. *Carroll*, 23 Gr. 438.

Legatee ordered to pay costs of unnecessary suit.

Application for administration should not be made on behalf of infants, merely to get maintenance.

An administration suit should not be instituted on behalf of infants, where the object is simply to obtain an allowance for their maintenance out of the estate, which can be as readily got by application under *Ord.* 527 *et seq.*; *Fenwick* v. *Fenwick*, 20 Gr. 381; *Goodfellow* v. *Rannie*, *Ib.*, 425.

Form of notice of motion for administration.

468. The notice of motion is to be in the form or to the effect set forth in schedule U hereunder written,

and must be served upon the executor or administrator. (3rd June, 1853; Ord. 15, s. 1.)

Where the motion is to be made before the Master in Chambers, the notice should be varied to the effect prescribed by *Ord.* 561; *e. g.*, "Take notice that an application will be made to the Master in Chambers on &c.; or, if opposed, then to a Judge in Chambers, as soon thereafter as a Judge shall be sitting in Chambers in the —Division, &c."

Guardian *ad litem* to infant defendants, how to be appointed.

Where infants are intended to be served with notice of the motion, a guardian *ad litem* must be appointed to them. The procedure provided by *Rule S. C.* 36, for the appointment of guardians *ad litem* to infant defendants, made parties by writ, does not appear to extend to applications for administration under these *Orders*. The appointment of a guardian *ad litem* for this purpose, should be made by order obtained on *præcipe* under *Ord.* 610, *post*.

Heir or devisee when to be served.

Where the administration of the realty is sought, notice must be given to the heirs, or devisees, or one or more of them: *Ord.* 472.

Legatees, and next of kin need not be served.

Next of kin, and legatees, need not be served with notice of the motion, but they must be served with an office copy of the judgment, as prescribed by *Ord.* 60 *ante*: See note to that *Order*.

Upon proof of service of notice, or on appearance of personal representative, &c., order for administration may be granted.

469. Upon proof by affidavit of the due service of the notice of motion, or on the appearance in person, or by his solicitor or counsel, of the executor or administrator, and upon proof by affidavit of such other matter, if any, as the Court requires, the Court may make the usual order for the administration of the estate of the deceased, with such variations, if any, as the circumstances of the case require; and the order so made is to have the force and effect of a decree to the like effect made on the hearing of a cause between the same parties. (3rd June, 1853; Ord. 15, s. 1.)

Affidavit in support of application to be filed.

The affidavit on which the application is founded should be filed with the proper officer, before the notice of motion is served.

Evidence in support, how obtained.

The affidavits should establish the facts and circumstances necessary to entitle the applicant to the administration. As to obtaining oral evidence in support of the motion: see *Ord.* 266, *ante*; see further as to the evidence required, *Ord.* 467 note. A commission may be issued after notice of motion served, for the purpose of obtaining evidence in support of the motion: *Farrell* v. *Cruikshank*, 1 Chy. Ch. R. 12.

Order for administration entered as a judgment.

The order for administration is now in effect a judgment, and is so entered, as required in the case of other judgments ; see *Rule S. C.* 325. But in *McHenry* v. *Lewis*, 47 L. T. N. S. 549, an interlocutory order for an account without any declaration of right was held not to be a judgment. But that case it is apprehended does not conflict with the practice as above stated ; because an order for administration can only be properly granted after an adjudication on the question of the applicant's right to the account claimed. Where any preliminary question has to be determined, as has been already pointed out, the Court will generally require an action to be brought ; see *ante Ord.* 467, note.

Distribution of estate after advertisement—an answer to application.

Where the personal representative has distributed the estate, after duly advertising under *R. S. O.* c. 107, s. 34, that is an answer to the application ; see *Ord.* 58, r. 1 note.

Application refused when estate trifling.

The fact that the estate was small, and that no misconduct was imputed to the executors, and that it was unadvisable to incur expense, was held to be no ground for refusing the application of a legatee for administration : *Re Falconer*, 1 Chy. Ch. R. 273. Where, however, the executor swore that the personal estate did not exceed $50, the Court, before granting the order, required the applican who was one of the residuary legatees, to file an affidavit stating that he had reason to believe, and did believe, that the result of the proceedings would show a substantial balance to be divided among the legatees : *Foster* v. *Foster*, 19 Gr. 463 ; and see *Westbrooke* v. *Browett*, 17 Gr. 339 ; *Shaw* v. *Freedy*, 8 C. L. J. N. S. 136; *Gilbert* v. *Braithwait*, 3 Chy. Ch. R. 413.

Or claim of applicant under $40.

Administration was refused on the application of a legatee whose claim only amounted to $28, although it was alleged that other claims to a considerable amount remained unpaid : *Reynolds* v. *Coppin*, 19 Gr. 627.

Special directions may be given respecting carriage of order, &c.

470. The Court is to give any special directions touching the carriage or execution of the order, which it deems expedient; and in case of applications for any such order by two or more persons, or classes of persons, the Court may grant the same to such one or more of the claimants as it thinks fit; and the carriage of the order may be subsequently given to any party interested, and upon such terms as the Court may direct. (3rd June, 1853 ; Ord. 15, s. 1.)

Carriage of order may be subsequently changed.

Several applications—only one

Where two or more applications are made by different persons under this *Order*, only one judgment for administration should be

granted; and the Court may determine which of the applicants shall have the carriage of it. The rule being to give the conduct of the proceedings *cæteris paribus*, to the party most interested in prosecuting them properly and economically: *Perrin* v. *Perrin*, 3 Chy. Ch. R. 452; *Re Adams, Adams* v. *Muirhead*, 6 P. R. 283; *Re Prime*, 48 L. T. N. S. 208; *Penny* v. *Francis*, 7 Jur. N. S. 248. But see *Re Swire, Mellor* v. *Swire*, 46 L. T. N. S. 437. The carriage of the judgment may be changed in case of delay: *Patterson* v. *Scott*, 4 Gr. 145; and see *Ord.* 211, 212 note.

Judgment should be granted.

Carriage of, to whom given.

471. An order for the administration of the estate of a deceased person may be obtained by his executor or administrator, and all the provisions of the foregoing Orders are to extend to applications by an executor or administrator. (3rd June, 1853; Ord. 15, s. 2.)

Order for administration may be obtained by personal representative.

Where the application is made by the personal representative, it may be made *ex parte*, *Re Dunlevy*, Esten, V. C., 16th May, 1861, Ord. B. 11, fo. 778.; *Re Ette* 6 P. R. 159. But where no sufficient ground was shown for making the order, it was refused: *Barry* v. *Barry*, 19 Gr. 458; and it is clear that the personal representative cannot apply for administration merely to obtain an indemnity by passing his accounts: *White* v. *Cummins*, 3 Gr. 602; *Cole* v. *Glover*, 16 Gr. 392.

Application for administration by personal representatives, may be made *ex parte*, but not granted unless good ground shown.

How far a deficiency of assets, justifies a personal representative applying for administration, is the subject of some doubt. In 1874, orders were made on that ground, on the application of the personal representative in *Swetnam* v. *Swetnam*, 6 P. R. 149, and *Re Ette*, *Ib.* 159. But in the subsequent cases of *Re Shipman, Wallace* v. *Shipman*, Blake, V.C., said that the reasons which existed for making the order in *Re Ette* no longer held good, and that the personal representative on being sued at law, could set up the deficiency of assets, and claim administration under *The Administration of Justice Act*. That Act, however, was in force when *Swetnam* v. *Swetnam* and *Re Ette* were decided. In 1877 in *Marsh* v. *Marsh*, 7 P. R. 129, Spragge, C., held that the course pointed out in *Re Shipman* should be followed, and refused the order; and in *Re Jack, Jack* v. *Jack*, 13 C. L. J. 358, Proudfoot, V. C., did the same. On the other hand, in *Re Bromley*, before Blake, V. C., 28th January, 1878, the order was granted, the applicant having been sued by one creditor in the Division Court, and another creditor having written to him, urging him to obtain the order.

Deficiency of assets, how far it justifies application by personal representative.

As to the grounds justifying a personal representative obtaining administration, see further, *Ord.* 58, *r.* 6 note.

Action by creditor against executor, in which judgment by default entered, not restrained even after judgment for administration.

An executor who has suffered a creditor of the estate to recover judgment against him by default of appearance cannot, on subsequently obtaining a judgment for administration, restrain the creditor from proceeding on his judgment, even though there be a deficiency of assets: *Doner* v. *Ross*, 19 Gr. 229, and see *Hutchinson* v. *Edmison*, 11 Gr. 477.

On deficiency of assets, personal representatives must distribute *pari passu* among creditors.

It is the duty of an executor, on a deficiency of assets, to pay all creditors *pari passu;* and even his right of retainer cannot be set up so as to give his own debt any preference, but the lien of any creditor on the real, or personal, estate created in the lifetime of the deceased, is not to be prejudiced by this rule: *R. S. O.* c. 107 s. 30; *Meyers* v. *Meyers*, 20 Gr. 185; but a creditor who has recovered execution against the executor has no priority: *Bank of British North America* v. *Mallory*, 17 Gr. 102; and debts due by the deceased as trustee form no exception to the rule: *Brock* v. *Cameron*, 25 Gr. 369. And it would seem, notwithstanding what is said by Mowat, V. C., in *Doner* v. *Ross*, *supra*; that creditors who have been overpaid, may be compelled to refund, on the application of a creditor who has not received his due proportion: *Chamberlen* v. *Clarke*, 1 O. R. 135.

Creditors overpaid, may be compelled to refund.

Suit improperly brought, or occasioned by personal representatives, costs of.

Where an executor improperly institutes a suit for administration he may be ordered to pay the costs of it: *Sullivan* v. *Sullivan*, 16 Gr. 94; or he may be refused his costs and commission: *Graham* v. *Robson*, 17 Gr. 310; and where he improperly renders a suit necessary by a creditor, he may also be ordered to pay the costs of it: *McGill* v. *Courtice*, 17 Gr. 271.

No accounts to be ordered of realty, unless heir, or devisee served.

472. No accounts or inquiries in respect of the real estate are to be directed, unless notice of the application has been given to the heirs and devisees interested therein, or one or more of them. (20th Dec. 1865; Ord. 13.)

Ord. 472 declaratory of previous practice.

This *Order* is merely declaratory of what had before been the practice of the Court: *Eccles* v. *Lowry*, 23 Gr. 172 per Proudfoot, V. C.

In case of intestacy, one or more of heirs must be notified,

In case of an intestacy, the heir, or one or more of the heirs, must be a party, or parties, to the application: *Tiffany* v. *Tiffany*, 9 Gr. 158; but it is not necessary, where there are several, that all should be joined as defendants: *English* v. *English*, 12 Gr. 441; and in case of testacy, it is sufficient to make one, or more, of the devisees, a party, or parties: *Tiffany* v. *Thompson*, 9 Gr. 244; where the executor was also devisee of part of the realty, it was held that he sufficiently represented the other parties interested in the realty: *Stewart* v. *Hunter*, 14 Gr. 132; where a devisee is a party, it is not necessary that the heir should be joined: *Fenny* v. *Priestman*, 1 Gr. 133.

Or in case of testacy, one or more of devisees.

Where, in an administration action, it is necessary to make the heir a party defendant, he is entitled to be paid his costs as between solicitor and client, in priority to the costs and claims of creditors, although the estate may be insufficient for the payment of the debts: *Hartrick* v. *Quigley*, 21 Gr. 287; *Tardrew* v. *Howell*, 2 Giff. 530.

On deficiency of assets, heir entitled to costs as between solicitor and client.

A judgment for the administration of the realty alone, will not be granted unless the personal estate has been previously administered: *Rowsell* v. *Morris*, 17 L. R. Eq. 20; but see *Dey* v. *Dey*, 2 Gr. 149.

Administration of realty not granted alone, unless personalty administered.

Although it is not necessary to serve all the parties interested in the realty, with notice of the application for administration, they must, nevertheless, all be served in the Master's office with an office copy of the judgment as prescribed by *Ord.* 60 *ante*; see note to that *Order*: parties who are not served, will not be bound by the accounts: *Norris* v. *Bell*, 9 Gr. 23.

Parties to be served with judgment.

473. After inquiries directed in respect of the personal estate, the Court may, in a proper case, after notice given to those interested in the real estate, or to one or more of them, make a supplemental order in respect of the real estate, upon such terms as the Court sees fit. (20th Dec. 1865; Ord. 13)

Accounts of realty may be directed by supplemental order.

It is now customary, wherever an administration of the realty is likely to be required, to serve all the parties necessary to be served, in order to obtain an administration of both realty, and personalty, and a judgment is then awarded for the administration of both the realty and personalty. And whenever the realty is the primary fund for the payment of debts, it is absolutely necessary that this should be done.

Where administration of realty required, order may be made in first instance.

As to the parties to be notified in order to obtain an administration of the realty, see note to preceding *Order*.

474. In taking an account of a deceased's personal estate under an order of reference, the Master is to inquire and state to the Court what, if any, of the deceased's personal estate is outstanding or undisposed of; and is also to compute interest on the deceased's debts from the date of the decree, and on legacies from the end of one year after the deceased's death, unless any other time of payment is directed by the will. (3rd June, 1853; Ord. 42, s. 14.)

Master to inquire as to outstanding estate.

And to compute interest on debts and legacies.

Master not to proceed *ex parte*

The Master ought not to proceed *ex parte*, even though the defendant did not appear on the motion for administration: *Jackson* v. *Matthews*, 12 Gr. 47.

Proof of persons necessary to be served with judgment.

Before proceeding to take the accounts, the Master should require the necessary evidence to be brought before him, to shew who are the parties, if any, who ought to be served with an office copy of the judgment as prescribed by *Ord.* 60. The Master should direct on whom the judgment is to be served, and he may also dispense with service, on any parties, as he may think fit; but he must state his reason for so doing in his report: see *Ord.* 587.

Service may be dispensed with.

Service may be dispensed with on parties whose apparent interest is small, and where there is difficulty in effecting service, and other parties in the same interest are already represented, or directed to be served with the judgment; mere difficulty in effecting service would not alone be sufficient ground for dispensing with service.

Persons served do not become parties to the action.

Parties who are served with an office copy of a judgment under *Ord.* 60 do not thereby become parties to the action, they merely acquire a right to attend the proceedings on giving notice of their desire to do so to the plaintiff's solicitor, but they are bound by the proceedings as though they were actually parties to the action.

But on notice to plaintiffs' solicitor may attend proceedings.

Parties so served may give notice to the plaintiff of their desire to attend the proceedings, and are then entitled to be served with the appointments in the Master's office, and with notice of the hearing on further directions: but when a person served with the judgment, does not notify the plaintiff of his desire to attend the proceedings, he is not entitled to notice of the proceedings in the Master's office, nor of the hearing on further directions, if any: see *Ord.* 60 note.

But if attending unnecessarily will not be entitled to costs.

Persons so attending, however, are not, as of course, entitled to the costs of so doing out of the estate, and unless the Court is satisfied that there was some good reason for their so attending they will be left to bear their own costs in any event.

Parties served are not liable to account.

Parties served under *Ord.* 60 cannot be required to account: see *Ord.* 58 *r.* 1 note.

Master may add parties.

Where the Master finds any persons (not coming within *Ord.* 60), ought to be made parties, and enabled to attend the proceedings, he may add them as parties, under *Ord.* 244. Persons added under that *Order* become parties to the action, as if they had been originally made parties to the writ.

Interest to be allowed on debts.

The direction contained in *Ord.* 474, as to the allowance of interest on debts, applies to debts not bearing interest, prior to the date of the judgment. The judgment for administration as has been said

operates as a judgment for all the creditors of the estate for the amount of their respective debts, and consequently from that date they bear interest; but where a creditor is entitled to interest from any prior date, by virtue of any statute, or any contract, expressed or implied, the Master may allow such interest. But where a sum is payable at a certain day, with interest, there is no implied contract to pay interest at the same rate after default; and even where the same rate has been paid for many years after default, there is no implied contract to continue doing so: *Re Roberts, Goodchap* v. *Roberts*, 14 Ch. D. 49; 42 L. T. N. S. 666; *Cooke* v. *Fowler*, 7 L. R. H. L. C. 27; *Dalby* v. *Humphrey*, 37 U. C. Q. B. 514; *Simonton* v. *Graham*, 8 P. R. 495; as to what is a sufficient demand of interest within the Statute *R. S. O.* c. 50, s. 267, ss. 2; see *Geake* v. *Ross*, 32 L.T. N. S. 666.

Judgment for administration operates as a judgment in favour of all creditors.

Rate of interest payable.

Interest on legacies charged on land, bear interest from the testator's death; but where the legacy is payable out of the proceeds of the sale of land, the interest does not run until a year from the death: *Turner* v. *Buck*, 18 L. R. Eq. 301.

Interest on legacies.

For form of report, see Schedule to *Ord.* 589.

475. Every advertisement for creditors affecting the estate of a deceased person, which is issued pursuant to an order, is to direct every creditor, by a time to be thereby limited, to send to such other party as the Master directs, or to his solicitor, to be named and described in the advertisement, the name and address of such creditor, and the full particulars of his claim, and a statement of his account, and the nature of the security (if any) held by him; and such advertisement is to be in the form set out in schedule V form No. 1, with such variations as the circumstances of the case require; and at the time of directing such advertisement, a time is to be fixed for adjudicating on the claims. (23rd Dec. 1865; Ord. 22.)

Advertisment for creditors, form of.

Where the Master finds that there has been a proper advertisement for creditors, under *R. S. O.* c. 107, s. 34, he may dispense with any further advertisement without any special direction so to do; *Cuthbert* v. *Wharmby*, W. N. (69) 12; Seton, 805.

Where advertisement for creditors has been issued, further advertisement may be dispensed with.

476. No such creditor need make an affidavit, or attend in support of his claim (except to produce his security, if any), unless he is served with a notice

Affidavit of creditor dispensed with unless required.

requiring him so to do, as hereinafter provided. 20th Dec. 1865; Ord. 23.)

Parties entitled to appear on adjudication on creditor's claim.

No person, except the personal representative, is entitled (except by leave of the Master) to appear on the claim of any person not a party to the cause, against the estate of the deceased, in respect of any debt or liability. But the Master may direct any other party to the cause to appear, either in addition to, or in place of, the personal representative, upon such terms as to costs or otherwise as he shall think fit: See *Rules S. C.* 114, 518.

Creditors not to be allowed costs.

Creditors merely sending in their claims pursuant to advertisement, ought not to be allowed any costs of so doing: but where they are required to go into formal proof thereof, the Master may fix a sum for costs, or allow taxed costs of proving the claim: See *Ord.* 225, and see *post Ord.* 478.

Notice to creditor to prove claim may be posted.

A notice to a creditor requiring him to make an affidavit in support of his claim, may be transmitted by post, pre paid, addressed to him or his solicitor: See *Ord.* 487, *post.*

Corroborative evidence.

When a creditor's claim is disputed, he may be required to produce corroborative evidence thereof: See *R. S. O.* c. 62, s. 10; and see cases *Ord.* 467 note.

Creditors to produce securities.

477. Every such creditor is to produce before the Master, the security (if any) held by him, at such time as is specified in the advertisement for that purpose, being the time appointed for adjudicating on the claims; and every creditor, if required by notice in writing, to be given by the executor or administrator of the deceased, or by such other party as the Master directs, in the form set forth in schedule V form No. 2, is to produce all other deeds and documents necessary to substantiate his claim before the Master, at such time as is specified in the notice. (20th Dec. 1875; Ord. 24.)

And other documents, if notified.

Notice may be posted.

The notice to produce documents in support of his claim, may be transmitted to the creditor, by post, addressed to him or his solicitor, if any: See *Ord.* 487, *post.*

Creditor neglecting to produce documents not to be allowed costs.

478. In case a creditor neglects or refuses to comply with the next preceding Order, he is not to be allowed

any costs of proving his claim, unless the Master otherwise directs. (20th Dec. 1865; Ord. 25.)

Creditors' claims to be examined by personal representative or other person.

479. The executor or administrator of the deceased, or such other party as the Master directs, is to examine the claims sent in pursuant to the advertisement, and is to ascertain, as far as he is able, to which of such claims the estate of the deceased is justly liable. (20th Dec. 1865; Ord. 26.)

Affidavit to be made by person examining creditors' claims.

When to be filed

Form of.

480. The executor or administrator, or one of the executors or administrators, or such other party either alone or jointly with his solicitor, or other competent person, or otherwise, as the Master directs, is, at least seven clear days before the day appointed for adjudication, to file an affidavit which may be in the form No. 3, in schedule V, verifying a list of the claims, the particulars of which have been sent in pursuant to the advertisement, and stating to which of such claims, or parts thereof, repectively, the estate of the deceased is, in the opinion of the deponent, justly liable, and his belief that such claims, or parts thereof repectively, are justly due, and proper to be allowed, and the reasons for such belief. (20th Dec. 1865; Ord. 26.)

Time for making affidavit may be postponed.

481. In case the Master thinks fit so to direct, the making of the affidavit referred to in the next preceding Order, is to be postponed till after the day appointed for adjudication, and is then to be subject to such directions as the Master may give. (20th Dec. 1865; Ord. 27.)

Adjudication on claims by Master.

482. At the time appointed for adjudicating upon the claims, or at any adjournment thereof, the Master may allow any of the claims, or any part thereof respectively, without proof by the creditors, and may direct such investigation of all or any of the claims not allowed, and require such further particulars, infor-

Further evidence may be required

mation, or evidence relating thereto, as he thinks fit and may, if he so thinks fit, require any creditor to attend and prove his claim, or any part thereof; and the adjudication on such claims as are not then allowed is to be adjourned to a time to be then fixed. (20th Dec. 1865; Ord. 28.)

Master cannot employ experts.

The Master has no power under this *Order* to employ experts to assist him in coming to a conclusion on the claims of persons claiming to be creditors: *Re Robertson, Robertson* v. *Robertson*, 24 Gr. 555.

Mortgagee may prove against general estate, and hold security for deficiency.

A mortgagee is entitled to prove against the general estate, and hold his security for any amount the general estate is insufficient to pay: *Re Stewart, Stewart* v. *Stewart*, 10 Gr. 169. Where on a deficiency of assets, some creditors are paid more than their proportion, they may, on the petition of a creditor who has not been paid his proportion, be ordered to refund the excess: *Chamberlen* v. *Clarke*, 1 O. R. 135.

Notice to creditor to prove claim may be posted.

Where the Master requires a creditor to attend and prove his claim, the notice so to do may be transmitted to him or his solicitor by post, unless the Master otherwise directs: See *Ord.* 487, *post.*

Notice to be sent creditors.

483. Notice is to be given by the executor or administrator, or such other party as the Master directs:

Where claim allowed without Proof.

1. To every creditor whose claim, or any part thereof, has been allowed without proof by the creditor, of such allowance, and such notice may be in the form No. 4 in schedule V.

Where proof of claim is required.

2. And to every such creditor as the Master directs to attend and prove his claim, or such part thereof as is not allowed, by a time to be named in such notice, (which may be in the form No. 5 in schedule V,) not being less than seven days after such notice, and to attend at a time to be therein named, being the time to which the adjudication thereon has been adjourned; and in case any creditor does not comply with such notice, his claim,

or such part thereof as aforesaid, is to be disallowed, unless the Master thinks fit to give further time. 20th Dec. 1865; Ord. 29.)

The notice may be transmitted by post, prepaid, to the creditor or his solicitor, unless the Master otherwise directs: See *Ord.* 487, *post.*

Creditor may send in particulars of claim seven days before any day to which adjudication adjourned,

484. A creditor who has not before sent in particulars of his claim pursuant to the advertisement, may do so seven clear days previous to any day to which the adjudication is adjourned. (20th Dec. 1865; Ord. 30.)

After expiry of time lime limited by advertisement for filing claims, none to be received, except by leave.

485. After the time fixed for the advertisement, no claim is to be received (except as before provided in case of an adjournment,) unless the Master thinks fit to give special leave upon application, and then upon such terms and conditions as to costs and otherwise as the Master directs. (20th Dec. 1865; Ord. 31.)

An application of a creditor to prove after the time has elapsed, is usually granted; but on the terms of not disturbing any division of assets which has actually been made: *Re Metcalfe, Hicks* v. *May,* 42 L. T. N. S. 383; 13 Ch. D. 236; 49 L. J. Ch. 192.

Creditors to be notified when their claims are payable out of Court.

486. Where an order is made for payment of money out of Court to creditors, the party whose duty it is to prosecute such order is to send each creditor, or his solicitor (if any,) a notice that the cheques may be obtained from the Registrar; and such notice may be in form No. 6, in schedule V, and such party is, when required, to produce any papers necessary to enable the creditors to receive their cheques. (20th Dec. 1865; Ord. 32.)

Form of notic

Creditors who have proved claims, but who are not parties to the action, are not entitled to notice of the hearing on further directions, or to the application for distribution: *Lavin* v. *O'Neill,* 13 Gr. 179.

Creditors who have received more than their share, may be ordered to refund, on the application of a creditor who has not received his proper proportion: *Chamberlen* v. *Clarke,* 1 O. R. 135.

Notices, how to be sent to creditors.

487. Every notice by these Orders, required to be given is, unless the Master otherwise directs, to be deemed sufficiently given and served if transmitted by post, prepaid, to the creditor to be served, according to the address given by the creditor in the claim sent in by him pursuant to the advertisement, or, in case the creditor has employed a solicitor, to such solicitor, according to the address given by him. (20th Dec. 1865; Ord. 33.)

XXXVII.—ALIMONY SUITS.

Ord. 488.

Order 488 prescribed a form of indorsement to be made on the office copy bill, in alimony suits, where the plaintiff required an allowance for alimony *pendente lite*. The *Order* is now superseded.

Application for interim alimony, when it may be made.

489. No application for interim alimony, or costs, is to be made until the time for answering has expired.

Ord. 489 still in force.

Interim Alimony.—This *Order* was held to be still in force: *Peck* v. *Peck*, 18 C. L. J. 265; 9 P. R. 299. For form of indorsement on writ, of claim for interim alimony: see *Rules S.C.* Form 9 *k*. If the indorsement is omitted, an application for interim alimony may be made, but in such case it will only run from the date of the order; and no costs of the motion will be allowed: *Peterson* v. *Peterson*, 6 P. R. 150.

The application may be made at any time after a statement of defence has been filed: *Gorman* v. *Gorman*, before Proudfoot, V. C., 20th September, 1875; or after the time for delivering it has expired: *Peck* v. *Peck*, *supra*; unless the defendant has given notice under *Ord.* 490.

Interim alimony when allowed.

Interim alimony is allowed, when necessary, for the maintenance of the plaintiff: *Soules* v. *Soules*, 3 Gr. 113; *Thompson* v. *Thompson*, 1 L. R. P. & D. 553, but not as of course, and if the plaintiff is shown not to be in need of support, it may be refused: *Bradtey* v. *Bradley*, 3 Chy. Ch. R. 329; *Smith* v. *Smith*, 6 P. R. 51.

From what date allowed.

Interim alimony is payable from the date of the service of the writ, if there has been no delay in making the application: *Howe* v. *Howe*, 3 Chy. Ch. R. 494; and the claim for interim alimony be indorsed on the writ: *Peterson* v. *Peterson*, 6 P. R. 150.

Evidence required on motion for interim alimony.

On a motion for interim alimony, it is sufficient if a *de facto* marriage be proved: *Taylor* v. *Taylor*, 1 Chy. Ch. R. 234; its validity cannot be enquired into: *Bradley* v. *Bradley*, *supra*; *Nolan*

v. *Nolan*, 1 Chy. Ch. R. 368; *Carr* v. *Carr*, 2 Chy. Ch. R. 71; nor can any question affecting the merits of the action; thus, alleged adultery by plaintiff, cannot be raised on such an application: *Campbell* v. *Campbell*, 6 P. R. 128; nor the question whether plaintiff is justified in leaving the defendant: *Wilson* v. *Wilson*, *Ib.*, 129; *Keith* v. *Keith*, 7 P. R. 41.

Plaintiff must undertake to proceed to trial at next sittings.

The plaintiff is usually required to undertake to proceed to a trial of the action at the next sittings; but when the defendant neglected to pay the alimony, and the plaintiff was left without means of taking the case to trial, the undertaking was extended: *Bowslaugh* v. *Bowslaugh*, 6 P.R. 200; and where the cause had been entered for trial, it was ordered to stand over, until a sum sufficient to pay plaintiff's witnesses was paid by defendant: *Haffey* v. *Haffey*, 7 P. R. 137.

Plaintiff's solicitor has no lien on interim alimony for cost.

It would seem that the plaintiff's solicitor has no lien for his costs on moneys paid to him for interim alimony: *Cross* v. *Cross*, 43 L.T. N.S. 533.

Interim alimony is allowed only from the service of the writ: *Thompson* v. *Thompson*, 19 C. L. J. 252.

Where interim alimony not applied for, permanent alimony ordered only from date of service of writ.

Where interim alimony had not been applied for, the Court refused to order the permanent alimony to run from a date prior to the decree: *Soules* v. *Soules*, 3 Gr. 113. But where the husband had agreed to a separation, and to pay the plaintiff an allowance, the Court awarded permanent alimony at the rate agreed to be paid by defendant, and directed payment from the date of the writ, though no application had been made for interim alimony: *Mallory* v. *Mallory*, before Boyd, C., at Cobourg, 2nd April, 1883.

Exception to rule.

Motion to set aside order.

Where, after an order for interim alimony, the wife returned to her husband's house, and resided there for some time, but was afterwards compelled to leave, by reason of cruelty; a motion to set aside the order for interim alimony on the ground of condonation was refused: *Maxwell* v. *Maxwell*, 1 Chy. Ch. R. 27.

Order cannot be made in Chambers even on consent for payment of permanent alimony.

An order cannot be made in Chambers, even on consent, for payment of permanent alimony, as that is equivalent to a judgment in the action: see *Craig* v. *Craig*, 1 Chy. Ch. R. 41.

Amount to be allowed for interim alimony.

Amount to be allowed.—There is no fixed rule as to the amount to be allowed for interim alimony. In England, the rule is usually to allow about one-fifth of the annual income of the husband, but it is in the discretion of the Court, and may vary according to the circumstances of the case. But in this Province a percentage on the income is not always the measure for the allowance, and the value of the defendant's labour may also be taken into account: see *McCulloch* v. *McCulloch*, 10 Gr. 320. The allowance is usually less than would be allowed as permanent alimony, the wife being bound *pendente lite* to live in retirement and seclusion: Coote Eccl. Pr. 338, *Rees* v. *Rees*, 3 Phill. 389; *Hawkes* v. *Hawkes*, 1 Hagg, 526; *Otway* v. *Otway* 2 Phill. 108. As to the effect of the Married Women's Property Act, on

the right to alimony, see *Wilson* v. *Wilson*, 2 Hagg., 204; *Milne* v. *Milne*, 2 L. R. P. & M., 202, 23 L. T. N. S. 877.

Where the defendant had agreed to pay the plaintiff an allowance for her separate maintenance, and subsequently a suit was brought for alimony, and for specific performance of the agreement, and the plaintiff obtained an order for interim alimony, and subsequently a decree for specific performance, it was held that the plaintiff was bound to credit the sums received as interim alimony on account of the sums payable under the agreement: *Maxwell* v. *Maxwell*, 7 P. R. 63.

Costs *de die in diem*.

Costs.—In addition to interim alimony, the plaintiff is also entitled to an order for payment *de die in diem* of the cash disbursements, properly made by her solicitor: *R. S. O.* c. 40, s. 47.

These disbursements do not include fees paid to agents for solicitors services, nor fees to counsel, when the solicitor, or his partner, is the counsel. But where an order for interim alimony was granted, (the defendant not appearing on the motion,) for the amount indorsed on the bill, and the defendant subsequently moved to reduce the amount as excessive; a reference was granted on payment of full costs of the application: *Hooper* v. *Hooper*, 3 Chy. Ch. R. 114.

Registration of Order.

Registration of Order.—An order for payment of interim alimony and disbursements. may be registered: see *R. S. O.* c. 40, s. 44.

Defendant may notify plaintiff that he submits to pay interim alimony claimed.

490. The defendant may, at any time before the answer is due, give notice in writing that he submits to pay the interim alimony, and costs, as demanded by the notice; and in that case no order is to be taken out until there has been a default in payment; and in case of default, affidavits being filed verifying the two notices and the default, the order is to be issued on præcipe.

Where the order is authorized to be issued on *præcipe*, the officer with whom the pleadings in the action are filed may issue it: see *Ord.* 23, s. 7, *Rule S. C.* 417.

Ord 491.

Order 491 fixed the amount payable for interim costs in alimony suits, and is now superseded by *R. S. O.* c. 40, s. 47, *supra*.

XXXVIII.—QUIETING TITLES.

Two or more properties held by separate titles not to be included in the same petition.

492. Under the Act for Quieting Titles to Real Estate in Upper Canada, the petition for an investigation of title is not to include two or more properties dependent on separate and distinct titles; but may include any number of lots or parcels belonging to the same person, and dependent on one and the same chain of title. (31st Aug. 1867; Ord. 1.)

This *Order* is now in force in all the Divisions of the High Court.

The Act referred to in this *Order* is now known as *The Quieting Titles Act, R. S. O.* c. 110.

Where the provisions of this *Order* are violated, the Referee may refuse to proceed with the investigation of the title. This may lead to delay and expense, as the objection can only appear before the Referee, after the proceedings necessary to show the title have been taken. The object of the *Order* is to prevent the proceedings becoming unnecessarily intricate.

Where Ord. 492 violated, Referee may refuse to proceed with investigation.

Who may File Petition.—Any owner of an estate in fee simple in land, or any trustee for the sale of the fee simple, may file a petition without leave: *R. S. O.* c. 110, s. 2. Any other person who has any estate, or interest, legal, or equitable, in or out of land in Ontario, may also file a petition: *Ib.* s. 3; but under *Order* 493, *post*, the petition in the latter case, must first receive the sanction of a Judge before it can be referred to a Referee for investigation. A vendor before conveyance, is within sect. 3, and his petition will not be entertained without the consent of his vendor: *Re Brown*, 3 Chy. Ch. R. 158.

Who may file petition under *Quieting Titles Act*.

Formerly it was necessary that the petitioner should be in possession by himself, or tenant: *Re Bell*, 3 Chy. Ch. R. 239; *Re Mulholland*, 18 Gr. 528; *Re Mono*, 6 P. R. 150; but that is no longer necessary; and a petitioner, who is out of possession, may, on obtaining a certificate of title, obtain on petition an order for the delivery of possesssion to him of the land in question, which may be enforced by the same process, as a judgment for the recovery of land: see *R. S. O.* c. 110, s. 43; *Re McDonald*, before Boyd, C., 16th May, 1881.

Not necessary that petitioner should be in possession.

Effect of Filing Petition.—The filing of a petition is not such a proceeding as will save the rights of a party *contestant*, otherwise barred by the Statute of Limitations: *Laing* v. *Avery*, 14 Gr. 33; nor, it would seem, will it have the effect of stopping the running of the Statute in favour of a contestant in adverse possession, until such contestant is notified, or has filed a claim, or otherwise become a party to the proceedings, nor even then, unless the petitioner ultimately obtain a certificate of title. Where a contestant claiming title under a tax sale, was barred, but the petition was also ultimately dismissed, it was held that the filing of the petition and the proceedings had on the claim of the contestant, were not an effectual questioning of the latter's title, so as to preclude him from the benefit of the Act, 37 Vict., c. 15 (O) curing the defect in the tax sale, under which he claimed, if not questioned within two years: *McNab* v. *Peer*, 32 C. P. 545.

Filing a petition will not save the rights of a contestant otherwise barred by Statute of Limitations.

Description of Land.—The description of the land in the head-

Description of land in petition.

ing of the petition, should be sufficient to enable the land in question to be identified, but usually it is unnecessary to set out in it the metes and bounds. The description of the lands in the body of the petition, should be given in the form in which the petitioner desires the land to be described in the certificate of title. Where there is any plan of the property registered, the description of the land in the petition must be in accordance with the plan : *Re Morse*, 8 P. R. 475 ; *R. S. O.* c. 111, s. 82, ss. 2.

Referee may insert more specific description of land in the notices to be served or published.

Where the description of the land in the heading of the petition, appears to the Referee of Titles, not to be sufficiently explicit, he should require a sufficient and proper description to be inserted in all notices by him directed to be published, or served ; and where it appears that there is no sufficiently definite description of the lands contained in either the heading, or the body of the petition, or that the description given is misleading, the Referee may require the petition to be amended in that respect, and to be re-registered before proceeding with the investigation.

Estate claimed must be correctly stated in petition.

Estate, or Interest, Claimed.—The estate, or interest, claimed by the petitioner, should also be accurately stated in the petition, and also the estates and interests of all other persons in the land, which are intended to be admitted by the petitioner, otherwise the petitioner may be ordered to pay the costs of such other persons who may come in to prove claims, not admitted in the petition.

Form of petition.

Form of Petition.—The form of petition given in the Schedule to the Act, *R. S. O.* p. 1060, should be followed as nearly as may be. It is neither necessary, nor desirable, to set out in detail, in the petition, the acts and circumstances affecting the title ; but whenever it is necessary, a concise statement of such facts as are necessary to make out the title, and which do not appear in the produced documents, is to be delivered to the Referee, with the other documents required to be furnished under *R. S. O.* c. 110, s. 7.

Statement of facts.

Filing petition.

Filing the Petition.—Under *R. S.O.* c. 110, s. 5, the application is required to be made to the Court of Chancery, but as all the Divisions of the High Court may now exercise the jurisdiction formerly vested in the Court of Chancery, a petition may, no doubt, now be filed in any Division. Where the petition is filed in the Chancery Division, it must be filed with the Clerk of Records and Writs. If filed in any other Division, it should be filed with the Registrar of the Division. All proceedings under *The Quieting Titles Act*, however, have thus far been taken exclusively in the Chancery Division.

Registration of petitions in Registry Office.

Registering Petition.—Upon filing a petition under the Act, the officer with whom it is filed, is to issue a certificate of its filing :

R. S. O., p. 1061; which is to be registered in the Registry Office of the Registration Division, in which the lands in question are situate: *R. S. O.* c. 110, s. 6.

Proofs Required on Investigation of Titles.—After the petition has been registered, the following are the papers which it is necessary to deliver to the Referee of Titles, to whom the petition is referred, in all ordinary cases, and the proofs 1 to 15 should be delivered at one time, not piece-meal. Proofs required on investigation of titles under *Q. T. Act.*

1. The affidavit of the petitioner, under the 8th section of *The Quieting Titles Act.* If the affidavit is not made by the petitioner, some valid reason should be given why it is not: *Re Rundell*, 4 Chy. Ch. R. 71. (For form, see Leggo's Forms, 2nd ed., No. 1029). The schedule of documents must be marked, as an exhibit, by the commissioner before whom the affidavit is sworn: *Re Dickson*, 3 Chy. Ch. R. 352. Affidavit of petitioner.

N. B.—None of the affidavits in support of the petition, should be sworn until the petition has been filed.

2. The certificate of counsel, or solicitor, under the 9th section of *The Quieting Titles' Act.* This certificate should not be dated prior to the swearing of the petitioner's affidavit to which it relates. The certificate should follow the language of section 9. A certificate of counsel that he had corresponded with the petitioner was held insufficient: *Re Dickson*, 3 Chy. Ch. R. 352. Certificate of counsel.

3. The County Registrar's certificate of all registrations upon the land in question, up to, and including, the certificate of the petition being filed: *Re Hill*, 2 Chy. Ch. R. 348. It is advisable that no further registrations should be made upon the lot by the petitioner pending the investigation. If any transfer by way of mortgage, or otherwise, be made by the petitioner pending the investigation, the Referee of Titles should be immediately notified thereof: See *Re Cummings*, 8 P. R. 473. County Registrar's certificate.

4. All deeds and evidences of title in the petitioner's possession or power: See *R. S. O.* c. 110, s. 7, ss. 1. Deeds.

5. If the petitioner cannot produce all the deeds relating to the land, under which he derives title, he must procure and produce:—

(*a*) Certified copies of all registered instruments affecting the title, of which the originals are not produced, including discharged mortgages, and also certificates of discharge of mortgages (with affidavits of execution). Certified copies of registered documents when originals not produced.

(*b*) Affidavits of diligent search for the originals of all deeds to which the certified copies of memorials relate (where the Affidavits of search for lost deeds.

memorials are not made sufficient evidence by *R. S. O.*, c. 109, s. 1, ss. 2 and 3), and of all other deeds relating to the title which are not produced.

Proof of contents where memorials not sufficient evidence.

(c) Proof of contents of the non-produced deeds, when the memorials are not sufficient evidence thereof. Those of which there are memorials in the short form in use before the Registry Act of 1865, should be shown to have contained no trust, limitation, condition, exception, or qualification, not mentioned in the memorial, unless such memorials are under *R. S. O.*, c. 109, sufficient evidence of the contents of the deeds to which they relate.

Proof of payment of consideration when necessary.

6. If any of the deeds have no receipt for consideration indorsed, there must further be produced some proof of payment of the consideration, unless the receipt of the consideration be acknowledged in the deed, and such deed be registered; or unless such deed be twenty years old or upwards, and the possession has been in accordance with such deed: See *R. S. O.*, c. 109, s. 1, ss. 4.

Proof of bar of dower.

7. If there is no release of dower by the wife of a former owner, shew that he was unmarried when he conveyed, or that his wife is dead, or that her dower is barred, or that the land is not subject to her dower: See *R. S. O.*, c. 126, s. 3; otherwise the certificate of title must be subject to her dower.

Affidavits as to possession.

8. Affidavits are required, shewing that possession has always accompanied the title under which the petitioner claims: See *Ord.* 501, *post.* Also affidavits shewing who is, at the time of making such affidavits, in occupation, and under what title, or claim of title. These affidavits should shew how the possession has been held, and should be made by disinterested persons: See Leggo's Forms, 2nd ed., No. 1035. See further as to evidence of possession requisite: *Ord.* 501.

Consent of all persons in actual occupation.

9. Consent of the person in actual possession (wherever any person other than petitioner is in occupation) duly verified by affidavit. For form of consent see Leggo's Forms, 2nd ed., No. 1037.

Consent of charges.

10. Consent of any mortgagee, or person entitled, to any outstanding charge, or estate, duly verified by affidavit. For form of consent see Leggo's Forms, 2nd ed., No. 1037; and see *Re Caverhill*, 8 C. L. J. N. S. 50.

N. B.—The consents mentioned in clauses 9 and 10 must be produced even though the petitioner admit that his title is subject to the right of such tenant, mortgagee, &c. In some cases the consent must be produced before the petition will be referred for examination; *e. g.*, where the petitioner is a purchaser who has not obtained his conveyance, the consent must be produced: *Re Brown*, 3 Chy. Ch. R. 158; or where he

is tenant in remainder expectant on a life estate, the consent of the tenant for life must be filed: *Re Pelten*, 8 P. R. 470.

Sheriff's certificate as to executions.

11. Sheriff's certificate that the property is not affected by any execution, sale under execution, or tax sale. (For form, see Leggo's Forms, 2nd ed., No. 1033, omitting word "in" in second line.) This certificate should include the names of all persons who have owned the land at any time since 1863: See *Re Harding*, 3 Chy. Ch. R. 232; *Re Rundel*, 4 Chy. Ch. R. 71; *Ex parte Lyons*, 2 Chy. Ch. R. 357.

County Treasurer's certificate as to taxes.

12. County Treasurer's certificate that there are no taxes in arrear and that there has been no sale for taxes, and that the roll of taxes in arrear has been returned to him. For form, see Leggo's Forms, 2nd ed., No. 1032. Proof must be given of payment of all taxes, except those for the year in which the certificate issues. If the certificate first produced does not cover all such taxes, an additional certificate will be required: See *Re Harding*, 3 Chy. Ch. R. 232; *Re Chamberlain*, 2 Chy. Ch. R. 352.

N. B.—Certificates of title are always granted subject to the taxes for the current year in which the certificate bears date. (See *R. S. O.*, c. 110, s. 12.) Whenever the roll of taxes in arrear for the preceding year has not been returned to the County Treasurer, his certificate must be supplemented by the collector's, or township treasurer's, receipt for that year. See *R. S. O.*, c. 180, s. 116.

Crown debts.

13. Certificate, or affidavit, that there are no Crown debts affecting the property. See *Con. Stat. C.*, c. 5; 29 & 30 Vict. c. 43; *R. S. O.*, c. 93. All Division Court bonds, and bonds to which the Provincial Government is entitled to the benefit of, are now released, unless registered against the land: *R. S. O.*, c. 93, s. 3; *Re Franklin*, 8 P. R. 470.

Statement of facts.

14. A concise statement of any other facts necessary to make out the title; and affidavits or other evidence to prove the same: *R. S. O.*, c. 110, s. 7, ss. 4, 5.

N. B.—All affidavits to prove facts material to the petitioner's title, should, as far as possible, be made by disinterested persons: *Ex parte Chamberlain*, 2 Chy. Ch. R. 352.

Schedule of particulars.

15. Schedule of the particulars so produced to be marked as an exhibit to the petitioner's affidavit: *Re Dickson*, 3 Chy. Ch. R. 352.

Referee's report on contestant's claim to be confirmed.

The Referee's certificate, allowing or disallowing the claim of any contestant, requires confirmation in the same manner as a Master's report made in an action.

Affidavits of publication of advertisement.

Affidavits proving the publication, and posting, of the advertisement required under *The Quieting Titles Act*, s. 14, should shew that

the deponent has examined issues of the papers in which the advertisement has been published; and also that the notices have remained posted at the Court House, and Post Office, continuously for one month: *Ex parte Chamberlain*, 2 Chy. Ch. R. 352; *Ex parte Hill*, *Ib.* 348. For forms of affidavits see Taylor on Titles, 2nd ed., pp. 200, 201.

Petitions to be referred to Judge in certain cases before being referred for investigation.

493. Where an application is made under the second section of the Act, the Clerk of Records and Writs is to attend one of the Judges with the petition for directions, before the same is referred for investigation. (31st Aug. 1867; Ord. 2.)

This *Order* is now in force im all the Divisions of the High Court, and its provisions would apply to any officer with whom a petition is filed under the Act.

The section of the Act referred to in this *Order* is now *R. S. O.*, c. 110, s. 3, and includes all applications except those by owners in fee-simple, or trustees for the sale of the fee-simple.

Where petitioner has only a partial interest, consent of other parties interested required.

Where the petitioner has merely a partial interest, the Court usually requires the consent of the other persons interested in the estate, to be filed, before authorizing the petition to be referred for investigation. Thus, where a purchaser before conveyance filed a petition, the consent of his vendor was required: *Re Brown*, 3 Chy. Ch. R. 158; and where the petitioner was a tenant in remainder, the consent of the tenant of the particular estate was required: *Re Pelten*, 8 P. R. 470.

The consent duly verified by affidavit should be attached to the petition, when brought to be filed.

Petition to quiet title to whom to be referred.

494. A petition under the Act may, at the option of the petitioner, be referred to any of the officers of the Court at Toronto, or to any conveyancing Counsel, who may from time to time be designated by the Court for the purpose; or to any of the following Local Masters, viz, the Masters at Barrie, Belleville, Brantford, Brockville, Cobourg, Cornwall, Goderich, Guelph, Hamilton, Kingston, Lindsay, London, Ottawa, Owen Sound, Peterborough, Sandwich, Sarnia, Simcoe, Stratford, St. Catharines, Whitby, and Woodstock; or to any other of the Local Masters who shall hereafter be designated. (31st Aug. 1867; Ord. 3.)

This *Order* is in force in all the Divisions of the High Court.

In addition to the Referees of Title named in this *Order* the Masters of the Court of Chancery at Brampton, Berlin, Chatham, Perth, and Walkerton, were prior to *The Judicature Act*, also appointed Referees of Titles; and since the passing of *The Judicature Act*, Sutherland Malcomson, Esq., one of the Masters of the Supreme Court at Goderich, has also been appointed a Referee of Titles, by the Presidents of the Queen's Bench, Chancery, and Common Pleas, Divisions of the High Court. Additional Referees of Titles.

The local Masters of the Supreme Court for Ontario, are not *ex officio* Referees of Titles, and only those who were Referees of Titles at the date when *The Judicature Act* came into force, or who have, since been expressly appointed by the Judges of the High Court, Referees of Titles, are now entitled to exercise the duties of the latter office. Local Master not *ex-officio* Referee of Titles.

Where the petitioner desires to have the petition referred to any local Master as Referee of Titles, he must designate the officer to whom he desires the reference, by indorsement on the petition: see *Ord.* 495. If there be no such indorsement the petition will be referred to the Referee of Titles at Toronto: *Ord.* 496.

495. To facilitate the proceedings in cases referred to the Local Masters, one or more Inspectors of Titles will be named by the Court, for the purposes, and with the powers mentioned in and provided for by the 25th and 26th sections of the said Act; and on the petition are to be indorsed the names of the Inspector, or one of the Inspectors, as the case may be, and of the Local Master, thus: "To be referred to the Master at , and to Mr. , Inspector of Titles." (31st Aug. 1867; Ord. 4.) Inspector of Titles to be appointed. Indorsement petition.

At present there is only one Inspector of Titles, and this officer is also the sole Referee of Titles at Toronto: see *Ord.* 633.

If there be no indorsement of the name of a local Master, the petition is to be referred to the Referee of Titles at Toronto: *Ord.* 496. Petitions not indorsed with name of a Local Referee, to be referred to Referee at Toronto.

Only a Local Master who is also a Referee of Titles can be named in the indorsement. As to the Masters who may be named, see *Ord.* 494 and notes.

Where the petition is required to be referred to a Local Master as Referee, it must, before being filed, be entered with the Inspector of Titles, and a fee of $8 in stamps must be paid thereon: see *Ords.* 97, 514. Fees—where petition referred to Local Referee.

Petitions, when to be referred to Toronto Referee.

496. Petitions filed unindorsed with the name of a Referee, are to be referred to the Referee in Toronto, or to one of the Referees in Toronto (if more than one), in rotation or otherwise as the Court from time to time directs; but a petition indorsed with the name of any Referee is to be referred to him accordingly, unless the Court otherwise directs. (31st Aug. 1867; Ord. 5.)

At present there is only one Referee at Toronto: see *Ord.* 633.

Petitions to be referred to Local Referees to be first entered with Inspector.

497. Where the petitioner desires the reference to a Local Master, the petition is to be entered with the Inspector of Titles before being filed as required by the Statute, and the Inspector is to note thereon the day of entering the same, adding to such note his own initials, and is thereupon to deliver the petition to the solicitor, or, if duly stamped, to the Registrar, to be filed. (31st Aug. 1867; Ord. 6.)

The word "Registrar" in this *Order*, appears to be a mistake; the "Clerk of Records and Writs," is the officer with whom the petition is filed in the Chancery Division.

Local Masters may confer with Inspector.

498. The Local Master shall be entitled to confer or correspond from time to time with the Inspector of Titles, for advice and assistance on questions of practice or evidence, or other questions arising under the Act or under these Orders. (31st Aug. 1867; Ord. 7.)

Certificate of filing of petition to be registered.

499. The Clerk of Records and Writs is to deliver to the party filing a petition under the Act, a certificate of the filing thereof, for registration in the proper County; and thereupon the petition is forthwith to be referred and delivered or posted by the Clerk of Records and Writs to the Referee named for that purpose. (31st Aug. 1867; Ord. 8.)

The form of the certificate referred to in this *Order* is given in *R. S. O.* p. 1061. The certificate is required to be registered in the proper registry office: see *R. S. O.* c. 110 s. 6.

The originals, or certified copies, of all instruments, registered prior to this certificate are required to be produced to the Referee: see *Ib.* s. 7 ss. 1, 2.

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500. The particulars necessary, under the fifth section of the Act, to support the petition are to be delivered or sent by the petitioner, or his solicitor, to the Referee, and are to be forthwith examined and considered by him. (31st Aug. 1867; Ord. 9.)

Papers in support of application to be delivered to Referee and examined by him.

The section of the Act referred to in this *Order* is now *R. S. O.* c. 110 s. 7. See further as to proof required, *Ord.* 492 note.

On delivering the papers to the Referee a fee of fifty cents is to be paid on each deed in the chain of title, other than satisfied mortgages. This fee is in lieu of all other fees; except fees for proceedings occasioned by any defects in the proof of title, and which shall be the subject of objection, or requisition, by the Referee: see *Ord.* 512.

Fees payable.

And where the reference is to the Referee at Toronto the additional fee of $4 on the certificate of title is also payable, *Ib.*.

501. In every case of an investigation of the title to property under the said Act, the petitioner is to shew, by affidavit or otherwise, whether possession has always accompanied the title under which he claims the property, or how otherwise, or is to shew some sufficient reason for dispensing with such proof either wholly or in part. (31st Aug. 1867; Ord. 10.)

Evidence required as to possession.

The question of possession is always a very important one, and it is necessary that the affidavits should shew how the possession has been held, *e. g.*: whether by residence, or by cultivation, and by whom, if by tenants giving their names and the periods during which they occupied. Proof as to possession is indispensable: *Re Wright*, 2 Chy. Ch. R. 355.

Possession, evidence as to.

Where the petitioner is a mere trespasser claiming to have acquired title by possession, the evidence as to possession must be very clear and conclusive, and it must be shewn to have actually extended to the whole of the land claimed. The actual possession of some part of a lot, or parcel, of land by a mere trespasser, will be insufficient to confer a title by possession, as to any other part of which there has been no actual possession, even though the lot be a wild lot: *Harris* v. *Mudie*, 7 App. R. 414. In order to confer a title under the Statute of Limitations there must be an actual and visible possession, mere payment of taxes on a vacant lot confers no title: *Re Jarvis* v. *Cooke*, 29 Gr. 303, *Walton* v. *The Woodstock Gas Co.*, 1 O. R. 630; but see *Steers* v. *Shaw*, 1 O. R. 26.

Petitioner originally entering as a trespasser.

Possession of part is not constructive possession of residue of lot.

Evidence where title claimed solely by possession.

Where the petitioner claims title by possession, he must prove possession for the requisite time by clear, and positive evidence, which should be of more than one independent witness. In such a case a notice, prepared by the Referee, should be served upon the person having the paper title, if he can be found, but if not, evidence of search for him and his representatives should be put in, and in such a case the possession should be shewn to have been long enough to bar him even though he had no notice of the possession: *Re Caverhill*, 8 C. L. J. N. S. 50; *Ex parte Chamberlain*, 2 Chy. Ch. R. 352. Where the petitioner claims title as against the patentee, or his heirs, or assigns, of land of which they have not taken actual possession by residing on, or cultivating some portion thereof, he must shew either knowledge of his possession by the patentee, or his heirs, or assigns, or else establish a possession for at least twenty years: *R. S. O.* c. 108 s. 5 ss. 4; *Re Linet*, 3 Chy. Ch. R. 230; *Bingle* v. *Dake*, 42 U. C. Q.B. 250; *Van Velsor* v. *Hughson*, 45 U. C. Q. B. 252; proof of notice to the husband of the owner is sufficient: *Harris* v. *Prentiss*, 30 C. P. 484; S. C. in Appeal, 7 App. R. 414.

Where petitioner enters under a title though originally defective actual possession of part may confer title to residue of lot.

It is not clear that it is necessary to establish so strict, and actual, a possession to all the land claimed, where the petitioner has been in possession under a claim of title which was originally defective. In such a case the doctrine of constructive possession might, and would probably, be held to apply, even as against the owner of the paper title: see *Dundas* v. *Johnston*, 24 U. C. Q. B. 550; *Davis* v. *Henderson*, 29 U. C. Q. B. 344; per Burton, J., *Harris* v. *Mudie*, 7 App. R. p. 425; *Steers* v. *Shaw*, 1 O. R. 26.

Where there is no contest, attendance of petitioner's solicitor dispensed with.

502. Where there is no contest, the attendance of the petitioner, or of any solicitor on his behalf, is not to be required on the examination of the title, except where, for any special reason, the Referee directs such attendance. (31st Aug. 1867; Ord. 11.)

Referee to deliver requisitions and objections.

503. If, on such examination as aforesaid, the Referee find the proof of title defective, he is to deliver or mail to the petitioner, or to his solicitor or agent, a memorandum of such finding, stating shortly therein what the defects are. (31st Aug. 1867; Ord. 12.)

If proofs are complete, and no requisition delivered by Referee, no further fees payable.

Where the proofs are complete in the first instance, no fees are payable to the Referee who examines the title, except the fifty cents payable on each deed in the chain of title. But where the proofs are defective, the Referee is, in addition, to be entitled to the same fees on all proceedings occasioned by any defects in the proof of title which

are mentioned in his memorandum delivered under this *Order*, as were payable to the Master in respect to similar proceedings in suits, but it would seem that these latter fees must be paid now according to the former Common Law tariff so far as applicable, and for proceedings not provided for therein according to the Chancery tariff referred to in *Ord.* 309 *ante* : see *Ord.* 512 *post.*

504. When the Referee finds that a good title is shewn, he is to prepare the necessary advertisement, and the same is to be published in the Official *Gazette* and in any other newspaper or newspapers in which the Referee thinks it proper to have the same inserted ; and a copy of the advertisement is also to be put up on the door of the Court House of the County where the land lies, and, unless the nearest Post Office is in a city, in some conspicuous place in the Post Office which is situate nearest to the property, the title of which is under investigation ; and the Referee is to indorse on the advertisement so prepared by him, the name of the newspaper or newspapers in which the same is to be published, and the number of insertions to be given therein respectively, and the period (not less than four weeks) for which the notice is to be continued at the Court House and Post Office respectively. (31st Aug. 1867 : Ord. 13.)

Advertisements to be published in *Gazette* and other newspapers.

Notices to be posted at Court House and Post Office.

The notice is not to be published until the Referee finds that a good title is shewn.

The notice is, ordinarily, required to be published once in the *Ontario Gazette*, and at least once a week for two weeks in some local newspaper published in the county town, or other place near where the lands in question are situated ; but in some cases it may be found advisable to publish the advertisement more frequently. At least a month should be given from the date of the publication of the first advertisement, for sending in claims.

Advertisement, how published.

The advertisement is principally intended for persons, if any, whose rights are not disclosed on the proceedings. Persons who are known to have any claim adverse to the petitioner, or persons who possibly may have some adverse claim, should generally be required to be served with notice of the proceedings : see *R. S. O.* c. 110 ss. 16-23.

Notice at Court House and P. O.

The notices required to be posted at the Court House, and Post Office, should be kept up continuously for the period directed, and the person intending to prove the posting up, should take care to see that such notices are kept up continuously for the requisite period: *Re Hill*, 2 Chy. Ch. R. 348; *Re Chamberlain*, 2 Chy. Ch. R. 352.

Affidavits proving publication.

For form of affidavits of posting, and of publication of advertisements, see Taylor on Titles 2nd ed. p. 200, 201.

Where the lands are situate in a city, posting of a notice at the Post Office is not required.

Notices required to be served, are to be prepared by Referee, and served as directed by him.

505. Any notice of the application to be served or mailed under the fourteenth section of the Act, is to be prepared by the Referee; and directions are in like manner, to be given by him as to the persons to be served with such notice, and as to the mode of serving the same, (31st Aug. 1867; Ord. 14.)

The 14th section of the Act is *R. S. O.*, c. 110, s. 16, and is as follows:—

Adverse claimant to be notified.

"16.—In case there appears to exist any claim adverse to, or inconsistent with, that of the petitioner to, or in respect of, any part of the land, the Judge shall direct such notice as he deems necessary to be mailed to, or served on, the adverse claimant, his solicitor, attorney, or agent."

By section 23, the Referee of Titles, to whom any petition is referred, is to proceed as the Judge should do under the Act, had the reference not been made, and he is to have the same powers.

Notice should be required to be served on every person known to have a claim adverse to the petitioner, whether the claim be admitted by the petitioner or not, unless the consent of such person be filed, duly verified, consenting to a certificate of title being granted to the petitioner, free from, or subject to, the claim, if any, of such consenting party, and, if subject to his claim, setting forth with clearness what his claim is. The notice to be served should contain explicit information why it is served: *Ex parte Hill*, 2 Chy. Ch. R. 348.

Notice is also often required to be served for the sake of precaution, thus, where an application was made by devisees within a year of the death of their testator, notice was required to be served on the heirs-at-law, as the petition was in effect a proceeding to establish the will: *Ex parte Hill*, 2 Chy. Ch. R. 348; and see *Re Dougherty*, 4 Chy. Ch. R. 80.

When title

When title is claimed by possession, notice should ordinarily be

served upon the persons who, but for such possession, would be the owners: *Re Chamberlain*, 2 Chy. Ch. R. 352. So also where the petitioner claimed the north-*east* part of a lot under a will devising the north-*west* part, alleging that the word "west" was a clerical error, all persons interested in maintaining the opposite view were required to be notified: *Ex parte Lyons*, 2 Chy. Ch. R. 357.

Claimed by possession, owner of paper title to be served.

Proceedings under *The Quieting Titles Act* being for the most part *ex parte*, it is often necessary to require the petitioner to negative the existence of facts, of which, in the case of a contest between the petitioner and any third person, the onus of proving would be on such third party: *Re Caverhill*, 8 C. L. J. N. S. 50.

Petitioner may be required to give negative evidence.

Where any transfer of the property has taken place, under circumstances of an unusual nature, it is necessary to require the petitioner to adduce evidence to negative the existence of any fraud, or want of *bona-fides*: *Re Dougherty*, 4 Chy. Ch. R. 80. Where, for instance, the property is claimed by, or on behalf of, a wife, under a conveyance made to her during coverture, an explanation of the transaction should be given on oath to show that it was *bonâ-fide*, and was such, that the husband's creditors could have no claim to the property, and the affidavit of the petitioner should be corroborated by disinterested persons of credibility: *Ex parte Lyons*, 2 Chy. Ch. R. 357. So where the former owner, a person of the same name as the petitioner, had conveyed the land to the petitioner a few days before the filing of the petition, and the title appeared simple, explanations were required to be given: *Re Wright*, 2 Chy. Ch. R. 355.

Or explain circumstances creating suspicion.

And, in addition, notice may also be required to be served on persons who may appear to have a possible interest in disputing the *bona fides* of any conveyance under which the petitioner claims, wherever there are any circumstances calculated to arouse suspicion: see *Re Dougherty*, 4 Chy. Ch. R. 80.

Persons interested in disputing *bona fides* of transaction under which petitioner claims, to be notified.

Notices required by the Referee, to be served, are to be prepared and issued by him. Where service is directed to be effected by mailing, the Referee may direct the letter enclosing the notice, to be prepaid and registered, and a notice to be indorsed on the envelope to the effect that if the letter be not called for within eight days that it is to be returned to the Referee of Titles, by whom the notice is issued. Directions to return letters, if not called for, are required by the Post Office authorities, to be printed, in order to secure due attention.

Service of notices, how effected.

Where a notice, served in this way, is returned to the Referee of Titles, he should require further service. Where service is authorised on the attorney, solicitor, or agent of the party to be notified, there

should be evidence produced that the person served was in fact the solicitor, attorney, or agent of the party required to be notified.

Proof of service.

Strict proof is required to be given of the due service of all notices required to be served. The entries of service in a deceased solicitor's docket were held insufficient proof: *Ex parte Palmer*, 2 Chy. Ch. R. 351.

Adjudication on claim of contestant.

Where there is a contest, the Referee may, by consent, report on the contestants' claim before disposing of the petitioner's title; but he should not do so, without consent. In general, the petitioner is bound, in the first place, to make out his own title before he can claim to have an adjudication upon the claim of a contestant: *Re Cameron*, 14 Gr. 612. And a contestant is at liberty to point out defects in the petitioner's title, before proceeding to prove his own: *Armour* v. *Smith*, 16 Gr. 380.

Referee may award costs

Form of report.

The Referee of Titles may award costs to, or against, a petitioner, or contestant: *Anon*, 2 Chy. Ch. R. 22. The order, or certificate of the Referee should be drawn up in similar terms to a report—*e. g.*, "I find and certify," and not "adjudge and determine," *Ib.*

Inspector, and Toronto Referee, to confer with Judges.

506. The Inspector, or Toronto Referee, is from time to time to confer with one of the Judges in respect of matters before such Inspector or Toronto Referee, as there shall be occasion. (31st. Aug. 1867; Ord. 15.)

When title made out before Local Referee, he is to certify same and forward papers to Inspector.

507. When any person has shown himself, in the opinion of a Local Master, to be entitled to a certificate or conveyance under the Act, and has published and given all the notices required, the Master is to write at the foot of the petition, and sign, a memorandum to the following effect: "I am of opinion that the petitioner is entitled to a certificate of title (*or* conveyance) as prayed" (*or* subject to the following incumbrances, &c., *as the case may be*); and is to transmit the petition (if by mail, the postage being prepaid,) with the deeds, evidence, and other papers before him in reference thereto, to the Inspector of Titles with whom the petition was entered; and the Inspector is to examine the same carefully, and should he find any defect in the evidence of title, or in the proceedings,

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he is, by correspondence or otherwise, to point the same out to the petitioner, or his solicitor, or to the Master, as the case may be, in order that the defect may be remedied before a Judge is attended with the petition and papers for approval. (31st Aug. 1867; Ord. 16.)

Finding of Local Referee not conclusive.

It will be seen from this *Order* that the finding of a Local Referee of Titles is not conclusive, but that it is the duty of the Inspector of Titles to examine the proceedings, and to require any defects in the proofs to be supplied. When the Inspector finds the proceedings defective, he either transmits the papers to the Referee, with a note of the defects, or, where they are few, and of trifling character, he communicates directly with the solicitor of the petitioner.

Local Referee to dispose of contestant's claim, if any, before transmitting papers to Inspector.

Where there has been any contest before a Referee of Titles, he should before certifying in favour of the petitioner, and transmitting the papers to the Inspector, dispose of the claim of the contestant. The order or report of the Referee on the claim of a contestant should be filed and confirmed, in the same manner as a Master's report in an action, before a certificate of title is granted to the petitioner.

Appeal from Inspector, or Referee of Titles.

An appeal will lie from the order, report, or certificate, of a Referee of Titles, or Inspector of Titles, to a Judge in Chambers. Such appeals are heard in the Chancery Division, on Mondays, and they must be set down at least the Saturday previously; and seven days' notice of appeal must be given to the respondent: See *Ord.* 591, *post.* The appeal must be argued by counsel: *Ib.*

Contestant establishing his claim, cannot obtain certificate of title without filing a petition.

A contestant who succeeds in establishing an adverse claim, cannot obtain a certificate of title in the proceeding in which he is contestant, but he may himself file a petition, and on such petition, he would be entitled to use the evidence taken in the matter in which he was contestant: *Re Dunham*, 8 P. R. 472.

When title is made out to satisfaction of Inspector, or Toronto Referee, he is to certify same: and to prepare certificate of Title

508. When the Inspector, or other Referee (not being a Local Master,) finds that the petitioner has shewn himself entitled to a certificate of title, or a conveyance under the Act, and has published and given all the notices required, the Inspector, or Referee, (not being a Local Master,) is to write at the foot of the petition, and sign a memorandum to the same effect as is required from a Local Master, and is to prepare

the certificate of title, or conveyance, and is to engross the same in duplicate, one being on parchment or parchment paper; and is to sign the same respectively at the foot or in the margin thereof; and is to attend one of the Judges therewith, and with the deeds, evidence, and other papers before him in reference thereto; and on the certificate or conveyance being signed by the Judge, the Inspector or other Referee aforesaid, as the case may be, is to procure the same to be signed by the Registrar, and registered; and the Clerk of Records and Writs is to deliver or transmit the same, when so signed and registered, to the petitioner, his solicitor, or agent, for registration in the proper County. (31st Aug. 1867; Ord. 17.)

Certificate to be engrossed in duplicate.

Signed by Judge, Inspector, or Toronto Referee, and Registrar.

Certificate of Title, by whom prepared.

A Local Referee to whom a petition is referred, is not to prepare the certificate of title.

The Inspector of Titles—or the Referee of Titles, at Toronto, where the petition is referred to him—are the only officers authorized to prepare certificates of title, issued under the Act.

Engrossment of certificate.

This *Order* requires the certificate to be engrossed by the officer preparing it; the object of the *Order* being, to insure the certificates being engrossed in a proper manner; but for sometime past, the practice has been for the petitioner, or his solicitor, to procure the engrossments to be made on printed headings, supplied for the purpose by the law stationers.

The engrossment should be well and carefully made, without using figures or abbreviations, as the Judges refuse to sign certificates engrossed in a careless and slovenly manner.

Fees on.

Where the petition is referred to a Local Referee, no fee is payable on the certificate of title, except the fees for entry; the fee of $8, payable to the Inspector, being in full of all fees. Where the petition is referred to the Referee of Titles at Toronto, a fee of $4 is payable on the certificate of title, in addition to the fees for entry: see *Ord.* 512, 514.

After certificate of title granted, Title Deeds may be delivered up without order on receipt being given.

509. When a certificate of title or conveyance under the Act has been granted, the Inspector or Referee may, without further order, deliver, on demand, to the

party entitled thereto, or his solicitor, all deeds and other evidences of title, not including affidavits made, and evidence given in the matter of the title; and is to take his receipt therefor. (31st Aug. 1867; Ord. 18.)

Under this *Order* it has been the practice to return only original deeds and documents of title, but not certified copies, these are retained by the Inspector of Titles, with the other papers in the matter.

Original deeds only returned to petitioner.

510. Every Inspector and other Toronto Referee is to keep a book, and to preserve therein a copy of all his letters under these Orders, and is to prepare monthly, for the information of the profession, a memorandum of points of practice decided in matters under the Act. (31st Aug. 1867; Ord. 19.)

Inspector or Toronto Referee to keep copies of all letters.

Points of practice decided under the Act, are now brought to the attention of the official reporter, and by him published in the authorized reports from time to time.

511. The fees of solicitors and counsel, and the fees payable by stamps, for proceedings under the said Act, are, respectively, to be the same as for like proceedings in suits. (31st. Aug. 1867; Ord. 20.)

Fees to solicitors and counsel to be same as for like proceedings in suits.

It is presumed that the tariff of fees promulgated by the Judges of the Supreme Court, on 10th September, 1881, would now be applicable to proceedings under *The Quieting Titles Act*; that tariff, however, in terms only relates to costs in "civil actions."

512. The Referee is, in lieu of all other fees, to be titled to a fee of fifty cents for every deed in the chain of title, other than satisfied mortgages; and Referees who prepare the certificate or conveyance, are to have a fee of four dollars, for drawing and engrossing the same in duplicate. Besides these fees, the Referee is to have the same fees in respect of proceedings occasioned by any defects in the proof of title, which shall

Fees payable to Referee of Titles.

Fees for proceedings occasioned by defects in title.

be mentioned in the Referee's memorandum referred to in Order 503, as are payable to the Master in respect of similar proceedings in suits. No further or other fee is to be payable to the Referee in respect of any of the proceedings by or before him under the said Act in an uncontested case. (31st Aug. 1867; Ord. 21.)

Fees payable to Referee in contested case.

513. In a contested case, the Referee is, in addition, to be entitled, in respect of the proceedings occasioned by the contest, to the same fees therefor as are payable to him for the like proceedings in suits. (31st Aug. 1867; Ord. 22.)

Fee payable to Inspector of Titles.

514. The fee of the Inspector of Titles on entering the petition with him is eight dollars, and no further fee is to be paid him for correspondence, examination of the title, drawing and engrossing certificate or conveyance, or for any other matter or thing done under the petition. (31st Aug, 1867 ; Ord. 23.)

Applicant to pay all postages, &c.

515. The applicant or his solicitor is to pay, or prepay, as the case may be, all postages and other expenses of transmitting letters or papers. (31st Aug. 1867 ; Ord. 24.)

Proceedings under *R. S. O.* c. 111, s. 33, how conducted, and fees therefor.

516. Petitions under the thirty-fifth section of the Act are to be filed and proceeded with in the same manner (as nearly as may be) as petitions for an indefeasible title; and the fees of officers, solicitors, and counsel, are to be the same as in respect of the like proceedings in suits. (31st Aug. 1867 ; Ord. 25.)

The 35th section of the Act, above referred to, is now *R. S. O.* c. 110, s. 33. That section is as follows :—

Declarations of legitimacy, &c.

"33. In case any person domiciled in Ontario, or claiming any real estate in Ontario, desires to establish, not his title to some specific property, but generally that he is the legitimate child of his parents, or that the marriage of his father and mother, or of his grandfather

and grandmother, was a valid marriage, or that his own marriage was a valid marriage, or that he is the heir, or one of the coheirs of any person deceased, or that he is a natural born subject of Her Majesty, he may, if the said Court thinks fit, have any of the said matters judicially investigated and declared."

Under the Imperial Statute, 21 & 22 Vict., c. 93, it has been held that a petitioner cannot obtain a declaration of the legitimacy of his grandfather: *Dodds* v. *Attorney General*, 42 L. T. N. S. 402.

XXXIX. INFANTS AND PERSONS OF UNSOUND MIND.

Order 517. Provided that in case of an infant defendant under the age of ten years, the office-copy bill was not to be served on him personally, but was to be left at the dwelling-house of the person with whom, or under whose care he resided, and if there were more infant defendants than one, only one office-copy need be served. Ord. 517.

The provisions of *Ord.* 517 were virtually superseded by the subsequent *Ord.* 610, *post.*

The practice as to the appointment of a guardian *ad litem* to infant defendants who are made parties by writ of summons, where they are resident within the jurisdiction, is now regulated by *Rule S. C.* 36. Where infants who are made parties by writ, are resident out of the jurisdiction, an order appointing a guardian must be obtained under *Ord.* 610 *post.* Where an infant is added in the Master's office, the Master making the order adding him, may also appoint a guardian *ad litem* under *Ord.* 587, or an order may be obtained under *Ord.* 610. Appointment of guardian *ad litem* to infants, how made.

Where infants are made parties to summary applications for administration, or partition, on motion in Chambers, an order should be obtained appointing a guardian *ad litem* under *Ord.* 610.

518. An order to take a bill *pro confesso*, against a defendant who at the time of the making of such order is an infant, or person of weak or unsound mind, unable of himself to defend the suit, is of no validity. (3rd June, 1853; Ord. 13, s. 5.) Order *pro. con.* of no validity against infant or lunatic.

Although there is no proceeding under the new procedure similar to the former orders to take bills *pro confesso*, nevertheless, the practice established by this *Order* will, no doubt, be held to be virtually still in force, and a judgment obtained against an infant, or person o

weak, or unsound mind, by default, without the previous appointment of a guardian *ad litem* would, it is apprehended, be of no validity under the new procedure. See *Rule S. C.* 39: But it has been recently held that where a plaintiff signs judgment against a defendant in ignorance that he is an infant, it is discretionary with the Court whether such judgment should be set aside: *Furnival* v. *Brooke*, 49 L. T. N. S. 134.

Application to appoint guardian *ad litem* to infant or lunatic may be made at any time after bill filed.

519. In case it shall appear to the Court that any defendant upon whom an office-copy of a bill has been served is an infant, or a person of weak or unsound mind not so found by inquisition, unable of himself to defend the suit, the Court, upon the application of the plaintiff, at any time after bill filed, may order that one of the solicitors of the Court be assigned guardian of such defendant, by whom he may answer the bill and defend the suit. (3rd June, 1853; Ord. 13, s. 5.)

Ord. 519 superseded as regards infants, but still in force as to lunatics.

This *Order* is virtually superseded so far as infants are concerned, by *Ord.* 610, *post*; but as regards lunatics, it would appear to be in force still.

Application to appoint guardian *ad litem* to lunatic by whom it may be made.

An application to appoint a guardian *ad litem* to a lunatic defendant, may be made by the defendant himself: *Worth* v. *Mackenzie*, 3 Mac. & G. 363; or by the plaintiff under this *Order*, at any time after the writ has issued. Where the application is made by the plaintiff for the appointment of a guardian to a person alleged to be a lunatic, who has not been so found by any judicial proceeding, the affidavits in support of the application must state facts showing the defendant to be a lunatic; it is not sufficient that the deponents swear that the person is of unsound mind, or that they believe him to be so: *McIntyre* v. *Kingsley*, 1 Chy. Ch. R. 281; and it should also be shown, that he has not been so found: *Crawford* v. *Birdsall*, 1 Chy. Ch. R. 70. Where the lunatic has been so found, the committee of the estate should be also made a party, and may defend the action on behalf of the lunatic without an order, but the sanction of the Court to his so doing should be obtained: Danl. Pr., 5th ed., 158; but if he has no committee, or the committee has an adverse interest, some one else will be appointed guardian *ad litem*: *Howlett* v. *Abraham*, 5 Mad. 23; *Worth* v. *McKenzie*, 3 Mac. & G. 363. As to service of notice of the application: see *Ord.* 520.

Evidence on motion.

Where lunatic is so found, committee may defend.

Official guardian when appointed.

Where a guardian is appointed other than the committee, the Official Guardian *ad litem*, is the person usually appointed, unless he be already appearing for other parties in the action having any interest adverse to that of the lunatic.

Where a guardian *ad litem* dies, or leaves the Province, a new guardian may be appointed on the application of the plaintiff *ex parte*: *Harper* v. *Harper*, 1 Chy. Ch. R. 217; *Weldon* v. *Templeton*, *Ib.* 360.

On death of guardian a new one may be appointed *ex parte*.

Where a lunatic is added as a defendant after judgment, or is served with a notice of motion for administration, under *Ord.* 467, a guardian is to be appointed in like manner, as guardians are appointed to lunatic defendants made parties to the writ of summons. See *Ord.* 522; *Rule S. C.* 69*a* Holmested's Manual, Pr. 63, 64.

Appointment of guardian *ad litem* to lunatic parties added in M. O., or served with notice for administration.

520. Notice of the application must be served upon, or left at the dwelling-house of, the person with whom, or under whose care the defendant resides, at least one week before the hearing of the application; and where the defendant is an infant, not residing with or under the care of his father or guardian, notice of the application must also be served upon, or left at the dwelling-house of, the father or guardian, unless the Court at the time of hearing the application thinks fit to dispense with such service. (3rd June, 1853, Ord. 13, s. 5.)

Notice of application, how to be served.

This *Order* continues in force so far as the appointment of guardians *ad litem* to defendants of weak, or unsound mind; as to infants, the *Order* is practically effete: see note to *Ord.* 517.

Seven days' notice of the motion, was held sufficient, even though the defendant was resident out of the jurisdiction: *Taylor* v. *Hargrave*, before Taylor, Referee, 21st January, 1872.

521. Notice of application for the appointment of a guardian *ad litem* to an infant defendant of the age of fourteen years or upwards, is to be served upon such infant personally, unless the Court otherwise directs, and is also to be served as directed by the preceding Order. (20th Dec. 1865; Ord. 2.)

When infant is 14, or upwards, personal service necessary unless dispensed with.

This *Order* would only seem to be in force, if at all, as regards motions before Masters to appoint guardians *ad litem* to infant defendants: see note to *Ord.* 522 *infra*.

522. When infants, or persons of unsound mind not so found by inquisition, are made parties to suits

Appointment of guardian *ad litem* to infants, or

lunatics added after judgment, or served with notice of motion under Ord. 467,

after decree, or are served with notice of motion under Order 467, guardians *ad litem* are to be appointed for them in like manner as they are now appointed at any time after bill filed. (8th Nov. 1856.)

Guardian *ad litem* appointment of, how made.

The appointment of guardians *ad litem* to infants made parties after judgment, or who are required to be served with notice of motion for administration, or partition, is now governed by *Ord.* 610. The procedure laid down by *Rule S. C.* 36 being confined to the case infants made defendants by writ of summons.

Master, may appoint when.

The Master, while proceedings are pending in his office, may, where he deems it advisable, appoint guardians *ad litem* to infant, and lunatic, parties. *Ord.* 587. Such applications to a Master would appear to be governed by *Ords.* 519, 520, 521 ; see *Ord.* 525. And it would therefore seem preferable to obtain the *Order* appointing a guardian in such cases under *Ord.* 610.

Motions for administration.

Where an infant, or lunatic, is made party to proceedings by motion for administration, sale, or partition, the order appointing a guardian *ad litem* may be properly obtained before the notice of motion for the administration, sale or partition, is returnable: *Barry* v. *Brazill*, 1 Chy. Ch. R. 237. In such a case, the application to appoint a guardian *ad litem* to a lunatic, should be made under the preceding *Orders*, but in the case of infants, the order should be obtained on *præcipe* under *Ord.* 610 *post*.

Service of infant, or lunatic, with judgment under Ord. 60, how effected.

523. Where a person required to be served with an office-copy of a decree, pursuant to Order 60, is an infant, or a person of unsound mind not so found by inquisition, the service is to be effected upon such person or persons, and in such manner, as the Master before whom the reference under the order is being prosecuted directs. (1st April, 1867; Ord. 14.)

This *Order* would seem to be still in force in all the Divisions. The Master under, *Ord.* 587, may appoint a guardian *ad litem* for any infant, or person of unsound mind, required to be served under *Ord.* 60, and service of the judgment is then directed to be made on such guardian : see *post Ord.* 525.

Persons served under *Ord.* 60 are not thereby made parties to the action, they are simply bound by the proceedings, and enabled to attend them if they wish : see *Ord.* 60 note.

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524. At any time during the proceedings before a Master under an order, the Master may, if he thinks fit, require a guardian *ad litem* to be appointed for any infant, or person of unsound mind not so found by inquisition, who has been served with an office-copy of the decree. (1st April, 1867; Ord. 11.)

Master may require guardian *ad litem* to be appointed for infant or lunatic served with o. c. judgment.

The Master may now, himself, appoint the guardian under *Ord.* 587 *post*, but it would seem doubtful whether the Master can make the appointment except upon notice as prescribed by *Ord.* 520. It would, therefore, appear preferable in all cases where an order for the appointment of a guardian *ad litem* is necessary, that it should be obtained under *Ord.* 610.

525. Guardians *ad litem* for infants or persons of unsound mind not so found by inquisition, who shall be served with an office-copy of a decree, are to be appointed in like manner as guardians *ad litem* to answer and defend, are appointed in suits on bill filed. (1st April, 1867; Ord. 12.)

Guardians *ad litem* to infants, or lunatics, served with o. c. judgment, how appointed.

Since the passing of this *Order* the practice as to the appointment of guardians *ad litem* to infant defendants by bill was materially changed by *Ord.* 610 *post*; as regards lunatics, the practice laid down by the preceding *Orders* continues in force.

526. A person desirous of appointing a guardian for him to defend a suit, may go before a Judge or Master with the proposed guardian if he thinks fit to do so. But he must satisfy the Judge or Master by affidavit that the proposed guardian is a fit person, and has no interest adverse to that of the person of whom he is to be the guardian in the matter in question; and if the affidavit is not sufficient for this purpose, the Judge or Master may examine the proposed guardian, or the person making the affidavit, *vivâ voce*, or require further evidence to be adduced until he is satisfied of the propriety of the appointment. (6th June, 1853; Ord. 2.)

Person desiring to have a guardian *ad litem* appointed to himself, may attend Judge with proposed guardian.

Evidence required on application.

Costs of guardian *ad litem.*

When on the application of the plaintiff for the appointment of a guardian *ad litem* to an infant, or lunatic, defendant, the guardian appointed was the nominee of the Court, the plaintiff was bound in any event to pay the guardian's costs, but where the nominee of the defendant was appointed, there was no such liability: *Clements* v. *Arnold*, 3 Chy. Ch. R. 75.

Official guardian to be appointed.

The Official Guardian *ad litem* is now, by the direction of the Court, appointed in all cases, unless some special reason exists for the appointment of some other person.

Proceedings set aside where guardian *ad lit.* irregularly appointed.

Where a guardian was irregularly appointed upon insufficient notice to the infant, the appointment was set aside on the application of the infant after decree: *Hamilton* v. *Hamilton*, 2 Chy. Ch. R. 160.

Petition for sale of infant's estate how entitled.

527. A petition for the sale or other disposition of the real estate of an infant, is to be intituled in the matter of the infant. (3rd June, 1853; Ord. 37, s. 1.)

Official guardian to be notified in *ex p.* applications by or on behalf of infants, when.

By direction of the Judges: "In all applications which may be made for the sale of infants' estates, the Local Judge, or officer to whom the application may be made is to be careful to require the Official Guardian *ad litem* to be notified on behalf of the infants, before disposing of any question in which the interests of the infants, and their mothers, or other persons who may act as their next friends, may conflict—*e. g.*, questions as to whether the lands should be sold free from, or subject to, any estate which the next friend may have therein, and whether a sum in gross, or annual sum, should be paid in lieu of such estate of dower, curtesy, &c., to which the next friend may be entitled, &c., &c." (Circular Letter of 6th Oct. 1882.)

Sale of infant's estate, on what grounds authorized.

Applications for the sale, leasing, or other disposition of the real estate of infants are authorized by *R. S. O.* c. 50 s. 76, *et seq.* where it is made to appear to the Court, that it is necessary, or proper, for the maintenance or education of the infant; or that, by reason of any part of the property being exposed to waste and dilapidation, or to depreciation from any other cause the interest of the infant requires, or will be substantially promoted by such disposition.

Interest of infant to be considered.

Where a sale is necessary for the payment of the debts of the ancestor it may be ordered: *Re McDonald*, 1 Chy. Ch. R. 97; *Re Barker*, 6 P. R. 225. But it should be shewn that unless the sale, or other disposition, is made, the estate will sustain loss, or that the creditors are about to enforce payment of their demands by suit: *Re Boddy*, 4 Gr. 144. Where none of the circumstances mentioned in the Act are proved to exist the Court has no authority to make any order: *Calvert* v. *Godfrey*, 6 Beav. 197; *Re Phelan*, 6 P. R. 259, and see *Re Jackes*, 3 C. L. J. N. S. 69, where the Court refused to sanction a renewal of a lease made by the infant's ancestor; and where it

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appeared that the application was made more for the benefit of the infants' father than of the infants themselves, the application was refused: *Re McDonald*, 1 Gr. 90; neither will a sale be ordered to repay a relative such as a father, mother, or brother, for the past maintenance of the infant: *Keller* v. *Tache*, 1 Chy. Ch. R. 388; and see *Edwards* v. *Durgen*, 19 Gr. 101.

No disposition can be authorized contrary to any will or deed.

No sale, lease, or other disposition can be ordered against the provisions of any will or conveyance by which the estate has been devised or granted to the infant, or for his use: *R. S. O.* c. 40, s. 77; *Re Smith*, 6 P. R. 282; *Re Wilson*, 7 P. R. 244: *Re Callicott*, 1 Chy. Ch. R. 182; but see *Re Bishoprick*, 21 Gr. 589.

Guardian cannot make valid lease of infant's land without sanction of Court.

A guardian of an infant, cannot, without the sanction of the Court, make a valid lease of his ward's land: *Collins* v. *Martin*, 41 U. C. Q. B. 602; *Switzer* v. *McMillan*, 23 Gr. 538; *Townsley* v. *Neil*, 10 Gr. 72; the report of the last case appears to be erroneous in describing the guardian who made the lease as a guardian *ad litem*, instead of a guardian of the estate of the infant.

Application for sale, &c., how to be made.

The Statute says, the application is to be made in the name of the infant by his next friend, or his guardian, but cannot be made without the infant's consent, if he is of the age of fourteen, or upwards: *R. S. O.* c. 40, s. 78, and see *post Ord.* 532; but see *Ord.* 528, *post.*

Applications for the sale, or other disposition, of infants' estates, may be made to the Master in Chambers, and it would also seem they may now be made to the County Court Judges, or Local Masters. *Rule S. C.* 422; see Holmested's Manl. Pr. pp. 213-214.

Execution of conveyance.

The Court may order the execution of the conveyance by the infant, or some one on his behalf, and a conveyance so executed is binding on the infant, as if made after he had attained his majority: *R. S. O.* c. 40, ss. 79, 80; *Rae* v. *Geddes*, 3 Chy. Ch. R. 404.

Proceeds of sale, retain quality of estate sold.

The proceeds of lands sold, or disposed of under the direction of the Court, retain the quality of the estate sold, or disposed of, so far as the rights of the infant's heirs, and next of kin, are concerned: *R. S. O.* c. 40, s. 82; *Fitzpatrick* v. *Fitzpatrick*, 6 P. R. 134; *Thompson* v. *McCaffrey*, 6 P. R. 193; *Campbell* v. *Campbell*, 19 Gr. 254. But where such moneys descend as realty, if the heir do not effect an actual reconversion they will pass to his representatives as personalty: *Mordaunt* v. *Benwell*, 19 Ch. D. 302; 45 L. T. N. S. 585.

Order for bar of dower.

Where the mother of the infant is a lunatic an application may be made for an order barring her dower: 44 Vict. c. 14 (O); 46 Vict. c. 12 (O); *R. S. O.* c. 126, ss. 8-10. The application must be made to a Judge in Chambers: *Re Colthart*, 9 P. R. 356.

Settled estates.

Settled Estates.—The Court has also the same jurisdiction which

jurisdiction of Court in regard to.

the Court of Chancery in England had on the 18th March, 1865, in regard to leases, and sales, of settled estates, and in regard to enabling infants, with the approbation of the Court, to make binding settlements of their real, and personal, estate on marriage : see *R. S. O.* c. 40, s. 85. The jurisdiction of the English Court of Chancery, at the above date was regulated by Imp. Acts 19 & 20 Vict., c. 120; 21 & 22 Vict., c. 77; 25 & 26 Vict., c. 108; 28 Vict., c. 45; see Taylor & Ewart's *Judicature Act*, p. [119].

Sale cannot be made of part to improve residue.

The Court has no power under *R. S. O.* c. 40, s. 85, to order the sale of a part of a settled estate, in order to make improvements on the remainder : *Re Moore's Settled Estates*, 6 P. R. 281; *Re Chambers*, 27 Beav. 653; nor can it sanction an exchange : *Re Bishoprick*, 21 Gr. 589; but in that case, on its being shown that, unless the exchange were made the property was liable to depreciation in value, the sale was directed under *R. S. O.* c. 40, s. 76; but the provisions of sect. 77, prohibiting any sale, or disposition against the provisions of any will, or conveyance, do not seem to have been considered in that case.

Applications respecting settled estates must be made to a Judge.

Applications as to leases, and sales, of settled estates, and to enable minors to make binding settlements of their real, and personal estate, on marriage; and in regard to questions submitted in the form of special cases by persons under disability of infancy or lunacy, under *R. S. O.* c. 40, s. 85, are excluded from the jurisdiction of the Master in Chambers and the County Court Judges, and Local Masters : *Ord.* 560, *post*; *Rule C. S.* 420-422: and see Holmested's Manl. Pr. 210-214.

Petition for sale of infant's estate, in whose name to be presented.

528. The petition is to be presented in the name of the infant, by his guardian, or by a person applying by the same petition to be appointed guardian, as hereinafter provided. (3rd June, 1853; Ord, 37, s. 2.)

Variance between Ord. and *R. S. O.* c. 40, s. 78.

There is a variance between this *Order*, and the Statute *R. S. O.* c. 40, s. 78, which provides that the application shall be in the name of the infant by his next friend, or by his guardian.

Petition for sale of infant's estate, what it is to state.

529. The petition is to state the nature and amount of the personal property to which the infant is entitled—the necessity of resorting to the real estate—its nature, value, and the annual profits thereof. It must also state circumstances sufficient to justify the sale or other disposition of the estate, and the application of the proceeds in the manner proposed. The prayer must

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state specifically the relief that is desired; it must designate the lands to be disposed of, and must propose a scheme for that purpose, and for the appropriation of the proceeds. If an allowance for the maintenance is desired, it must be so prayed, and a case must be stated to justify such an order, and to regulate the amount. (3rd June, 1853; Ord. 37, s. 3.)

Court has no authority to order sale, except under Statute.

A similar procedure prevails in the State of New York: see Tyler on Infancy, p. 300, s. 196. Apart from the power given by the Statute, the Court has no authority to direct the sale of an infant's estate, on the mere ground that it would be beneficial: *Calvert* v. *Godfrey*, 6 Beav. 197.

Circumstances which justify a sale of infants' estate.

The circumstances justifying a sale of an infant's estate, under the Statute, are: (*a*) The fact that the sale is necessary, in order to maintain, or educate, the infant; or, (*b*) that by reason of the property, or any part of it, being exposed to waste and dilapidation, or to depreciation from any other cause, the interest of the infant requires, or will be substantially promoted by, a sale, or other disposition: see *R. S. O.* c. 40, s. 76.

Payment of debts.

A sale may be authorized for the payment of the ancestor's debts for which the estate is liable, where the creditors are pressing, and loss is likely to be incurred, if the sale be not made: *Re Boddy*, 4 Gr. 144; *Re Barker*, 6 P. R. 225.

Master in Chambers has jurisdiction to order sale.

The petition may be presented to the Master in Chambers, who has power to direct a sale, and take all necessary accounts, and make all necessary inquiries, but an order of a Judge must be obtained, for the payment out of Court of any money realised from any sale, or other disposition of the estate: *Rule S. C.* 424.

Duty of father to maintain his children.

Where the father of an infant is living, it is his duty *primâ facie* to support and maintain, and educate, the infant, no matter what the infant's fortune may be: Simpson, on Infancy, p. 161; and maintenance is not ordinarily allowed out of the infant's estate, except upon proof that the father is unable to maintain, and educate, his children, according to their station and prospects in life; and although where there is an express trust in the marriage settlement, to which the father is a party, requiring the trustees to expend the trust fund for the support of the children of the marriage, such a trust may be enforced by the father: *Mundy* v. *Earl Howe*, 4 Bro. C. C. 223; yet where the trustees have an option, or a mere power, to do so, the Court will not compel them so to apply the trust

fund except on evidence of the father's inability to maintain the infant: *Wilson* v. *Turner*, 48 L. T. N. S. 370.

Mother not so bound.

A mother is not under any obligation to support her offspring, and consequently maintenance will be allowed out of the children's own property, without reference to her ability to support them: Simp. 161.

On sale being directed, inquiry as to debts of ancestor made.

Upon an application under the *R. S. O.* c. 40, s. 76, for the sale of an infant's estate, it is usual before directing any application of the proceeds, to require proof of payment of the debts of the ancestor, in cases where the infant has become entitled to the property directed to be sold, as heir-at-law, or devisee; or to require an advertisement to be issued for creditors, where no sufficient advertisement has previously been issued by the personal representative, and the Court then makes provision for the payment of the debts, if any. Where the sole object of the sale is the maintenance of the infant, the proceedings ought to be taken under the *R. S. O.* c. 40, s. 76, and not by way of action for the general administration of the estate; and the Court has refused, where the latter proceeding has been adopted unnecessarily, to sanction a sale in the administration proceedings, for the purpose of maintenance; *Fenwick* v. *Fenwick*, 20 Gr. 381; *Goodfellow* v. *Rannie*, *Ib.* 425; *Foster* v. *Patterson*, *Ib.* 345.

Sale not ordered in administration action, when brought merely for maintenance of infants.

Principal not usually broken into.

As a general rule the Court will not break in upon the principal money, for the maintenance, and education, of infant legatees, still it may be done where necessary: *Ashbough* v. *Ashbough*, 10 Gr. 430.

Petition for sale of infant's estate may pray for appointment of guardian.

530. The petition may pray for the appointment of a guardian, as well as for the disposal of the infant's estate. In that case a proper case must be made by the petition, and established by the evidence, for the appointment of the person proposed. (3rd June, 1853: Ord. 37, s. 3.)

High Court and Surrogate Court have concurrent powers to appoint guardians for infants.

The Surrogate Court has also power to appoint guardians to minors: See *R. S. O.* c. 132; 44 Vict. c. 16 (O). These Statutes, however, do not exclude the jurisdiction of the High Court: *Re Stannard*, 1 Chy. Ch. R. 15; *Re McQueen*, *McQueen* v. *McMillan*, 23 Gr. 191.

When Surrogate Court has appointed guardian, High Court will not appoint.

Where a guardian has been appointed by the Surrogate Court, the High Court will not appoint any other except for cause, and it should therefore be shewn, on applications to appoint guardians under these *Orders*, that the minor has no guardian.

Where the High Court appoints a guardian of the person and

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estate of a minor, it usually requires the guardian to give security. And if a guardian has been appointed by a Surrogate Court, an inquiry is sometimes ordered as to whether the guardian so appointed has given sufficient security; and if he has not, then he is required to give additional security before he is empowered to receive moneys on account of the infant. Where, however, the fortune of the infant is trifling, and the fund is lodged in Court, the Court frequently dispenses with security being given by the guardian; and requires instead an affidavit to be filed by the guardian from time to time, showing the due application of moneys paid to him under the order of the Court.

But may order inquiry as to sufficiency of security.

Security when dispensed with.

Although the Court is in the habit of paying respect to the wishes and directions of a testator in reference to the guardianship, and care of his children, it will not do so, where it is clearly shown, that a compliance therewith, would be prejudicial to the happiness, and moral training, of the infants: *Anon*, 6 Gr. 632; *Re McQueen*, *McQueen* v. *McMillan*. 23 Gr. 191.

In appointment of guardian Court considers interest of infant.

So, where there was a contest between a step-father and an uncle, and the child preferred the former, the Court being satisfied that it was better for the infant that the uncle should be appointed, appointed him: *Re Irwin*, 16 Gr. 461. The Court may remove testamentary guardians, and trustees, for the same causes as other guardians: *R. S. O.* c. 132, s. 8.

Where the father is living, if it is proposed to appoint any other person guardian, the father must be notified of the application: *Re Henricks*, 2 Chy. Ch. R. 418.

Where father living he should be notified of application.

It is improper to give a reversionary guardianship of wards in Court to the successors in office of any named person: *Murphy* v. *Lamphier*, 12 Gr. 241.

Guardianship not to be committed to a person and his successors in office.

It is a contempt of Court to remove a ward of Court from the jurisdiction, without the sanction of the Court; and the Court will interfere on the application of his guardian to prevent his removal: *Re Gillrie*, 3 Gr. 279.

Removal of ward from jurisdiction a contempt.

A guardian appointed either by the Surrogate Court, or by the High Court, has no power to make leases of the infant's lands in his name: *Townsley* v. *Neil*, 10 Gr. 72; *Switzer* v. *McMillan*, 23 Gr. 538. The report of *Townsley* v. *Neil* appears to be erroneous in describing the guardian, as a guardian *ad litem*.

Guardian cannot make valid lease without sanction of Court.

The sanction of the Court should be obtained to all dispositions, whether by sale, or lease, of an infant's estate.

531. Upon all petitions for the sale of an infant's estate, the infant is to be produced before a Judge in

On all petitions for sale of infants' estate the

infant is to be produced to Judge, or Master.

Chambers, or before a Master. (3rd June, 1853; Ord. 37, s. 5.)

Production of infant when dispensed with.

Where the infant is out of the jurisdiction, and not of an age making his consent to the proceedings essential, his production before the Master may, on application to a Judge, be ordered to be dispensed with: *Re Lane*, 9 P. R. 251; *S. C. sub nom. Re Love*, 18 C. L. J. 371.

But unless this order be obtained, the infant should in all cases be produced before the Master, even though he be under fourteen years.

Infant if over seven years to be examined

532. Where the infant is above the age of seven years he is to be examined, apart, by the Judge or Master, upon the matter of the petition, and as to his consent thereto, as required by the Statute; and his examination is to be stated to have been taken under this Order, and is to be annexed to and filed with the petition. Where the infant is under the age of seven years, the fact is to be certified by the Judge or Master before whom he is produced. (3rd June, 1853; Ord. 37, s. 6.)

Examination to be attached to petition.

tatute requires consent of infant only when he is 14 years or upwards.

At the time this *Order* was passed the Statute required the consent of an infant to be given, if he was of the age of seven years or upwards. The Statute has since been amended; and now the consent of the infant is only necessary when he is fourteen years or upwards: see *R. S. O.* c. 40, s. 78. It would, therefore, seem that the examination of the infant is no longer necessary where he is under fourteen. But until there is some judicial construction of the *Order*, it is perhaps safer to adhere to the practice here prescribed.

Examination of infant, how to be taken and certified by Master.

The Master before whom the infant is examined, should take down his examination in writing, and also his consent, where the consent is necessary; and this should be signed by the infant, and the Master, and attached to the petition: *Re Axford*, 6 P. R. 192.

Where the infant is under fourteen, the Master should not only certify the fact, but also the fact that the infant was produced before him.

Evidence should be given before the Master identifying the infant and proving his age.

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533. The witnesses to verify the petition are also to be produced before the Judge, or Master, and are to be examined *vivâ voce* to the matter of the petition, and the depositions so taken are to be stated to have been taken under this Order. (3rd June, 1853; Ord. 37, s. 7.)

Witnesses in support of petition may be examined before Judge or Master.

Formerly a *subpœna* might be issued under *Ord.* 266, for the examination of witnesses in support of the application; but whether this practice may still be followed, is doubtful. In *Monaghan* v. *Dobbin*, 2 C. L. T. 260; 18 C. L. J. 180, it was held that a witness could not be examined in support of a motion, without an order; but see *contra Raymond* v. *Tapson*, 23 Ch. D. 430; 48 L. T. N. S. 403: and see *Ord.* 534 *infra*.

Oral evidence in support of petition, how obtained.

534. The Masters of the Court are authorized to examine infants and witnesses under the preceding Order, without special order or reference. (3rd June 1853; Ord. 37, s. 8.)

Masters authorized to take examination without special order

Probably not only the Masters in Chancery holding office when *The Judicature Act* came into operation, and their successors, have power to act under this *Order*, but also the County Judges, who under *J. A.* s. 64, become *ex officio* Local Masters. The duties and powers of the latter class of Masters do not, however, seem to be very clearly defined by *The Judicature Act*.

535. Upon a petition so verified, the Court may either grant the relief prayed at once, or make such order as to further evidence, or otherwise, as the circumstances of the case require. (3rd June, 1853; Ord. 37, s. 9.)

Court may grant relief or require further evidence.

536. Where, by an order, a day is reserved for an infant defendant to show cause, it shall not be necessary to issue a subpœna to show cause against the order, but the plaintiff is to serve the defendant after he attains twenty-one years of age, with an office-copy of the order, indorsed with a notice in the form set forth in schedule W.

Day to show cause. Notice to be served on infant in lieu of subpœna.

Day to show cause must be reserved in judgment against infants for foreclosure.

It is still necessary to give an infant a day to show cause in judgments for foreclosure: *Gray* v. *Bell*, 46 L. T. N. S. 521; and see *Ord.* 434, note. This *Order* would, therefore, seem to be still in force in all the Divisions of the High Court.

Committees of lunatics to be appointed in same manner as Receivers.

537. Committees of the persons and estates of lunatics, idiots, and persons of unsound mind, and guardians, excepting guardians *ad litem*, are to be appointed in the same manner as Receivers, as nearly as circumstances will permit. (3rd June, 1853; Ord. 38, s. 2.)

The mode of appointing Receivers, is regulated by *Ord.* 278, *et seq.*

As to passing accounts of Receivers, and Committees of Lunatics, see *post Ord.* 588.

XL.—MISCELLANEOUS.

No suit open to objection on ground that a declaratory decree is sought.

538. No suit is to be open to objection on the ground that a merely declaratory decree or order is sought thereby; and the Court may make a binding declaration of right without granting consequential relief. (3rd June, 1853; Ord. 28.) (*Imp. Act*, 15 & 16 *V.*, *c.* 85, *s.* 50.)

Declaratory judgment not granted in favour of party who would not be entitled to relief.

This *Order* would appear to be still in force: see *Cox* v. *Baker*, 3 Ch. D. 359. It was formerly held only to apply to cases where the plaintiff was entitled to relief consequent upon the declaration he asked, if he chose to claim it, but it was held not to apply to cases where the plaintiff was not entitled to claim any relief consequent upon the declaration: *Rooke* v. *Lord Kingsdown*, 2 K. & J. 753; *Clarke* v. *Cook*, 23 Gr. 110; *Cogswell* v. *Sugden*, 24 Gr. 474. Thus, a decree was pronounced declaring the true construction of a will, without directing administration, in a case where the plaintiff was entitled to the latter relief if he desired it: *Murphy* v. *Murphy*, 20 Gr. 575; and see *Canada Central R. W. Co.* v. *The Queen*, *Ib.* 303.

Cases in which declaratory decrees have been refused.

A declaratory decree has been refused, where it was sought for the purpose of protecting the plaintiff, against a contingent claim by the defendant: *Jackson* v. *Turnley*, 1 Drew 617; and see *Cogswell* v. *Sugden*, *supra*; and also where it was sought to affect future rights

in events which had not happened: *Langdale* v. *Briggs*, 8 D. M. & G. 391; *Dowling* v. *Dowling*, 1 Chy. App. 612; or persons entitled in reversion: *Garlick* v. *Lawson*, 10 Ha. App. xv; or not *in esse*, *Bright* v. *Tyndall*, 4 Ch. D. 189; or to declare a purely legal question as against infants, even by consent; *Webb* v. *Byng*, 8 D. M. & G. 633; *De Windt* v. *De Windt*, 1 L. R. H. L. 87; or to declare a merely legal right: *Trustees of Birkenhead Docks* v. *Laird*, 4 D. M. & G. 732; *Bristow* v. *Whitmore*, 4 K. & J. 743; *Metropolitan Board of Works* v. *Sant*, 7 L. R. Eq. 197; *Jenner* v. *Jenner*, 1 L. R. Eq. 361.

Cases in which declaration of right made.

But in some cases the Court has made a decree declaring future rights. Thus the question of the right of renewal, on which a lessee's claim to compensation for land taken by a railway depended, was declared: *Bogg* v. *Midland R. W. Co.*, 4 L. R. Eq. 310; and, to save expense, it has construed executory marriage articles: *Byam* v. *Byam*, 19 Beav. 58.

Ord. 539.

Order 539 provided that where, according to the former practice, the Court was in the habit of refusing equitable relief, until the party seeking such relief had established his legal title at law. The Court would itself determine the legal right, or might direct it to be established at law. It is obviously now obsolete.

Court, or Judge, may dispose of matters without referring the case to a Master

540. In all cases where, according to the present practice, a reference to the Master would be directed, the Court may dispose of such matters itself, if it thinks fit, and may direct the proceedings to be taken in full Court, or in Chambers, as it finds expedient. (3rd June, 1853; Ord. 33, s. 1.)

This *Order* is still in force. It is usually acted upon only in simple cases, to save the expense of a reference to a Master. The most usual instance of its application being, where the account necessary to be taken involves a mere computation. In such a case the Judge usually directs the Registrar to ascertain the amount, and it is then inserted in the judgment, or order, as the finding of the Court.

Occasionally, however, the accounts in an administration suit have been taken under this *Order*.

Court may obtain services of experts.

541. The Court may obtain the assistance of accountants, merchants, engineers, actuaries, or other scientific persons, in such way as it thinks fit, the better to enable it to determine any matter in evidence in any

cause or proceeding, and may act on the certificate of such persons. (3rd June, 1853; Ord. 33, s. 2.) *Imp. Act*, 15 & 16, *V.*, *c.* 80, *s.* 42.

Master cannot employ experts.

This *Order* is still in force; see *Hawkins* v. *Mahaffy*, 29 Gr. 326. It is only the Court that is authorized to obtain the assistance of experts. A Master to whom a cause is referred, has no authority to employ experts for the purpose of assisting him to come to a conclusion on matters referred to him: *Re Robertson*, *Robertson* v. *Robertson*, 24 Gr. 555; *Mildmay* v. *Lord Methuen*, 1 Drew. 216; 16 Jur. 965; but see *contra*, *Re London & Birmingham R. W. Co*, 6 W. R. 141.

Costs of expert may be allowed though improperly employed.

Where, however, the Master had, at the instance of the plaintiff, and with the consent of the creditors, in an administration suit, employed an expert, and the parties received the benefit of his services without objection, the Court on appeal by the creditors refused to disallow the costs incurred: *Re Robertson*, *Robertson* v. *Robertson*, *supra*.

Court cannot refuse to grant relief against nuisance until inquiry made by expert how it may be best abated.

Where a plaintiff proves himself entitled to an injunction against a nuisance, or other injury, the Court cannot, before pronouncing judgment, order an expert to be employed, for the purpose of ascertaining the best mode of removing the nuisance, &c., even though the injunction to which the plaintiff is entitled, be a difficult one for the defendant to obey: *Attorney-General* v. *Colney Hatch Asylum*, 4 L. R. Chy. 146; and a general inquiry as to what ought to be done to preserve the plaintiff's light, and air, was refused: *Stokes* v. *City Offices Co.* 13 W. R. 537. But after judgment, the opinion of an expert may be taken, as to the time which ought to be allowed, for carrying it into effect: *Attorney-General* v. *Merthyr Tydfil*, 5 W. R. (1870) 148.

After judgment expert may be appointed.

Expert cannot call witnesses. His reports not conclusive.

An expert cannot call witnesses: *Morris* v. *Llanelly R. W. Co.*, W. N. (68) 46; and his report is not conclusive: *Ford* v. *Tynte*, 2 D. J. S. 127; *Adamson* v. *Gill*, 16 W. R. 306.

Appointment of expert may be *ex parte*.

Where an expert is employed, it is not absolutely necessary that the appointment should be made in the presence of the parties: *Re London and Birmingham R. W. Co.*, 6 W. R. 141.

Cases in which expert appointed.

An expert has been employed to ascertain the effect of a dam on the water penned back: *Hawkins* v. *Mahaffy*, 29 Gr. 326; and the amount of encroachment of alluvium on a sea shore: *Attorney-General* v. *Chambers*, 4 D. G. & J. 55, 58; and as to the effect of using steam boats on a canal: *Case* v. *Midland R. W. Co.*, 27 Beav. 247.

542. Where on a proceeding before an officer of the Court, pleadings or other documents, filed with another officer of the Court, are required, the officer with whom the pleadings or other documents are filed, is, upon production of a certificate signed by the officer requiring the pleadings or other documents, that the same are required for some proceeding before him, to transmit the pleadings or other documents mentioned in the certificate.

Transmission of documents from one officer of the Court to another.

This *Order* is still in force. Where pleadings or other documents in an action are required at the trial, their production may be procured in the Chancery Division, under *Ord.* 165 *ante*.

Where the documents in some other cause are required to be produced, an order should be obtained. When a party in his affidavit on production referred to documents produced by him, and in the custody of a Deputy Registrar in another suit, an order was made *ex parte* for their production: *Gainer* v. *Doyle*, 2 Chy. Ch. R. 279; but see *Hamelyn* v. *White*, 6 P. R. 143. On a motion to produce documents in another cause at the trial it should be shewn that the original documents are required, and that the production of office copies will not be sufficient: *Chadwick* v. *Thompson*, 2 Chy. Ch. R. 389; *Jarvis* v. *White*, 8 Ves. 313. *Attorney-General* v. *Ray*, 6 Beav. 335; *Anon.*, 13 Beav. 420; and ordinarily, an application for the order must be on notice: *Lamb* v. *Danby*, 9 W. R. 765.

Production of documents in other causes may be ordered.

Proof required that production of originals is necessary.

543. Where such documents are to be transmitted from one officer of the Court in Toronto to another, they are to be transmitted by delivering the same to the officer requiring the same, or his clerk.

Documents, how transmitted in Toronto.

544. Where such documents are to be transmitted by an officer of the Court in Toronto to one in an outer County, or from an officer in an outer County to one in Toronto, they are to be sent by parcel post, or by express, and, before they are sent, the party requiring their transmission is to deposit a sufficient sum to cover the expense of transmission, and of re-transmission to the office from which they are sent.

Transmission of documents to, or from, an outer County.

Documents to be returned.

545. As soon as the purpose for which any such documents are required is completed, the officer to whom they have been sent is to re-transmit them to the office from which they were sent.

Ord. 546.

Order 546 provided that all defences are to be presented to the Court by demurrer or answer, or both, according to circumstances, and is now obsolete.

XLI.—SUPPLEMENTARY ORDERS.

Office copies may be certified by Deputy Registrars.

547. Office copies of decrees to be served on persons made parties in the Master's office, may be certified by the Deputy Registrar at the place where the reference is being prosecuted. (5th Oct. 1859.)

This *Order* is still in force, and now applies to judgments, instead of decrees as formerly.

Office copies, how made.

Office copies are copies authenticated by the proper officer. In order to enable a local officer to authenticate a judgment which has not been entered in his own office, an authenticated copy must be produced to him, with which other copies may be compared. It has been usual to mark them "Examined," and stamp them with the seal of office of the officer who certifies them.

The power here conferred on Deputy Registrars may now be exercised by Local Registrars, and Deputy Clerks of the Crown, as well as Deputy Registrars: *Rule S. C.* 417.

The right to certify office copies under this *Order*, has been in practice extended to cases where an office copy is required to be served on parties interested, but who are not made parties: see *Ord.* 60.

Copies of documents to be demanded in writing.

548. A party requiring a copy of any pleading or affidavit is to make a written application for the same to the solicitor of the party by whom it has been filed, or on whose behalf it is to be used; and where the party has no solicitor, then to the party himself. (3rd June, 1853; Ord. 43. s. 4.)

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The *Order* is still in force as to affidavits, but it would seem no longer applicable to pleadings, which are now required to be served without a demand: *Rule S. C.* 131, Holmested's Manl. Pr. 92.

The practice prescribed by this *Order* is now followed in all the Divisions.

An irregularity in the indorsement of the affidavit is waived by demanding a copy: *Bennett* v. *O'Meara*, 2 Chy. Ch. R. 167.

Where copy of document demanded, it is to be furnished within 48 hours.

549. Where an application is made for a copy of any pleading or affidavit, it is to be delivered within forty-eight hours from the time of the demand; and any further time which may elapse before the delivery is not to be computed against the party demanding the same. (3rd June, 1854; Ord. 43, s. 4.)

Copies of affidavits, costs of furnishing.

This *Order* would seem to be still in force as regards affidavits. It is imperative, and the Court will enforce compliance with it: *Totten* v. *Macintyre*, 2 Chy. Ch. R. 80; *Burrows* v. *Hainey*, 2 Chy. Ch. R. 186. Formerly the costs of furnishing copies were part of the costs of the cause, or application, and payment of the costs of the copies could not be required as a condition of furnishing them, whether the *Rules S. C.* are intended to make any change in this respect is not very clear, see *Rule S. C.* 433. At law a party requiring copies of affidavits, had formerly to obtain them from the officer with whom the affidavits were filed on payment of the usual fees, but the practice prescribed by *Ord.* 548, is now followed in the Q. B. & C. P. Divisions, and this *Order* would also seem now applicable to all the Divisions.

DECLARATORY ORDERS.

17TH OCTOBER, 1868.

Amendment of Ords. 88, 120, 200, 288.

550. In Orders 88 and 120, the word "month" is to be read as lunar month; in Order 200 the word "shall" is to be read as permissive; in Order 288 the words "with the Registrar" are to be struck out; and in Schedules C. D. N. and S. the word "Registrar" is to be struck out wherever the same occurs, and the words, "Clerk of Records and Writs" inserted in lieu thereof.

This *Order* is still in force to a limited extent. *Ords.* 88, 120, and 288, and the forms in schedules C. D. N. & S. are now obsolete.

Fee payable on setting down causes.

551. In accordance with the practice heretofore prevailing in the office of the Registrar, the fee of $2, payable on setting down a cause with the Clerk of Records and Writs, is to be payable only on the setting down of causes for examinination and hearing, or motion for decree, or on bill and answer; in all other cases the fee on setting down a cause is to be fifty cents.

Additional fees payable to Clerk of R. & W.

The following fees, which before the naming of a Clerk of Records and Writs, were payable to the Registrar, are now to be payable in the office of the Clerk of Records and Writs:—

Every Certificate for Registration	$0 50
Enrolling Order	0 50
Drawing Order, per folio	0 20
Entering same when necessary, per folio	0 10
Entering Certificate of Title or Conveyance, per fo.	0 10

This *Order* is now in force only so far as it prescribes fees for proceedings for which no provision is made in the old Common Law Tariff: see *Rule S. C.*, 432.

Fourteen days' notice of motion for administration to be served.

552. A notice of motion under Order 467 is to be served upon all proper parties at least fourteen days before the day named for hearing the application.

It is doubtful how far this *Order* is in force. It has not been expressly retained by the *Rules S. C.*, but see *Rule S. C.* 3, which expressly retains *Ords.* 467 and 638, and see Holmested's Manl. Pr. 216; and see construction placed on *Rules S. C.* 3, *Trust & Loan Co.* v. *McCarthy*, 19 C. L. J. 188; 3 C. L. T. 366.

The words "at least," indicate that the notice is to be fourteen clear days. *Rumohr* v. *Marx*, 3 C. L. T. 31.

ORDERS OF 10TH SEPTEMBER, 1869.

Fees payable for proceedings within former jurisdiction of C. C.

553. In all suits or proceedings which, before the passing of "The Law Reform Act of 1868," might have been brought, instituted, or carried on under the equity jurisdiction of the County Courts, and which

are now pending, or which may hereafter be brought or carried on in the Court of Chancery, the fees and disbursements set forth in the Schedule hereto may be charged in respect of the services therein enumerated.

The tariff prescribed by this *Order* is continued in force by *Rule S. C.* 515, which is as follows :

"**515.** In all actions which (before the passing of *The Ontario Judicature Act*, 1881, and the *Law Reform Act* of 1868) might have been brought under the equity jurisdiction of the County Court, and which are now carried on in the High Court of Justice, such fees and disbursements may be charged as are fixed by the lower tariff referred to in *Order* 553 of the General Orders of the Court of Chancery, and for all fees and disbursements not provided for in the said lower tariff may be charged the amounts allowed in like cases by the tariff of the 10th September, 1881, subject, however, to the same proportion of reduction as exists between the said lower tariff, and the higher tariff of the Court of Chancery." *Rule S. C.* 515, costs in cases within the former equity jurisdiction of C. C.

The Taxing Officer is to tax according to the lower scale wherever that tariff is applicable without any express direction : see *Ord.* 318 *ante* ; *Brough* v. *Brantford*, 25 Gr. 43. Taxing officer to tax according to scale applicable.

The lower scale is applicable only where the County Court formerly had jurisdiction, in those cases, therefore, where the County Court jurisdiction was excluded, the higher scale costs should be allowed. Lower scale, when applicable.

The equity jurisdiction formerly possessed by the County Courts was defined by C. S. U. C. c. 15 ss. 34 & 35, which were as follows : Former equity jurisdiction of C. C.

"**34.** Any person seeking equitable relief may (personally or by attorney) enter a claim against any person from whom such relief is sought, with the clerk of the County Court of the county *within which such last mentioned person resides*, in any of the following cases, that is to say : C. S. U. C, c. 16, s. 34.

"1. A person entitled to, and seeking, an account of the dealings and transactions of a PARTNERSHIP *dissolved or expired*, the joint stock of capital not having been over $800 ; Partnership.

"2. A CREDITOR upon the estate of any deceased person, such creditor seeking payment of his debt (not exceeding $200) out of the deceased's assets (not exceeding $800) ; Administration by creditors.

"3. A LEGATEE under the will of any deceased person, such legatee seeking payment or delivery of his legacy (not exceeding $200 in amount or value) out of such deceased person's personal assets (not exceeding $800) ; Suit for legacy by legatee.

Administration, by residuary legatee.

"4. A RESIDUARY LEGATEE, or one of the residuary legatees of any such deceased person, seeking an account of the residue and payment, or appropriation of his share therein, (the estate not exceeding $800) ;

Or personal representative.

"5. AN EXECUTOR, OR ADMINISTRATOR, of any such deceased person seeking to have the personal estate (not exceeding $800) of such deceased person, administered under the direction of the Judge of the County Court for the county within which such executor or administrator resides ;

Mortgage suits for foreclosure, or sale.

"6. A LEGAL, OR EQUITABLE, MORTGAGEE, whose mortgage has been created by some instrument in writing, or a judgment creditor having duly registered his judgment *(a)*, or a person entitled to a lien or security for a debt, seeking foreclosure or sale, or otherwise, to enforce his security, where the sum claimed as due does not exceed $200.

Redemption.

"7. A PERSON ENTITLED TO REDEEM any legal or equitable mortgage, or any charge or lien, and seeking to redeem the same, when the sum actually remaining due does not exceed $200 ;

Equitable relief.

"8. ANY PERSON SEEKING EQUITABLE RELIEF for, or by reason of any matter whatsoever, where the subject matter involved does not exceed the sum of $200."

Injunctions.

"35. Injunctions to restrain the committing of waste, or trespass to property, by unlawfully cutting, destroying, or removing trees or timber, may be granted by the Judge of any County Court ; and such injunction shall only remain in force for a period of one month, unless sooner dissolved on an application to the Court of Chancery ; but the power to grant such injunction shall not authorize the prosecuting of the suit in the County Court ; and the injunction may be extended, and the suit further prosecuted to judgment, or otherwise, in the Superior Court in the like manner as if the same had originated in that Court."

Residence of parties, affected right of action in C. C.

It will be observed from section 34, that in order to give a County Court jurisdiction, all the defendants must have been resident in the same county ; and in administration suits by executors or administrators, both plaintiffs and defendants must have been resident in the same county, in order to give a County Court jurisdiction.

No jurisdiction if all defendants did not reside in the same county.

Thus in a mortgage suit, where some of the defendants were out the jurisdiction : *Lawrason* v. *Fitzgerald*, 9 Gr. 371 ; *Skelly* v. *Skelly*, 18 Gr. 495 ; or did not reside in the same county : *McLeod* v. *Millar*, 12 Gr. 194, the County Court had no jurisdiction.

(a) Registration of judgments was afterwards abolished in 1861, by 24 Vict. c. 41, s. 7.

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But if a person out of the jurisdiction is unnecessarily added as a party defendant, that does not entitle the plaintiff to costs on the higher scale, if the action would otherwise have been within the jurisdiction of a County Court: *Scott* v. *Burnham*, 19 Gr. 238. **Defendant out of jurisdiction unnecessarily made a party.**

Where the plaintiff's claim is within the former jurisdiction of a County Court, but there are incumbrancers, who are required to be made parties, whose claims exceed the jurisdiction of the County Court, the plaintiff is entitled to costs on the higher scale: *Hyman* v. *Roots*, 11 Gr. 202: *Seath* v. *McIlroy*, 2 Chy. Ch. R. 93; *Mitchell* v. *Martin*, 2 C. L. J., N. S. 249. **Claims of incumbrancers, effect of on jurisdiction of C. C.**

But where creditors, whose claims in the aggregate were under $200, obtained the usual administration order, and it was shown that the value of the estate, including lands, was under $800, and that the lands were subject to a mortgage, on which there was due $199 10, it was held that the existence of the mortgage did not entitle the plaintiffs to costs on the higher scale: *Re Scott, Hetherington* v. *Stevens*, 15 Gr. 683. But where the estate administered exceeds $800, the plaintiff is entitled to higher scale costs, though his claim be under $200: *Goldsmith* v. *Goldsmith*, 17 Gr. 213. **Administration.**

But where the plaintiff's claim is within the jurisdiction of the County Court, he is entitled only to lower scale costs, no matter what the value of the property may be out of which he seeks to recover it: *Forrest* v. *Laycock*, 18 Gr. 611. **Value of property out of which plaintiff seeks to recover is immaterial.**

Suits for foreclosure, or sale, could only be brought under clause 6, where the mortgage was created by some written instrument; a mortgage by deposit of title deeds unaccompanied by any written instrument, could not have been enforced in a County Court, unless the case could be brought within clause 8. **Foreclosure.**

Where the mortgagee was entitled to proceed under clause 6, the value of the mortgaged estate was immaterial; but where the case was governed by clause 8, it would seem the value of the mortgaged estate would be "the subject matter involved," and the jurisdiction of the County Court would have been excluded if it exceeded $200. Even in cases where the plaintiff's claim was under $200, if there were subsequent incumbrancers on the property, whose claims exceeded $200, the jurisdiction of the County Court was excluded: *Mitchell* v. *Martin*, 2 C. L. J. N. S. 249.

On a bill filed by a mortgagor for an account, where the mortgagee had exercised his power of sale and realised $350, and on taking the account only $130 was found due to the plaintiff, it was held "the subject matter involved" was the $350, and the plaintiff was therefore entitled to costs, on the higher scale: *McGillicuddy* v. *Griffin*, 20

Injunction.

Gr. 81; and where, besides a money demand within the jurisdiction of the County Court, the plaintiff claimed an injunction, and to have certain fences erected and maintained the costs were allowed on the higher scale: *Brough* v. *Brantford*, 25 Gr. 43. And in a suit by a purchaser for specific performance of a contract for the sale of land for a sum under $150; but before suit the plaintiff had entered and improved the land and increased its value to more than $200, it was held that "the subject matter involved" was over $200, and higher scale costs were allowed: *Kennedy* v. *Brown*, 6 P. R. 318.

Specific performance.

Partnership.

Actions for a partnership account could only be brought in a County Court under clause 1 of sect. 34, where the partnership was dissolved, or expired. A suit, therefore, for dissolution of a partnership, could not have been entertained in a County Court unless it could have been brought within clause 8, and see *Blaney* v. *McGrath*, 9 P. R. 417.

Certificate to be filed on instituting suit, where lower scale tariff is applicable.

554. The solicitor or party instituting any suit or proceeding, in respect of which he claims to pay the fees of Court, according to the said tariff, is to file with the Clerk of Records and Writs, or the Deputy Registrar, a certificate in the form hereunder set forth, of which certificate the Clerk of Records and Writs or Deputy Registrar, as the case may be, is, at the request of any solicitor or party acting in person in the suit or matter, to mark a copy.

Ord. 554, how far in force.

Rule S. C. 515 having continued the lower scale tariff it would seem that this *Order* is also by implication continued in force: see construction placed on *Rule S. C.* 3; *Trust & Loan Co.* v. *McCarthy*, 19 C. L. J. 188; 3 C. L. T. 366; and see *Rule S. C.* 445.

Order is directory.

This *Order* is directory, and the omission to file a certificate does not entitle a defendant on dismissal of the action, to higher scale fees except for fees of Court actually paid by him: *Ferguson* v. *Rutledge*, 18 Gr. 511. It applies only where the plaintiff admits that the lower scale is applicable. *Prima facie* in every action commenced in the High Court of Justice, the fees of Court are payable according to the higher scale.

The certificate should be filed on the issue of the writ, with the officer by whom it is issued. There being no practice at law on this point, it is presumed the practice prescribed by this *Order* will be followed in all the Divisions of the High Court.

The form of certificate needs variation to meet the altered circumstances, and the following is now suggested as a proper form to be adopted:

Form of certificate in actions brought under lower scale.

In the High Court of Justice.

—— Division.

(*Title of cause or matter.*)

I hereby certify that to the best of my judgment and belief, the tariff of fees under the orders of the Court of Chancery of 10th September, 1869 is under *Rule* 515, applicable to this case.

Dated, &c. A. B.,

Solicitor for ——

555. On production of a copy of the certificate, the officers of the Court are to receive and file all papers and take all necessary proceedings upon payment by stamps, or otherwise, as the case may be, of the proper fees, according to the said tariff.

On production of copy of certificate lower scale fees to be charged.

This *Order*, it is presumed, is also retained in force: see note to preceding *Order*.

556. In every case certified for the said tariff in which it may happen that the Solicitor becomes entitled to charge and be allowed according to the tariff contained in the Consolidated General Orders of 23rd June, 1868, the deficiency in the fees of Court is to be made good.

Where party becomes entitled to costs on higher scale, deficiency in the fees of Court to be made good.

This *Order*, it is presumed, is also retained in force: see note to *Ord.* 554.

It appears by this *Order* that the Court is not bound by the plaintiff's claim to bring the action under the lower scale, but may award costs according to the scale properly applicable.

Court may award costs on higher scale, in action brought on the lower scale.

It would seem that the deficiency to be made good under this *Order*, is the difference in the fees of Court which have been previously paid under the lower scale, and the amount which should have been paid according to the higher scale, by the party to whom the higher scale costs are awarded. It would not seem to include the deficiency in fees paid by the opposite party, and even if it did, there seems to be no means of enforcing the payment of the deficiency.

Where fees have been paid according to higher scale, in a case where lower scale is applicable, excess may be allowed, in discretion of Taxing Officer.

557. In any case in which the fees of Court have been paid, according to the tariff contained in the Consolidated General Orders of 23rd June, 1868, and in which it may happen that the Solicitor becomes entitled to charge and be allowed his own fees, only according to the tariff to these Orders, the excess of fees of Court so paid may be allowed upon the taxation of costs, if the circumstances of the case, in the judgment of the Taxing Officer, justify such allowance.

This *Order*, it is presumed, is also retained in force: see note to *Ord.* 554.

It provides for the converse of the case covered by the preceding *Order*—viz: where the party awarded costs has paid fees of Court according to the higher scale, and is only awarded lower scale costs. In such cases the extra disbursements may be allowed in the discretion of the taxing officer.

Ord. 558.

Order 558 provided that the Judges' Secretary should be sole Inspector of Titles, and Referee of Titles at Toronto under *The Quieting Titles Act*, it is superseded by *Ord.* 633 *post.*

ORDERS OF 23RD FEBRUARY, 1871.

The Judges of the Court of Chancery for Ontario, do hereby in pursuance and execution of all powers and authorities enabling them in that behalf, order and direct in manner following:—

Certain orders abrogated.

559. The Orders of this Court numbered 14 to 22 inclusive, 31, 329, 355, 415, and 416, are hereby abrogated.

Orders 14–16 enabled the Accountant of the Court of Chancery to discharge the duties of a Master. These *Orders* were subsequently revived by *Ord.* 598, but are now effete.

The other *Orders* abrogated related to the duties of, and appeals from, the Judges' Secretary; the signing of cheques; and the sittings of the Court.

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REFEREE IN CHAMBERS.

Jurisdiction of Referee in Chambers.

560. The Referee in Chambers is hereby empowered to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same, as, by virtue of any Statute or custom, or by the practice of the said Court, is now done and transacted by a Judge of the Court sitting in Chambers, except the matters following:

Matters excluded from his jurisdiction.

1. Granting writs of *Habeas Corpus*, and adjudicating upon the return thereto; — *Habeas corpus.*

2. Appeals and applications in the nature of Appeals; — Appeals.

3. Proceedings as to Lunatics under the Consolidated Statutes of Upper Canada, chapter 12, section 33, and the 28th Victoria, chapter 17, sections 5 to 11 inclusive; — Lunacy.

4. Applications for Writs of Arrest; — Writs of arrest.

5. Petitions for advice under the Property and Trusts Act, 29th Victoria, chapter 28, section 31; — Petitions by trustees for advice.

6. Applications as to the custody of Infants under the Consolidated Statutes of Upper Canada, chapter 74, section 8; — Custody of infants.

7. Applications as to leases and sales of settled estates; to enable minors, with the approbation of the Court, to make binding settlements of their real and personal estate on marriage; and in regard to questions submitted for the opinion of the Court in the form of special cases on the part of such persons as may by themselves, their committees, or guardians, or otherwise, concur therein, under the 28th Victoria, chapter 17, section 1; — Leases and sales of settled estates. Settlements by infants, &c. Special cases where persons under disability interested.

Opposed motions for Administration.

8. Opposed applications for Administration Orders;

Opposed motions respecting infants or their estates.

9. Opposed applications respecting the Guardianship of the person and property of Infants;

Ex parte injunctions.

10. *Ex parte* injunctions;

Partition.

11. Proceedings as to Partition and sale of Real Estate, under the Ontario Statute, 32nd and 33rd Victoria, chapter 33.

Applications to appeal, or re hear.

12. Applications for Leave to Appeal or Re-hear after the time limited for that purpose has elapsed.

Referee in Chambers, duties of, now performed by Master in Chambers.

The office of Referee in Chambers was created by 34 Vict., c. 10, (O.) 15th February, 1871.

The Master in Chambers now exercises the duties formerly discharged by the Referee in Chambers: *Rule S. C.*, 420; and see Holmested's Manl. Pr., 210 *et seq.*

Jurisdiction of Referee.

It will be observed that the Referee's powers were limited to the transaction of such business as could, on 23rd February, 1871, be done and transacted by a Judge sitting in Chambers, subject to the specified exceptions—new powers conferred by subsequent Statutes, or General Orders, on a Judge in Chambers, could not have been exercised by the Referee in Chambers, and cannot now be exercised by the Master in Chambers, unless the power be expressly conferred on him by Statute, or Rule of Court. Thus the A. J. Act, 1873 sec. 35, (*a*) empowers a Judge in Chambers to determine, on a summary application, whether a conveyance made by a judgment debtor is fraudulent, and it was held that the Referee had no jurisdiction to entertain such applications: *Queen* v. *Smith*, 7 P. R. 429, and see *Re Nolan*, 6 P. R. 115; and it was also held the Referee could not grant a decree in a partition suit, under the *Orders* of 10th January, 1879: *Re Arnott, Chatterton* v. *Chatterton*, 8 P. R., 39. Where, however, a statute passed after 1871 merely enlarged the power of a Judge in Chambers, in a case in which the Referee had previously exercised jurisdiction, it was held that the Referee could exercise the additional powers conferred by the statute upon a Judge in Chambers: *Collver* v. *Swayzie*, 8 P. R. 421; 15 C. L. J. 137.

Does not include statutory powers conferred on a Judge in Chambers, subsequent to 23rd Feb. 1871.

Matters excluded from jurisdiction.

Applications to the summary jurisdiction of the Court against Solicitors, were excluded from the jurisdiction of the Referee: *Re L. & M.*, 6 P. R. 21; but see *Re Carroll* 2 Chy. Ch. R. 323; *Re Walker*, *Ib.* 324: *Re Toms*, *Ib.* 381: as also applications by parties claiming.

(*a*) Now *R. S. O.* c. 49, s. 10.

adversely to a receiver, or sequestrator: see *Brown* v. *Dollard*, 6 P. R. 113.

The restriction of clause 12 did not extend to applications for leave to appeal from a Master's report: *Russel* v. *Brucken*, 3 Chy. Ch. R. 488, but only to applications for leave to appeal to the Court of Appeal. May entertain application for leave to appeal from Master's report.

Where an application was made to the Referee, which he had no power to entertain, he refused to adjourn it before a Judge: *Lapp* v. *Lapp*, 3 Chy. Ch. R. 234, or to hear it even by consent: *Thompson* v. *Freeman*, 4 Chy. Ch. R. 1. Where no jurisdiction, adjournment before a Judge refused

561. Notice of an application for an administration order, or respecting the guardianship of the person or property of an infant, may be in the following form: "Take notice that an application will be made to the Referee in Chambers on, &c., or, if opposed, then to a Judge in Chambers so soon thereafter as a Judge shall be sitting in Chambers," &c.; and in such case the application, if opposed, is to be heard by a Judge in Chambers forthwith, if a Judge happens to be then sitting in Chambers, or on the first Monday thereafter on which there shall be a Judge so sitting in Chambers. Notice for administration, or appointment of guardian, form of. Application to be heard before Judge if opposed.

The practice prescribed by this *Order* would seem to be still in force, except that "the Master in Chambers" should now be substituted for "the Referee in Chambers" in the notice of motion. In the Q. P. and C. P. Divisions the Judges sit on Tuesdays and Fridays, instead of on Monday, as in the Chancery Division, for hearing Chamber applications.

Order 562, which enabled the Referee to direct matters to be heard before a Judge, is now superseded by *Rule S. C.* 426, which is to the same effect: see *Hughes* v. *Rees*, 9 P. R. 86, *ante* p. 85. Ord. 562.

563. The Orders regulating the conduct of business in Chambers are to apply to proceedings before the Referee in Chambers. Orders regulating business in Chambers, apply to proceedings before Referee.

This *Order* would seem to be still in force. The *Orders* regulating the business in Chambers are *Ord.* 197–210, *ante.*

This *Order* must, however, be construed with reference to *Ord.* 560 and the *Rules S. C.* limiting the jurisdiction of the Master in Chambers.

Referee may award costs in gross, in lieu of taxed costs.

564. Where the Referee in Chambers deems it proper to award costs to either party, he may direct payment of a sum in gross in lieu of taxed costs, and directed by and to whom such sum in gross is to be paid.

The power conferred by this *Order* on the Referee in Chambers is now exercised by the Master in Chambers.

Orders in Chambers, how to be signed and authenticated, and entry of.

565. All orders made in Chambers are to be signed by the Referee, and further authenticated by the stamp of his office; and such of the said orders as require entry are to be entered by the Entering Clerk in a separate book kept for that purpose as hitherto.

This *Order* would seem still to be in force, and to apply to all the Divisions: as to the orders requiring entry, see *Ord.* 594. Judgments pronounced in Chambers are required to be entered in the judgment book, in the same manner as other judgments.

Ord. 566.

Order 566 provided that appeals from orders of the Referee in Chambers are to be made within fourteen days, and is now superseded by *Rule S. C.* 427, regulating appeals from the Master in Chambers.

Ord. 567.

Order 567, which provided that the fees payable to the Judges' Secretary should be paid in stamps, is obsolete.

ACCOUNTANT.

The following *Orders*, 568–583, are printed as still (except when otherwise noted) regulating the practice in the office of the Accountant of the Supreme Court. It is doubtful, however, how far any of them are actually in force.

In England, the Rules existing before the English Judicature Act affecting the Chancery funds, have been formally revoked, and new Rules substituted: see Snow & Winstanley's Pr., pp. 591, *et seq.*

Accountant to have charge of books.

568. The Accountant is to have charge of the Books required by the Orders relating to the Suitors' Accounts, Suitors' Fee Fund Account, Mortgages, and

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other investments, and is to be responsible for the due keeping of the said Books in accordance with the said Orders, and for the correctness of all entries therein.

Amendment of certain orders.

569. The word "Accountant" is substituted for "Registrar" in Orders 255, 256, 352, 368, 369, 371, 373, and 486; and in Schedule V., Form No. 6; and for "Ledger Clerk," in Orders 353, 354, 356, and 357.

570. The duties assigned by Orders 365 and 367, to the Registrar and Ledger Clerk are to belong to the Accountant alone.

Ord. 571.

Order 571, provided for the signing and countersigning of cheques and is now superseded by *Rules S. C.* 477–478.

Fees payable to Accountant.

572. The fees heretofore payable in the Registrar's office upon the payment of money into or out of Court, and upon certificates as to the state of any account, are to be paid in the office of the Accountant.

Moneys directed to be paid to woman who subsequently marries.

Where sum $600 or under, or $50 per annum or under, it may be paid out on affidavit negativing any settlement affecting same.

573. Where the Accountant is directed by an order to pay money to an unmarried woman, and the order does not extend to the transfer or delivery to her of any stocks or securities, and she marries before payment of the money, the Accountant, if the same does not in the whole exceed $600 of principal money, or $50 in annual payments, may draw for the money in favour of such woman, upon an affidavit of herself and her husband that no settlement, or agreement for a settlement, has been made or entered into, before, upon, or since their marriage; or in case any settlement, or agreement for a settlement, has been made or entered into, then upon an affidavit by the woman and her husband, identifying the settlement or agreement for a settlement, and stating that no other settlement or agreement for a settlement has been made or entered into as aforesaid, and an affidavit of the solicitor of

the woman and her husband, that such solicitor has carefully perused such settlement or agreement for a settlement, and that, according to the best of his judgment, such money is not, nor is any part thereof, subject to the trusts of the settlement, or agreement for a settlement, or in any manner comprised therein or affected thereby.

Affidavit when dispensed with

When the fund was under £10, an affidavit was dispensed with: *Veal* v. *Veal*, 4 L. R. Eq. 115; and where the husband was permanently resident out of the jurisdiction, the affidavit of the wife alone was accepted and acted on: *Wilkinson* v. *Schneider*, 9 L. R. Eq. 423: and in another case an affidavit by a solicitor disclosing facts, from which it appeared that it was unlikely that there was any settlement, was accepted as sufficient: *Woodward* v. *Pratt*, 16 L. R. Eq. 127.

Stock, &c., directed to be transferred to a woman who subsequently marries, if it do not exceed $600, may be transferred on affidavit being filed negativing any settlement affecting same.

574. Where the Accountant is directed by any order to transfer or deliver any stocks, funds, shares, or securities to an unmarried woman, and the order does not extend to the payment to her of any money, and the woman marries before the transfer or delivery of the stocks, funds, shares, or securities, and the same do not in the whole exceed in value $600 then, upon an affidavit of the woman and her husband that no settlement or agreement for a settlement has been made or entered into before, upon, or since their marriage; or, in case any such settlement or agreement for a settlement has been made or entered into, then, upon an affidavit of such woman and her husband, identifying such settlement or agreement for a settlement, and stating that no other settlement or agreement for a settlement has been made or entered into as aforesaid, and an affidavit of the solicitor of such woman and her husband, that such solicitor has carefully perused the settlement or agreement for a settlement, and that according to the best of his judgment the stocks, funds, shares, or securities, are not, nor is any part thereof subject to the trusts of any settle-

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ment or agreement for a settlement, or in any manner comprised therein or affected thereby, the Accountant may transfer or deliver such stocks, funds, shares, or securities to such married woman.

Stocks, &c., may be transferred, or money paid to woman who marries, after order for payment.

575. A similar course to that mentioned in Orders 573 and 574 is to be adopted in the case of money directed to be paid, and of stocks, funds, shares, and securities directed to be transferred or delivered to a woman who afterwards marries, where the aggregate value of such money, stocks, funds, shares, and securities does not exceed $600.

Settlement of fund, may be waived.

If the fund exceed $600 the money cannot be paid out, or stock transferred, without a special order, in which the Court will provide for the settlement of the fund before paying it out; and where the applicant is an infant, it has been held she has no power to waive her equity to a settlement: *Shipway* v. *Ball*, 16 Ch. D. 376 : 44 L. T. N. S. 49. But where the husband and wife are of age, the Court will order the money to be paid out without a settlement if the parties appear by separate solicitors, and consent: *Cline* v. *Cline*, before Blake, V. C., 8th March, 1875; but see *Tompkins* v. *Holmes*, 14 Gr. 245, where a wife was directed to be examined before a Master, apart from her husband, as to her consent to abandon a fund in litigation.

Moneys payable to legal personal representatives may be paid to survivor of them.

576. Where money is directed to be paid out of Court to persons to be named in an order or a report, and a sum is reported or found to be due to any persons as legal personal representatives, the same or any portion thereof for the the time being remaining unpaid may, upon proof to the Accountant of the death of any of them, be paid to the survivors or, survivor of them.

577. Where money is directed to be paid out of Court to the legal personal representatives of any person, or to any persons as legal personal representatives, the same or any portion thereof for the time being remaining unpaid may, upon proof to the

Accountant of the death of any of such legal personal representatives, whether before, on, or after the day of the date of the order, be paid to the survivors or survivor of them.

Money directed to be paid to a person, or his legal personal representatives, may be paid to the latter or the survivor of them.

578. Where money is directed to be paid out of Court to any person named in the order, or named or to be named in any report, or his legal personal representatives, the same, or any portion thereof for the time being remaining unpaid, may, on proof to the Accountant of the death of such person, whether before, on, or after the day of the date of the order, be paid to such legal personal representatives, or the survivors or survivor of them.

Stocks, &c., directed to be transferred to a person or his representatives may be transferred to latter, or survivor of them.

579. Where stocks, funds, shares, or securities, are directed to be transferred or delivered out of Court to the legal personal representatives of any person, or to any persons as legal personal representatives of any person, the Accountant may, upon proof of the death of any such representatives, whether before, on, or after the day of the date of the order, transfer, or deliver such stocks, funds, shares, or securities to the survivors or survivor of them; and where stocks, funds, shares, or securities are directed to be transferred and delivered out of Court to any person or his legal personal representatives the Accountant may, upon proof of the death of such person, whether before, on, or after the day of the date of such order, transfer or deliver such stocks, funds, shares, or securities to such legal personal representatives, or the survivors or survivor of them.

No money to be paid, or stock transferred, under probate, or administration granted 6 years subsequent to date of order for

580. No principal sum of money, nor any stocks, funds, shares, or securities, shall, under Orders 578 and 579 be paid, transferred or delivered out of Court to the legal personal representatives of any person, under

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any probate, or letters of administration, purporting to be granted at any time subsequent to the expiration of six years from the day of the date of the order directing such payment, transfer, or delivery. payment or transfer.

581. No interest or dividends shall, under Order 578 be paid out of Court to the legal personal representatives of any person, under any probate, or letters of administration, purporting to be granted at any time subsequent to the expiration of six years after the day of the date of the order directing such payment, or after the last receipt of such interest or dividends under such order, which shall last happen. Interest, or dividends, not to be paid under probate or administration granted 6 years, subsequent to date of order for payment, or last payment of interest or dividends.

582. Where money is directed to be paid out of Court to any persons named or to be named in an order or report, and such money shall, by such order or report, be found to be due to them as partners, the same may be paid to any one or more of such partners. Money found due to partners may be paid to any one of them.

583. Where an order directing the investment from time to time of any interest or dividends accruing upon any stocks, funds, shares, or securities standing in the name of the Accountant, in trust, in or to the credit of any cause, matter, or account, or upon any stocks, funds, shares, or securities which may be directed to be transferred into the name of the Accountant, or to be carried over from one account to another, or upon any stocks, funds, shares, or securities which may be directed to be purchased with any cash in Court, or with any cash to be paid into Court with his privity, is brought to the Accountant for the purpose of having such direction for investment carried into effect, the Accountant may, from time to time, until he receives notice of an order to the contrary, without any further request, invest the interest Under order directing investment of interest, or dividends, in stock, &c., Accountant may from time to time purchase stock, &c., in which investment directed to be made.

or dividends so directed to be invested, together with all accumulations of interest or dividends thereon, as soon as conveniently may be after they accrue due and have been received, in the purchase of the particular description of stocks, funds, shares, or securities named in the order directing such investment, and place such stocks, funds, shares, or securities, when purchased, to the credit of the cause, matter, or account respectively, as may be directed by such order.

MASTERS' OFFICES.

Where there is undue delay in prosecuting a reference, Master may close it.

584. Where there is undue delay in prosecuting a reference in the office of the Master in Ordinary, or any local Master, he may issue his warrant to the solicitors or parties interested, which may be transmitted by post, calling upon them to show cause why the reference should not be duly proceeded with. In default of sufficient cause being shewn to excuse the delay, or upon default being made in attending upon the return of the warrant, the Master is to certify to the Court the circumstances of the case; and thereupon the reference in his office is to be deemed closed, and is not to be resumed until further order.

This *Order* is still in force in all the Divisions.

English practice where delay occurs in prosecution of suits.

In England a somewhat similar practice prevails; there the Chief Clerks from time to time go through all matters pending before them, and in those cases which have been left unattended to by the solicitors having the conduct of the cause or matter, they address a formal notification to such solicitors, pointing out the excessive delay, the present position of the matter, and informing them unless the matter is attended to, it will be handed over to the official solicitor of the Chancery Division. See *Law Times Jour.* for 21st December, 1878, p. 133.

This *Order*, however, only provides for closing the reference. After it has been closed under this *Order*, an application must be made to the Court before it can be resumed. The object of the *Order* is to

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protect the Court and its officers from any responsibility for undue delays in the prosecution of references, and its provisions should, therefore, be strictly observed by the Masters.

When a reference has been closed in pursuance of this *Order*, it has been the practice heretofore for the Master to forward to the Registrar the certificate of the circumstances of the case—such certificates should now be forwarded to the Registrar of the Division in which the action is pending.

585. In all cases under the foregoing Order, the Master may order payment of fees and costs in such manner as he thinks fit.

Master may order payment of costs of proceedings under Order 584.

This *Order* is in force in all the Divisions. The Master has no power to order costs to be paid except in such cases as he is empowered to do so by statute, or General Orders: see note to *Ord.* 225, *ante*. Under this *Order* he may make an order for payment of costs, which may be enforced by execution.

586. Where an appointment fails by reason of the non-attendance of any party, and the Master does not think fit to proceed *ex parte*, he may fix the amount of costs to be paid by the absent party to the party attending upon the appointment.

Where parties do not attend, Master may fix costs to be paid.

This *Order* is in force in all the Divisions. The *Order* merely authorizes the Master to fix the costs to be paid, but does not in terms authorize him to order their payment.

In order to enforce payment of costs fixed under this *Order*, it might probably be found necessary to obtain an order in Chambers: see note to *Ord.* 225 *ante*.

587. The Master may, while proceedings are pending in his office, and where he deems it advisable, appoint guardians *ad litem*; and he may also dispense with service of the decree upon the persons referred to in Order 60; and in such case he is to state the reasons therefor in his report.

Master may appoint guardians, *ad litem*.

And may dispense with service of judgment under Order 60.

This *Order* would seem to empower the Master to appoint guardians *ad litem* for lunatics not so found, as well as for infants. Under *R. S.*

Master's power to appoint guardians *ad litem*.

O. c. 220, s. 49, the Inspector of Prisons and Public Charities is now constituted *ex officio* Committee for all lunatics who are confined in any public asylum, who have no other committee. But notwithstanding this statute, a guardian *ad litem* must still be appointed for any such lunatic, who is a party defendant; and the estate of the lunatic is not bound by merely notifying the Inspector on behalf of the lunatic: 43 Vict., c. 36, s. 1, (O.) In cases where it is necessary to appoint a guardian, *ad litem*, to a lunatic, the procedure prescribed by *Ord.* 520 *et seq.* should be followed.

Service on Inspector of Asylums, for lunatic not sufficient.

When this *Order* was promulgated the procedure for the appointment of guardians *ad litem* to infants, was regulated by *Ord.* 520,521, *ante*, which require notice of the application to be served, and it would seem that the Master can still only appoint guardians *ad litem*, upon notice, as provided by those *Orders*. *Ord.* 610, however, enables the Clerk of Records and Writs, and Deputy Registrars, to issue orders on *præcipe;* and it would seem that even when the case is pending before the Master, the cheapest and easiest method of appointing a guardian *ad litem* for an infant, would be by application under *Ord.* 610, instead of to the Master, under this *Order*.

Appointment of guardian *ad litem*, to infants how made.

The Master may, in a proper case, dispense with service of the judgment upon persons referred to in *Ord.* 60: and when service on an infant is dispensed with, of course no guardian need be appointed. Thus, when the parties entitled as next of kin are very numerous and difficult to be served, the Master may dispense with service on some of them, and direct one of a family, or class, to be served: *Anderson* v. *Kilborn*, 2 Chy. Ch. R 408. As to the effect of dispensing with service on parties, see note to *Ord.* 60, *ante* p. 49.

Master may dispense with service of judgment under Ord. 60.

588. Where an order directs the appointment of a receiver, committee of the person and estate of a lunatic, idiot, or person of unsound mind, or a guardian other than a guardian *ad litem*, and does not regulate the matter herein provided for, the Master is to fix the time or times in each year when the person appointed is to pass his accounts and pay his balances into Court; and in default of compliance with such direction, the person appointed may, on the passing of his accounts, be disallowed any salary or compensation for his services, and may be charged with interest upon his balances.

Master to appoint time for Receivers, and Committees, to pass accounts where not fixed by Court.

Consequence of non-compliance with Master's directions.

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589. In administration suits reports are, as far as possible, to be in the form given in the schedule hereto. Reports in administration suits.

The Master should not, in an administration suit, attach to his report a copy of the will of the testator whose estate is administered: *McCargar* v. *McKinnon*, 15 Gr. 361.

SITTINGS OF THE COURT.

590. A Judge will sit in Chambers every Monday, and on such other days as the state of business may require, to hear and dispose of such Chamber applications as cannot be heard and disposed of by the Referee. Sittings of Judge in Chambers.

This *Order* continues to regulate the practice in the Chancery Division. In the other Divisions a single Judge sits on Tuesdays and Fridays in each week, except during vacation, for the transaction of Chamber business in those Divisions which cannot be taken by the Master in Chambers.

591. Appeals from the Referee in Chambers, or from Local Masters and others when they are acting under Order 36 or under the Act for Quieting Titles, are to be heard in Chambers, and are to be set down for that purpose on or before the preceding Saturday. Seven clear days' notice is to be given of all appeals under the Act for Quieting Titles; and two clear days' notice of other appeals from the Referee in Chambers. All such appeals are to be argued by counsel. Appeals from Referee in Chambers, Local Masters, and under Q. T. Act.

To be argued by counsel.

This *Order* appears now only to be in force so far as it relates to appeals from a Referee of Titles, or the Inspector of Titles, under *The Quieting Titles Act*. Appeals under Q. T. Act.

Appeals from the Master in Chambers, and from local Masters, and County Court Judges, when exercising the jurisdiction of the Master in Chambers, are now regulated by *Rule S. C.* 427. From Master in Chambers.

Appeals from Masters' reports, rulings, and certificates, and orders, made in the course of the prosecution of references before From Masters.

them, are still governed by *Ord.* 642, *post*, as also appeals from judgments for administration, or partition, when pronounced by them under *Ords.* 638 and 640.

Rule S. C. 427, and *Ord.* 642 are somewhat difficult to reconcile; but the construction above stated has been adopted in practice, although there does not appear to be any actual decision in its favor.

Sittings of Jupge in Court

592. A Judge will sit in Court on Tuesday, Wednesday, and Thursday, and such other days as the state of business may require, in every week, for the despatch of all business other than rehearings and Chamber business.

This *Order* still regulates the practice in the Chancery Division: *Rule H. C. J.* IV. In the other Divisions a single Judge sits to hear motions in either Division, on Tuesdays and Fridays in each week.

During the Vacations special arrangements are made n all the Divisions, of which notice is given from time to time.

Business in Court, how to be taken.

593. The business before the Court will be taken as follows:—

TUESDAY.—Motions.

WEDNESDAY.—Hearings *pro confesso;* and on Bill and Answer: Motions for Decree; Further Directions; Petitions; Demurrers.

THURSDAY.—Appeals from Masters' Reports.

This *Order* still regulates the order of business in the Chancery Division: *Rule H. C. J.* IV.

On Wednesday, however, instead of hearings *pro confesso;* and on bill and answer; and motions for decree,—motions for judgment in default of defence, or upon the statements in the pleadings are now heard.

Appeals from Masters heard in Chambers.

Appeals from Masters' reports are now heard in the Chancery Division before a Judge in Chambers on Monday, for which day they must be set down: see *Ord.* 642. When, however, the Judge in Chambers considers an appeal of this kind of sufficient importance to be argued in Court, it is adjourned to be heard on a Thursday.

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MISCELLANEOUS.

594. No orders of course, or orders made in Chambers, are to be entered, except:— Orders required to be entered.

Decrees issued upon *Præcipe*;
Decrees against Infants;
Orders declaring persons Lunatics;
" for Administration;
" for the Sale of Infants' Estates;
" for Payment of Money into or out of Court;
" for Foreclosure or Sale;
" of Revivor;
Vesting Orders;

and such other orders as may from time to time, in any particular case or otherwise, be directed to be entered.

This *Order* would now appear to be in force in all the Divisions of the High Court; and orders, and judgments of the kind therein enumerated, should now be entered as prescribed by this *Order*, no matter in which Division they happen to be made.

Judgments for foreclosure, or sale, in mortgage suits, and judgments for administration, or partition, when pronounced in Chambers, must be entered in the judgment book either of the Registrar of the Division in which the action is pending, or of the proper local officer in the same manner as other judgments. Judgments and orders to be entered.

The other orders, not being judgments, enumerated in this *Order* are entered by the Entering Clerk in Chambers.

Where an order, which had not been entered, was lost, it was directed to be redrawn: *Ex parte Dean of St. Paul's*, 18 W. R. 724. No proceedings can properly be taken upon a judgment or order required to be entered, until it has been entered: see *Ballard* v. *Tomlinson*, 48, L. T., N. S. 515.

595. Where a bill is filed in the office of the Clerk of Records and Writs, all orders of course in the progress of the cause are to be issued by him; and where Orders of course, by whom to be issued.

the bill is filed in the office of a Deputy Registrar, all orders which can be issued by such Deputy Registrar under Order 37 are to be issued by him.

This *Order* is still in force, and applies as well to Local Registrars as to Deputy Registrars. It also now applies to Deputy Clerks of the Crown: *Rule S. C.* 417

Appointments to settle minutes or pass orders, how to be issued.

596. No notice of settling minutes, or passing an order is to be given until the proposed minutes or order, have or has been prepared by, or delivered to, the Registrar; the notice (where the Registrar deems a notice proper) is to be by an appointment signed by him, a copy whereof is to be served; the proposed minutes or order shall remain in his office for inspection until settled or passed; and any party may take a copy thereof.

The practice prescribed by this *Order* is still followed by the Registrar and Assistant Registrar of the Chancery Division, when acting as Judgment Clerks under *Rule S. C.* 416.

Style of cause.

597. In all proceedings in a cause, except Bills, Petitions in the nature of Bills, Decrees, and Decretal Orders, the following short style of cause shall be sufficient:

"*Between John Smith and others,—Plaintiffs,*
and
Richard Roe and others,—Defendants."

In case of proceedings which it has been the practice to entitle more shortly, thus: "*Smith* v. *Roe*," such practice is to continue.

Short style of cause, in what proceedings it may be used.

This *Order* would seem to be still in force, and to apply to all Divisions of the High Court. For petitions in the nature of bills, must now be understood, petitions presented to the Court praying relief, and not being mere formal petitions, or petitions upon which an order of course may issue; and for decrees, and decretal orders, must now be understood judgments, or orders in the nature of judgments.

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In all these proceedings the full style of the action, or matter, is to be set out, in other proceedings including affidavits, interlocutory orders, notices of trial, to produce, and admit, notices of motion, and notices of appeal, the shortened style first given in the *Order* may be used.

The shorter title *e. g. Smith* v. *Roe* is usually confined to appointments for settling minutes, Master's warrants, notices of taxation, or other notices and appointments not already mentioned required to be served in the progress of a cause. There is, however, no authority for styling affidavits in this way.

Orders 598-602.—Are now effete. *Ord.* 598 revived certain orders conferring on the Accountant of the Court of Chancery the jurisdiction of a Master. *Ord.* 598 was subsequently amended by substituting for the word "Accountant," the words "Referee in Chambers:" see *Ord.* 626. The other *Orders* related to the signing of cheques, and provided for the discharge of the duties of the Referee in Chambers during his temporary absence. Ord. 598-602.

603. Orders in Chambers made by a Judge in person may be signed by the Referee or his Clerk. Judges orders in Chambers, how signed.

This *Order* is still acted upon so far as concerns orders made in Chambers by Judges of the Chancery Division, which are now signed by the Clerk of the Master in Chambers; orders made in Chambers by Judges of the other Divisions are signed by the Judge making the order.

Order 604 gave the Master discretion to increase counsel fees in certain cases, and is now effete. See Tariff of Supreme Court items, 158 *et seq.* Holmested's Manl. Pr. 196. Ord. 604.

Order 605 is now effete. It related to bringing causes to a hearing. Its provisions are now superseded by *Rule S. C.* 255. Ord 605.

Order 606 is now effete. It provided for countersigning cheques. Ord. 606.

Order 607 is now effete. It provided for the temporary absence of the Referee in Chambers. Ord. 607.

Order 608 prescribed a tariff of fees. It is now effete: see Tariff of Supreme Court. Holmested's Manl. Pr. p. 188 *et seq.* Ord. 608.

Order 609 provided for signing cheques during the temporary absence of the Accountant of the Court of Chancery, and is now effete. Ord. 609.

ORDERS OF 18TH FEBRUARY, 1875.

610. In any proceeding in the Court, in which it may be necessary to appoint a guardian *ad litem* for Guardians *ad litem* for infants may be appointed by order on *præcipe*.

an infant the person desiring such appointment shall, upon an allegation contained in the *præcipe* of the infancy of the person for whom such guardian is sought, be entitled to an order *ex parte* from the Clerk of Records and Writs, or where the bill is filed, or the proceedings are taken, outside of Toronto, from the Deputy Registrar of the county where such bill is filed, or proceedings are had, appointing a guardian *ad litem* to such infant.

Guardian *ad litem*, how appointed for infant defendants made parties by writ of summons under *Rule S. C.* 36

"Where an action is for the administration, or partition, of an estate in which an infant is interested; or where the action is for any purpose other than the recovery of money from the infant defendant personally, or of lands, goods, or chattels of which he is personally in possession, service on the Official Guardian shall be good service on the infant defendant if *such infant defendant is resident in Ontario* at the time of such service.

(*a*) If in such case there is more than one infant defendant for whom service is to be made on the Official Guardian, one copy only need be so served.

(*b*) From the time of such service the Official Guardian shall become and be the guardian *ad litem* of the infant unless and until the Court otherwise orders; and it shall be his duty forthwith to attend actively to the interests of the infant in the action, and for that purpose to communicate with all proper parties, including the father or guardian (if any) of the infant, and also the person with whom or under whose care the infant resides, in case such person is not the infant's father or guardian; and the guardian is to make such other inquiries and to take such other proceedings as the interests of the infant may require.

(*c*) Any person interested may move before a Judge in Chambers, on such material as he may think proper, for an order appointing a guardian other than the Official Guardian so served; whereupon such order as may be considered most conducive to the interests of the infant, shall be made, and a copy of the order shall forthwith be served on the Official Guardian." *Rule S. C.* 36.

How appointed for infants in other proceedings.

It will be seen that this *Rule* which is grouped with others under the heading "SERVICE OF WRIT OF SUMMONS" applies only to the case of infant defendants residing within the jurisdiction, who are made parties defendants by the writ in the class of cases mentioned. Where it is required to appoint a guardian *ad litem* for an infant in any case not covered by *Rule S. C.* 36 the provisions of this *Order*

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apply, at all events in that class of cases which was formerly within the exclusive jurisdiction of the Court of Chancery: *Ren* v. *Anthony*, 19 C. L. J. 234. Thus, in summary applications in Chambers for administration, or partition, or upon an original, or interlocutory, petition to which infants, who are not parties by writ, are made respondents; or in cases where the infant defendant is made a party by writ, but is out of the jurisdiction, the provisions of this *Order* would seem to apply, and also where the infant is added as a defendant by any order to continue the proceedings upon the death, change, or transmission, of interest of any original party to the action or where the infant is added in the Master's office: (See *Ord.* 587 *ante*,) or is required to be served with an office copy of a judgment under *Ord.* 60; in all of these cases the appointment of a guardian *ad litem* may be effected under this *Order*. In cases where the infant is required to be personally served with a writ of summons (see *Rule S. C.* 37) it would seem desirable that a special application for the appointment of a guardian *ad litem* should be made in Chambers. But it is possible that the appointment might be made under this *Order*. By *The Administration of Justice Act*, 1873, the Court of Chancery acquired jurisdiction in all matters which would be cognizable in a Court of Law (See *R. S. O.* c. 40 s. 86) and this *Order* was subsequently promulgated in 1875 at a time when it was competent for a suitor to have brought a suit in Chancery against an infant for any tort committed by the infant; and in such a suit it seems that the guardian *ad litem* might have been appointed under this *Order*.

Where infant out of jurisdiction

Or is sued for tort.

When a guardian *ad litem* is appointed under this *Order*, it is not necessary to serve the infant with any proceedings.

The guardian to be appointed by any order issued on *præcipe*, is in all cases to be the Official Guardian *ad litem* unless the Judges otherwise direct.

611. With the order appointing such guardian shall be served on the guardian one copy of the proceedings had up to the time of such appointment, or of such part thereof as may be necessary to enable the guardian to protect the interests of the infant to whom he has been appointed guardian.

Proceedings to be served on guardian *ad litem*.

612. Any person aggrieved by such order may move before a Judge in Chambers, on such material as he may think proper, to discharge the same, whereupon

Order appointing guardian *ad litem* may be discharged.

such order as may be considered most conducive to the interests of the infant, shall be made.

Ord. 613. **Order 613**, abolished the order for a married woman to answer separately, and is now effete.

Ord, 614. **Order 614**, provided for turning any motion into a motion for decree. Its provisions are reproduced in *Rule S. C.* 323.

Tariff of fees payable to Masters, Deputy-Registrars, Sheriffs, and Special Examiners.

615. In lieu of the fees allowed to the Master in Ordinary, the Local Masters, the Deputy Registrars, the Sheriffs and the Special Examiners, by the former tariff—the fees set forth in the tariff appended to this Order may, from this date, be charged in respect of the services there enumerated, and no other fees, costs, or charges, than are therein set forth shall be allowed in respect of the services therein mentioned. This Order shall not interfere with the matters referred to in Order No. 553, in respect of which the fees heretofore charged shall continue to allowed.

This *Order* and the tariff thereby prescribed, are now in force only so far as those services are concerned for which no fee is prescribed by the Common Law tariff: see *Rule S. C.* 432.

Certain Orders abrogated.

616. Orders 298, 299, 300, 301, 302, and 303, and all Orders and portions of Orders inconsistent with these Orders now promulgated, are hereby abrogated.

Ord. 617. **Order 617**, provided for signing of cheques during the temporary absence of the Accountant, and is now effete.

ORDER OF 21ST MARCH, 1875.

Election Court.

618. The "Clerk of the Court." under the Dominion Controverted Election Act, 1874, for the purpose of receiving deposits under section eight of the said Act on Petitions filed in the Court of Chancery, shall be the Accountant of the said Court, and deposits to

be made under the said section, and any other moneys required for any purpose under the said Act to be paid into Court, shall be paid to the said Accountant, and shall be deposited in the Bank of Commerce to an account to be styled The Dominion Controverted Elections Account of the Court of Chancery, in the same manner as moneys are under the present practice of this Court paid into the same; and cheques for the payment out of any moneys so deposited shall be signed and countersigned as in the case of other moneys paid into the said Court. For all purposes other than for the purpose above described the "Clerk of the Court" shall be the Registrar of the Court of Chancery.

Accountant to be Clerk of Court for receiving moneys, &c.

For all other purposes Registrar to be Clerk of the Court.

Order 619. Provided for signing of cheques during the temporary absence of the Accountant, and is now effete. Ord. 619.

Orders 620-622 related to service of bills, and time for answering, &c., and are now effete. See *Rules S. C.* 31, 45, 61. Ords. 620-622.

Order 623 abrogated *Ords.* 88, 90, and 95, and all *Orders* and portions of orders inconsistent with *Ord.* 620, 621, and 622. Ord. 663.

Order 624 provided for the signing of cheques during the temporary absence of the Accountant of the Court of Chancery, and is now effete. Ord. 624.

ORDERS OF 26TH JUNE, 1876.

Order 625 appointed the duties of the Accountant to be discharged by the Referee in Chambers, and is now effete. Ord. 625.

Order 626 amended all orders containing the word "Accountant" by substituting therefor the words "Referee in Chambers" and is now obsolete. Ord 626.

Order 627 related to the signing and countersigning of cheques, and is now effete. See *Rules S. C.* 477-478. Ord. 627.

Order 628 abrogated *Ord.* 571. Ord. 628.

Order 629 provided that certain clerks should be designated Assistant Registrars. See now *R. S. O.* c. 40, s. 8; Order in Council 30 June, 1881; Holmested's Manl. Pr. 272. Ord. 629.

Registrar and Assistant Registrars to settle and sign orders, &c.

630. The Registrar and Assistant Registrars shall sign all orders and decrees issued by them respectively, and in respect to such orders and decrees shall discharge all the duties and possess all the powers which are, under General Orders 8 to 13 both inclusive, and Order 596, discharged or possessed by the Registrar.

Ord. 631.

Order 631 provided that bonds given by committees of lunatics, should be taken in the name of the Referee in Chambers; they are now to be taken in the name of the Accountant of the Supreme Court: see *Rule S. C.* 519.

Bonds in lunacy matters to be filed with Clerk of Records and Writs.

632. Every bond or recognizance given under section 34, sub-section 3, or under section 37, sub-section 1 of chapter 12 of the Consolidated Statutes of Upper Canada, and every inventory filed in pursuance of section 37, sub-section 2 of the same statute shall be filed in the office of the Clerk of Records and Writs.

Bond to be given by third party on traversing inquisition of lunacy.

The Bond under *C. S. U. C.* c. 12, s. 34, ss. 3 referred to in this *Order* is the bond which may be ordered to be given by a person, not being the lunatic, who desires to traverse an inquisition of lunacy: see now *R. S. O.* c. 40, s. 59, ss. 4. That section requires the security to be given in favor of the Registrar for the time being, but now every bond required by the practice of the Court for the purpose of security is, unless otherwise ordered, to be taken in the name of the Accountant of the Supreme Court, his executors, administrators, or assigns: *Rule S. C.* 519.

Bond by committee of lunatic, how to be given.

The bond or recognizance, and inventory, referred to in *C. S. U. C.* c. 12, s. 37, ss. 12, are those required to be filed by a Committee of a lunatic: see now *R. S. O.* c. 40, s. 66. The security by bond, must now be given in the name of the Accountant: *Rule S. C.* 519.

When the proceeding is in the Chancery Division this *Order* will still apply, and the bond and inventory must be filed with the Clerk of Records and Writs. In the other Divisions they should be filed with the Registrar of the Division in which the proceeding may be pending.

Registrar to be sole Referee of Titles at Toronto, and also Inspec-

633. The duties of the Accountant being by the foregoing Order No. 625 to be hereafter discharged

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by the Referee in Chambers, and it being impracticable that he should also discharge the duties of Referee and Inspector under the Act entitled "An Act for Quieting Titles to Real Estate in Upper Canada," the Registrar is, until further order, to be the sole Inspector of Titles in respect of future petitions filed under the said Act, and sole Referee of any petitions, the proceedings under which are to be conducted in Toronto.

tor of Titles under Q. T. Act.

This *Order* is still in force, and under its provisions the Registrar of the Chancery Division continues to be Inspector of Titles, and Referee of Titles at Toronto. As Inspector of Titles he supervises the work of all Local Referees of Titles, and as Referee of Titles at Toronto he investigates titles referred to him for investigation. See *Ord.* 492 *et seq.*

634. All petitions heretofore entered or filed with the Referee in Chambers either as Inspector or Referee, and under which no proceedings have yet been taken by the present Referee, shall be prosecuted before the Registrar.

Petitions entered with Referee to be prosecuted before Registrar.

Order 635 authorized the payment of $26,000 to the Provincial Treasurer out of the funds in the Court of Chancery standing to the credit of the General Interest Account, pursuant to 39 Vict. c. 8, s. 2 (O.)

Ord. 635.

Orders 636, 637 provided for the discharge of the duties of the Referee in Chambers during his temporary absence, and are now effete.

Ords. 636, 637.

ORDERS OF 10TH JANUARY, 1879.

638. Any adult person entitled to apply, under Orders 467 or 471, for an administration order may apply to the Master in the County Town of the County (other than the County of York) where the deceased person whose estate it is desired to administer resided at the time of his death; and such Master may, on 14 days' notice being given to the person or persons entitled

Adult person may apply to Local Master for administration of deceased person's estate.

Notice requisite.

under the present practice to notice of such an application, make an order for the administration of, and proceed to administer such estate in the least expensive and most expeditious manner.

Ords. 638–650 continued in force by *Rule S. C.* 3.

By *Rule S. C.* 3, *Ords.* 638 to 650 are made applicable to all the Divisions of the High Court. This *Order* extended to local Masters, in certain cases, the jurisdiction formerly exercised by the Judges, and the Referee in Chambers under *Ord.* 467.

Master has no jurisdiction to entertain applications by infants.

The jurisdiction of the Master under *Ord.* 638 is confined to applications made by adult persons: where an administration of an estate is sought on behalf of an infant, or where the person whose estate is to be administered died in the County of York, the application must be made in Chambers at Osgoode Hall; or in some cases it may be necessary to commence an action by writ for that purpose. When the application is made by persons claiming as creditors, or as specific, pecuniary, or residuary, legatees, or next of kin, notice must be served on the personal representative of the deceased person whose estate is sought to be administered: and where an administration of the realty is required, unless the applicant himself be entitled to some interest therein, some one or more of the heirs or devisees interested therein, must be served with notice of the application: *Ord.* 472.

Personal representative when to be served.

Application may be made, though wilful neglect and default charged.

Ord. 467 under which similar applications were authorized to be made, was formerly held to apply to simple cases only, and where executors were charged with misconduct, it was held that a bill must be filed, but a different construction has since been placed on that *Order*; the earlier cases proceeded to some extent on the ground that under the common order for administration, an inquiry as to wilful neglect and default could not be made, unless the order were obtained by the personal representative himself: *Harrison* v. *McGlashan*, 7 Gr. 531; *Ledgerwood* v. *Ledgerwood*, *Ib.* 584; but it it is now held that the inquiry as to wilful neglect or default, may be made in all cases, and therefore it is no longer a sufficient reason for not proceeding by summary application instead of by action, that an inquiry as to wilful neglect and default is required: *Re Allen Pocock* v. *Allen*, 9 P. R. 277; as to cases in which it is proper to commence an action for administration by writ: see note to *Ord.* 467 *ante*.

Writ of summons where necessary.

Costs, where writ issued unnecessarily.

When a plaintiff unnecessarily issues a writ for administration, instead of applying for a judgment on notice, he is not entitled to the extra costs thereby occasioned: *Sovereign* v. *Sovereign*, 15 Gr. 559; and where it is not clear whether the proceeding by writ is un-

necessary the costs will be reserved until further directions: *Eberts* v. *Eberts*, 25 Gr., 565.

Administration, when estate of trifling amount.

When the estate in question is small, a suit for administration should not be brought until all reasonable means of avoiding the suit have been exhausted; and where a next friend of an infant brought a suit for administration, without having taken steps to avoid litigation, and the suit afterwards appeared to have been unnecessary, he was ordered to pay the costs of the suit: *Hutchinson* v. *Sargent*, 17 Gr. 8: *McAndrew* v. *Laflamme*, 19 Gr. 193: *Moodie* v. *Leslie*, 12 Gr. 537; and see *Re Johnston, Johnston* v. *Hogg*, 25 Gr. 261: *Carroll* v. *Carroll*, 23 Gr. 438.

Where an executor in answer to an application for administration swore that the personal estate had not exceeded $50, the Court before it would make an order for administration, required the applicant to file an affidavit stating that he had reason to believe, and did believe, that the result of the proceedings would show a substantial balance of personal estate to be divided among the legatees: *Foster* v. *Foster*, 19 Gr. 463.

Administration was refused on the application of a legatee whose claim, including interest on his legacy, only amounted to $28, notwithstanding that it was alleged that other legacies remained unpaid which amounted to a considerable amount: *Reynolds* v. *Coppin*, 19 Gr. 627; and see *Re Johnston, Johnston* v. *Hogg*, 25 Gr. 261.

Creditor, legatee, or next of kin, bringing unnecessary suit liable to be ordered to pay costs.

And where a creditor brings an administration suit, after being informed that there are no assets applicable to the payment of his claim, if the information appear by the result to be substantially correct, he may have to pay the costs of the suit: *The City Bank* v. *Scatcherd*, 18 Gr. 185; and so also a next of kin, or residuary legatee, unnecessarily bringing a suit, may be ordered to pay the costs of it: see *Parsill* v. *Kennedy*, 22 Gr. 417; *Re Woodhall, Garbutt* v. *Hewson*, 2 O. R. 456; so also a trustee: *Re Cabburn*, 46 L. T. N. S., 848.

Legatee, or next of kin, cannot apply until lapse of a year from death.

A legatee, or next of kin, cannot apply for administration until the expiration of a year from the death of the person whose estate is sought to be administered: *Slater* v. *Slater*, 3 Chy. Ch. R. 1; *Vivian* v. *Westbrooke*, 19 Gr. 461.

Creditor must establish his claim if disputed.

When the application is made by a creditor whose claim is disputed, he must establish his debt by proper evidence, his own uncorroborated affidavit is not sufficient: *Vivian* v. *Westbrooke*, 19 Gr. 461.

Residuary legatee may be charged with costs of unnecessary suit—Is not entitled as of course, to have property brought into Court.

A suit unnecessarily brought by a residuary legatee claiming, but failing to establish himself, to be a creditor, was on further directions dismissed with costs: *Re Johnston, Johnston* v. *Hogg*, 25 Gr. 562; and see *Re Woodhall*, 2 O. R. 456; and a residuary legatee of money and stocks subject to a prior estate for life, is not entitled, as of course, to have the property brought into Court to be administered; and where the fund is invested in the names of proper trustees, and in proper securities, the Court will refuse to interfere: *Re Braithwaite, B.* v. *Wallis*, 48 L. T. N. S. 857.

Application by personal representative may be granted *ex parte*.

Where the personal representative makes an application for the administration of the personal estate the application may be granted; *ex parte* per Esten, *V. C., Re Dunlevy*, see Order Book 11, fo. 778; *Re Ette*, 6 Pr. R. 159; *Re Bromley*, before Blake, V. C., 28 January, 1878.

Suits by personal representative, deficiency of assets,

There appears to be some conflict of authority as to whether a deficiency of assets for the payment of debts, is a sufficient ground for the personal representative to apply to the Court for administration; see cases cited *ante* in note to *Ord.* 467.

Suit to obtain indemnity against covenants in lease.

The personal representative is entitled to bring a suit for administration in order to obtain an indemnity in respect to leasehold estates: *Re Bosworth, Howard* v. *Easton*, 45 L. T. N. S. 136; but he has no right to institute a suit for administration merely to obtain an indemnity by passing his accounts: *White* v. *Cummins*, 3 Gr. 602; *Cole* v. *Glover*, 16 Gr. 392; *Barry* v. *Barry*, 19 Gr. 458; and he may be refused his costs of a suit unnecessarily brought: *Graham* v. *Robson*, 17 Gr. 318; but see *Farrow* v. *Austen*, 18 Ch. D. 58; 45 L. T. N. S. 227; or he may be ordered to pay the costs of the suit: *Sullivan* v. *Sullivan*, 16 Gr. 94; or the costs of a suit brought by a creditor or legatee, rendered necessary by the action of the executor: *McGill* v. *Courtice*, 17 Gr. 271; *Re Radcliffe, Pearse* v. *Radcliffe*, 44 L. T. N. S. 96: 50 L. J., Chy. 317. So also executors have been charged with so much of the costs of the reference as were incurred in establishing charges against them which they disputed: *Stewart* v. *Fletcher*, 18 Gr. 21; *Smith* v. *Roe*, 11 Gr. 311; *Bald* v. *Thompson*, 17 Gr. 154; and see *Ashbough* v. *Ashbough*, 10 Gr. 433. But an executor may be allowed his costs though he have committed a breach of trust if the estate have suffered no loss: *Wiard* v. *Gable*, 8 Gr. 458. But a personal representative in default was held not entitled to costs until he had made good his default: *Re Basham, Hannay* v. *Basham*, 48 L. T. N. S., 476. In *Tebbs* v. *Carpenter*, 1 Madd., 290, it was laid down that if the suit would have been proper, and the executor a necessary party, if the executor had not misconducted himself, he ought not to pay all the costs of the suit, though in the course of the suit it appears he has misconducted himself; but if the misconduct of the executor, was the sole occasion of the suit, he ought then

Personal representative may be ordered to pay costs of unnecessary suit, or of suit rendered necessary by his misconduct.

As to Death of person who represented Estate See pp 32.33.
Ont St 1885 C 135.11 & 12
Daniel, p 208.

to pay the costs. This rule was approved in *Smith* v. *Rowe*, 11 Gr., 321; and *Simpson* v. *Horne*, 28 Gr. 1; but see remarks in the latter case at p. 9.

Guardian *ad litem* of infant refused costs where he consented to unnecessary proceedings.

Where the guardian *ad litem* of an infant defendant had made no objection to the unnecessary proceedings, no costs were given either to the executors or the guardian, of such proceedings; *Springer* v. *Clark*, 15 Gr. 664,

All the personal representatives must be notified.

Where there is more than one personal representative all must be notified, notwithstanding that one of them be resident out of the jurisdiction: *Re Freeborn, Freeborn* v. *Carroll*, 6 P. R., 188. A judgment for administration cannot be made against an executor *de son tort*, where there is no legal personal representative before the Court: *Rowsell* v. *Morris*, 17 L. R., Eq. 20; *Outram* v. *Wyckhoff*, 6 P. R., 150; *Re Colton, Fisher* v. *Colton*, 8 P. R., 542. A creditor making an application must be a creditor of the deceased person and not merely a creditor of his executor, or administrator: thus, an application by a person who had made advances to the executor was refused; *Campbell* v. *Bell*, 16 Gr. 115; *Farhall* v. *Farhall*, 7 L. R. Chy. 123; *Re Pettee, McKinley* v. *Beadle*, 6 P. R. 157; *Ewart* v. *Steven*, 18 Gr. 35; *Mills* v. *Cottle*, 17 Gr. 335; *Hughes* v. *Hughes*, 6 App. R. 378; but see *Henry* v. *Sharp*, 18 Gr. 16, where a decree was made by consent. A plaintiff who had made advances to pay debts of a deceased person to save the estate the costs of suits to recover the same, was held entitled to administration: *Glass* v. *Munsen*, 12 Gr. 77.

Administration not granted as against executor *de son tort*.

Creditor applying must be creditor of estate, and not of executor.

Exception.

In simple cases only one report necessary.

In simple cases where all parties interested are represented before the Master it would be possible, under this and the following *Order*, for the Master to defer making any report until the accounts were taken and the estate realized, and then by one general report to wind up all matters connected with the estate, and this course is pursued wherever practicable.

Practice in administration suits.

The practice in administration suits is governed largely by *Ord.* 211-257, 470-487, 584-9. Wherever, however, the provisions of any of the General Orders conflict with *Ord.* 638-650 they are abrogated by *Ord.* 651.

Master may give special directions as to conduct of proceedings.

Under *Ord.* 470 the Master would have power to give any special directions he might think proper respecting the carriage of the judgment, where there are conflicting claims, and also to transfer its carriage from one party to another, if occasion should require. The rule being, to give the conduct of the proceedings, *cæteris paribus*, to the party most interested in prosecuting them properly, and economically: *Perrin* v. *Perrin*, 3 Chy. Ch. R. 452; and see *Re Adams, Adams* v. *Muirhead*, 6 P. R. 283: *Lambiere* v. *Lambiere*, 19 C. L. J. 158: *Re Prime*, 48 L. T. N. S. 208: see, however, *Re Swire, Mellor* v. *Swire*,

46, L. T. N. S. 437 : *Townsend* v. *Townsend*, 48 L. T. N. S. 694, where it was held that the party first originating proceedings was entitled to the conduct.

For form of judgment on applications under this *Order*, see *Rules S. C.*, Form No. 171.

Master to have full power to deal with realty and personalty, and dispose of costs, &c.

639. Such Master shall have full power to deal with both the realty and personalty of the estate, the subject of administration, and shall dispose of the costs of the proceedings, and shall finally wind up all matters connected with such estate, without any further directions, and without any separate, interim, or interlocutory reports, or orders, except where the special circumstances of the case absolutely call therefor; and in so doing he shall be guided by the practice heretofore had in the administration of estates upon an application made in Chambers for an administration order. Provided always, that all moneys realized from the estate shall at once be paid into Court, and that no moneys shall be distributed or paid out for costs or otherwise, without an order of the Judge in Chambers or the Court, and on the application for such order, the Judge may review, amend, or refer back to the Master his report or order, or make such other order as he deems proper.

Moneys realized to be paid into Court, and not paid out except on Judge's order.

Order intended to do away with further directions in administration suits.

The object of this *Order* is to do away with the necessity of a hearing on further directions in administration suits; the judgment granted by the Master covers all those directions which, by the former practice, were usually made on the hearing on further directions, except the order for payment of the fund out of Court; *e. g.*, it directs any balances found in the hands of accounting parties to be paid into Court, it also authorizes a sale of the land, the payment of the purchase money into Court, the execution of conveyances by all proper parties, and empowers the Master also to execute such conveyances for infants, who are incapable of executing the same themselves: see *Rules S. C.*, Form No. 171; *Rule S. C.* 331. The Master has also power to make any order, or report, which may be necessary, for completely winding up the estate, or protecting the rights of the parties to the suit; for example, if it should become necessary to appoint a receiver, or grant an injunction, it would seem that it is intended that the Master shall have power to make

Judgment, form of.

Powers of Master under.

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the necessary order therefor: see *Re Patterson, Catton* v. *Patterson*, before Proudfoot, J., 23rd Nov., 1881. Where the executor is insolvent a receiver may be appointed: *Harrold* v. *Wallis*, 9 Gr. 443.

Separate orders and reports only to be made when essential.

The words "without any separate or interlocutory reports, or orders, except so far as the special circumstances of the case may require," indicate that it is only unnecessary orders, or reports, that are dispensed with, but that so far as such interlocutory reports, or orders, may be essential to the winding up of the estate, the Master is to have power to make them. Under *Ord.* 231, a party directed by the Master to bring in any account, or do any other act, is to be held bound to do the same in pursuance of the direction of the Master without any warrant, or written direction, served for that purpose. The provisions of that *Order* of course only apply when the party attends the Master in person or by solicitor, and has notice of the direction.

Master not to proceed *ex parte*.

The Master should not proceed with the reference *ex parte*, even though the defendant did not appear on the motion for judgment: *Jackson* v. *Matthews*, 12 Gr. 47: *Robinson* v. *Whitcombe*, 20 Gr. 415.

Accounts which may be taken under ordinary administration judgment.

Under the ordinary administration order, it has been held that the Master may take an account of timber cut with which a defendant is chargeable: *Stewart* v. *Fletcher*, 18 Gr. 21; and may also without any special directions take evidence, and report the facts, as to payments made by executors for the maintenance, and education, of infant beneficiaries: *Stewart* v. *Fletcher*, 16 Gr. 235; and may also take the accounts on the footing of wilful neglect and default; and when the widow of the deceased is found a debtor to the estate, her indebtedness may be set off against her claim for past and future dower: *Williams* v. *Reynolds*, 25 Gr. 49. The Master would have similar powers under a judgment awarded by himself, he would also be entitled to make all proper allowances to executors, administrators, and trustees, by way of compensation for their services.

Compensation to executors, &c., may be allowed.

Where a legacy is given to executors as compensation for their services, they are at liberty to claim a further sum under the statute if the legacy be an insufficient remuneration: *Denison* v. *Denison*, 17 Gr. 306: see, however, *Kennedy* v. *Pingle*, 27 Gr. 305. In the event of a deficiency of assets such a legacy does not abate with other legacies: *Anderson* v. *Dougall*, 15 Gr. 405. Such a legacy precludes any presumption that the executor is entitled to the undisposed of residue: *Loveless* v. *Clarke*, 24 Gr. 14; but see *Boys' Home* v. *Lewis*, 3 C. L. T. 211. Where a suit was brought by an executor unnecessarily, the Court refused to allow him any commission: *Graham* v. *Robson*, 17 Gr. 318. But when executors had acted improperly, the Court although allowing them compensation, refused them their costs of suit: *Kennedy* v. *Pingle*, 27 Gr. 305. The omission to keep a regular

Effect of legacy by way of compensation.

set of books is not alone a sufficient ground for refusing trustees compensation: *Life Association of Scotland* v. *Walker*, 24 Gr. 293.

Misconduct of executor, effect of, on right to compensation.

Nor is the fact that a balance is found against an executor, part of which is occasioned by the allowance of a surcharge, alone sufficient to disentitle him to compensation: *Sievewright* v. *Leys*, 1 O. R. 375: *McCardle* v. *Moore*, 2 O. R. 229. An executor, not being a trustee of the realty, is not entitled to receive the rents thereof, and if he do, he is a mere intermeddler, and not entitled to any compensation in respect of such rents: *Dagg* v. *Dagg*, 25 Gr. 542; and see *Re Brazill, Barry* v. *Brazill*, 11 Gr. 253. See further as to principle on which compensation is allowed: *Ord.* 220, note *ante*.

None allowed to executor for intermeddling with realty.

Compensation prior to claims of creditors.

The executor's claim for compensation is prior to the claims of creditors: *Harrison* v. *Patterson*, 11 Gr. 105.

Order for payment out of Court cannot be made by Master.

The only order which the Master is precluded from making in suits for administration, or partition, in which he has awarded judgment, is that for the payment out of the money in Court; but the Master should state the amount of the commission, and what he finds would be a proper apportionment thereof among the different solicitors under *Ord.* 643, and also the amounts he finds payable to creditors, and other beneficiaries, respectively.

Application to Judge for, how made.

The order for payment is to be made by a Judge, or the Court. Application for this order, in cases in the Chancery Division, is to be made in Chambers on a Monday: *Ord.* 590: *Rule H. C. J.*, IV. Holmested's Manl. Pr. 275; in the other Divisions the motion may be made on a Tuesday, or Friday. The application is to be made upon notice; and it would seem that all persons who, under the former practice, would be entitled to notice of a hearing on further directions, would be entitled to notice of such an application.

Adult party may apply to Local Master for partition, on motion.

640. Any adult person who has, heretofore, been entitled to a decree or order for the partition of an estate, may, on serving one or more of the persons entitled to a share of the estate of which partition is sought, with a 14 days' notice of motion, apply to the presiding Judge in Chambers, or to the Master in the County (other than the County of York) wherein the land sought to be affected by the proceeding lies, for an order for the partition or sale of the premises in question; whereupon such Judge or Master may make such order for partition or sale, or such other order as may be proper, and the Master shall thereupon proceed

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in the least expensive and most expeditious manner, according to the practice now in force, for the partition or sale of the premises, the ascertainment of the rights of the various persons interested, the adding parties, the taxation and payment of costs, and otherwise. Provided always, that where an infant is interested in the estate, no order shall be made for partition, or sale until such infant is represented by its guardian *ad litem;* and provided also that all moneys realized from the estate shall at once be paid into Court, and that no moneys shall be distributed or paid out for costs or otherwise, without an order of the Judge in Chambers or the Court; and on the application for such order, the Judge may review, amend, or refer back to the Master his report or order, or make such other order as he deems proper.

Proceedings on judgment for partition.

Infants interested must be represented by guardian *ad litem.*

Money not to be paid out without Judge's order.

This *Order* is also confined to the case of suits instituted by adult persons; where an infant institutes a suit for partition, a writ must be issued: *Brown* v. *Brown*, 2 C. L. T. 311. This order extends the principle of *Ord.* 58 to partition suits; formerly it was necessary to make all tenants in common of the land in question, parties to the bill; under this order it will suffice to notify one or more such persons. The application cannot be made for the partition of an estate of a deceased person, until the lapse of six months from his death: *R. S. O.* c. 101, s. 6: *Grant* v. *Grant*, 9 P. R. 211. Where the interests are unequal, the person having the largest interest should, as a general rule, be notified of the application.

Where infant plaintiff seeks partition, writ must be issued.

Application for partition of deceased person's estate, cannot be entertained until lapse of 6 months from his death.

The *Order* does not apply where it is necessary to add a defendant whose claim to share in the estate is contested, *e. g.*, where a stranger is in possession claiming adversely to the plaintiff and his co-tenants, an action must be brought by writ: see *Young* v. *Wright*, before Blake, V. C., 23 Sept., 1879: *Re McMillan, Patterson* v. *McMillan*, 8 P. R. 546; 17 C. L. J. 86: *Hopkins* v. *Hopkins*, 9 P. R. 71.

Summary application cannot be made, when any party claims adversely.

Wherever an account is required from any person, such person should be made a defendant in the first instance, as it would seem parties served with the judgment in the Master's office cannot be made to account thereunder: *Walker Seligmann*, 12 L. R. Eq. 152: *Hopper* v. *Harrison*, 28 Gr. 22.

Accounting parties to be made original defendants.

The plaintiff was formerly bound to allege, and if disputed, to

Evidence on motion.

prove, his title, and under this *Order* it will still be necessary that the affidavits in support of the application should establish the applicant's title, and it would also appear to be necessary to show thereby, the estates and interests of all other persons interested as joint owners. The existence of a discretionary power of sale in trustees, does not exclude the jurisdiction of the Court to order partition: *Boyd* v. *Allen*, 48 L. T. N. S. 628.

Partition not granted of unpatented land.

The Court will not decree partition of lands, for which no patent has issued, neither will it decree a sale of such lands at the instance of the representatives of a deceased locatee: *Abell* v. *Weir*, 24 Gr. 464: *Cuthbert* v. *Cuthbert*, 11 Gr. 88, at p. 91: *Jenkins* v. *Martin*, 20 Gr. 613.

Tenant for life, or dowress, how far entitled to partition.

A tenant for life of an undivided share, is entitled to partition: *Gaskell* v. *Gaskell*, 6 Sim., 643; and see *Lalor* v. *Lalor*, 9 P. R. 455. A decree for partition was made at the suit of a dowress: *Harrison* v. *Bottrill*, before Blake, V. C., 21st January, 1880; but, see *contra*, *Rody* v. *Rody*, 1 C. L. T. 546. The right of a dowress in the whole estate to have partition or sale, appears to be doubtful, but where the dower is claimed out of an undivided share, the dowress would seem entitled to partition, or sale, as the only way by which her claim can be properly ascertained and satisfied.

Mortgagee not entitled to partition

Tenant in common whose share is mortgaged, may have partition.

Extra costs must be borne by his share.

A mortgagee of an undivided share, has been held not to be entitled to partition: *Train* v. *Smith*, before Spragge, C., 14th April, 1875; but in *Fall* v. *Elkins*, 9 W. R. 861, it seems to have been assumed that a mortgagee was entitled to this relief; and see *Agar* v. *Fairfax*, 2 W. & T. L. C. 881: as to whether a tenant in common who has mortgaged his land can have a partition without first paying off his mortgage see *Gibbs* v. *Haydon*, 47 L. T. N. S. 184. In this Province it would seem that he can, and that his mortgagee should be made a party either in the first instance, or in the Master's office, but additional costs so occasioned must be borne by the mortgagor: *McDougall* v. *McDougall*, 14 Gr. 267; a mortgagee who comes in and consents to a sale, is not entitled to either six months' notice, or six months' interest: *Re Houston*, 2 O. R. 84.

Where the plaintiff claimed as vendee of the equity of redemption of one of four tenants in common under a sale by the sheriff, a decree for partition was set aside on appeal, on the ground that the interest was not salable: *Wood* v. *Hurl*, 28 Gr. 146.

Sale or partition ordered according to which is best for all parties.

In determining whether a sale, or partition, should be directed, the Master will be guided by what is best for all parties interested: *Bladell* v. *Baldwin*, 3 App. R. 6. When the property is not susceptible of partition, a sale should be directed: *Steven* v. *Hunter*, 14 Gr. 541.

Where lands in York, or in more

Where the lands are situate in the County of York, or in more Counties than one, the application for partition should be made to a

Judge in Chambers. The new jurisdiction, here conferred on a Judge in Chambers, cannot be exercised by the Master in Chambers: see *Ord.* 560; his powers do not extend to any matters which on the 23rd February, 1871, were not done or transacted by a Judge of the Court of Chancery sitting in Chambers: *Re Arnott, Chatterton* v. *Arnott*, 8 P. R. 39; and see *Queen* v. *Smith*, 7 P. R. 429.

Counties than one, application to be made to Judge in Chambers.

Where two or more judgments are granted for partition of different parts of the same person's estate, the proceedings may be consolidated under *Ord.* 641.

Several proceedings—consolidation of.

By this *Order* the Master is empowered to award such a judgment as the Court of Chancery was accustomed to grant in partition suits,—except the order for payment of the money out of Court: (see note to *Ord.* 639). He would, therefore, appear to be entitled to award a judgment under which an account of rents and profits could be taken, and under which a sum in gross could be allotted in lieu of dower, or curtesy, or any other life estate, and under which all other usual and necessary accounts, and inquiries, could be taken, and made, as the circumstances of the case may require. For form of judgment: see *Rules S. C.*, Form No. 172.

Form of judgment.

All parties interested in the land who are not served with the notice of motion for the judgment, will have to be served with an office copy of judgment, *Ord.* 244, and they will be entitled to move to vary, or set it aside, as provided by *Ord.* 246.

Persons interested in the land, who are not notified of application for partition must be served with the judgment.

A tenant in common who has been himself in actual occupation of the whole estate cannot be charged with an occupation rent: *Henderson* v. *Eason*, 17 Q. B. 701: *Rice* v. *George*, 20 Gr. 221. He is, however, liable to account to his co-tenants for rents and profits received from third parties: *Ib. Goodenow* v. *Farquhar*, 19 Gr. 614: *Curtis* v. *Coleman*, 22 Gr. 561; and if he make any claim for improvements made, or for prior incumbrances paid off, by him, he must submit to account for an occupation rent, otherwise he cannot be allowed them: *Rice* v. *George*, *supra*: *Rivet* v. *Desourdi*, 12 C. L. J. N. S. 203. In making partition, those portions on which improvements have been made by any of the tenants in common should, as far as possible, be allotted to the parties by whom they were made: see *Wood* v. *Wood*, 16 Gr. 471.

Tenants in common, liability for rents and profits &c.

Improvements to be allotted to parties making them.

641. When after an order has been made under Order 640, lands are discovered in another county, an application may be made to a Judge in Chambers for the partition or sale of such lands under the order formerly made, and where two or more orders have

When after judgment, lands discovered in another county, application for partition thereof may be made to a Judge in Chambers.

been made by Masters in different Counties, an application may be made in Chambers for an order as to the conduct of the future proceedings.

Where lands are discovered in another county after a judgment has been pronounced by a Local Master, the Judge in Chambers may award judgment as to the lands so discovered: *Clark* v. *Clark*, 8 P. R. 156

Several suits, consolidation of.

The object of this *Order* is to prevent more than one suit being brought in respect of the same estate. Where more than one suit is brought, under this *Order*, application may be made to consolidate them. The application must be made before a Judge in Toronto. But where two or more applications are made by different persons to the same Local Master, the latter has jurisdiction to pronounce judgment in one of them, and stay the others: *Lambier* v. *Lambier*, 9 P. R. 422; 19 C. L. J. 158, see *Ord.* 470 note. Where a suit is stayed, the costs are *prima facie* payable out of the estate *pari passu* with the costs of the suit which is carried on: *Re Clark*, *Cumberland* v. *Clark*, 4 L. R. Chy. 412.

Costs.

Appeal to a Judge in Chambers from any decree, order, report, ruling, or other decision of Master.

642. There shall be an appeal to the presiding Judge in Chambers—on any day that he may sit in Chambers—against any decree, order, report, ruling, or other determination of any Master; the notice of such appeal shall be a seven days' notice, and shall set out the grounds of objection, and the appeal shall be set down for argument not later than the Saturday preceding the day on which it is to be argued, and shall be brought on for argument within a month—not including vacation—of the making of such decree, order, report, ruling, or determination, or within such further time as a Judge may think proper, and the presiding Judge may then hear, or adjourn into Court, or otherwise dispose of such matters on such terms as he thinks proper.

Time for.

Re v Bulloz Lowe 10 P.R 153.

Appeals from Master's reports to be heard in Chambers.

This *Order* now applies to all the Divisions of the High Court, *Rule S. C.* 3. It worked an important change in the practice. All appeals from Master's reports are now to be brought on in the first instance before a Judge in Chambers, who has power to adjourn any case he may think proper into Court.

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Reports, confirmation of.

Under *Ord.* 252 a report became absolute without an order confirming the same at the expiration of fourteen days from the filing thereof, unless previously appealed from. Under *Ord.* 642 the time for appealing is altered, and dates from the making, and not the filing of the report. No report which requires confirmation, therefore, becomes absolute until a month has elapsed from its date, and fourteen days from its filing: *re Eaton, Byers* v. *Woodburn*, 8 P. R. 289; and if any proceedings are required to be taken thereunder before the expiration of the month, it would require a special order confirming it. An order for confirmation before the lapse of the month, would as a general rule, only be made on consent of, or notice to, all parties interested therein and entitled to appeal therefrom.

Extending of time for appealing.

When refused

Power is reserved to a Judge to extend the time for appealing under this *Order*, so as to meet the case of parties who are not notified of the order, report, &c., until after the time limited for appealing therefrom has expired, or so nearly expired as to prevent the party from prosecuting the appeal within the limited time. But the time for appealing will not be extended merely on account of ignorance of the practice: *Blackstock* v. *McFarlane*, 15 C. L. J. 137.

Orders of Master's, time for appealing from.

This *Order* applies to all orders made by Masters, except perhaps when they are exercising the jurisdiction of the Master in Chambers under *Rule S. C.* 422, and as to orders made in the exercise of that jurisdiction it is possible the provisions of *Rule S. C.* 427 as to appealing, would be held to apply to the exclusion of this *Order*.

As to appeals from Masters, see further *Ord.* 252, 253, and notes.

Appeals from judgments awarded by Masters, or Local Registrars, &c.

It will be observed that *Ord.* 638 and 640 empower the Local Masters to award judgment for administration, or partition, or sale, but the power to award judgment in mortgage suits, is given to the Local Registrars, Deputy Registrars, and Deputy Clerks of the Crown. This distinction must be carefully borne in mind, for although some of the Local Masters are also Deputy Registrars, yet some of them are not; it is also to be noted that it is only judgments or orders granted by Masters that are appealable under *Ord.* 642.

Motions to set aside judgments, how made.

A motion to set aside a judgment obtained on *præcipe* and for leave to defend, may be made in Chambers: *Kline* v. *Kline*, 3 Chy. Ch. R. 79; or such a judgment may be varied on petition, an appeal in such cases being unnecessary: *Nelles* v. *Vandyke*, 17 Gr. 14; see also *Simmers* v. *Erb*, 21 Gr. 289. But where a person, not originally made a party, is served with an office-copy of the judgment, and desires to vacate it, the motion must be set down to be heard, and the motion must be brought on for hearing within fourteen days after service of the judgment on the applicant: *Wright* v. *Wright*, before Blake, V. C., 29th March, 1881; and see *Miller* v. *Brown*, before Proudfoot, V. C., 23 Nov., 1880; and see *Rule H.*

C. J. IV. In the Chancery Division such motions are heard on a Wednesday, and in the other Divisions, either on a Tuesday, or Friday.

Commission to be allowed in lieu of taxed costs in administration and partition suits.

643. In all suits hereafter instituted for administration, or partition, or administration and partition, unless otherwise ordered by the Court or a Judge, instead of the costs being allowed according to the tariff now in force, each person properly represented by a solicitor, and entitled to costs out of the estate—other than creditors not parties to the suit—shall be entitled to his actual disbursements in the suit, not including Counsel fees, and there shall be allowed for the other costs of the suit payable out of the estate, a commission on the amount realized, or on the value of the property partitioned, in the suit, which commission shall be apportioned amongst the persons entitled to costs, as the Judge or Master thinks proper. Such commission shall be as follows:—

On sums not exceeding $500, - - - -	20 per cent
for every additional $100 up to $1,500,	5 " "
for every additional $100 up to $4,000,	3 " "
for every additional $1,000 up to $10,000,	2½ " "
for every additional $1,000, - - - -	1 " "

and such remuneration shall be in lieu of all fees, whether between "party and party," "as between solicitor and client," or "between solicitor and client."

Commission in lieu of costs, who entitled to share in.

The commission payable under this order is divisible only between those who are strictly parties to the suit, properly represented by a solicitor, and entitled to costs out of the estate. Persons not originally made parties to the suit, but served with a copy of the judgment under *Ord.* 60, are not thereby made parties to the suit, but are merely enabled to attend the proceedings, and are bound thereby as though they were actually parties: *English* v. *English*, 12 Gr. 441. In a suit by a residuary legatee, the plaintiff sufficiently represents the other residuary legatees, and they are not entitled as of course to costs out of the estate occasioned by their appearing by another solicitor in the Master's office: *Gorham* v. *Gorham*, 17 Gr. 386.

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Creditors who are neither plaintiffs, nor defendants, are also excluded from participation in the commission, their costs are disposed of as formerly. The commission is to cover both the solicitors' fees, and the fees to counsel. It is of course not intended to cover costs ordered to be paid by one party to another. It is intended to cover only costs payable out of the estate. Costs are to be apportioned under this *Order* in proportion to the work done by, and responsibility imposed on, the solicitors engaged: *Dodge* v. *Clapp*, 8 P. R. 388; *Campbell* v. *Campbell*, 8 P. R. 159; 16 C. L. J. 16. The work done in the Master's office is not alone to be considered in making the apportionment of the commission: *Cameron* v. *Leroux*, 9 P. R. 304. The Master should also consider the circumstances under which the suit is brought, when the judgment has been pronounced by himself, and should not award commission to parties who ought to be deprived of, or ordered to pay, costs. In ascertaining the commission, if the estate has been sold subject to a mortgage, the amount of the mortgage is not to be included as part of the "amount realized": *Re McColl, McColl* v. *McColl*, 8 P. R. 480: but in *Re Brown, Brown* v. *Brown*, 19 C. L. J. 367, it was held that the commission is to be computed on the total amount accounted for, and not merely on the balance found in the accounting parties' hands.

Mode of apportionment.

On what sum to be estimated.

Ordinarily no costs will be allowed in addition to the commission and disbursements: *Re Fleury, Fleury* v. *Fleury*, 9 P. R. 87.

Where the Master finds, in any administration action commenced before himself, that any of the parties to the suit should pay the whole, or any part, of the costs of the suit, instead of their being borne by the estate, it would seem that he should so direct: *Ord.* 639. But in such a case it would be convenient also to apportion the commission, and ascertain the disbursements payable out of the estate, in case the costs ordered to be paid by any of the parties personally, could not be recovered from them.

Where the principal part of the costs of a suit are ordered to be paid personally by one or more of the parties, and the costs of only a small proportion of the work done, are chargeable against the estate, it does not appear that in such a case the full amount of the commission here provided would be payable, and the power reserved to the Judge to make other order would probably be exerted. Cases might arise where from special circumstances, the commission here provided would be clearly inadequate, and in such cases too it would be possible that the power to make other order as to the costs would be exercised.

Where taxed costs allowed in lieu of commission.

An agent employed by a principal solicitor who is paid by commission, is liable to have his bill taxed: *Re Idington*, 8 P. R. 566.

Agent's bill is taxable though principal paid by commission.

Costs of suits unnecessarily prosecuted may be disallowed.

644. When two or more suits are instituted for administration, or partition, or sale, the Judge may, in his discretion, disallow all, or any, of the costs of any suit or suits, which in his opinion has or have been unnecessarily prosecuted.

Costs, unnecessary, not to be allowed.

By *Ord.* 308 the Master is directed not to allow a party on taxation any costs which do not appear to have been necessary, or proper, for the attainment of justice, or for the defending his rights, or which appear to have been incurred through over-caution, negligence or mistake, or merely at the desire of the party; and under *Ord.* 315 unnecessary costs occasioned by defendants severing in their defence are to be disallowed. Under the present *Order* the whole costs of a suit may be disallowed if it have been commenced, or prosecuted, unnecessarily, and not only the costs of the plaintiff but those of defendants as well, the latter having power under *Ord.* 641 to prevent the prosecution of more than one suit.

Order 434 to apply to cases where adults interested as well as infants.

645. Order 434 shall apply to cases in which an adult is interested in the estate as well as an infant, and also to suits for redemption.

Ord. 645 enables motion for judgment in mortgage cases to be made in Chambers, tho' some of defendants are adults.

Ord. 434 was held to apply only to cases where all the defendants were infants. Where there were adult defendants, as well as infants, the *Order* was held not to apply, and such suits had consequently to be set down for hearing in Court: *Fullerton* v. *Keely*, 9 C. L. J., N. S. 54. The present *Order* was passed so as to enable such suits to be disposed of before the Referee in Chambers. The Master in Chambers, and Local Masters in certain cases, now exercise jurisdiction under this *Order*.

Ord. 435 to apply to redemption suits.

646. Order 435 shall apply to redemption suits; and under Orders 434 and 435 there may be granted, where it is prayed for, and notice is given in pursuance of Order 647, a decree embracing the additional relief which this Court is entitled, under "The Administration of Justice Act," to give, in mortgage cases, on the hearing of the cause *pro confesso*, and such a decree may be granted, notwithstanding that the defendant has been served by publication, or otherwise, or is a corporation; provided always that where the bill has not been personally served, the claim of the plaintiff shall be duly verified by affidavit.

Relief on covenant, and in ejectment, to be granted in mortgage actions on *præcipe*.

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By this *Order* the power of the Registrar to issue decrees on *præcipe*, was extended to redemption suits, *Ord.* 436 having previously restricted that power to suits for foreclosure, or sale.

Judgment on *præcipe* may be granted in redemption action.

Local Registrars, Deputy Registrars, and Deputy Clerks of the Crown, have now like powers to enter judgment on *præcipe*, in actions for redemption : see *Rules S. C.* 78, 417, 520.

To obtain the additional relief referred to in this *Order*, it must be claimed by the indorsement on the writ of summons. See *Rules S. C.* Form No. 9. Unless the defendant have by covenant, or otherwise, made himself personally liable for the debt, he is not liable personally, and a claim for a judgment for payment personally, may be resisted : *Christie* v. *Dowker*, 10 Gr. 199 ; S. C. 10, U. C. L. J. 161 ; *Clarkson* v. *Scott*, 25 Gr. 374. Thus, when the defendant is merely the owner of the equity of redemption as assignee of the original mortgagor, and has entered into no covenant, or agreement, with the mortgagee, to pay the mortgage debt, no judgment for payment can properly be claimed against him, notwithstanding he may have covenanted with his assignor to pay it : *Clarkson* v. *Scott*, *supra;* but when the mortgagor is a party, and is legally bound to pay the debt, he may be ordered to pay it, notwithstanding that he may have conveyed away his equity of redemption to a co-defendant.

Claims for payment, and delivery of possession, must be indorsed on writ, or cannot be granted.

Personal order for payment when it may be claimed.

Where judgment for delivery of possession is required, the claim therefor must be specially indorsed on the writ, and the description of the lands must be set out in the indorsement.

647. In suits for foreclosure or sale, where the plaintiff prays for an order for the immediate delivery of possession, or for an order for immediate payment against a defendant, he must, in addition to the notice required by Schedule S, indorse upon the office copy of the bill served upon the defendant, the further notice :

Form of indorsement of bill, where delivery of possession, or personal order for payment, is sought.

(*Where order for immediate possession prayed.*)

"And the plaintiff will be entitled to an order for the immediate delivery of possession of the mortgaged premises to him."

(*Where order for immediate payment prayed.*)

"And the plaintiff will be entitled forthwith to execution against the goods and lands of you (*naming*

the defendant against whom the plaintiff is entitled to this relief) to recover payment of the amount due by you."

This *Order* though retained in force is practically effete ; see now for forms of indorsement on the writ, *Rules S. C.* Form No. 9.

Deputy Registrars to have same powers as Registrar to issue decrees on *præcipe*.

648. Every Deputy-Registrar shall have the same power, as to the issue of decrees on *præcipe*, as by Order 646, and the Consolidated General Orders, is given to the Registrar of the Court.

Power of Deputy Registrars to issue *præcipe* decrees formerly restricted to actions between mortgagee and mortgagor—restriction now removed.

Under *Ord.* 38 the power of Deputy-Registrars to issue decrees in mortgage suits on *præcipe*, was limited to suits for foreclosure, sale, or redemption, between the original mortgagee and mortgagor. *Ord.* 648 removes this restriction, and extends the power of Deputy-Registrars to all cases brought for the foreclosure, sale, or redemption, of mortgaged property. This power is now extended to the Local Registrars, and Deputy Clerks of the Crown, in actions commenced in their respective offices : see *Rule S. C.* 3, 78, 417, 520.

Under *Ord.* 435 the Registrar had power to issue on *præcipe* such a decree in mortgage cases as the Court would, previously to that *Order*, have made upon a hearing *pro confesso : Kirkpatrick* v. *Howell*, 22 Gr. 94, and the same power to award the like judgments is continued under *The Judicature Act*. See further, *Ord.* 435, note.

Judgment on *præcipe*, how drawn up.

The judgment is drawn up upon *præcipe*, upon proof of service of the writ of summons duly indorsed, and an affidavit of non-appearance, or of non-delivery of statement of defence.

Where the defendant has not been personally served, proof of the plaintiff's claim must be adduced ; see *Ord.* 646. In other cases no affidavit is required from the plaintiff proving his claim, but the account is to be taken on the basis of the special indorsement on the writ served. Where, however, the plaintiff, as is sometimes the case, admits that he has indorsed his writ for more than is actually due, it should be stated in the judgment that he abandons the excess claimed by the indorsement, and only the balance should be ordered to be paid.

Decree to be absolute, in all cases, unless otherwise ordered.

649. Every decree or order hereafter made by the Court, whether the service of the bill, or other proceedings on the defendant, has been personal, by pub-

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lication, or otherwise, shall be absolute in the first instance, unless the Court shall otherwise order.

This *Order* is now in force in all the Divisions: *Rule S. C.* 3.

All judgments absolute in first instance, unless otherwise ordered.

This *Order* created an important change in the practice: formerly a decree founded on an order *pro confesso*, in cases where the defendant had not been served personally with the bill of complaint, and had not appeared at the hearing, was merely a decree *nisi* and required to be made absolute under *Ord.* 114 *et seq.* Under *Ord.* 649 all decrees are to be absolute in the first instance, unless the Court otherwise order, and the same rule now applies to judgments.

Proof of claim required, where writ not personally served.

Where the judgment is granted on a *præcipe*, against a defendant who has not been personally served with the writ, the plaintiff's claim is required to be verified by affidavit: *Ord.* 646; and it would seem probable that the same rule would be followed in causes heard in Court.

All decrees or orders made by Local Masters, or Deputy Registrars, to be entered.

650. The Local Masters and Deputy-Registrars shall enter in a book or books, kept for that purpose, all decrees, or orders, made by them, and they shall, on the conclusion of every suit, or matter, annex together all the pleadings and papers, filed with them in such suit, or matter, and transmit the same to the Clerk of Records and Writs, who shall duly enter and file the same.

At conclusion of suit papers to be forwarded to Clerk of R. & W.

This *Order* is now extended to all the Divisions of the High Court, *Rule S. C.* 3. With regard to the entry of judgments: see *Rules S. C.* 325, 517.

The requirement to transmit documents to the Clerk of Records and Writs, would seem only to be applicable to an action in the Chancery Division. In actions in the other Divisions the documents should be transmitted to the Registrar of the Division.

The *Order* has not, so far, been very generally observed by the Local Officers.

Orders inconsistent with Ord. 638-650, abrogated.

651. All Orders and portions of Orders, inconsistent with these Orders, are hereby abrogated.

This *Order* though not expressly retained in force by *Rule S. C.* 3, would, however, by implication, seem to be still in operation and to extend now to all Divisions of the High Court.

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SCHEDULES

TO

CONSOLIDATED CHANCERY ORDERS

OF

23 JUNE, 1868.

SCHEDULE A.

Indorsement on Office-Copy of a Decree, served under Order 60.

"Take notice, that from the time of the service hereof, you (*or, as the case may be, the infant or person of unsound mind*) will be bound by the proceedings in this cause in the same manner as if you (*or, the said infant, or person of unsound mind*) had been originally made a party to the suit; and that you (*or, the said infant, or person of unsound mind*) may, upon service of notice upon the plaintiff, attend the proceedings under the within decree; and that you (*or, the said infant, or person of unsound mind*) may, within fourteen days after the service hereof, apply to the Court to add to, vary, or set aside the said decree:

A. B.

of the City of Toronto, in the County of York, Plaintiff's Solicitor."

NOTE.—The word 'decree' in this form should now be changed to 'judgment.'

SCHEDULE B.

Contained forms of Bills of Complaint, which are now obsolete.

SCHEDULE C.

Contained a form of Indorsement to be made on a Bill of Complaint, which is now obsolete.

SCHEDULE D.

Contained a form of Affidavit of service of Bills of Complaint, which is now obsolete.

SCHEDULE E.

Contained a form of notice for publication in case of an absconding defendant, which is now obsolete.

SCHEDULE F.

Contained a form of an answer, which is now obsolete.

SCHEDUDE G.

Contained a form of Affidavit on production ; see form now to be used, *Rules S. C.* Form No. 34.

SCHEDULE H.

Contained a form of Replication, which is now obsolete.

SCHEDULE I.

Contained a form of notice to admit documents ; see form now to be used, *Rules S. C.* Form No. 26.

SCHEDULE J.

Form of Order, referred to in Order 187.

The Court doth order that the following accounts and inquiries be taken and made by the Master of this Court, *(a)* that is to say :

1st. An account of the personal estate not specificially bequeathed (*b*) of A. B. deceased, the testator in the pleadings mentioned, come to the hands of, &c.

(*a*) The Masters are now officers of the Supreme Court of Judicature. *J. A.* s. 58, sub.s. 2.

(*b*) The words "not specifically bequeathed" seem to have crept in by mistake, as the form of report prescribed by Ord. 589, paragraph 5, shows that the Master is required to set out the personal estate "specifically bequeathed," and if there is no specific bequest, the fact is to be reported.

2nd. An account of the said testator's debts.

3rd. An account of the said testator's funeral expenses.

4th. An account of the said testator's legacies.

5th. An inquiry, what parts, if any, of the said testator's personal estate are outstanding or undisposed of.

And it is ordered that the said testator's personal estate, not specifically bequeathed, be applied in payment of his debts and funeral expenses, in a due case of administration, and then in payment of his legacies. (*a*)

(*If ordered.*)

And it is ordered that the following further accounts and inquiries be taken and made, that is to say :

6th. An inquiry what real estate the said testator was seised of, or entitled to, at the time of his death.

7th. An inquiry what incumbrances affect the said testator's real estate.

8th. An account of the rents and profits of the said testator's real estate received by, &c.

(*If Sale ordered.*)

9th. An account of what is due to such of the incumbrancers as shall consent to the sale hereinafter directed in respect of their incumbrances.

10th. An inquiry what are the priorities of such last mentioned incumbrances.

And it is ordered that the testator's real estate be sold, with the approbation of ——————.

And it is ordered that further directions and costs be reserved, until after the said Master shall have made his report.

(*a*) This clause is now, in practice, usually omitted.

For another Form of Judgment for administration : see *Rules S. C.* Form No. 171.

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SCHEDULE K.

Appointment, referred to in Order 198.

IN CHANCERY.

Between A. B.,.....Plaintiff,

and

C. D.,.....Defendant.

The ——— day of ——— is hereby appointed to proceed (*here state the nature of the business for which the appointment is made*) when all parties are to attend at Chambers in Osgoode Hall, in the City of Toronto, at the hour of ——.

(To be signed by Judge, or Judge's Secretary.)

NOTE.—If you do not attend either in person or by your solicitor, at the time and place above mentioned, such order will be made and proceedings taken in your absence, as may seem just and expedient.

G. H., Solicitor for ———.

SCHEDULE L.

Indorsement on Office-Copy Decree, referred to in Orders 206, *and* 245.

To A. B., (*the person upon whom service has been directed.*

(*set out the order.*)

If you wish to apply to discharge the foregoing order, or to add to, vary, or set aside, the decree, you must do so within fourteen days from the service hereof. (*When the order fixes a time for the further proceedings, add,*) And if you fail to attend at the time and place appointed, either in person or by your solicitor, such order will be made and proceedings taken, in your absence, as may seem just and expedient; and you will be bound by the decree, and the further proceedings in the cause, in the same manner as if

you had been originally made a party to the suit, without notice.

The word "decree" in this form should now be changed to "judgment."

SCHEDULE M.

Jurat to Affidavit, referred to in Order 258.

Sworn before me at ——, in the County of ——, on the —— day of ——, A.D.——.

SCHEDULE N.

Contained an Indorsement to be made on an Order, served under *Ord.* 293, which is now obsolete.

And an Indorsement to be made on an Order of Revivor, served under *Ord.* 341, which is now superseded by *Rules S. C.* Form 20.

SCHEDULE O.

Precipe for Direction to the Bank, referred to in Order 353.

IN CHANCERY.

(*Short Style of Cause.*)

Required, a direction from the Bank to receive from ——, $——, payable into Court to the credit of this cause, under —— dated ——, (*or, as the case may be.*)

A. B., Defendant's Solicitor,

(Date). *(Or as the case may be.)*

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Præcipe for Cheque, referred to in Order 356.

IN CHANCERY.

(Short Style of Cause.)

Required a Cheque for $——— [with $——— interest thereon from —— to —— *(being the period, if any, for which interest is payable under the Order, but which has not been already taken into account and computed)*], payable to ———————; and the following papers are produced herewith *(naming the Decrees, Reports, &c., shewing the party's right to the Cheque, thus:*

Decree dated ——,
Report dated ——, &c.)

A. B., Plaintiff's Solicitor,
(Or as the case may be.)

(Date).

———

SCHEDULE P.

Conditions of Sale, referred to in Order 379.

1. No person shall advance less than $10 at any bidding under $500, nor less than $20 at any bidding over $500, and no person shall retract his bidding.

2. The highest bidder shall be the purchaser; and if any dispute arise as to the last or highest bidder, the property shall be put up at a former bidding.

3. The parties to the suit, with the exception of the vendor, *(*and, *naming any parties, trustees, agents, or others, in a fiduciary situation,)* shall be at liberty to bid.

4. The purchaser shall, at the time of sale, pay down a deposit, in the proportion of $10 for every $100 of the purchase money, to the vendor, or his solicitor; and shall pay the remainder of the purchase money, on the ——— day of ——— next; and upon such payment, the purchaser shall be entitled to the conveyance, and to be let into possession; the purchaser at the time of sale to sign an agreement for the completion of the purchase.

5. The purchaser shall have the conveyance prepared at his own expense, and tender the same for execution.

6. If the purchaser fails to comply with the conditions aforesaid, or any of them, the deposit and all other payments made thereon, shall be forfeited, and the premises may be resold; and the deficiency, if any, by such re-sale, together with all charges attending the same, or occasioned by the defaulter, are to be made good by the defaulter.

SCHEDULE Q.

Report on Sale, referred to in Order 387.

IN CHANCERY.

Between A. B., ...Plaintiff,

and

C. D.,.....Defendant.

Pursuant to the decree (*or* order) of this Honourable Court, bearing date the ——— day of ———, and made in this cause, I have, under the General Orders of this Court, in the presence of (*or*, after notice to), all parties concerned, settled an advertisement and particulars and conditions of sale, for the sale of the lands mentioned or referred to in the said decree (*or* order), and such advertisement having, according to my directions, been published in the (*naming the newspaper or newspapers*), once in each week for the —— weeks immediately preceding the said sale (*or as the case may be*), and bills of the said sale having been also, as directed by me, published in different parts of the township (*town or city*) of ——— and the adjacent country and villages, (*or as the case may be*), the said lands were offered for sale by public auction, according to my appointment, on the ——— day of ———, by me, (*or* by Mr. —— of ———, appointed by me for that purpose, auctioneer), and such sale was conducted in a fair, open and proper manner, when ——, of ——, was declared the highest bidder for, and became the purchaser of the same,

at the price or sum of $———, payable as follows (*set out shortly the condition of sale as to payment of the purchase money*).

All which having been proved to my satisfaction by proper and sufficient evidence, I humbly certify to this Honourable Court.

Dated ———.

For the word "decree" the word "judgment" should now be used.

SCHEDULE R.

Notice, referred to in Order 430.

IN CHANCERY.

(*Short Title*).

To ———, Defendant.

Take notice that the plaintiff elects that the sale of the mortgaged premises be conducted by you instead of by the plaintiff, and you are at liberty to withdraw the deposit made by you in this cause for the purpose of such sale.

SCHEDULE S.

Contained a form of indorsement on Office-copy Bill for foreclosure, or sale, under *Ord.* 436, and which is now obsolete.

SCHEDULE T.

Notice, served under Order 444.

IN CHANCERY.

Between A. B.....Plaintiff,

and

C. D.....Defendant.

Whereas an action has been instituted by the above named plaintiff for the foreclosure (*or* sale) of (*or* enforcement of a

lien on) certain lands, being *(insert description of lands)* and I have been directed by the decree made in this cause, and dated the ——— day of ———, to inquire whether any person, other than the plaintiff, has any charge, lien, or incumbrance upon the said estate. And whereas it has been made to appear before me that you have each some lien, charge or incumbrance upon the said estate, and I have therefore appointed the —— day of ———, at —— o'clock in the —— noon, for you to appear before me, at my Chambers at ———, either in person or by your solicitor, to prove your claims.

Now you are hereby required to take notice: 1st. That if you wish to apply to discharge my order making you a party, or to add to, vary, or set aside the decree you must do so within fourteen days from the service hereof; and if you fail to do so, you will be bound by the decree. and the further proceedings in this cause as if you were originally made a party to the suit. 2nd. That if you fail to attend at the time and place appointed, you will be treated as disclaiming all interest in the land in question, and it will be dealt with as if you had no claim thereon, and your claim will be in fact foreclosed.

W. L., *Master.*

To ———

For the word "decree" the word "judgment" should now be inserted.

Appointment, served under Order 446.

IN CHANCERY.

Between A. B., ... Plaintiff,

and

C. D., ... Defendant.

Having been directed by the decree in this cause, dated the —— day of ———, to inquire whether any person other than the plaintiff has any lien, charge or incumbrance upon

the lands in the pleadings mentioned, being (*insert description of land*), I do hereby appoint the ——— day of ——— next, at —— o'clock in the —— noon, at my Chambers at ———, to proceed with the said inquiries.

And you are hereby required to take notice:

That if you fail to attend at the time and place appointed, you will be treated as disclaiming all interest in the land in question, and it will be dealt with as if you had no claim thereon, and your claim will be in fact foreclosed.

W. L., *Master.*

For the word "decree," the word "judgment" should now be used.

SCHEDULE U.

Notice of Motion for Administration Order, under Order 468.

In the matter of the estate of E. F., late of the Township of Vaughan, in the County of York, deceased.

A. B. against C. D.

To C. D., Executor of E. F., deceased.

Take notice that A. B., of the City of Toronto, in the County of York, Esquire, (*or other proper description of the party*), who claims to be a creditor upon the estate of the above named E. F., will apply to the Court of Chancery, (*a*) in Chambers, at Osgoode Hall, in the City of Toronto, on the —— day of ——, at the hour of ——, for an order for the administration of the estate, real and personal, of the said E. F., by the Court of Chancery (*a*); and upon such application will be read the affidavits of (*state the materials upon which the application is founded*) this day filed.

If you do not attend either in person or by your solicitor

(*a*) Instead of the words "Court of Chancery," in this form, the words "High Court of Justice" should now be used: and see *Ord.* 561. The notice of motion should be entitled in the High Court of Justice, naming also the Division in which the affidavits are filed.

at the time and place above mentioned, such order will be made in your absence as may seem just and expedient.

Dated, &c.

G. H.,

Of the City of Toronto, Solicitor for the above named A. B.

SCHEDULE V.

No. 1.—*Advertisement for Creditors, under Order* 475.

Pursuant to a decree [*or* an order] of the Court of Chancery made in [the matter of the estate of A. B., and in] a cause S. against P. [*short title*], the creditors of A. B., late of —— in the County of ——, who died in or about the month of ——18—, are, on or before the —— day of ——, 18—, to send, by post, prepaid to E. F., of ——, the solicitor of the defendant C. D., the executor [*or* administrator] of the deceased [*or as may be directed*], their Christian and surnames, addresses and description, the full particulars of their claims, a statement of their accounts, and the nature of the securities (if any) held by them; or in default thereof, they will be peremptorily excluded from the benefit of the said decree [*or* order]. Every creditor holding any security is to produce the same before me, at my Chambers, at, &c., on the —— day of ——, 18—, at —— o'clock in the —— noon, being the time appointed for adjudication on the claims.

Dated this —— day of ——, 18—.

G. H., *Master.*

For the word "decree," the word "judgment" should be now used.

No. 2.—*Notice to Creditor to produce Documents under Order* 477.

(*Short Title*).

You are hereby required to produce, in support of the claim sent in by you, against the estate of A. B. deceased [*describe any document required*], before me at my Cham-

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bers, at, &c., on the ——day of ——,18—, at —— o'clock in the —— noon.

Dated this ———— day of -————, 18—.

G. R., of, &c., Solicitor for the plaintiff,
[*or*, defendant, *or as may be*].

To Mr. S. T.

No. 3.— *Affidavit of Executor or Administrator as to Claims, under Order* 480.

IN CHANCERY.

(*Title*).

We, C. D., of, &c., the above named plaintiff [*or* defendant, *or as may be*], the executors [*or* administrators], of A. B., late of ——, in the County of ——, deceased, and E. F., of, &c., solicitor, severally make oath, and say as follows, —

I, the said E. F., [solicitor] for myself, say as follows:

1. I have, in the paper written now produced and shewn to me, and marked A., set forth a list of all the claims the particulars of which have been sent in to me by persons claiming to be creditors of the said A. B., deceased, pursuant to the advertisement issued in that behalf, dated —— day of ——, 18—.

And I, the said C., D., for myself, say as follows:

2. I have examined the several claims mentioned in the paper writing now produced and shewn to me, and marked A., and I have compared the same with the books, accounts, and documents of the said A.B., [*or as may be, and state any other inquiries or investigations made*], in order to ascertain, as far as I am able, to which of such claims the estate of the said A. B., is justly liable.

3. From such examination [*and state any other reasons*], I am of opinion, and verily believe, that the estate of the said A. B. is justly liable to the amounts set forth in the sixth column of the first part of the said paper writing marked A.; and to the best of my knowledge and belief, such several amounts are justly due from the estate of the said A. B., and

proper to be allowed to the respective claimants named in the said schedule.

4. I am of opinion that the estate of the said A. B. is not justly liable to the claims set forth in the second part of the said paper writing marked A., and that the same ought not to be allowed without proof by the respective claimants, [*or*, I am not able to state whether the estate of the said A. B., is justly liable to the claims set forth in the second part of the said paper writing marked A., or whether such claims, or any parts thereof, are proper to be allowed without further evidence].

Sworn, &c.

Exhibit referred to in Affidavit No. 3.
(*Short Title.*)

List of claims the particulars of which have been sent in to E. F., the solicitor of the plaintiff, [*or*, defendant, *or as may be*], by persons claiming to be creditors of A. B., deceased, pursuant to the advertisement issued in that behalf, dated the ——— day of ———, 18 —.

This paper writing, marked A., was produced and shewn to ———, and is the same as is referred to in his affidavit, sworn before me this —— day of ——, 18 —,

W. B., &c.

First Part.—Claims proper to be allowed without further evidence.

Serial No.	Name of Claimants.	Addresses and Descriptions.	Nature of Claim.	Amount claimed.	Amount proper to be allowed.
					$. c.

U. W. O. LAW

Second Part.—Claims which ought to be proved by the Claimants.

Serial No.	Names of Claimants.	Addresses and Description.	Nature of Claim.	Amount claimed.
				$. c.

No. 4.—*Notice to Creditor that claim allowed, under Order* 483.

(*Short Title.*)

The claim sent in by you against the estate of A. B., deceased, has been allowed at the sum of $———, [with interest thereon at $—— per cent., per annum, from the —— day of ——, 18 —, *and* $—— for costs, *or as the case may be*].

If part only allowed, add.—If you claim to have a larger sum allowed, you are hereby required to prove such further claim, and you are to file [&c., *as in Form No.* 5].

Dated this —— day of ——, 18 —,

G. R., of, &c., Solicitor for the plaintiff
[*or* defendant, *or as may be.*]

To Mr. P. P.

No. 5.—*Notice to Creditor to prove his claim, under Order* 483.

(*Short Title.*)

You are hereby required to prove the claim sent in by you against the estate of A. B., deceased. You are to file such affidavit as you may be advised in support of your claim, and give notice thereof to ——, Master in Chancery *(a)* [*or as*

Amount proper to be allowed.
$. c.

(a) For "Master in Chancery," "Master of the Supreme Court of Judicature for Ontario," must be substitued.

the case may be], on or before the —— day of ——, 18 —; and to attend personally, or by your solicitor, at his Chambers, on the —— day of ——, 18 —, at —— o'clock in the —— noon, being the time appointed for adjudicating on the claim.

Dated this —— day of ——, 18 —,

G. R., of, &c., Solicitor for the plaintiff

[*or* defendant, *or as may be*].

To Mr. S. T.

No. 6.—*Notice that Cheques may be received, under Order* 486.

(*Short Title*).

The cheques for the amounts directed to be paid to the creditors of A. B., deceased, by an order made in this [matter *or*] cause dated the —— day of ——, 18 —, may be received at the Accountant's Office, in Osgoode Hall, Toronto, on and after the —— day of ——, 18 —,

G. R., of, &c., Solicitor for the plaintiff

[*or*, defendant, *or as may be.*]

To Mr. W. S.,

&c.

SCHEDULE W.

Indorsement on Office-copy Order, served under Order 536.

Take notice that unless you within —— days after the service hereof upon you, shew unto the Court of Chancery for Upper Canada, *(a)* good cause why the within decree *(b) or* order) should not be binding upon you, you will be bound

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(a) For the words "Court of Chancery for Upper Canada" must now be substituted "the High Court of Justice, —— Division, naming the proper Division.

(b) For "decree" the word "judgment" should now be used.

by the said decree (*or* order), and the same will stand and be absolute against you.

Dated, &c.,———

G. R.,
Solicitor for the plaintiff.

———

TARIFF. (*a*)

(*Referred to in Order* 309.)

MASTER. (*b*)

Every summons or warrant	$0 30
Administering oath, or taking affirmation	0 20
Marking every exhibit	0 20
Drawing depositions, reports or orders, per folio	0 20
One fair copy when necessary, per folio	0 10
Copy of papers given out when required, per folio	0 10
Every attendance upon a reference	1 00
For each additional hour	1 00
Every certificate	0 50
Filing each paper	0 10
Taxing costs, including attendance	1 00
Making up and forwarding answers and depositions	0 30
Every special attendance out of office, within two miles	1 00
Every additional mile above two	0 20
Reading affidavit—per folio	0 02

(*a*) The fees prescribed by this Tariff for Solicitors, and Counsel, were superseded by a subsequent tariff prescribed by *Ord.* 608, and that part of the tariff is therefore omitted, as being obsolete. Such fees are now regulated by the tariff of the Supreme Court.

(*b*) The fees payable to the Masters are now regulated by the Common Law Tariff, and where there were no similar proceedings in the former Courts of Law, then by the Tariff prescribed by *Ord.* 615, *post* p. 409, *Rule S. C.* 432. The scale of fees formerly payable to the Master under this Tariff, however appears still to regulate the fees payable to the Referees of Titles under *Ord.* 512.

Matter added—per folio	0 20
Searching files in office	0 20

REGISTRAR.

Drawing minutes of decree or special order—per folio..	0 20
Drawing decree or order—per folio	0 20
Entering same—per folio	0 10
Fee on payment of money into Court	0 30
Fee on payment of money out of Court	0 30
Fee on admission of Solicitor	1 00
Commission appointing Local Master, or Deputy Registrar	2 00
Attendance on appointment of Guardian	0 50

JUDGES' SECRETARY.

On every application in Chambers (including the order thereon, if made,) for a decree against infants, for the administration of an estate, for the sale of an infant's estate, to declare a person a lunatic, for *interim* alimony, for a vesting order, for final order of foreclosure or sale, for foreclosure after abortive sale, to extend time for payment of mortgage money, or for taxation	1 00
On every other application (including the order thereon, if made)	0 50
For other services, the like fees as are payable to the Master	....

SPECIAL EXAMINERS.

Every summons or warrant	0 30
Administering oath, or taking affirmation	0 20
Marking each exhibit	0 20
Drawing depositions—per folio	0 20
Copy for Solicitor, when required—per folio	0 10
Every attendance out of office, when within two miles	1 00
Every attendance out of office above two miles, extra per mile	0 20

Every certificate	0 50
Making up and forwarding answers and depositions	0 30
Every attendance upon an appointment, when Solicitor or witnesses do not attend, and Examiner not notified	1 00

CLERK OF RECORDS AND WRITS, AND DEPUTY REGISTRARS. (*a*)

Entering parties' names, and filing bill, answer or demurrer	$0 50
Entering and filing all other pleadings, interrogatories and depositions, or other evidence	0 20
Filing and registering affidavits, exhibits or other papers	0 10
Entering note *pro confesso*	0 50
Subpœna, including filing præcipe	0 50
Special writ, writ of commission	1 00
Office-copy of papers required to be given out—per folio	0 10
Examining and authenticating same, when office-copy prepared by Solicitor—every three folios	0 05
Amendment of record, when re-engrossment not necessary—per folio	0 20
Making up and forwarding interrogatories	0 30
Setting down cause, other than for hearing *pro confesso*	2 00

[The fee payable to a Deputy Registrar on setting down a cause for hearing to be $8.]

Setting down cause *pro confesso*	$0 50
Certificate of pleadings being filed	0 40
Certificate of state of cause	0 50
Searching files in office	0 20

(*a*) A new tariff of fees payable to Deputy Registrars was prescribed by *Ord.* 615. See additional fees payable to Clerk of Records and Writs, and Deputy Registrars, under *Ord.* 551 and *R. S. O.*, c. 40, s. 105. The fees now payable to the Clerk of Records and Writs are those prescribed by the Common Law Tariff, but where there were no similar proceedings in the former Courts of Law, then for such matters the fees prescribed therefor by this Tariff and *Ord.* 551 are payable.

SCHEDULES TO ORDERS PASSED SUBSEQUENT TO CONSOLIDATION,

LOWER SCALE TARIFF.

(Referred to in Order 553.) (a)

SOLICITOR.

Instructions for suit	$1 00
Instructions to defend	1 00
Instructions for petition where no bill is filed	1 00
Letter of notice before instituting suit	0 25
Drafting bill not exceeding twenty folios, including copy to keep	2 00
For every additional folio above 20, (to be allowed in the discretion of the Master) including copy to keep, per folio	0 20

[No greater sum than $3 to be taxed by the Master for drawing any bill, without any special direction of one of the Judges of the Court upon the application of the Solicitor requiring the same, for which application no charge to be made.]

Drafting answer or other pleading, petition or special affidavit, per folio	$0 20

[No greater sum than $3, to be taxed for drawing any answer, petition, or affidavit, without the special direction of one of the Judges of the Court, as provided for in the case of bills; and no greater sum is to be allowed for drawing an answer, petition, or affidavit, than would have been taxed irrespective of this order.]

Engrossed copies to file, copies to serve (other than copies on which a fee is paid to the Master, Clerk of Records and Writs, or Deputy Registrar, for reading over or authenticating the same), per folio	$0 10
Copies of orders, or other papers, or documents, required to be served, per folio	0 10

See note to *Ord.* 553.

Office-copies authenticated by the Clerk of Records and Writs, or Deputy Registrar, per folio..... 0 08

Affidavits of service of bill, including attendance to swear 1 50

Affidavits of service, including attendance to swear... 0 20

Precipe for any process, including attendance..... 0 25

Special attendance on Master's warrant or appointment, or on examination of witnesses, or on hearing of cause or demurrer or special motion 0 50

[No such fee or any other costs of, and incidental to an appointment, is or are, to be allowed by the Master to any party, either by consent, or on any ground whatever, as part of the costs of the cause, when the appointment was adjourned without being proceeded on, or where no substantial progress with the reference was made thereon. But the Master may order the payment of such costs as provided for by Order 213.]

When the hearing shall exceed one hour, then for every additional hour which shall be occupied by such hearing, and at which the Solicitor shall be present in Court, provided the same be noted in the Registrar's book, or be proved by affidavit (such affidavit to be without charge,) the same not to exceed $2..... 0 50

For every additional hour beyond one hour in the Master's office..... 0 50

[For attendance in the Master's office upon a warrant or appointment to hear and determine, the Master may increase the fee for such attendance to any sum not exceeding one dollar per hour, where, in the judgment of the Master, the matters to be heard and determined are of such special nature as to have required previous preparation, and where the Master finds that previous preparation has been bestowed thereupon, and that in his judgment such increased fee is reasonable and proper under the circumstances; but no such allowance is to be made for more than one day, unless the hearing is proceeded with *de die in diem* to the conclusion thereof: or unless such proceeding be prevented by a party other than the one claiming the increased allowance; and the increased allowance is not to be made unless the same is noted at the time in the Master's book.]

For every additional hour in the examination of witnesses where no counsel employed..... $0 50

[The fee on the attendance of a Solicitor, where the Solicitor attends in person, and no counsel is employed, may in special cases be increased in the discretion of the Judge, or Officer before whom the examination is had, to one dollar, and where the examination occupies more than one hour, then one dollar for every additional hour which is so occupied, and during which the Solicitor is present in attendance thereupon, provided the same is noted at the time in the Registrar's book, or in the book of the Master, or other Officer, as the case may be.]

Attending consultations of Counsel, per hour 0 50

[No special attendance to be allowed to a Solicitor on proceedings upon which he appears also as counsel.]

Appointment to settle minutes, or pass decree or order, copy and service. 0 50

For every hour's attendance before the Registrar by his appointment, on settling minutes, the same being noted by the Registrar.... ..... 0 50

For every hour's attendance before the Registrar by his appointment, on passing decree or special order, the same being noted by the Registrar .. 0 50

[The fee on settling minutes and on passing decrees or orders may be increased in the discretion of the Registrar, in special cases, to one dollar, where the Solicitor attends personally on each settling or passing.]

Where minutes settled, or decree or special order approved of or passed between the Solicitors after appointment issued by the Registrar..... 0 50

[In such case no fee to be allowed to either party as for attendance before the Registrar in respect of the same settling or passing.]

Fee on all orders and writs of Court to the party obtaining the same..... 0 50

Instructions for brief 0 50

Brief, per folio, including briefing and fair copy, subject to be reduced by the Master, if the same contain superfluous matter or be of unnecessary length 0 10

Observations, or other original matter in brief, per folio 0 20

[A brief of depositions or special affidavits to be allowed only where fee and brief for second counsel is taxed.]

Drawing special minutes when prepared by the Solicitor per folio	$0 20
Advertisement for sale of real, or personal estate, under the direction of the Court, including all copies, except for printing	0 50
Copies for printing—per folio	0 10
Fee on conducting sale—including arrangements with auctioneer, correcting proof sheets (if any), and attending sale	2 50
For every hour beyond three occupied at such sale	0 50
Drawing bill of costs and attending taxation	0 50
Drawing Judge's appointment, and attending for his signature, and to serve	0 50
Every necessary attendance	0 25
Necessary agency letters in the course of a cause or matter, to be allowed on taxation between party and party, as attendances,	
Postages—the amount actually disbursed.	

(The sum allowed for copying and briefing shall be ten cents per folio, except where authenticated by the Clerk of Records and Writs, or read over by the Master, but the same shall not in any case exceed one-half of the amount allowed for drawing what shall be so copied or briefed.]

COUNSEL.

On argument in Chambers in cases proper for the attendance of Counsel, to be increased at the discretion of the Judge	$1 00
On settling and signing pleadings and petitions respectively, where from their special nature the Master shall think the pleading or petition a proper one to be settled by comnsel	1 00
On consultations	2 00
On special applications to the Court, arguing demurrer or other special argument. or at the hearing of a cause	5 00

[To be increased in the discretion of the Master, to a sum not

exceeding $20 to senior Counsel, and $10 to junior Counsel, in suits of a special and important nature; but more than one Counsel fee is not to be allowed in any case not of a special and important nature. Where two Counsel fees or an increased fee is allowed by a Local Master, he is to forward to the Taxing Officer with the bill, upon transmitting it for revision, such information as may enable the Taxing Officer to judge of the propriety of the fee or fees allowed.]

MASTER.

Every summons or warrant	$0 10
Administering oath, or taking affirmation	0 20
Marking every exhibit	0 10
Drawing depositions, reports or orders, per folio	0 20
One fair copy when necessary, per folio	0 10
Copy of papers given out when required, per folio	0 10
Every attendance upon a reference	0 50
For each additional hour	0 50
Every certificate	0 20
Filing each paper	0 10
Taxing costs, including attendance	0 50
Making up and forwarding answers and depositions	0 10
Every special attendance out of office, within two miles	0 50
Every additional mile above two	0 10
Reading affidavit—per folio	0 02
Matter added—per folio	0 20
Searching files in office	0 10

REGISTRAR.

Drawing minutes of decree or special order—per folio	$0 20
Drawing decree or order—per folio	0 20
Entering same—per folio	0 10
Fee on payment of money into Court	0 10
Fee on payment of money out of Court	0 10

JUDGES' SECRETARY.

On every application in Chambers (including the order thereon, if made), for a decree against infants, for the administration of an estate, for a vesting

order, for final order of foreclosure or sale, for foreclosure after abortive sale, or to extend time for payment of mortgage money	$0 50
On every other application (including the order thereon, if made)	0 20
For other services, the like fees as are payable to the Master.	

SPECIAL EXAMINERS.

Every summons or warrant	$0 10
Administering oath, or taking affirmation	0 20
Marking each exhibit	0 20
Drawing depositions—per folio	0 20
Copy for Solicitor, when required—per folio	0 10
Every attendance out of office, when within two miles	0 50
Every attendance out of office above two miles, extra per mile	0 10
Every certificate	0 25
Making up and forwarding answers and depositions	0 10
Every attendance upon an appointment, when Solicitor or witnesses do not attend, and Examiner not notified	0 50

CLERK OF RECORDS AND WRITS, AND DEPUTY REGISTRARS.

Entering parties' names, and filing bill, answer or demurrer	$0 50
Entering and filing all other pleadings, interrogatories, depositions, or other evidence, filing and registering affidavits, exhibits, or other papers	0 10
Entering note *pro confesso*	0 20
Subpœna, including filing precipe	0 20
Special writ, writ of commission	0 50
Office-copy of papers required to be given out—per folio	0 10
Examining and authenticating same, when office-copy prepared by Solicitor—every three folios	0 05
Amendment of record, when re-engrossment not necessary—per folio	0 10
Making up and forwarding interrogatories	0 10

Setting down cause, other than for hearing *pro confesso*	$1 00

[The fee payable to a Deputy Registrar on setting down a cause for hearing to be $4.]

Setting down cause *pro confesso*	0 20
Certificate of pleadings being filed	0 20
Certificate of state of cause	0 20
Searching files in office	0 10

SHERIFFS.

Receiving, filing, entering, and endorsing every paper	$0 10
Return of all process and writs except subpœnas	0 25
Warrant to Bailiff, on writ not executed by Sheriff or Deputy	0 25
Serving each office-copy bill, including affidavit of service	0 50
Serving each warrant, notice, certificate, subpœna, or other paper	0 50
Writ of arrest—arrest on	1 00
Attachment—arrest on	1 00
Sequestration—upon seizure of estate and effects under writ of sequestration	1 00
Schedule of goods taken in execution, including copy for defendant, if not exceeding 5 folios	0 50
Each folio above 5	0 10

Removing or retaining property, reasonable or necessary disbursements, and allowance to be made by the Master, or by order of the Court or Judge.

Poundage upon sequestration, followed by sale, 5 per cent

For services not specified—The like charges as are allowed by County Court tariff for analogous service.

P. M. VAN KOUGHNET, *C.*
J. G. SPRAGGE, *V. C.*
O. MOWAT, *V. C.*

U.W.O. LAW

SCHEDULE TO ORDER, 554.

(Form of Certificate.)

(Title of cause or matter.)

I hereby certify that, to the best of my judgment and belief the tariff of fees under the Orders of this Court of 10th September, 1869, is applicable to this case.

A. B., *Solicitor for* ——

Dated, &c.

SCHEDULE REFERRED TO IN ORDER 589.

Form of Report in Administration Suit.

IN CHANCERY.

BETWEEN

A. B. AND OTHERS,

AND

Plaintiffs.

C. D. AND OTHERS,

Defendants.

Pursuant to the Order [*or* Decree] (*a*) herein made, dated the ——— day of ——— 1871, having caused an Office, copy thereof to be served upon [*give the names of persons served under Order* 60, *and also the names of those upon whom service has been dispensed with, and the reason for dispensing with service*], I proceeded to dispose of the matters referred to me, and thereupon was attended by the Solicitors for all parties interested [*or as the case may be*].

[*If the Master has appointed a Guardian ad litem for any of the parties, this should be so stated, and the reason why such appointment was made.*]

and I find as follows :—

1. The personal estate not specifically bequeathed of the testator come to the hands of the executors, and wherewith

---

(*a*) For the word "decree" the word "judgment" should now be substituted.

they are chargeable, amounts to the sum of $———, and they have paid, or are entitled to be allowed thereout, the smu of $———, leaving a balance due from them [*or* "to them," *as the case may be,*] of $——— on that account.

[*If no personal estate, say:* No personal estate has come to the hands of the executors, nor are they chargeable with any.]

2. The creditors' claims sent in pursuant to my advertisement in that behalf (published in —— issues of the newspaper called ————), and which have been allowed, are set forth in the first Schedule hereto, and amount altogether to $ ———.

[*If no creditors, say:* No creditor has sent in a claim pursuant to my advertisement in that behalf, nor has any such claim been proved before me.]

3. The funeral expenses of the testator amounting to $——— have been paid by the executors and are allowed to them in the account of personal estate.

4. The legacies given by the testator are set forth in the second schedule hereto, and with the interest therein mentioned, remain due to the persons named [*or as the case may be.*] *(a)*

5. The personal estate of the said testator outstanding or undisposed of, is set forth in the third schedule hereto.

[*In this third schedule personal estate not specifically bequeathed should be set forth separately from the other personalty outstanding or undisposed of. If there is no specific bequest, it should be so stated in the body of the report.*] *(b)*

(*a*) The Master, in reporting on legacies, should show what has been paid on account: *Clouster* v. *McLean*, 10 Gr. 576.

(*b*) The Master should find the facts as to outstanding assets, and not refer to consents or admissions respecting the same filed in his office; but he is not bound to report as to whether the assets are good, bad, or doubtful. *Ib.*

As to goods exempt from Execution, see *R. S. O.*, c. 66, s. 3.

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6. The real estate which the said testator was seised of or entitled to, and the incumbrances (*if any*) affecting the same, are set forth in the fourth schedule hereto.

7. The rents and profits of the testator's real estate received by the said executors, or with which they are chargeable, amount to $———, and they have paid, or are entitled to be allowed thereout, the sum of $———, leaving a balance due from [*or* to] them of $——— on that account.

[*If no rents, &c., received, say:* No rents and profits have come to the hands of the said executors, nor are they chargeable with any.]

8. I have allowed to the said executors the sum of $——— as a compensation for their personal services in the management of the said estate.

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The First Schedule referred to in the foregoing Report.

No.	NAMES OF CREDITORS.	PRINCIPAL.	INTEREST ALLOWED.		Costs at law(*a*) (if any) subsequent to Judgment.	Costs of this suit.	TOTAL.
			Rate per Cent.	Amount to date of Report.			
		$ c.		$ c.	$ c.	$ c.	$ c.
	[Distinguish any which are secured by mortgage, lien, or otherwise entitled to any priority.]						

[No general form can well be framed for the other Schedules, but in all cases brevity is to be studied. Where particulars are given they should shew merely the general character of the things described; as, for instance, the Schedule of outstanding personalty may say: A number of book debts outstanding amounting in the aggregate to $—— ; a quantity of household furniture and effects valued at $—— ; and the like short particulars should be given in other cases. Lands should be described without setting forth metes and bounds.]

(*a*) The words "at law" are no longer appropriate.

Receiving,
Return of a
Return of
rants o
Warrant to
Deput
Service of c
oath):
by Sol
Each additi
Serving eac
other p
Each additi
Actual and
to the
paper c
Writ of arre
ceed
Ditto
Ditto over
Mileage goi
Ditto convey
the gao
Attachment,
Sequestratio
writ of
Schedule of
for defe
Removing or
sary dis
by the

TARIFF. (*a*)

(*Referred to in Order* 615.)

SHERIFF.

Receiving, filing, entering, and indorsing every paper	$0 25
Return of all process and writs except subpœnas	0 50
Return of subpœnas, orders, notices of motion, warrants or other papers	0 25
Warrant to Bailiff on writ not executed by Sheriff or Deputy	0 75
Service of office-copy of Bill (including affidavit and oath): stamped form of affidavit to be furnished by Solicitor	1 50
Each additional party served	0 50
Serving each warrant, notice, certificate, subpœna or other paper	0 75
Each additional party served	0 50
Actual and necessary mileage from the Court House to the place where service of any Bill, process, paper or proceeding is made, per mile	0 13
Writ of arrest, arrest on, where amount does not exceed $200	2 00
Ditto $400	4 00
Ditto over $400	6 00
Mileage going to arrest when made, per mile	0 13
Ditto conveying party arrested from place of arrest to the gaol, per mile	0 13
Attachment, arrest on (besides mileage and expenses)	4 00
Sequestration, upon seizure of estate and effects under writ of sequestration	4 00
Schedule of goods taken in execution (including copy for defendant) if not exceeding five folios	1 00
Removing or retaining property, reasonable and necessary disbursements and allowances to be made by the Master, or by order of the Court or Judge.	

(*a*) See note to *Ord.* 615.

(*a*) The words "at law" are no longer appropriate.

setting forth metes and bounds.]

Poundage upon sequestration followed by sale or collection, or on execution, where amount made shall not exceed $1,000, six per cent.: over $1,000 but under $4,000, three per cent. on whatever exceeds $1,000 in addition to the poundage allowed up to $1,000. When the sum is over $4,000, 1½ per cent. on whatever exceeds $4,000, in addition to the sum allowed up to $4,000, exclusive of mileage for going to seize and sell, and except all disbursements necessarily incurred in the care and removal of property—to be allowed by the Master in Ordinary in his discretion.	
Executing writ of assistance (besides mileage and expenses)	5 00
Every search not being by a party to a cause or his solicitor	0 30
Certificate of result of search—when required, [a search for a writ against lands of a party shall include sales under writ against same party, and for the then last six months]	0 75
Drawing every affidavit when necessary and prepared by Sheriff	0 25
Notice of appointment for ballot of Jury	0 50
Notice to Clerk of the Peace of such appointment	0 50
Fee on balloting Jury	0 50
Fee on striking	2 50
Serving each Juror, besides mileage at 13 cents per mile	0 50
Keeping and checking pay list of Jurors' attendance in each case	1 00
Every Jury sworn	1 00

CORONERS.

The same fees shall be taxed and allowed to Coroners for services rendered by them in the service, execution and return of process, as allowed to Sheriffs for the same services above specified.

U. W. O. LAW

CRIER.

Calling every case with or without Jury	0 60
Swearing each witness or constable.....	0 15

ALLOWANCE TO WITNESSES.

To witnesses residing within three miles of the Court House, per diem	1 00
To witnesses residing over three miles from the Court House, per diem	1 25
Barristers and attorneys, physicians, and surgeons, when called upon to give evidence, in consequence of any professional service rendered by them, or give professional opinions, per diem	4 00
Engineers and surveyors, when called upon to give evidence of any professional service rendered by them, or give evidence depending upon their skill or judgment, per diem	4 00

If the witnesses attend in one cause only, they will be entitled to the full allowance.

If they attend in more than one case, they will be entitled to a proportionate part in each cause only.

The travelling expenses of witnesses over ten miles shall be allowed, according to the sums reasonably and actually paid, but in no case shall exceed one shilling per mile one way.

MASTER.

Filing and entering decree in Master's book	$0 20
Every summons, warrant or appointment.....	0 50
Administering oath or taking affirmation.....	0 20
Marking every exhibit	0 20
Drawing depositions, reports or orders, per folio.....	0 20
Fair copy per folio (when necessary).....	0 10
Copy of papers given out when required, per folio ...	0 10
Every attendance upon a reference	1 50

For each additional hour	1 50
Fee on report signed (only one to be allowed in each suit)	2 00
Every certificate *if not longer than two folios*	0 50
For each folio over two	0 20
Filing each paper	0 10
Taxing costs per hour	1 00
Making up and forwarding depositions, bills of costs and proceedings in Master's office	0 50
Every special attendance out of office within two miles	2 00
Every additional mile above two	0 20
Every attendance on application to a Master in Chambers	1 00
Searching files in office, same allowance as to Deputy Registrar.	

SPECIAL EXAMINER.

Every appointment	0 50
Administering oath or taking affirmation	0 20
Marking every exhibit	0 20
Taking depositions per hour	1 50
Fair copy for Solicitor, per folio (when required)	0 10
Every attendance out of office when within two miles	2 00
Every attendance over two miles out of office—extra per mile	0 20
Every certificate	0 50
Making up and forwarding answers, depositions, &c., including filing *præcipe*	0 50
For every attendance upon an appointment, when Solicitor or witnesses do not attend, and examiner not previously notified	1 00

DEPUTY REGISTRAR.

Entering parties' names and filing bills	0 50
Filing answer or demurrer	0 50
Entering and filing all other pleadings, affidavits on production, interrogatories, and depositions or other evidence	0 20

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Filing other papers	0 10
Entering note, *pro confesso*	0 75
Subpœna, including filing *præcipe*	0 50
Fi. Fas. and other Writs	1 00
Copy of papers required to be given out, per folio	0 10
Examining and authenticating same, when office-copy prepared by Solicitor, every 3 folios	0 05
Amendment of Record when re-engrossment not necessary, per folio	0 20
Forwarding papers from Deputy Registrar's office, including bills of costs	0 50
Setting down a cause for hearing	8 00
Certificate, if not more than 2 folios	0 50
For each additional folio	0 20
Searching files in office (if within one year)	0 20
Over one year and within two years	0 30
Every search over two years, or a general search in one cause	0 50
Marking every exhibit produced on the examination of witnesses	0 20
Swearing each witness	0 20
Taking account on *Præcipe* Decree	1 00
Taxing Costs on same	1 00
Attending on opening Commission	1 00
Stamping affidavit of service in each suit	0 10
Attending on inspection of documents produced with affidavits on production per hour	1 00

SHORT-HAND REPORTER.

On the certificate of the Judge before whom the examination of a witness or witnesses takes place, the Master may allow on taxation, a reasonable sum for the expense of a short-hand reporter.

J. G. SPRAGGE, *C.*
S. H. BLAKE, *V. C.*
WM. PROUDFOOT, *V. C.*

U. W. O. LAW

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