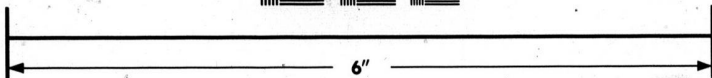
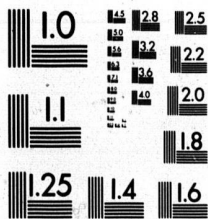
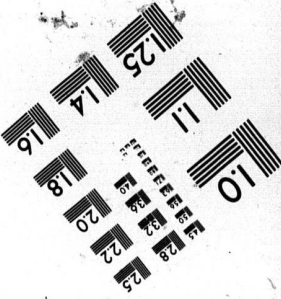
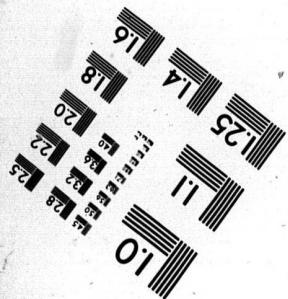


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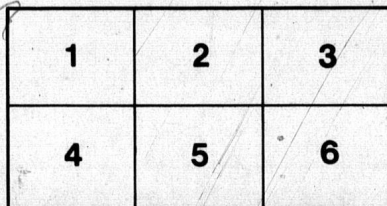
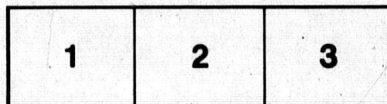
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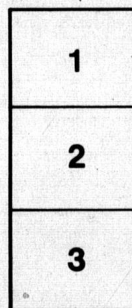
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THE RULES AND PRACTICE
OF THE
COURT OF CHANCERY
OF
UPPER CANADA,

COMPRISING

THE ORDERS OF 1850 AND 1851,

WITH

Explanatory Notes referring to the English Orders and Decisions;

BY

ROBERT COOPER, ESQ., BARRISTER AT LAW.

TORONTO:

A. H. ARMOUR AND CO.

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INTRODUCTORY REMARKS.

It will be readily observed by those members of the Profession, whose daily and nearly sole practice is in the Court of Chancery, that this Manual will afford them little more than a more convenient mode of reference to materials with which they are already familiar. But even to these practitioners this ready means of reference may be found of some service.

To other members of the Profession,—to the country practitioners, and to those who have not hitherto been much in this Court—the arrangement of the Rules of the Court in a compendious shape, as is here attempted, would seem necessary for the purpose of enabling them, without much discouraging inconvenience and trouble, to conduct Causes in Equity. The Rules, or Orders, by which the Practice was governed, were to be searched for among the English orders passed prior to March, 1837, the date of our first Chancery Act—among the several Orders of this Court issued prior to the Act of 1849, excepting out of them such as are abrogated by the Orders of 1850; and with them were to be incorporated the Orders of 1849, 1850, and 1851. It was thought, that to arrange these with reference to their subject matter would be useful to the practitioner and the student; and especially to those who, practising out of Toronto, had not hitherto been enabled to attend personally to the conduct of Equity Causes, but to whom the practice is now opened by the Orders of 1851, which are published at the close of this volume. With respect to these last mentioned Orders, it was the intention to incorporate them with the others according to their subject matter; but, as they have not been promulgated so early as was expected, and the writer having

been strongly advised not to delay the publication of the work, all that part containing the former Orders was at once sent to the press, thereby rendering it necessary to print the new Rules by themselves at the end ; but short notes have been appended, showing their connection with, or effect upon, the provisions of the former Orders.

A circumstance, which might possibly be supposed to render a work of this kind not altogether necessary, is, that there is an opinion in some quarters to this effect, that the Court of Chancery, as now established in Upper Canada, is not likely to remain a permanent institution—that, like many other creatures of Canadian Parliamentary birth, it may soon suffer annihilation at the hands of the parent, and that indeed such an event would be rather popular than otherwise. On this subject it would be presumption to offer an opinion here. The benefit, or otherwise, of this particular Court is a question of public economy, and not of law. Those whose duty it is to consider and decide upon such questions, will no doubt give it sufficient consideration. But one conclusion is inevitable, whether this or that Court be suffered to remain or be abolished, some tribunal, having power to try causes, such as those now brought before the Court of Chancery, must exist. There must be a Court, in which claimants can have redress in cases which the present common law tribunals cannot reach. Such cases will arise, and by some Court they must be decided. This is sufficient for our purpose ; and it is therefore unnecessary to enter into an argument as to which kind of Court would be most popular for the purpose, or which system would be most efficient. If, whatever changes in the jurisdictions take place, there must still be Equity administered by some Court, (and this seems undeniable) then it must be useful for the Profession to have kept clearly before them, from time to time, as alterations take place, the Rules by which the practice in the administration of Equity is governed.

When further important alterations happen to be made in the practice, the writer hopes that he, unless some one more fitted for it shall undertake the task, will keep the Profession supplied with the necessary supplementary publications.

It may not be out of place,—but chiefly with a view to those readers whose business may not have led them to pay much attention to Equity,—to refer to a few of those cases, in which the proper relief cannot be had at law, and the intervention of *some* tribunal, empowered to administer Equity, becomes necessary.

A party has purchased a lot of land. He pays a portion of the purchase money, but is in arrear as to the remainder. The vendor brings an action of Ejectment and turns the purchaser out of possession. The purchaser afterwards tenders his purchase money, but the vendor refuses it, saying that the payment was not made in time, and he will not now take it. He prefers keeping the part of the purchase money which has been paid, and taking also the benefit of the improvements which the purchaser may have made. The Ejectment clearly could not have been defended. Such a purchaser can in Equity, unless there are special circumstances against him, have a specific performance of his contract, and a conveyance of the Estate on making payment. A recent case on this subject is *MACDONALD vs. ELDER*.—*Grant's Chancery Reports*, Vol. 1.

The ordinary mortgage transactions, which are constantly occurring, cannot be adjudicated upon completely by the Common Law Courts. The right of the mortgager to redeem is no unreasonable indulgence, limited, as it now is, to six months instead of twelve as formerly, after the account is taken. The Court of Chancery is the only Court by proceedings in which, this right can be foreclosed, or extinguished.

There are many cases where the right to redeem, does not rest on the express words of a mortgage in the usual form, but upon special circumstances and extrinsic evidence; which in some cases have been deemed sufficient to sustain the right to redeem, although such a permission might seem contrary to the words of the deed. Where, for instance, there has been fraud, accident, or mistake, and the holding of the deed to be an absolute conveyance would be inconsistent with the dealings between the parties. In such cases the Rules of Common Law prevent any relief being granted in those Courts, and resort is necessary to an Equitable jurisdiction. A case of this kind is

LETARGE *vs.* DE TUYLL,—*Grant's Chancery Reports*, Vol. 1, p. 227 ; and the distinction is very clearly drawn in the judgment of the Court of Appeal in the case of STEWART *vs.* HOWLAND between the cases in which relief can, and where it cannot, be given in opposition to the words of the conveyance---in short, where the Statute of Frauds must prevail, and where it can be held inapplicable, because to use it as a shield would be to make it the means of effectuating fraud. The case of STEWART *vs.* HOWLAND was decided in December 1850, and will be found in *Grant's Reports*.

The Jurisdiction of the Court of Chancery is frequently invoked in cases of fraud, where an advantage has been gained by one party over another, who may have his advantage strengthened by having the *Law on his side*. This is the case often enough, where a person has, in ignorance of his actual rights, and not being in a position clearly to understand the effects of his act, executed papers which must have their full effect at Law, but which may be considered in Equity with reference to the real merits of the transaction arising out of all the circumstances. On this subject, though the case goes to other points, the reader is referred to STUART *vs.* HORTON,—*Grant's Chancery Reports*.

The Jurisdiction of Equity embraces the whole numerous class of partnership cases, and those wherein the relations of trustee and *cestui-que-trust* are in question.

A partnership has to be dissolved, and the affairs wound up, and in the meantime one partner desires to be protected against the fraudulent collection and expenditure of the partnership funds. A decree is made, under which the Master has to take the accounts. An injunction is granted, which prevents any improper interference with the assets ; and the business is directed to be managed by a "Receiver," who, as the Agent of the Court, collects the assets, and the Court disposes of them in favour of those whom the event of the suit may show to be properly entitled. Such is the case of PRENTISS *vs.* BRENNAN,—*Grant's Chancery Reports*, Vol.1, p. 371.

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property which he may hold in such capacity, deals with it in a manner to serve his own ends, and contrary to the real interests of those for whom he acts. The interference of the Court is invoked in manner similar to that above stated. *ARTHURTON vs. DALLEY*,—*Grant's Chancery Reports*; and to these may be added, the large class of cases of administration of Testators and Intestates effects, and the management of the Estates of Infants and Lunatics.

These are a few, and very far from the whole, of the classes of cases, in which an Equitable jurisdiction under the system of laws which obtains in England and here is absolutely necessary. In whatever Court that jurisdiction may be vested, is a matter of comparatively little importance to the lawyer or to the student, or even to the public, provided that it be a Court competent for the purpose, and such as to satisfy the wants, but not to form a disproportionate drag upon the resources of the country. The Equity must be somewhere administered, and it must therefore be studied and practised. Nor will it continue to be studied and practised by a few only of the Profession. The more summary mode of proceeding, and the great reduction of costs in all the Courts, will render it almost out of the question for any one class of men to confine themselves to one branch of the Profession, however desirable that might, under some circumstances, be considered with a view to greater efficiency. These considerations, although perhaps stated at too great length, may be given as fair reasons among others for believing, that a publication of this kind may be useful.

The few authorities cited in these Introductory Remarks are selected, as being in a certain sense leading cases, and having been decided since the establishment of the new Courts.

In the ensuing pages it has not been attempted, in such explanatory notes as are given, to state what the precise practice may be under the New Orders, where any reasonable doubt may exist. And for this reason, that the practice is too new, to render it possible, that the construction of the Orders should be as yet settled by Decisions. In course of time, when other publications of this kind become necessary, the practice may be more clear. A year or two may give occasion, for instance, for many important deci-

sions affecting questions upon which there are now many doubts, namely, *What cases may be referred to the Master under the 75th Order? And how far is a defendant concluded by such reference, if made before he could possibly answer the Bill? And to what extent may the motion be resisted on affidavit?* These questions, and many more such, cannot be answered satisfactorily in the present infancy of the practice; and therefore it is hoped that the omission to attempt showing what the practice is, where it is undeniably in doubt, will be readily excused. What few annotations appear, may be useful to some; but the chief object has been, to give all the Orders in the order of the proceedings in a Cause, and to supply a sufficient Index.

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CHAPTER I.

The Statutes.

The Court of Chancery for Upper Canada, as at present constituted, owes its existence to, and is governed by, the following mentioned Enactments of the Provincial Legislature.

Court
established.

The first Establishment of the Court was by an Act of the Parliament of Upper Canada,—7th Wm. 4, ch. 2, dated the 4th March, 1837.

Statute of
1837.

This Act created a Court, to be called "The Court of Chancery for the Province of Upper Canada", of which Court the Governor of the Province was to be Chancellor, but the Judicial powers of the Court, "both Legal and Equitable", were to be exercised by the Vice Chancellor.

A Vice Chan-
cellor to be the
Judge.

Sec. 2, enacts, that the Court shall have Jurisdiction, and "*possess the like powers and authority as by the laws of England are possessed by the Court of Chancery in England*" in respect of the following matters:—

Same powers
as the Court in
England.

1. "In all cases of Fraud ;
2. "In all matters relating to Trusts ;
3. "In all matters relating to Executors ; and
4. "Administrators ;
5. "In all matters relating to Mortgages ;
6. "In Dower.
7. "In all matters relating to Infants, Idiots, and Lunatics, and their Estates, except where special provision hath been or may hereafter be made with respect to them or either of them by any law of this Province ;

Matters over
which the
Court has Ju-
risdiction.

Under the above Clause (7) with respect to Infants the jurisdiction of the Court is confined to cases which do not fall within the "Act respecting the appointment of Guardians," being the 8th Geo. IV. Ch. 6, dated 17th February, 1827. Revised Statutes, page 465. When the case comes within that Act, the application for the appointment of a Guardian must be to the Probate or Surrogate Court, and not to the Court of Chancery. It would undoubtedly be more convenient, had the Court of Chancery a concurrent jurisdiction. In cases where the Estate of an Infant, whose father is not living, and who has no legal Guardian, is in Chancery, although that Court has full power over the Estate, it does not seem, under

notice of
order, in

the exception above mentioned, to have power to appoint a Guardian of the person. Such a jurisdiction has been exercised by this Court, it is true, prior to the Act of 12th Vic. Ch. 64; but it was only in *Exparte Cases*, and an application of the kind would, it is believed, now meet with a refusal; for the Court would feel bound by the expressed exception, however convenient and useful to all parties the exercise of the jurisdiction might be.

An important jurisdiction is given to the Court in the case of Infants by the Act of 12th Vic. Ch. 72, dated 30th May 1849. The first Section enacts, "That any Infant seized or possessed of, or entitled to any Real Estate *in fee, for a term of years, or otherwise howsoever*, in Upper Canada, may by his or her *next friend*, or by his or her *Guardian*, apply to the Court of Chancery in and for Upper Canada for the sale or *other disposition* of such property, or a competent part thereof, in manner and for any of the purposes hereinafter directed." The "purposes" are, the support, maintenance and education of the Infant; and the Court must be satisfied that the advantage of the Infant is consulted. If over seven years of age, the Infant must be a consenting party. The disposition of the proceeds is controlled by the Court and see 2 W. 4, ch. 35, sec. 9, as to partition of Infant's Estates. *Lunacy Cases*.

The practice in Lunacy Cases is regulated by 9th Vic. Ch. 10, dated May 18th, 1846.

The jurisdiction in respect to the Repeal of Letters Patent is extended by the 29th Section of 4 and 5 Victoria, (1842), Chap. 100, which enacts "That it shall and may be lawful for the Court of Chancery in that part of this Province formerly called Upper Canada, and for the Court of King's Bench in that part of this Province formerly called Lower Canada, upon Action, Bill or Plaint, to be exhibited in either of the said Courts, respecting grants of Land situate in the said Parts of this Province respectively, and upon hearing of the parties interested, or upon default of the said parties, after such notice of proceedings as the said Court shall respectively order, in *all cases* wherein Patents for Lands *have* or

Repeal of
Patents.

shall have issued through fraud, or in error, or mistake, to decree the same to be void; and upon the Registry of such Decree in the Office of the Provincial Registry of this Province, such Patents shall be deemed void, and of none effect to all intents and purposes whatsoever, and that the practice and proceeding in Court in such cases shall be regulated by orders to be from time to time made and issued by the said Courts respectively."

No orders of Court have been made expressly under this Act, but the proceedings are of course governed by the General Orders.

Court
remodelled.

The Constitution of the Court was materially altered by the 12th Vic. Ch. 64, intitled "*An Act for the more effectual Administration of Justice in the Court of Chancery of the late Province of Upper Canada.*"

Under this Act the number of Judges was increased to three, and the offices of Registrar and Master were separated. They had formerly been filled by one person.

How Court
constituted.

The Court now consists of the Chancellor and two Vice Chancellors. There are a Master, and Master's Clerk, a Registrar, who is also Registrar of the Court of Appeals, and Registrar's Clerk, and a Reporter. The payment of Officers by fees is abolished by this Act, and the fees are funded, the Officers being paid by Salaries.

Alterations in
the practice
suggested by
12 Vic. Ch. 64.

The 12th Section of the Act recites the appointment of the Chancery Commissioners, and that "Whereas the said Commissioners by the Report respectively made on the Twentieth day of April in the Eighth year of the Reign of Her Present Majesty, and on the Twentieth day of January then next ensuing, recommended certain alterations to be made in the pleadings and practice of the said Court, and, whereas it is desirable that the suggestions of the said Commissioners in regard to shortening the Bill and answer, and enabling the Plaintiff to obtain discovery through the medium of a *vivâ voce* examination of the Defendant, and for extending a like privilege to the Defendant in relation to the *vivâ voce* examination of the Plaintiff, should be adopted;

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" And, whereas it is believed that the adoption of the above
 " suggestion, *the abolition of all unnecessary proceedings,*
 " and *enabling matters to advance uninterruptedly in*
 " *the Master's Office,* will greatly tend to diminish the
 " costs of proceedings in the said Court, and to promote
 " the ends of Justice, but it is nevertheless expedient for
 " the purpose of more conveniently and safely carrying
 " out these and other alterations, that power should be
 " vested in the Judges to be appointed under this Act to
 " make such *rules and orders respecting the pleadings*
 " and *practice of the said Court,* for the purpose of
 " carrying out the aforesaid suggestion, as well as such
 " others as to them may seem expedient for the purposes
 " mentioned in the hereinbefore recited Commission, and
 " for *amending or modifying any of the rules or orders*
 " which have been or may be made for that purpose, and
 " for regulating the Offices of the Master and Registrar
 " of the said Court of Chancery, as well as for *rescinding*
 " *the said rules and orders,* or any of them. Be it
 " therefore enacted, That it shall be lawful for the Judges
 " to be appointed under the Act for the time being, to
 " make such *rules and orders as to them may seem ex-*
 " *pedient* for regulating the Offices of the Master and
 " Registrar of the said Court of Chancery, and for carry-
 " ing into effect the recommendations of the said Commis-
 " sioners as aforesaid, and from time to time to *make other*
 " *rules and orders, amending, altering or rescinding the*
 " *same or any of them,* and also to make all such *rules*
 " *and orders as to them may seem meet for the purpose*
 " *of adapting the proceedings of the said Court of*
 " *Chancery to the circumstances of this Province,* as
 " well in regard to the Process and Pleadings as in the
 " practice and proceedings of the said Court, and more
 " especially *the taking, publishing, using and hearing*
 " *of testimony in any suit therein pending, or the ex-*
 " *amination of all, or any of the parties to any such*
 " *suit upon their oaths vivâ voce or otherwise,* including
 " also the power to regulate by rules or orders the

"allowance and amount of costs. Provided always, that no such rule or order shall have the effect of altering the principles or rules of decision of the said Court, or any of them, or of abridging or affecting the right of any party to such remedy as, before the passing of this Act, might have been obtained in the said Court, but may in all respects extend to the manner of obtaining such remedy by regulating the nature and form of process and pleadings, and the practice of said Court as regards the method of taking, receiving, publishing, using, and hearing of testimony, the examination of witnesses or parties, or any other matter or thing which may seem expedient for better attaining the ends of Justice, and advancing the remedies of Suitors in the said Court."

Under the very ample powers given by this section, the Court has issued the orders of 1850 and 1851, which will be found in their proper order in the following pages.

Country practice.

The conduct of causes in Chancery has been, until recently, necessarily confined to Toronto, where the Court is situated, and the Master's and Registrar's Offices kept. An Act of last Session, 13th and 14th Vic. Ch. 50, dated 10th August, 1850, entitled, "An Act for the more effectual Administration of Justice in the Court of Chancery in Upper Canada," effects an important change in this respect. It empowers the Judges to appoint Masters and Deputy Registrars "in such localities as the said Judges may consider necessary and expedient for the purpose of promoting as far as possible the local administration of Justice;" and to make rules and orders for regulating such offices of Master and Deputy Registrar, and specifying what business may be transacted in them.

The Orders made under this Act will be found near the end of this volume.

Partition.

13 and 14 Vic.
Ch. 50,
Sec. 4, 5, 6.

This Statute also provides for the Partition of Estates held in joint tenancy, tenancy in Common or Coparcenery. The same power in this respect is given to the Court as is exercised by the Court of Chancery in England, and as

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is given to the Courts of Queen's Bench and the County Courts in Upper Canada.

Among the numerous questions arising in a Court of Equity was one of frequent occurrence, as to which the law is materially altered by a recent Act. It was the acknowledged rule in Equity, that a bona fide purchaser of real estate for value, purchasing and paying his money without notice of any previous Conveyance, could defend his title against a prior purchaser. And under the Registry Laws of this Province, as they formerly stood, such a title could be so defended, although the holder of it had not registered his deeds. Nor was the mere fact of registration necessarily notice to a purchaser, unless he searched. But, if he searched the Registry Books, he was bound by notice of their contents. And the same with regard to Judgments. It may here be noticed with regard to this subject of notice, that a purchaser should always make himself acquainted with all circumstances affecting the possession of the land. If a third party, and not the vendor, is in possession, the purchaser should enquire of the third party by what title he holds, for he will be bound by his title if he have one. And it was a rule with respect to the plea of "bona fide purchaser for valuable consideration without notice," that it must contain an averment that the vendor was at the time of the purchase in possession. And, although pleas are now abolished, if under the present practice such a defence is set up by answer, this averment should still be made.

The Act of 1850 alters the law as to all conveyances executed after the 1st of January, 1851. The following sections it has been thought advisable to give in full:—

2. And be it enacted, That a judgment to be entered up against any person in any Court of Record in Upper Canada *after the first day of January, one thousand eight hundred and fifty-one*, shall operate as a charge, so soon as a certificate of such judgment shall have been duly registered, upon all lands, tenements, and hereditaments situate within the county where such certificate shall have been registered as aforesaid, of or to which such person shall at the time of registering such judg-

Change in the law with regard to notice to purchasers, of outstanding encumbrances.

13 and 14 Vic. Ch. 63. Registration Notice.

13 and 14 Vic. Ch. 63. How registered judgments shall affect lands, &c.

Remedies of
judgment
creditor.

Proviso as to
notice.

All deeds, devise,
&c., executed after 1st
January, 1851,
to be registered.

ment, or at any time afterwards, be seized, possessed or entitled, for any estate or interest whatever at law or in equity, whether in possession, reversion, remainder or expectancy, or over which such person shall at the time of registering such judgment, or at any time afterwards have any disposing power, which he might without the assent of any other person exercise for his own benefit, and shall be binding against the person against whom judgment shall be so entered upon and registered, and against all persons claiming under him after such judgment and registry, and shall also be binding as against the issue of his body, and all other persons whom he might without the assent of any other person cut off and debar from any remainder, reversion or any other interest, in or out of the said lands, tenements, or hereditaments; and that every judgment creditor shall have such and the same remedies in a Court of Equity against the hereditaments so charged by virtue of this Act or any other part thereof as he would be entitled to in case the person against whom such judgment shall have been so entered up and registered, had power to charge the said hereditaments, and had by writing under his hand agreed to charge the same with the amount of such judgments—debt and interest; and all such judgments shall be claimed and taken to be valid, and effectual according to the priority of registering such certificates. *Provided nevertheless, that nothing therein contained shall be deemed or taken to alter or affect any doctrine of Courts of Equity, whereby protection is given to purchasers for valuable consideration without notice.*

3. And be it enacted, That after any Grant from the Crown of any lands in Upper Canada, and Deed Patent thereof issued, every deed, devise, or other conveyance which shall be executed at any time after the first day of January, one thousand-eight hundred and fifty-one, whereby any lands, tenements or hereditaments in Upper Canada may be in any wise affected in Law or Equity, shall be adjudged fraudulent and void, not only against any subsequent purchaser or mortgagee for valuable consideration, but also against a subsequent judgment creditor, who shall have registered a certificate of his judgment, unless such memorial be registered as by the said first recited Act* is specified before the registering of the memorial of the deed, devise or conveyance, or the certificate of the judgment, under which such subsequent purchaser, mort-

* This is the Registry Act of 1846, 9 Vic. Ch. 34.

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gaggee or judgement creditor respectively shall claim, subject nevertheless as to devisees, to the provisions contained in the twelfth section thereof. Provided always, that nothing herein contained shall be construed to affect the rights of equitable mortgagees as now recognised in the Court of Chancery in this Province.

Proviso.

4. And, whereas the Doctrine of Tacking has been found to be productive of injustice, and requires correction: Be it enacted, That every deed and conveyance executed after the first day of January, one thousand eight hundred and fifty one, a memorial whereof shall be duly registered, and every judgement recovered after the date last aforesaid, a certificate whereof shall be duly registered, shall be deemed and taken as good and effectual both in Law and in Equity according to the priority of the time of registering such memorial or certificate; and, when no memorial of such deed or conveyance shall have been duly registered, then such deeds or conveyances shall be deemed and taken to be valid and effectual, both at Law and in Equity, according to the priority of time of execution.

Deeds, &c., to take priority according to the date of registry.

7. And be it enacted, That the Registry, or Registry of any certificate of judgment *as hereinbefore mentioned*, shall be deemed and taken to be a registry of such judgment for the purposes of this Act.

Certificate of judgment may be registered.

8. And be it enacted, That the Registry of any deed, conveyance, will or judgment *under the first recited Act*, or this Act, affecting any lands or tenements, shall in Equity constitute notice of such deed, conveyance, will or judgment, to all persons claiming any interest in such lands or tenements subsequent to such registry.

Registry to be deemed notice.

9. And be it enacted, That the Register of every County in Upper Canada shall, after the passing of this Act, enter in a separate book to be kept for that purpose the certificates of all judgments brought to him for registration, and prepare an alphabetical index thereto.

Separate book for registry of judgments.

As regards judgments which have already been registered under 9 Vic. Ch. 34, they may be rendered of the same effect as if registered under the above Act, by complying with the following provision of the first section, "that whenever any judgment shall have been registered before the passing of this Act, the party in whose favour the same shall have been rendered, may require the Registrar of any County to mark on the margin of such registry, and sign the same "Registered this — day of

Re-entry of registration of judgments already registered.

— A. D. eighteen, —

Intention and
effect of the
Act.

Judgment cre-
ditors parties to
Bills.

Proviso as to
bona fide
purchasers.

Tacking.

and such entry of registry shall have the same effect from such dates as if it had been registered under this section." That is, the same effect as docketted judgments in England before the practice of docketting was there discontinued. And it is submitted, that under the above 7th and 8th sections, taken with the first, such formerly registered judgments with the new entry made as above prescribed, will stand in precisely the same position from the date of the new entry, as judgments entered up and registered after the 1st January, 1850; and such would seem to have been the intention of the Act.

All the holders of such registered judgments and conveyances will have the right to redeem as against a prior encumbrancer, and will be proper parties to bills, to redeem and foreclose; and their rights cannot be extinguished without their being so made parties.

The proviso at the close of the above second section, taken in connection with 8th section, can only affect a small class of cases. The old rules will hold in cases where the question lies between two encumbrancers, neither of whom have registered, and the same would have been the result, had the above proviso been omitted, for the other provisions of the Act do not apply to such cases.

The doctrine of Tacking, which is done away with by the above 4th section, had been, though with some remarks as to its inconvenience, held to apply in this country. It is thus defined by Mr. Justice Story in his Equity Jurisprudence, sec. 412, "Uniting Securities given at different times, so as to prevent any intermediate purchasers from claiming a title to redeem, or otherwise to discharge, one lien, which is prior, without redeeming or discharging the other liens also, which are subsequent to his own title. Thus, if a third mortgagee, without notice of a second mortgagee, should purchase in the first mortgage, by which he would acquire the legal title, the second mortgagee would not be permitted to redeem the first mortgagee without redeeming the first mortgage also; for in such a case Equity tacks both mortgages together in his favor.

And in such a case it will make no difference, that the third mortgagee had notice of the second mortgage; for he is still entitled to the same protection."

In cases arising upon titles acquired prior to the operation of the above Statute, the same doctrine will still apply; but to no other cases. As regards judgments unregistered, they are of course cut out by a registered deed under the above Act, whether or not it be true that a judgment creditor, whose judgment is not registered, has a right to redeem—a question on which there is here some difference of opinion. The better opinion seems to be that a judgment creditor, who has placed his writ against lands in the Sheriff's hands, has a right to redeem a prior mortgage, and should be a party to a bill to foreclose; although it has been otherwise decided by Mr. Vice Chancellor Jameson. But of course under the above Act, such a creditor, neglecting to register his judgment, can be completely shut out by a subsequent encumbrancer who registers.

CHAPTER II.

The Bill.

First proceeding.

The first proceeding in a suit in Chancery is by Bill. This Bill formerly consisted of nine parts,—1. The address.—2. The names of the parties.—3. A statement of the facts.—4. A general charge against the Defendant.—5. Particular charges in answer to what the Defendant pretends to be his case.—6. An averment that the Defendant's conduct was contrary to equity and good conscience.—7. The interrogatories, which the Defendant was bound to answer substantially and literally.—8. The prayer for relief.—And 9. The prayer for process or writ of subpoena, to compel the defendant to appear and answer; and the bill was to be signed by the Counsel. The form is now much shortened, and embraces only the 1st, 2nd, 3rd, 8th and 9th of the above mentioned parts; and neither the bill, nor any other pleading, needs be signed by Counsel. The Bill is now in the shape prescribed by the following order:—

1850.
XI.
Form of Bill.

The bill shall in future be in the form of a petition, addressed to the Chancellor. The address and conclusion shall be as in Schedule A. to these Orders appended. It must contain—

1. The name and description of each party complainant.
2. A statement of the plaintiff's case in clear and concise language.

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3. It must pray the specific relief to which the plaintiff supposes himself to be entitled.

4. Besides the prayer for process the prayer for general relief may be added.

The bill needs not be signed by Counsel, nor shall it contain any interrogatories, and all merely formal parts shall be omitted except only the address and conclusion.

The form is as follows :—

IN CHANCERY.

*To the Honorable William Hume Blake, Chancellor
of Upper Canada :*

The Bill of Complaint of A. B., of &c. (here follow the names and additions of all the parties complainant)

Showeth, that (state the complainant's case as succinctly as can be done consistently with due certainty, and in any language suitable for the purpose)

To the end, therefore, that (state the relief sought) your complainant prays that (if an injunction or other special writ be required, introduce an appropriate prayer) a subpoena may issue under the seal of this Honorable Court, directed to the said C. D. (name all the parties defendant), calling upon him to appear to this bill and observe what this Honorable Court shall direct in that behalf.

And your complainant shall ever pray, &c.

There is no English Order similar to this, the change having been there from the old Bill with Interrogatories and formal parts to the Short Claims under Lord Cottenham's Orders of 1850.

The other modes of proceeding in Chancery are those prescribed by the Orders of 1851, which are given at the conclusion. This was found more convenient than embracing the Orders in this part of the book. The proceedings here stated apply to all such cases as are not excepted by the more recent Orders, the object of which has been, to simplify the proceedings in all cases which involve no points on which evidence is required to be entered upon prior to the decree. The practitioner then will find it necessary to ascertain whether each case comes under the provisions of the now stated Orders, or those of 1851.

Other modes of
commencing a
suit.

Amendment. After the Bill is filed, several circumstances may render it advisable to alter or amend it. Some fact may come to the Plaintiff's knowledge, which it may be found necessary to put in issue before the Defendant has answered the Bill; and at that early period the amendment may be made as of course. Or, after the Bill is answered, it may be found advisable to make an amendment with a view to meeting the case set up in defence; and frequently several amendments may become necessary. The terms on which these can be made are provided for by the following Order—

1850.

AMENDMENT OF BILL.

XII. An Order for leave to amend the Bill may be obtained at any time before answer, upon motion or petition in the Cause without notice.

Clerical error. An Order for leave to amend the Bill, only for the purpose of rectifying a clerical error in names, dates, or sums, may be obtained at any time upon motion or petition in the Cause without notice.

One Order of course. One Order of course for leave to amend the Bill, as the plaintiff may be advised, may be obtained by the plaintiff at any time before filing the replication, and within four weeks after the answer, or the last of several answers shall be filed; but no further Order of course for leave to amend the Bill is to be granted, after an answer has been filed, except in the case provided for by the second section of this Order.

Without prejudice to an injunction. The plaintiff, having obtained an Order for leave to amend his Bill, has, in all cases in which such Order is not made without prejudice to an injunction, fourteen days after the date of the Order within which he may amend such Bill.

If such Bill be not amended within such fourteen days, the Order for leave to amend becomes void, and the Cause as to dismissal stands in the same situation as if such Order had not been made.

Amend within seven days. And the plaintiff, having obtained an Order for leave to amend his Bill, without prejudice to an injunction, must amend such Bill within seven days from the date of the Order.

If such Bill be not amended within such seven days, the Order for leave to amend becomes void, and the cause as to dismissal stands in the same situation as if such Order had not been made.

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Supplemental Bills are hereby abolished. Where a suit is defective by reason of some imperfection in the Bill, and not in consequence of any event occurring subsequent to its institution, the Court may at any time permit an amendment of the Bill in furtherance of justice, and on such terms as may be proper, for the purpose of altering the allegations in the Bill, or of putting new matter in issue, as well as for the purpose of adding or striking out the names of parties, or of varying the relief prayed, or praying further relief.

Such Order shall be applied for by motion, stating the required amendment, of which motion notice must be served upon the parties or their solicitors, unless dispensed with.

The motion must be supported by affidavit satisfying the Court—

1. Of the Truth of the Amendment.
2. Of the propriety of permitting the Amendment at the particular stage of the Cause under all the circumstances.
3. That the Order will promote the ends of justice, unless these requirements may sufficiently appear from evidence before the Court.

Upon pronouncing such Order for amendment, the Court shall give such directions as to the future conduct of the Cause, in relation to answering such amendments, as also respecting the evidence taken, or to be taken, and in all other respects, as the circumstances of the case may require.

Bills of Revivor, Bills of Revivor and Supplement, original Bills in the nature of Bills of Revivor, and original Bills in the nature of Supplemental Bills, are hereby abolished. When a suit becomes defective, or abates by any event subsequent to its institution, and before final decree, it shall be competent to the Court to direct an amendment of the Record, in order that such defect may be remedied, and the suit continued, and the benefit thereof obtained.

The order for such amendment shall be applied for by motion, specifying the nature of the amendment and the applicant's title to the same.

Notice of this motion must be served on the parties to the suit or their solicitors, unless the Court under special circumstances shall dispense therewith; and it may be made by any person who could have heretofore obtained the desired object by Supplemental Bill, or by any form of Bill by this Order abolished.

1850.

XIII.

Amendment in
lieu of Supple-
mental Bill.

Order, how
applied for.

1850.

XIV.

Amendment in
lieu of Bills of
Revivor, Bills
of Revivor and
Supplement,
and Bills in
nature of Sup-
plemental Bills.

Motion, how
made.

The motion must be supported by such evidence as shall satisfy the Court—

1. Of the Applicant's Title to Relief.
2. Of the propriety of permitting the amendment at the particular stage of the Cause under all the circumstances.
3. That the Order will be a furtherance of Justice.

The Court, upon pronouncing any Order for amendment under this rule, shall give such directions as to the future conduct of the Cause, in relation to answering such amendments, the evidence taken, or to be taken, and in all other respects, as the circumstances of the case may require.

The first two clauses of the above Order XII are in the words of the English Orders LXIV, LXV, of 1845.

English Order
LXVI.

The English Order LXVI of 1845 is in the words of the third Clause of the above 12th Order, except that, instead of the words "before filing a replication", it says, "before filing (*or undertaking to file*) a replication."

Compared with
English Orders.

The words "last of several answers" in the 66th English Order of 1845, which answers to the 3rd Clause of the above Order 12, have been held to mean, the last answer to be put in before replication, and not the last answer filed before the application to amend. That is, the Plaintiff may wait for all the answers, and then amend within four weeks, unless put upon terms by a motion to dismiss. (See *post* under head of "Speeding the Cause"). *Arnold vs. Arnold*, 1 Phillips, 805; *Dalton vs. Hayter*, 7 Beaven, 586; *Forman vs. Gray*, 9 Beaven, 200). The statement that the Plaintiff may wait for all the answers before amending, may be subject to this exception, that, if a Defendant is stated to be out of the jurisdiction, and all the others have answered, and more than a month has elapsed, an Order of course may be held irregular.—(*King of Spain vs. Hullett*, 3 Sim. 338).

It is advisable generally not to take the Order to amend until all the Defendants, who are likely to answer, have answered, for a subsequent answer may suggest a new amendment, and there cannot be a second Order of course to amend. The above 3rd clause of Order 12 says "*one*

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Order of course, &c." And see *Davis vs. Prout*, 5 Beaven, 375; and, even when the first Order has not been acted upon, a second taken as of course will be irregular, (*Brooks vs. Purton*, 4 Beaven, 494).

When a Bill is amended, if any of the amendments extend to more than two folios, the Bill must be re-engrossed and filed, and the Plaintiff pays 20s. to the Defendant, if a further answer is required, but not otherwise.

Re-engrossment.

By an Order of 1843 it is directed:

That where a Bill is amended, and a re-engrossment thereof filed, and a copy of such re-engrossment served on the opposite party under the foregoing Orders, it shall not hereafter be necessary for the Plaintiff to pay such opposite party the usual sum of twenty shillings, unless a further answer be required.

It will be seen, that by the foregoing Orders many descriptions of Bills are abolished, the purposes being attained by simple amendments. All other kinds of Bills, except Original Bills, are abolished by the following Orders:—

When a suit becomes abated after decree, any party entitled to revive the same may do so by petition in the cause, which shall state the title of the petitioner to the relief sought. This petition must be verified by affidavit, and be served upon the solicitors of all parties interested, and, in case any such party has no solicitor, upon such party.

XV.
Suits how revised.

Petition.

Bills of Review are hereby abolished. When the reversal of a decree is sought upon the ground of error apparent upon the face of the decree, that object may be attained by rehearing the cause, whether the decree have or have not been enrolled. One rehearing may be had upon petition, signed by counsel, as in the case of an ordinary rehearing, as well before as after enrolment, but no petition for a second rehearing shall be filed without leave of the Court first had, upon special motion for that purpose. Provided that this order shall not be construed to authorise the rehearing a cause, in the ordinary acceptance of the term, after enrolment.

XVI.
BILLS of REVIEW abolished.
REHEARING on Petition.

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 execution; are hereby abolished. Any party heretofore entitled to file a bill of review, praying the variation or rever-

XVII.
Other Bills abolished.
REVERSAL of DECREE upon Petition.

sal of a decree upon the ground of matter occurring subsequently to the decree, or subsequently discovered, or any description of bill by this Order abolished, may in future proceed by petition in the cause, which shall specially pray the relief sought, and state the ground upon which it is claimed. This petition must be verified by affidavit and served upon the solicitors of all parties interested; and in case any such party has no solicitor, then upon such party; and, where the reversal or variation of a decree is sought upon new matter, such proof as would have been requisite upon a motion to file a bill of review must be supplied. Upon the hearing of this petition the Court may, in its discretion, 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 future hearing of the petition, as to the Court may seem meet.

Rescinded
Orders as to
amendment.

The 1st Order of 1850 rescinds many of the former Orders specifically, and such rescinded Orders are of course omitted.

The 2nd Order of 1850 is as follows :—

All former Orders and parts of Orders not specified in Order 1, so far as the same are now in force *and consistent with these Orders*, are to remain in full force and effect.

Application to
amend must
now be to the
Court on
motion, not-
withstanding
Order 181 of
1846.

The Order 181 of 1846 is not specifically rescinded, and it provides, among other things, that applications “for leave to withdraw replication and amend Bills are to be to the Master, with an appeal, by motion, to the Court. But it will be seen, that this part of the Order of 1846 is not “consistent” with the foregoing Orders of 1850, and is therefore not in force, and all applications for leave to amend must now be to the Court, by motion, on notice.

These Orders, abolishing Supplemental and other Bills, are not after any English Orders, and therefore there is no English practice analogous to that established by them. Such Bills are still in use in England.

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CHAPTER III.

The Writ.

The first process against a Defendant is the *subpœna*, SUBPŒNA. obtained on præcipe on filing the Bill, but it cannot be obtained until the Bill is filed.

The 18th Order of 1850 provides that

1850.
XVIII.

Subpœnas to appear and answer, and to answer respectively, shall be in the form specified in Schedule B, to these Orders appended, with such memoranda subjoined as therein mentioned.

The form of a subpœna to *appear and answer* is as follows:—
IN CHANCERY.

Subpœna to
original Bill.

CANADA.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To (here insert the names of all the defendants in full, as in the Bill).

GREETING.

We command you, that you cause an appearance to be entered for you in our Court of Chancery of Upper Canada, within (*fourteen days, if the Defendant is within the jurisdiction—in other cases such time as the Court may order*) days after the service of this Writ upon you, exclusive of the day of such service, and that you answer a Bill of Complaint exhibited against you in

our said Court by (*here insert names of Plaintiff in full, as in the Bill*), and observe what our said Court shall direct in that behalf. Witness the Honorable William Hume Blake, our Chancellor, this day of 185 in year of our reign.

(Name of Registrar.)

Registrar.

(Name of Solicitor.)

Plaintiff's Solicitor.

The following Memorandum to be placed at the foot.

Memorandum
at foot of
Subpœna.

Appearances are to be entered at the Registrar's office at Osgoode Hall in the City of Toronto; and, if you do not cause your appearance to be entered within the time limited by the above writ, an appearance will be entered for you at your expense; and, if you do not answer or demur to the bill within

you will be subject to such order or decree being made against you as the Court shall think just upon the plaintiff's own showing—(*where the defendant is to be served out of the jurisdiction, add the following words*)—without further notice.

Defendant has
only fourteen
days to demur
alone, notwith-
standing the
words of the
memorandum.

The form of this Memorandum would seem to give rise to reasonable doubt, whether or not the Defendant has the same time to demur alone as to answer, or answer and demur. The 27th New Order, (1850), commences with these words.—“A Defendant is to answer or demur, *not demurring alone*, to any original bill, or bill amended before answer, within one month after appearance,” &c. And the 26th New Order gives only fourteen days to demur alone. Whatever may be the apparent meaning of the above form of notice then, a defendant on receiving it is to understand, that, if he elects to demur alone to the Plaintiff's Bill, he must do so within fourteen days after his appearance. It has been suggested, that it would be as well to insert in the memorandum the words “not demurring alone,” but this, it has been intimated by the Court, would be a departure from the Order, which prescribes the form, and therefore incorrect.

Mode of service
of Subpœna.

Service of the Subpœna is by delivering a copy to the Defendant personally (with some exceptions) and producing and showing the original writ. The affidavit of service must state when and how the service was effected.

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The service of the Subpœna is generally, as we have stated, a personal service; but there are cases where leaving the copy at the residence of the Defendant, and the like, is deemed good service. It is recommended, however, that the service be personal in every case when it can be effected; but, were it peremptory in every case, the ends of justice might be defeated by the concealment of a Defendant. There are cases in which service not personal has been held sufficient. See *Earl Chesterfield vs. Bond*. 2. Beaven, 263.

When service
of Subpœna
not personal.

Under the 20th Order (see *post* p. 29), it will be seen that the service, in order to enable the Plaintiff to appear for the Defendant, may be at his dwelling house or usual place of abode. Still it is apprehended that there must be some good reason for omitting to make the personal service. (See *Pultney vs. Skelton*, 5 Vesey, 147).

Under special circumstances the Court may order service of a Subpœna on the Agent or Solicitor of the Defendant. The following are some of the cases on the subject:—*Smith vs. H. M. Co.*, 1 Schoales & Lefroy, 238; *Bromley vs. Bank of England*, 7 Jurist, 120; *Hobhouse vs. Courtney*, 12 Simons, 140; *Murray vs. Vibait*, 1 Phillips, 521; *Cooper vs. Wood*, 5 Beaven, 391; *Woodall vs. Walker*, 3 Hare, 339; *Hornby vs. Holmes*, 4 Hare, 306; *Cope vs. Russell*, 11 Jurist, 463; *Hurst vs. Hurst*, 12 Jurist, 152; *Waterton vs. Croft*, 5 Simons, 502; *Kinder vs. Forbes*, 2 Beaven, 503; *Lane vs. Hardwicke*, 5 Beaven, 222.

Substitutional
service.

After amendment of a Bill, it is sufficient, as regards all Defendants to the Original Bill who have appeared to it, that the Subpœna to answer be served on the Solicitor for such Defendants, the 14th Order of June, 1837, remaining, in that respect, in force. That Order is as follows:

Service of
Subpœna to
amended Bills.

XIV. That service on the Solicitor of any Subpœna to *rejoin*, or to answer an amended Bill, or to hear judgment, shall be deemed good service.

Order of 1837.
Subpœna to
amended Bill.

That part of the above Order relating to Subpœnas to *rejoin* needs not be attended to, for that writ was abolished

by the 157th Order of 1845, and although that Order is among the Orders rescinded by the Orders of 1850, the Subpœna to rejoin is not now necessary, but the cause may be at once set down after replication, and proceeded with by Subpœna to hear Judgment, as hereafter shown.

The above Order (14th of 1837) is in the precise words of the English Order, 26th of May, 1845, under which it has been decided that the Order is not applicable where the Defendant is abroad and his Solicitor only was served; (*Marquis of Hertford vs. Suisse*, 13 Sim., 489.) In the case of a Corporation, service on any member is said to be sufficient.

In default of appearance the Defendant cannot be attached as formerly, but the Plaintiff is enabled to appear for him, and proceed with his cause. The following rule abolishes process of contempt for non-appearance.

1850.
XIX.

Form of
subpœna to
amended Bill

All process of contempt for the purpose of compelling appearance is hereby abolished.

The form of the subpœna to answer an amended bill differs from the above form, where the Defendant to whom it is directed is already a Defendant to the original bill. As respects such Defendant, the writ is as follows :—

We command you, that within days after the service of this writ upon you, exclusive of the day of such service, you do answer the amended bill of complaint exhibited against you in our Court of Chancery of Upper Canada, by and observe what our said Court shall direct in that behalf. Witness the Honorable William Hume Blake , our Chancellor,
day of 185 in year
of our reign.

(Name of Registrar.)

Registrar.

(Name of Solicitor.)

Plaintiff's Solicitor.

Memorandum at the foot.

The Bill of complaint filed against you by
has been amended by Order bearing date

If you do not answer or demur to the said Bill, or obtain further time for that purpose, within days after the service of this writ upon you, exclusive of the day of such service, the Plaintiff will be at liberty to file his replication.

Where a New Defendant is added, the writ, it would seem, should be in the form first given, putting the word "amended" before the word "bill." For such New Defendant is entitled to his time to appear as well as answer.

CHAPTER IV.

The Appearance.

Orders of 1850.

XX.
Appearance,
and proceed-
ings in default
of appearance.

The Subpœna having been duly served, the Defendant must within the limited time enter his appearance, as in the Subpœna directed, or the Plaintiff may appear for him, and in default of answer may proceed to a hearing of the cause, as if the statements in the Bill were admitted, or traversed, in the manner prescribed by the Orders presently following.

The time limited for appearance in ordinary cases is fourteen days, under the following Orders :—(The Italics show where the words differ from those of the English Order 29th).

Order XX.

If any defendant, not appearing to be an infant, or a person of weak or unsound mind, unable of himself to defend the suit, *shall*, when within the jurisdiction of the Court, *be* duly served with a subpœna to appear and answer a bill, and *shall* refuse or neglect to appear thereto within *fourteen* days after such service, the plaintiff may, after the expiration of such *fourteen* days, and within *four* weeks from the time of such service, apply to the Registrar to enter an appearance for such defendant; and, no appearance having been entered, the Registrar is to enter such appearance accordingly, upon being satisfied by affidavit that the Subpœna was duly served upon such defendant personally, or at his dwelling-house or usual place of abode; and, after the expiration of such *four* weeks, or after the time allowed to such defendant for appearing has expired, in any case in which the Registrar

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is not hereby required to enter such appearance, the plaintiff may apply to the Court for leave to enter appearance for such defendant; and the Court, being satisfied that the subpoena was duly served, and that no appearance has been entered for such defendant, may, if it think fit, order the same accordingly.

Any appearance entered at the instance of the plaintiff for a defendant, who at the time of the entry thereof shall be an infant, or person of weak or unsound mind, unable of himself to defend the suit, shall be irregular and of no validity.

XXI.

If upon default, made by a defendant, in not appearing to or not answering a bill, it appear to the Court that such defendant is an infant, or person of weak or unsound mind, not so found by inquisition, so that he is unable of himself to defend the suit, the Court may upon the application of the plaintiff order that one of the solicitors of the Court be assigned guardian of such defendant, by whom he may appear to and answer, or may answer the bill and defend the suit.

Appointment of
Guardian.

But no such Order is to be made unless it appears to the Court on the hearing of such application, that the subpoena to appear and answer the bill was duly served, and that notice of such application was after the expiration of the time allowed for appearing or for answering the bill, and at least six days before the hearing of the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such subpoena, and (in the case of such person being an infant, not residing with or under the care of his father or guardian) that notice of such application was also served upon or left at the dwelling-house of the father or guardian of such infant, unless the Court, at the time of hearing such application, thinks fit to dispense with such last mentioned notice.

Service of Sub-
poena and
notice before
appointment of
Guardian.

The English Orders on this practice are as follow:—English Orders Order 29 of 1845 corresponds to the above Order 20, and is as follows:—(the parts differing from the words of the above Orders are italicised).

on this practice.

If any Defendant, not appearing to be an infant or a person of weak or unsound mind, unable of himself to defend the suit, *is*, when within the jurisdiction of the Court, duly served with a Subpoena to appear *to or to appear to* and answer a Bill, and refuses or neglects to appear thereto within *eight* days after such service, the Plaintiff

English Order
XXIX.

may, after the expiration of such eight days, and within three weeks from the time of such service, apply to the *Record and Writ Clerk* to enter an appearance for such Defendant; the *Record and Writ Clerk* is to enter such appearance accordingly, upon being satisfied by affidavit that the Subpœna was duly served upon such Defendant personally, or at his dwelling-house or usual place of abode; and after the expiration of such three weeks, or after the time allowed to such defendant for appearing has expired, in any case in which the *Record or Writ Clerk* is not hereby required to enter such appearance, the Plaintiff may apply to the Court for leave to enter such appearance for such Defendant; and the Court, being satisfied that the Subpœna was duly served, and that no appearance has been entered for such Defendant, may, if it so thinks fit, order the same accordingly.

English Order
XXX.

The 30th English Order of 1845 is in the precise words of the first section of the above Order 21.

XXXII.
Appointment
of Guardian.

The 32nd English Order of 1845 is in the precise words of the second and third section of the above Order 21. Except that the last word in the English Order is "service," where the above reads "*notices*," but this evidently causes no difference in the meaning of the language.

Process of Con-
tempt abolish-
ed.

The New Orders having provided ample means for proceeding with a cause in the absence of the Defendant, and under the form of Bill now used, a discovery (except in bills for discovery alone) not being required, the process of contempt is now abolished.

Under the above 20th Order, answering to the English 29th Order of 1845, the appearance cannot be entered by the Plaintiff for the Defendant, as of course, if four weeks have elapsed from the service of the Subpœna, but a motion must be made for leave to enter the appearance. This should be made within a reasonable time, or the Court may require a notice to be given to the Defendant, or even a new Subpœna to be taken out. (*Radford vs. Roberts*, 2 Hare, 96; *Bointon vs. Parkinson*, 7 Jurist, 367; *Devenish vs. Devenish*, 7 Jurist, 841; *Edmonds*

vs. *Nichols*
Simons,

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vs. *Nicholls*, 6 Beaven, 334 ; *Walker vs. Hurst*, 13 Simons, 490.)

These cases were decided under the 8th English Order of 1841, but it is apprehended that the same principle would now apply ; for under the new Order the Court will only direct the appearance to be entered " *if it think fits.*"

Under the English Orders of 1845, answering to the 2nd and 3rd classes of the above 21st Order, the following cases have been decided :—Of the six days which the notice has to run, one day may be Sunday, (*Brewster vs. Thorpe*, 11 Jurist, 6.) The Order applies in cases of absent Defendants, being infants, or of unsound mind, (*Anderson vs. Stather*, 10 Jurist, 383 ; *Bidulph vs. Lord Camoys*, 7 Beaven, 580). As to on whom the service may be made, see *Hitch vs. Wells*, 8 Beaven, 576. In case of the death of the Guardian, there must be another application, in the same manner, (*Needham vs. Smith*, 6 Beaven, 130.)

The appearance, it will be seen by the foregoing Orders, must in ordinary cases be within fourteen days after service of the Writ. Where the Defendant (an infant or of unsound mind) is abroad, an application to serve the subpoena must be made, under the Order as to absent Defendants, (for which see a subsequent chapter), and after the time for appearance the Plaintiff may proceed as by the above Order prescribed.

CHAPTER V.

Absent Defendants.

In cases where the Defendant is out of the jurisdiction, the proceedings are to be according to the following 22nd, 23rd, and 24th Orders :

Where a Defendant in any suit is out of the jurisdiction of the Court.

1850.
XXII.
Absent
Defendants.

Service of Sub-
pœna out of
jurisdiction.

Time to be
limited for
appearance.

Service of copy
of Bill and
Order.

In default,
Order for ap-
pearance by
Plaintiff.

1. The Court, upon application, supported by such evidence as shall satisfy the Court in what place or country such Defendant is or may probably be found, may order that the Subpœna *to appear to and answer, or to answer the Bill*, may be served on such Defendant in such place or country, or within such limits as the Court may think fit to direct.
2. Such Order is to limit a time (depending on the place or country within which the Subpœna is to be served) after service of the Subpœna, within which such Defendant is to appear to the Bill, and also a time within which such Defendant is to answer or demur; or obtain from the Court further time to make his defence to the Bill.
3. At the time when such Subpœna shall be served, the Plaintiff is also to cause such Defendant to be served with a copy of the Bill and a copy of the Order, giving the Plaintiff leave to serve the Subpœna.
4. And if, upon the expiration of the time for appearing, it appears to the satisfaction of the Court that such Defendant was duly served with the Subpœna, and with a copy of the Bill and a copy of the Order, the Court may, upon the application of the Plaintiff, order an appearance to be entered for such Defendant.

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Affidavits, filed for the purpose of proving the service of a Subpœna upon any Defendant, are to state when, where and how, such Subpœna was served, and by whom such service was effected.

1850.
XXIII.
Form of Affidavit.

The Plaintiff, having duly caused an appearance to be entered for any Defendant, is entitled as against the same Defendant to the costs of and incident to entering such appearance, whatever may be the event of the suit; and such costs are to be added to any cost which the Plaintiff may be entitled to receive from such Defendant, or set off against any costs which he may be ordered to pay to such Defendant; but payment thereof is not to be otherwise enforced, without the leave of the Court.

Order as to costs in such cases.

A Defendant, notwithstanding an appearance may have been entered for him by the Plaintiff, may afterwards enter an appearance for himself in the ordinary way, but such appearance by such Defendant is not to affect any proceeding duly taken, or any right acquired by the Plaintiff under or after the appearance entered by him, or to prejudice the Plaintiff's right to be allowed the costs of the first appearance.

A Plaintiff may afterwards enter his own appearance.

In cases where the Defendant is out of the jurisdiction, and the Plaintiff cannot discover his residence, under some special circumstance, proceedings may be had by means of advertising, under the following Order:

In case it shall appear to the Court by sufficient evidence that any Defendant, against whom a Subpœna to appear and answer, or to answer a Bill, has issued, has been within the jurisdiction of the Court at some time, not more than two years before the Subpœna was issued, and that such Defendant is *out of the jurisdiction of the Court*, or that upon inquiry at his usual place of abode (if he shall have had any) or at any other place or places where, at the time the Subpœna was issued, he might probably have been met with, he could not be found so as to be served with Process, and that in either case there is just ground to believe that such Defendant is gone out of the *jurisdiction*, or otherwise absconded, to avoid being served with Process, then and in such case the Court may order that such Defendant do appear at a certain day, to be named in the Order; and a copy of such Order, together with a notice, to the effect set forth in *Schedule C. appended to these Orders*, may, within fourteen days after such Order shall be made, be inserted in the *Canada Gazette*, and be otherwise published as the Court shall direct; and in case the Defendant shall not appear within the time

Absconding Defendants.

1850.
XXIV.

limited by such Order, or within such further time as the Court shall appoint, then, on proof made of such publication as aforesaid of the said Order, the Court may order an appearance to be entered for the Defendant, on the application of the Plaintiff.

The following is the Form in Schedule C.

A. B., take notice, that, if you do not appear pursuant to the above Order, the Plaintiff may enter an appearance for you, and the Court may afterwards grant to the Plaintiff such relief as he may appear to be entitled to on his own shewing.

English Order
XXXIII.

The English Order 33, of 1845, is in the words of the above Order 22, with the exception of a few words not materially affecting the sense. In the first section in the English Order, the words are "*Subpœna to appear to or to appear to and answer*", and the above Order reads "to appear to and answer or to *answer*", saying nothing of a Subpœna to appear merely.

In the second section of the English Order there are the words ("if an answer be required") and the word "plead" is introduced. The difference there is, that in this country, the Order must *in all cases* state the time within which the Defendant is to answer or demur. Pleas in Equity, are, by the Orders of 1850, entirely abolished in this country, as will be seen by the subsequent Orders, and therefore the word does not occur in the above Order 22.

The Court exercises a discretion on the application for the Order to serve a Defendant abroad, in view of all the circumstances, (*Whitmore vs. Ryan*, 4 Hare 612; 10 Jurist 368).

After such service, the cause may be carried on to hearing, in the usual way, and in default of *Answer*, the Bill taken *pro confesso* as prescribed by the Orders.

The above Order 23 is in the precise words of the English Orders 34, 35, and 36 of 1845.

English Order
XXXI.
Absconding
Defendants.

The above Order 24 is taken from the English Order 31 of 1845, which is in the following words:—

In case it appears to the Court by sufficient evidence,

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that any Defendant, against whom a Subpœna to *appear* or to *appear* to *and answer* a bill has been issued, has been within the jurisdiction of the Court at some time not more than two years before the subpœna was issued, and that such Defendant is *beyond the seas*, or upon inquiry at his usual place of abode (*if he had any*), or at any other place or places where, at the time when the subpœna was issued, he might probably have been met with, he could not be found so as to be served with process, and that in either case there is just ground to believe that such Defendant is gone out of the realm, or otherwise absconded, to avoid being served with process, then and in such case the Court may order that such Defendant do appear at a certain day to be named in the Order; and a copy of such Order, together with a notice thereof to the effect set forth *at the foot of this Order*, may, within fourteen days after such Order made, be inserted in the *London Gazette*, and be otherwise published as the Court directs; and in case the Defendant does not appear within the time limited by such Order, or within such further time as the Court appoints, then, on proof made of such application as aforesaid of the aforesaid Order, the Court may order an appearance to be entered for the Defendant on the application of the Plaintiff.

The notice appended is in the words of that above given, at the foot of Order 24.

Under the English Order 31 of 1845, answering to the above Order 24, it has been decided, that it is not necessary to prove that the Defendant absconded to avoid process in that particular suit. (*Cope vs. Russell*, 2 Phillips, 404; 12 Jurist, 105.)

CHAPTER VI.

Demurrer.

Demurrer must be within fourteen days after appearance. If the Defendant is advised that the Plaintiff's bill is, for any thing apparent on the face of it, bad in law, and the Plaintiff therefore not entitled to the relief sought by the bill, he may, as we have seen, demur. This demurrer must be filed, and an office copy served on the Plaintiff's Solicitor within fourteen days from the time of appearance entered. In counting this time, the day of appearance is exclusive and the day of demurring inclusive. When the demurrer is filed, either party may set it down with the Registrar to be argued on præcipe. Eight days' notice must then be given to the opposite party of the day of argument, and care must therefore be taken, in setting down the demurrer, to have it set down for a day which will leave time for the eight days' notice.

The following are the rules governing this practice :—

1850.
XXVI.
Demurrer, fourteen days.
Setting down. A Defendant may demur alone to any bill, within fourteen days after his appearance thereto, but not afterwards. It needs not be entered with the Registrar; but, upon the filing thereof by a defendant, either party is to be at liberty to set the same down for argument immediately.

The former practice was to allow the demurrer, unless the Plaintiff set it down to be argued within a limited time.

The Rule, under which the eight days' notice is required, is the 158th Order, of January, 1845, which, as so far as it is consistent with the New Orders, is still in force. It is as follows :—The parts italicised are inconsistent with the New Orders, and therefore not in force.

Order of 1851. [That no subpoena to hear judgment shall be sued out in any case but] the party setting down the [plea or] demurrer, to be argued, [or the cause to be heard] shall give a notice in writing, stating that the [plea or] demurrer

Eight days notice of argument of demurrer.

[or the cause to be argued] the Registrar may set it down for argument on any day on which the court sits, that such day shall be a day of argument of the plea or demurrer, to be argued, to be furnished to the Registrar, is to be entered

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[*or the cause*] has been entered in the Cause Book with the Registrar for argument [*or hearing*], and stating the day on which the same is to be argued [*or heard*]. And that such notice shall be served eight days before the day of argument [*or hearing*], and that it shall be the duty of the party entering such [*plea or*] demurrer, [*or cause*] to be argued [*or heard*], at the time of entering thereof to furnish the Registrar with the day on which the same is to be argued [*or heard*], in order that the same may be entered in the Cause Book.

The 111th Order of 1842, under which the Plaintiff had a time, within which to set down the demurrer, is expressly repealed, and 97th Order of 1842, allowing the Defendant to set it down after ten days, is also abolished, being not "consistent with" the above 26th Order. The demurrer must now be set down and disposed of.

The above language of this Order, so far as it abolishes the subpoena to hear judgment, is not now in force, because the 69th New Order establishes the practice of Subpœnas to hear judgment. The rule does not apply to pleas, because they are abolished. And it does not apply to setting down Causes, because the 69th New Order provides for a different kind of notice, namely a service of the Subpœna to hear judgment. But, although the 69th Order says that Demurrers as well as Causes may be set down in vacation, it does not provide for any notice or Subpœna in respect of demurrers, and therefore as to them, we have to refer to the above Order. The 69th Order says that "*The party setting down a Cause*" &c., must sue out a Subpœna, but it does not make any provision of the kind for the setting down of demurrers.

The above Order only applies to demurrers.

69th new Order requires no subpoena ad audiendum for the hearing of demurrers.

The Defendant may couple a demurrer with an answer, at any time within the time for answering; but the demurrer must not be to the whole material part of the Bill with a mere denial of fraud and combination. Some fact must be admitted, traversed or denied. (*Wetherhead vs. Blackburn*, 2 Vesey and Beames 123; *Tomkin vs. Lethbridge*, 9 Vesey 179, 463; *Baker vs. Mellish*, 11 Vesey 73).

CHAPTER VII.

The Answer.

The answer formerly consisted of a complete, literal and substantial answer to the Interrogatories of the Bill. There are now no Interrogatories to the Bill, (except in Bills for Discovery, as to which the practice is peculiar,) and the answer may be as short a statement of the defence as the Defendant may think proper to put in. The answer must be filed within one month—twenty-eight days,—the first being inclusive, and the last exclusive after appearance, unless further time be granted, which may be done under certain circumstances on application to the Master as provided by the following Orders. The Order, by which the form of the answer is now governed, is the 27th Order of 1850.

Form of, and
time for
answer.

1850.
XXVII.
One month.

Eight days to
amended Bill.

A Defendant is to answer or demur, not demurring alone, to any original bill or bill amended before answer, within one month after appearance thereto has been entered by or for him, or from the time of amendment, as the case may be. Where the Plaintiff amends his bill after answer, any Defendant desiring to answer the same must put in his answer thereto within eight days after service of the Subpœna to answer the amended bill, or within such further time as the Master may allow; and a Defendant, being served with Subpœna to answer an amended bill, praying an injunction to stay proceedings at law, and desiring to avoid a motion for an injunction on affidavit of the truth of the amendments, has for that purpose only eight days after service of Subpœna to answer, within which he is to answer or demur to such amended bill.

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The commencement and conclusion of the answer shall be in the form prescribed in Schedule D. to these Orders appended. It must be verified by the oath of the Defendant, as heretofore, but needs not be signed by counsel. It shall consist of a clear and concise statement of such defence or defences as the Defendant may desire to present. The silence of the answer as to any of the statements of the bill shall not be construed into an implied admission of their truth; and statements introduced into the answer, for the purpose merely of preventing such implied admission, shall be considered impertinent. Provided always, that nothing herein contained shall be construed so as to prevent a Defendant from introducing into his answer any matter which may be material, for the purpose of preventing an injunction from being granted, or of procuring the same to be dissolved.

Answer must
be sworn to.

Must be con-
cise.

Omission to
deny Bill, no
admission.

Impertinence.

The following is the form given in the Schedule.

COMMENCEMENT AND CONCLUSION OF ANSWER.

The answer of C. D., one of the Defendants to the bill of complaint of A. B., complainant.

This Defendant, for defence to the said bill, says that, &c. (state the defence as succinctly as can be done consistently with due certainty, and in any language suitable to the purpose.)

This Defendant therefore humbly insists that (where the Defendant requires any peculiar relief, it should be specially stated), and prays to be hence dismissed with his reasonable costs in this behalf wrongfully sustained.

A second or supplemental answer could only be filed, according to the old practice, under very special circumstances, and was very rarely permitted. The practice is somewhat relaxed under the following Orders.

It shall be competent to the Court, at any time, in furtherance of justice and upon such terms as may be proper, to permit a supplemental answer to be filed, for the purpose of putting new matter in issue. Leave to file a supplemental answer shall be applied for by motion, which shall set forth the proposed answer, and shall state the ground upon which the indulgence is asked.

Notice of this motion must be served upon the solicitors of all parties to this suit; and, when any party has no solicitor, then upon such party, unless the Court under special circumstances shall dispense therewith; and it must be supported by such evidence as shall satisfy the Court of the propriety of permitting such supplemental

1850.
XXIX.
Supplemental
answer—on
motion.

Motion how
made.

answer under the circumstances, having reference to the subject matter of the answer, to the Defendant's former answer, and to the stage of the cause in which the application is made.

There is no such Order in England, but it is now necessary here, since the first answer may under the present practice be short, and not in the nature of a discovery.

The ostensible object of a decree in Equity is to give that relief to all the parties, Defendants as well as Plaintiffs, which the facts warrant, and in furtherance of that view, is the following Order :

1850.

XXVIII.
Decree may be
so framed as to
give the proper
relief to the
defendant as
well as the
plaintiff.

Where, in order to complete justice, relief ought to be given to the Defendant as well as the Plaintiff, or to the Defendant alone, it shall be competent to the Court, if it see fit, so to frame the decree as to attain such object, whenever the Defendant's right to relief grows out of the same transactions as form the subject matter of the Bill ; and the facts necessary to ground such relief may be stated by the Defendant in his answer as part of his case. Provided, that nothing herein shall be construed to authorise a defendant to state in his answer any distinct and independent matters, as the foundation for relief, not connected with, and growing out of, the case made by the bill ; and it shall in all cases be discretionary with the Court whether to grant such relief upon the answer, or to direct a separate suit to be instituted.

Application for
time to answer
is to the Mas-
ter.

The application for further time to answer must be made to the Master, by taking out a warrant returnable on the fourth day from its date, that is, allowing two clear days between its date and the return ; and it must be returnable before the ordinary time for answering has expired ; otherwise the Master cannot entertain the application, having no jurisdiction, but a special motion must be made to the Court.

The practice before the Master in these applications is under the following Orders of 1846, which are not repealed except as to the parts italicised in brackets :—

1846.

181.

Application to
Master for time
to answer.

It is ordered—That the Master in ordinary of this Court shall hear and determine all applications for time [*to plead*] answer or demur, [*and for leave to amend Bills, and for leave to withdraw replication and amend Bills*], and for enlarging publication, and either party shall be at liberty to appeal by motion to the Vice Chancellor from the Order made by the Master upon such application.

The above language with regard to amendments is repealed by the 12th and 13th New Orders, which provide for amendments, either as of course, or on motion.

Another Order of 1846 states the practice on the warrant :

That such applications to the Master shall be made by taking out a warrant which shall be under-written with the object of the application, and the same shall be served two clear days before the return thereof.

1846.

183.

Warrant to run two clear days.

The conditions of the Order for time, are prescribed by the 184th and two following Orders of 1846, as follows :

That in every Order granted by the Master for further time to answer shall be made a condition of such Order that the defendant shall enter his appearance with the Registrar and consent, that in case of default the plaintiff shall be entitled to a writ of sequestration, unless under any special circumstances the Master shall otherwise direct, and which circumstances shall be shortly stated in the Order made upon such application.

1846.

181.

Condition of Order for time. Defendant must appear.

The use of the above is not very clear. Unless the defendant had already appeared, or the plaintiff had appeared for him, in which case his own appearance is not necessary, the time could not be running against him for answering, and therefore the application could hardly be necessary. The rule has consequently not come in question in practice.

That upon such applications aforesaid the Master shall be at liberty to direct, and shall accordingly in the Orders made thereon direct whether the costs of the application shall be costs in the cause, or whether such costs, or any part thereof, shall be paid by any of the parties personally ; and in the latter case the Master shall in such Order either fix the sum to be paid for such costs or tax the same at his discretion, and the party, to whom such costs are directed to be paid, shall be entitled to sue out a subpoena for the same, or the Master may in his discretion award costs to neither party.

1846.

185.

Costs on applications for time to answer.

That the Master shall draw up the Orders upon such applications aforesaid in a short form, and the same, when signed by him, shall be entered in a book to be kept for that purpose in the office of the Master ; and such Orders shall then be binding (unless reversed or varied on ap-

1846.

186.

Orders for time drawn up by the Master.

peal), and shall be enforced in like manner as if made by the Court; and the original Order or any duplicate thereof (which the Master is to grant on the application of any party) shall be a sufficient warrant to every officer of the Court to do the act therein mentioned, or to permit the same to be done, and each party shall be at liberty to inspect the entry of all such Orders in the said Entering-book without fee.

Defendant within one month may answer and demur, but must not demur alone.

The answer must, as we have seen, come in within one month after appearance, unless further time is given; but the answer filed needs not be to the whole bill. So that there is some answer, the defendant may couple that answer with a demurrer to the Bill, provided he does not demur to the whole Bill, but answers as to some part. The demurrer, thus coupled with the answer, may then be set down by either party, and, if it is overruled, the defendant must answer over, and counsel should at once ask the Court for time to answer, or the Plaintiff may proceed by traversing note, under the 32nd New Order.

Must clearly distinguish part answered from part demurred to.

If the demurrer is allowed, the Plaintiff's case fails as to so much of the Bill as has been demurred to, and he can only rely on the remaining part at the hearing. The answer and demurrer must clearly state and distinguish the respective parts of the Bill to which the answer and the demurrer relate.

The practice may be considered somewhat relaxed in that respect by the following Orders, but still there should be clearness and particularity observed in stating what parts of the Bill the demurrer is meant to govern. Otherwise, were the demurrer allowed, it might be difficult to say how much of the Bill should be struck out by amendment.

It had been held when the defendant answered and demurred, that a demurrer was bad if it had extended to any part of the Bill which the answer also covered. This is altered by the following Order:

1842.
113.
Demurrer not bad because answer extends to part.

That no demurrer or plea shall be held bad and overruled upon argument only, because the answers of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

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The following rule also remains in force, except, like the above, as the "plea."

That no demurrer *or* plea shall be held bad and overruled upon argument only, because such demurrer *or* plea shall not cover so much of the Bill as it might by law have extended to.

1842.

114.

Demurrer or
plea not bad
for covering
less than it
might.

The answer is sworn before a Master of the Court, and manner of swearing it is prescribed by the following Order.

That in the case of answers the following oath or affirmation shall be administered to the party by the Master or Master Extraordinary.

Mode of taking
answers.

"You do swear, (or affirm as the case may be), that you have read (or heard read) this your answer subscribed by you, and that you know the contents thereof, and that the same is true of your own knowledge except as to matters which are therein stated upon your information and belief, and as to those matters you believe it to be true."

1837.

24.

Form of oath.

That the Master or Master Extraordinary shall then subscribe or endorse on the answer a Jurat in the following form:—

"The Defendant C— D— on the — day of Form of Jurat.

"— in the year of our Lord, &c., appeared before me at my chambers in the — of — in the District of — and answered that he had read the foregoing answer, and signed the same in my presence, and thereupon was sworn (or affirmed) before me that he had read (or heard read) the foregoing answer subscribed by him, and that he knew the contents thereof, and that the same was true of his own knowledge except as to matters which are therein stated to be, on his own information and belief, and as to those matters he believed it to be true."

That in the case of an illiterate Defendant the Jurat shall run thus:—

"The Defendant C— D— not being able to read or write, E—F—, Solicitor for the said Defendant, was sworn that he had truly and faithfully read the contents of this answer to the said C— D— and that he appeared perfectly to understand the same: and the said C— D— was thereupon sworn that he had heard the said answer, subscribed by him with

In case of an
illiterate per-
son.

"his mark, read, and knows the contents thereof, and
 "that the same is true of his own knowledge except as
 "to matters which are therein stated to be on his in-
 "formation, and as to those matters he believes it to be
 "true."

How to be
 folded and
 transmitted.

That the Master or Master Extraordinary shall fold
 the answer, and bind it with tape, and set his seal at the
 several meetings or crossings of the tape, endorse his
 name on the outside and direct it thus "To

, Esquire, Registrar of the Court of Chancery,
 City of Toronto." The Master or Master Extraordina-
 ry shall immediately deposit the packet so directed in the
 nearest Post-Office, and endorse thereupon "Deposited
 in the Post-Office at ——— this ——— day of ———
 by me A—— B—— a Master or Master Extraordinary,"
 as the case may be; and he shall enclose at the same
 time the Registrar's fee of two shillings and sixpence for
 filing the answer. The postage and fee shall be paid by
 the Defendant or his solicitor.

1843.
 134, 135.
 No answer
 or demur-
 rer to be deem-
 ed filed until
 copy served.

By Order 134 of 1843, the copies of proceedings for
 service, are first compared with the record filed, and then
 stamped and marked by the Registrar. And by Order
 135 of 1843, no answer or demurrer is considered filed,
 until a copy of it, so authenticated, is served upon the Plain-
 tiff's Solicitor or Agent. This practice remains in force.

When the answer was to the whole Bill and interroga-
 tories, it was exceptionable if every part was not com-
 pletely answered. The exceptions were argued before
 the Master, and, if they were allowed, the Defendant was
 compelled to file a further answer. This practice is now
 of course abolished, or it would clash with the 28th
 New Order. The 30th New Order provides:—

1850.
 XXX.

Exceptions
 abolished.

No exceptions to an answer on the ground of insuffi-
 ciency shall in future be filed; nor shall any process of
 contempt be issued for the purpose of compelling an an-
 swer. But, if upon the hearing of any cause, petition, or
 motion, the Court is of opinion that any pleading, peti-
 tion, or affidavit, which has not been referred for imper-
 tinence, or any part of such pleading, petition, or affidavit,
 is improper or of unnecessary length, the Court may
 either order such pleading, petition, or affidavit, to be
 taken off the file, or may declare such pleading, petition,
 or affidavit, or any part thereof, to be improper or of un-
 necessary length; and, if it shall declare such pleading,

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petition, or affidavit, to be of unnecessary length, may direct payment of a sum in gross in lieu of taxed costs therefor, or may fix the length at which the same shall be considered on taxation; or may direct the taxing master to look into such pleading, petition, or affidavit, and distinguish what parts or part thereof are or is improper or of unnecessary length; and may direct the taxing-master to ascertain the costs occasioned to any party by such parts or part thereof, as in the one case may have been declared to be, and in the other case may have been distinguished as being improper or of unnecessary length; and may make such order as is just for the payment, set off, or other allowance of such costs, by the party, his solicitor or counsel, as to the Court may seem just.

Costs of pleadings unnecessarily long.

A notice of the filing of any appearance, or pleading, must be always served on the opposite party, under the following rule.

1850.
XLVII.

When any solicitor or party shall cause an appearance to be entered, or an answer, demurrer or replication to be filed, he shall on the same day give notice thereof to the solicitor of the adverse party, or to the adverse party himself, if he act in person.

Notice of filing appearance and pleadings.

CHAPTER VIII.

The Replication.

Replication.

Setting down
cause on Bill
and answer.

After the filing of the answer, the next proceeding is to file the Replication, which must be done by the Plaintiff within the time limited by the following Orders, or to set down the cause to be heard upon Bill and answer. The effect of setting down the cause on Bill and answer is that the truth of the answer is admitted, and the Plaintiff must rely upon what he finds in the answer, and on nothing more, as his evidence, to support his claim to a decree. He cannot go out of the answer to prove his case, (*Jones vs. Griffith*, 8 Jurist, 733). Under the old practice, when the Defendant was compelled to make full discovery of all the facts, in answer to the specific Interrogatories of the Bill, he frequently could not avoid making such admissions as were sufficient to sustain the Plaintiff's case, notwithstanding anything else in the answer contained. In such cases the Plaintiff might at once, without replying to the answer, set down the cause.

Not likely to
be now usual.

If he replied, the Defendant was then, as now, at liberty to go into evidence; but the Plaintiff might and still may read from the answer, as true, to support his cases any passages he may think proper as evidence. Under the present practice the Defendant, not being compelled to make full discovery, is unlikely to state such a case on his answer as will alone sustain the Plaintiff's case, and therefore causes will very seldom be set down to be heard on Bill and answer.

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The replication will then in most cases be necessarily filed. 1850.

No subpoena to rejoin is hereafter to be issued, and only one replication is to be filed in the cause, unless the Court otherwise orders; and the replication is to be in the form set forth in Schedule E. to these Orders appended, or as near thereto as circumstances admit and require; and upon the filing of the replication the cause is to be deemed to be completely at issue.

XLV.
Cause put at
issue by
replication.

The following is the form :—

Between A. B.

and

Plaintiff,

C. D., E. F., G. H., &c.

Defendants.

The Plaintiff in this cause joins issue with the Defendant C. D. (*all the Defendants who have answered, or against whom a traversing note has been filed*), and will hear the cause upon bill and answer against the Defendant E. F. (*all the Defendants against whom the cause is to be heard on bill and answer*) and on the order to take the bill as confessed against the defendant G. H. (*as the case may be*).

Form of
replication.

The subpoena to rejoin had been already abolished by the 157th Order of 1845, which gave the following very short form of replication. "The Plaintiff replies to the Defendant's answer." The above form under the New Order, it will be seen, is to meet any case of several Defendants. If all the Defendants have answered, the first clause will of course be sufficient, and so on, according to the circumstances. The 157th Order of 1850 is repealed, and the replication will therefore always commence according to the above form under the Order of 1850.

Subpoena to
rejoin abolished
in 1845.

There should be only one replication to all the answers, and, a replication to one answer having been filed, and another answer afterwards coming in, an application to the Court will be required to withdraw the first one. (*Stinton vs. Taylor*, 4 Hare, 608; 10 Jurist, 386).

The Plaintiff (not obtaining an Order for leave to amend his bill) must either file his replication, or set down the cause to be heard on bill and answer, within one month after the filing of the last answer. The plaintiff having obtained an order for leave to amend after answer, must

1850.
XLVI.
Replication
one month after
last answer.

either file his replication, or set down the cause to be heard on bill and answer. within the times following, viz. :

Amendment,
but no answer,
plaintiff must
reply after eight
and within
fourteen days.

Within four-
teen days after
further time
to answer
refused.

If amendments
answered. Re-
plication with-
in fourteen
days after
answer.

1. Where the plaintiff amends his bill, and no answer is put in thereto, and no warrant for further time to answer the same is served within eight days after service of the subpoena to answer the amended bill, the plaintiff is, after the expiration of such eight days, but within fourteen days from the time of such service, either to file his replication, or set down the cause to be heard upon bill and answer. Otherwise any defendant may move to dismiss for want of prosecution.
2. Where the plaintiff amends his bill after answer, and a defendant, within eight days after the service of the subpoena to answer the amended bill, serves a warrant for further time to answer the amendments, but the Master refuses to grant such further time, the plaintiff is, within fourteen days after such refusal, either to file his replication, or to set down the cause to be heard on bill and answer. Otherwise any defendant may move to dismiss the bill for want of prosecution.
3. If a defendant puts in an answer to amendments, the plaintiff must, within fourteen days after the filing of such answer, either file his replication, or set down the cause to be heard on bill and answer, unless in the meantime he obtains from the Court a special order for leave to amend the bill. Otherwise any defendant may move to dismiss the bill for want of prosecution.

The above introductory clause of the 46th Order is taken from Article 37 of the English Order 16 of 1845.

Compared with English Orders. Article 1 of the above Order 46 is from 38th Article of the English 16th Order. Article 2 is from Article 40 of the said 16th Order, and Article 3, from Article 41 of the 16th Order ; all with a few verbal alterations, necessary to adapt them to our practice, of never compelling an answer. The authorities on this subject will be found under the Orders as to Dismissal of Bill.

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CHAPTER IX.

Traversing Note.

Another mode of proceeding, which the Plaintiff may adopt, if, after the appearance the Defendant neglect to answer, is under the following Order :—

At the expiration of the time allowed to a defendant to answer or demur (not demurring alone) to any original bill or bill amended before answer, if such defendant have filed no answer or demurrer, the plaintiff may file a note to the following effect : "The plaintiff intends to proceed with his cause as if the defendant had filed an answer traversing the case made by the bill."

A traversing note having been filed, a copy thereof shall be served on the defendant against whom the same shall be filed, and thereupon such note shall have the same effect as if such defendant had filed an answer traversing the whole bill on the day on which such note shall be filed.

After service of a copy of a traversing note, filed as aforesaid, a defendant is not at liberty to answer or demur to a bill without the special leave of the Court ; and the cause is to stand in the same situation as if such defendant had filed an answer to the bill on the day on which the note was filed.

Where a demurrer to the whole bill is overruled, the plaintiff may immediately file his note in manner and with the effect hereinbefore directed, unless the Court, upon overruling such demurrer, give time to the defendant to answer or demur ; and in such case, if the defendant shall file no answer or demurrer within the time so allowed by the Court, the plaintiff may, on the expiration of such time, file such note.

1850.

XXXII.
Traversing
note.

Form.

Copy to be
served.

Same effect as
answer.

In case of
demurrer over-
ruled.

The above Order is from 52nd, 55th, 56th, 57th, and 58th English Orders of 1845, *mutatis mutandis*. All reference to Pleas and Supplemental Bills is necessarily omitted, as also provisions pointing to the Plaintiff's right to compel an answer. The Order would seem not to apply to Infant Defendants (*Emery vs. Newson*, 10 Simons, 564). It is irregular, if answer has been sworn, (*Rigby vs. Rigby*, 6 Beaven, 265). There seems to be no good reason why it may not apply to cases of Defendants out of the jurisdiction, (*Moss vs. Buckley*, 2 Phillips 628; *Laurie vs. Burn*, 12 Jurist, 598; but see *Anderson vs. Stather*, 11 Jurist, 96). Service of the note should be proved at the hearing (*Evans vs. Williams*, 6 Beaven, 118). As to the effect of the Note, with a view to the evidence, (see *Martin vs. Norman*, 2 Hare, 596.) At the hearing the Plaintiff must prove his case, and the Court will make such a decree as the evidence warrants.

Some of the above cases were decided prior to the Orders of 1845, but they went upon the Orders of 1844, under which there was a similar proceeding, and are therefore applicable to the present practice.

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CHAPTER X.

Evidence.

The cause being at issue, each party has two months' time to examine witnesses, and a material alteration, effected by the recent Orders, consists of the examination by each party of the opposite party, if it is desired. The time for taking evidence was formerly three months. The rule to produce witnesses, formerly in use, is abolished. Written Interrogatories are now dispensed with.

The following are the Orders :—

Immediately after the replication shall have been filed, each defendant may give notice of his intention to proceed to the examination of witnesses ; and the plaintiff may in like manner proceed to examine his witnesses, so soon as notice of the replication having been filed shall have been duly served on all the defendants who have filed an answer, or against whom a traversing note has been filed. Such notice must be in writing, and, beside specifying the time and place when and where, and before whom, such examination is to be proceeded with, must contain the name of each witness to be examined, his degree, and place of

1850.

LII.

Examination of
witnesses on
fourteen days'
notice.

abode. This notice must be served on the solicitors of all the other parties entitled to examine witnesses, and in case any such party has no solicitor, upon such party, at least fourteen clear days before the day therein named for proceeding to examine witnesses.

LIII.
Interrogatories
abolished.

No written interrogatories for the examination of either witnesses or parties, either before or after decree, shall henceforward be filed, except by direction of the Court; such examinations shall be *viva voce*, and may be conducted either by the parties, their solicitors or counsel.

LIV.
Witnesses in
County of York
must be exam-
ined before
the Court.

Witnesses (whether parties to the record or not), residing within the County of York, shall be examined before the Court, as the Court shall appoint; and witnesses (whether parties to the record or not) residing in any other county than the County of York, may be examined before the Court by consent of parties, or at the instance of any party willing to pay the extra expense, if any, thereby incurred. In other cases witnesses (whether parties to the record or not) shall be examined at the county town of the county in which such witnesses reside. Provided that nothing herein contained shall be construed to prevent an examination of witnesses from being had at any place that may be fixed by consent of parties.

Other witnesses
may be so ex-
amined.

LV.
Examination
before exam-
iners in the
country.

The examination of witnesses, (whether parties to the record or not) when not taken before the Court, is to be taken by some one of the examiners, unless otherwise ordered; and, where any of the witnesses reside out of the jurisdiction, it may be taken by commission as heretofore.

These Orders are peculiar to this country, and it is believed that they effect a material improvement in the practice. Having been for so short a time in force, no decisions of importance have taken place under them.

The mode of proceeding is as follows, when the examination is in Toronto:—The subpoena for witnesses having been taken out, an application is made to the Chancellor to name a day for examination. This he does by signing an appointment for a day not less than fourteen days distant, and notice of the names of the intended witnesses is then given to the opposite Solicitor, stating the time when they will be examined. The witnesses should each be served with a copy of the subpoena and a copy of the appointment attached, and paid the same fees as witnesses are al-

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lowed in the Queen's Bench. The witness having been sworn by the Registrar, one of the Judges takes down his evidence (the full Court being sitting), and at the conclusion of the examination in chief, cross-examination, and re-examination respectively, the evidence is read over to the witness and signed by him. After publication has passed, the Registrar furnishes to the Solicitors, who request them, copies of the depositions, and they are read at the hearing in the same manner as formerly.

A large portion of the evidence is often documentary, and may be put in on affidavit under the following Order :

That in cases in which any exhibit may by the present practice of the Court be proved *viva voce* at the hearing of a cause, the same may be proved by the affidavit of the witness who would be competent to prove the same *viva voce* at the hearing.

Jan. 1842.
120.
Exhibits may
be proved by
affidavit.

For what exhibits may be so proved, see *Daniel's Chancery Practice*, vol. 2, p. 1025 and following pages, Perkins' Edition, 1846.

Another mode of putting documents in evidence is under the following Orders, which establish a practice similar to that which has been found highly useful in the Common Law Courts.

Any person after replication filed may give notice to the other in the form set forth in schedule F. to these orders appended, or to the like effect, of his intention to adduce in evidence certain documents ; and, unless the adverse party shall consent by indorsement on such notice within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required to show cause why he should not consent to such admission, or in case of refusal be subject to pay the costs of proof ; and, unless the party required shall expressly consent to make such admission, the Court shall, if the application seem reasonable, make an order, that the costs of producing any document specified in the notice, which shall be proved at the hearing to the satisfaction of the Court, shall be paid by the party so required, whatever may be the result of the cause : Provided, that, if the Court shall think the application unreasonable, the motion shall be endorsed accordingly : Provided also, that the Court may give such time for enquiry, or examination of

XLV...
Admission of
documents may
be demanded.

Costs.

the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as they shall think right. If the party required shall consent to the admission, the Court shall order the same to be made. No costs of proving any document shall be allowed to any party who shall have adduced the same in evidence, unless he shall have given such notice as aforesaid, and the adverse party shall have neglected or refused to make such admission, or the Court shall have endorsed upon the motion that they do not think it reasonable to require it. The Court may make such order as they may think fit respecting the costs of the application, and the costs of production and inspection; and in the absence of a special Order the same shall be costs in the cause.

The following is Schedule E., in the above Order referred to:—

IN CHANCERY.

Between $\left\{ \begin{array}{l} \text{A. B.} \\ \text{C. D.} \end{array} \right.$ and $\left\{ \begin{array}{l} \text{Plaintiff,} \\ \text{Defendant.} \end{array} \right.$

Take notice that the plaintiff (or defendant) in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the plaintiff (or defendant), his solicitor or agent, at _____ on _____ between the hours of _____ and _____ and that the plaintiff (or defendant) will be required to admit that such of the said documents as are specified to be originals were respectively written, signed or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and that such documents as are stated to have been served, sent or delivered, were so served, sent, or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated this _____ day of _____ 18 ____ .
Yours, &c. C. R.

Solicitor or Agent (for plaintiff or defendant).
To E. F.

Solicitor or Agent for (plaintiff or defendant).

Then describe the documents; the manner of doing which may be as follows:

Description

Deed of C.
A. B. a
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Indenture
A. B. t

Letter of
Plaintiff

Memorandum
ment be
E. F.

Bill of Exchange
at three
by A.
cepted by
ed E. F.

Description
Documents

Registrar
Baptism
A. B. in the
parish of

Letter,—
Plaintiff
Defendant

Notice to
produce
papers.

Letter
Patent
King George
III.

EVIDENCE.

57

ORIGINALS.

<i>Description of the Documents.</i>	<i>Dates.</i>	
Deed of Covenant between A. B. and C. D. of the first part, and E. F. of the second part.	1st Jan., 1850	
Indenture of Lease from A. B. to C. D.	1st May, 1850	
Letter of Defendant to Plaintiff.	12th March, 1850.	
Memorandum of Agree- ment between C. D. and E. F.	1st December, 1849.	
Bill of Exchange for £100 at three months, drawn by A. B. on and ac- cepted by C. D. indors- ed E. F.		

COPIES.

<i>Description of Documents.</i>	<i>Dates.</i>	<i>Original or Duplicate served, sent or delivered, when, how, and by whom.</i>
Registrar of Baptism of A. B. in the parish of	1st January, 1850.	
Letter,— Plaintiff to Defendant.	1st February, 1850.	{ Sent by General Post, 2nd February, 1850.
Notice to produce papers.	1st March, 1850.	{ Served 2nd March, 1850, on defendant's Solicitor, by E. F. of
Letter Patent of King Geo. III.	1st January, 1800.	

An important part of the evidence of either party is often taken from documents in the possession of the opposite party, and, to compel the production of such papers, there are the following rules :—

1850.
XXXI.
Production of
papers, by
either party.

On motion of
course.

May be en-
forced by
order, on
motion after
notice.

What docu-
ments to be
produced.

Either the plaintiff or defendant may at any time after answer obtain an Order of course, requiring the adverse party to produce, within a time to be limited by the order, all deeds, papers, writings and documents in his custody or power, relating to the matters in question in the cause under oath, and deposit the same with the Registrar of the Court for the usual purposes. *Provided always, that neither the plaintiff nor the defendant shall be bound in pursuance of such order to produce any deeds, papers, writings, or documents, which a defendant now admitting the same by his answer to be in his custody or power would not be bound to produce.* Any party objecting to the production of deeds, papers, writings, or documents, in his custody or power, shall, in the affidavit to be made upon such occasion, assign the reason for his declining or refusing to produce the same; and, in case the party obtaining such order shall have reason to think that the exigency of the same has not been fully complied with, he may apply to the Court, upon notice, for an order to compel the production and deposit of such deeds, papers, writings, or documents as he may have reason to think should be produced, and may support such applications by the pleadings, or by affidavit, or both, as he may be advised; and thereupon the Court may make such order as may seem just.

Under this Order, it will often be important to consider what documents a party was, under the former practice, compellable to produce. The cases on the subject are very numerous. The Defendant can, it seems, under this Order compel the production of the documents stated in the bill as those on which the Plaintiff relies, and which are stated to be in his own possession, see *Bate vs. Bate*, 7 Beaven, 528; and *Taylor vs. Henning*, 4 Beaven, 235. These cases show, that without any such order as this, the Court would still, in some cases take means to give the defendant the inspection of documents clearly material. And it is apprehended, that now the Plaintiff would be compelled to produce any such documents as the Defendant is compellable to produce. Among the cases tending to show

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what documents the Defendant is compellable to produce, are the following :—*Attorney General vs. Berry*, 2 Collyer, 33 ; 9 Jurist, 224 ; *Brown vs. Perkins*, 2 Hare 540 ; 8 Jurist, 186 ; *Atkins vs. Wright*, 14 Vesey, 211 ; *Sweet vs. Hunter*, 9 Jurist, 807 ; *Combe vs. Corporation of London*, 10 Jurist, 57 ; *Harris vs. Harris*, 4 Hare, 179 ; *Bannatyne vs. Leader*, 10 Simons, 230 ; *Edwards vs. Jones*, 1 Phillips, 501 ; *Smith vs. Duke of Beaufort*, 1 Phillips, 209 ; *Marquis of Bute vs. Glamorganshire Canal Company*, 1 Phillips, 681 ; *Smith vs. Dowling*, 10 Jurist, 63 ; *Flight vs. Robinson*, 8 Beaven, 22 ; *Steele vs. Stewart*, 1 Phillips, 471 ; *Woods vs. Woods*, 4 Hare, 83 ; *Holmes vs. Baddley*, 1 Phillips, 476 ; *Belshaw vs. Perceval*, 10 Jurist, 772 ; *Wroughton vs. Barclay*, 11 Jurist, 274 ; *Johnston vs. Tucker*, 11 Jurist, 382 ; *Price vs. Gordon*, 7 Jurist, 1076 ; *Grane vs. Cooper*, 4 Mylne and Craig 263 ; *Gerard vs. Penswick*, 1 Swanson, 533. In many of these cases, the right is shown to be restricted to the admissions in the answer ; but it is clear that such a limitation cannot now hold, because the answer is not now a discovery, and the Defendant may omit to name as many papers as he pleases, and the above Order permits the motion to be supported by affidavit, whereas before, the answer could not be added to by affidavit. It seems then, that now each party can be compelled to produce all papers of such character as a Defendant, admitting them to be in his possession, could formerly have been compelled to produce. In effect, all that are relevant to the issue, and as to which there is no protection on any special ground, such as that of confidential communication between Solicitor and Client.

The Order of course may be obtained upon petition or motion without notice, and the petition should specify the number of days within which the papers are to be deposited.

It may frequently happen that a Plaintiff or Defendant, when under examination, speaks of documents which were not previously known to the opposite party, and the produc-

tion of such documents can be compelled, under the following Order :

LVI.
Production of
documents
named by
party, when
under examin-
ation.

Any party to the record under examination, admitting that he has in his custody or power any deeds, papers writings or documents relating to the matters in question in the cause, shall be liable, upon the order of the Court, or of an examiner or commissioner before whom he shall be examined, to produce the same for the inspection of the party examining him, for which purpose a reasonable time shall be allowed : provided always, that either party may appeal from the order of such examiner or commissioner, whereupon such examiner or commissioner shall certify under his hand the question raised, and the order thereupon, and the costs of such appeal shall be in the discretion of the Court. Provided also, that no party shall be obliged to produce any deeds, papers, writings or documents which he would have been obliged to produce heretofore.

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CHAPTER XI.

Examination of Parties.

The rules under which Plaintiffs and Defendants may be examined are as follow :—

Any party to a suit may be examined as a witness by the party adverse in point of interest, or by any one of several parties 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 other witness, except as hereinafter provided. And any person, for whose immediate benefit a suit is prosecuted or defended, though not a party to the record, may be regarded as a party for the purpose of this order. Provided always, that, where it shall appear upon the hearing that any party examined under this order is united in interest with the examining party, the evidence so taken shall not be used on behalf of either the examining party, or of the examined, but may be struck out on the hearing at the instance of any party affected thereby.

Any party defendant may be examined, as heretofore, upon order for that purpose, on behalf of either the plaintiff or a co-defendant, upon points as to which the party so to be examined is not interested. And any party plaintiff may, under the same circumstances, be examined by a co-plaintiff or by a defendant. Provided, that, where any person having an interest shall have been examined under this order, such evidence shall not be used on behalf of either the examining party or of the party so examined, but may be struck out upon the hearing, at the instance of any party affected thereby ; but such examination shall not preclude the Court from making a decree either for or against the party examined.

1850.

L.

Any party to the record may be examined by a party in adverse interest.

L.I.

Co-plaintiff and Co-defendant may be examined on points on which he is disinterested.

Any party so examined may be cross-examined on his own behalf, confining the explanation to points on which he has been examined, under the following order :—

LVII.

Cross-examination of party to the record.

Evidence taken under Order L. may be rebutted by adverse testimony. Any party examined as therein provided may be further examined, on his own behalf, in relation to any matter respecting which he has been examined in chief. And, where one of several plaintiffs or defendants, who are joint contractors, or united in interest, has been so examined, any other plaintiff or defendant, so 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. Provided nevertheless, that such explanatory examination must be proceeded with immediately after the examination in chief, and not at any future period, except by leave of the Court.

The following Order provides some stringent remedies in the case of any party to the record neglecting to attend to be examined.

LVIII.

Party to record not attending, is in contempt.

Bill may be moved to be taken *pro confesso*, or dismissed.

Any party refusing or neglecting to attend at the time and place appointed for his examination under Order L. may be punished as for a contempt; and it shall be lawful for the party desiring such examination, in addition to any other remedy to which he may be entitled, to apply to the Court, upon motion, either to have the bill taken *pro confesso*, or to have it dismissed, according to circumstances; and it shall be competent to the Court, upon such application, to order either that the bill be taken *pro confesso* against the party making default, or that it be dismissed; and, where from the circumstances of the case such order cannot be made, consistently with the rights of other parties to the suit, then it shall be competent to the Court to make such order, as to enlarging the time for passing publication, or otherwise, as to the Court may seem just.

Under the above Order 57, it might be supposed that the party examining an adverse party on the record necessarily subjects himself to the testimony that such witness may give in his own favour, if on the points on which he has been examined in chief. Under the following (59) Order, however, the examining party, whether a Plaintiff or a Defendant, may, if he is advised, omit to read any part of the testimony, and then the explanatory evidence cannot be read against him. This places the

Evidence cannot be read unless the examining party read it.

evidence not taken by cross-examination. It differs from that can be the Defendant's Order :—

Where evidence taken it shall be to put in in chief as

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evidence merely on the same footing as any other evidence taken by a Plaintiff, when the Defendant can read the cross-examination if the examination in chief has been read. It differs from ordinary evidence taken by a Defendant, for that can be read by a Plaintiff if he thinks proper, whether the Defendant reads it or not. The following is the Order :—

Where the examining party uses any portion of the evidence taken under Order L. (but not otherwise), then it shall be competent for those, against whom it is used, to put in the entire evidence so taken, as well that given in chief as that in explanation.

LIX.
All evidence
may be read, if
any part read.

It frequently happens, that in the examination before a Master Extraordinary in the country, the evidence is but imperfectly taken down; and, previous to the new rules, this led to much serious inconvenience, for it was only under the most special circumstances, and indeed very rarely, that a witness could be recalled. The following rule renders the practice more reasonable.

Whenever the evidence in a cause or any part thereof has been taken before an examiner or commissioner, and it can be made to appear that it would be conducive to the ends of justice that any of the witnesses so examined (whether parties to the record or not) should be examined before the Court upon the hearing, it shall be competent to any party concerned in interest, at any time after publication passed, to apply to the Court, by motion, supported by affidavit, for that purpose; and thereupon it shall be competent for the Court to make such order as under all the circumstances may seem just.

LX.
Witness may
be recalled, if
he has been
imperfectly ex-
amined before
Master Extra-
ordinary.

The time for taking the evidence is limited by the following Order :—

The rules to produce witnesses and pass publication are henceforth to be discontinued. Publication is to pass without rule or order on the expiration of two months after the filing of the replication, unless such time expire in the long vacation, or is enlarged by order; but in the computation of the two months hereby allowed, or any enlargement of such time, the long vacation is not to count. If the time be enlarged by order, publication is to pass without rule or order on the expiration of such enlarged time, unless the time is further enlarged by order.

LXI.
Publication
passed in two
months, unless
enlarged by
order.

The Orders under which the time for passing publica- Application to

enlarge publication is to the Master.

tion, are the 181st Order of 1846, and the following Orders, *ante* page 42. The application is to the Master. The application must be made before the two months expire, or it would seem that the Master has not jurisdiction, for then publication has passed, and, if evidence is required, a special application must be made to the Court on motion, founded on special circumstances.

1850.
LXII.
Deposition in
the first person.

By LXII. New Order all depositions are to be taken down in the first person. This was already the rule. If the deposition were otherwise, they could be suppressed, or their reading objected to at the hearing.

The following Order lays down some rules for the guidance of the Examiners in the country.

LXIII.
Examination
of witnesses in
the country.

If the examination of witnesses cannot be completed in one day, and the circumstances of the case permit, the examiner is to proceed *de die in diem* during six hours of each day, between the hours of eight in the morning and six in the afternoon, until the witnesses for all parties are fully examined. Nevertheless the examiner may, if in his opinion the circumstances of the case require an adjournment, adjourn the proceedings from time to time, and from place to place, in such manner as he thinks proper; but he is in all cases to enter on the depositions any adjournment, and, where such adjournment is from place to place or otherwise than *de die in diem*, the cause or reason of such adjournment.

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CHAPTER XII.

Setting Down the Cause.

Publication having passed, the cause is set down to be argued, as follows:

Whereas the present practice, that causes can only be entered for hearing during the sittings, is productive of delay and inconvenience: It is ordered that from henceforth causes may be set down for hearing, and demurrers for argument, and the subpoenas *ad audiendum judicium* returnable on any day. The party setting down a cause to be heard must sue out a subpoena to hear judgment, which writ shall be tested on the day on which such cause shall have been set down, and shall be made returnable in one month from the test; it must be served on all necessary parties at least seven days before that on which it is returnable. So soon as any cause shall have been set down, it shall be entered by the Registrar on the list of causes for hearing, and shall be called on and heard on the day for which it shall have been so set down, or so soon thereafter as the causes standing before it shall have been disposed of.

The cause must be set down by the plaintiff, unless he neglect to set it down within four weeks after publication has passed, and in that case any defendant can, unless he desires to move to dismiss the Bill, set down the cause to be heard under the following Order:

If after publication passed the plaintiff neglects to set down the cause to be heard, any defendant, after the expiration of four weeks, may set the same down at his own request, instead of proceeding to dismiss the Bill for want of prosecution, and may obtain a subpoena to hear judgment, and serve the same on the parties to the cause.

[1850.

LXIX.
Setting down
cause.

Seven days'
notice.

1850.

LXVI.
Defendant may
set down cause
after four
weeks.

Arguing cause. On the day on which the subpoena to hear judgment is returnable, the party, who has set down the cause, calls it on, and can insist on its being argued in its turn, next after the other causes which stand for that day. If not called on, it is put down to the foot of the paper. Care should therefore be taken to have a cause called on, on the day for which it is set down, and, if the opposite party applies for and obtains a postponement under any special circumstances, get some other day peremptorily fixed by the Court for the argument. The Court has recently determined, that if, when a cause is called on in its turn, the parties are unprepared, it is to be struck out of the paper, and not again set down except on a special application, and on good cause shown.

Question of necessity for time which elapses after publication and hearing.

It is submitted, that the month's time, during which, under the above Order, the defendant must wait before he can set down the cause, which it may often be desirable to do, instead of moving to dismiss, is too long; and that the practice which has obtained, namely of any party to the cause setting it down as soon as he pleases, after publication passed, would be more speedy and convenient. And also, that there is no necessity for the month's time between the setting down the cause and the day of argument. The subpoena, as has been seen, need be served only seven days before the hearing, although it must be taken out a month before. The plaintiff under this practice can cause two months to elapse after publication before the hearing.

January, 1845.
116.

The above Order 66 is like the 116th English Order of 1845, except that instead of the word *parties* the word *plaintiff* is used, and it has been held that under the English Order the co-defendants need not be served by the defendant who set the cause down. (6 Maddock 193). Our Order being differently worded, the defendant, who sets the cause down, must serve all the parties, defendants as well as plaintiff.

Proceedings on objections for want of parties.

When the answer objects to the frame of the bill for want of proper parties Plaintiff or Defendant, the case

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may at once be set down for the purpose of arguing that question under the following Order :—

That, when the defendant shall by his answer suggest that the bill is defective for want of parties, the Plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only, and the purpose for which the same is so set down shall be notified by an entry to be made in the Registrar's Book in the form or to the effect following, that is to say, "Set down upon the defendant's objections for want of parties," and that, where the Plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties, but the Court, if it thinks fit, shall be at liberty to dismiss the bill.

Plaintiff may, within fourteen days set down the cause on question of parties only.

This Order is copied from the English Order 39 of 1841, under which the following cases have been decided. After the lapse of the fourteen days it is said that the Court has no jurisdiction to allow the cause to be set down on the question of parties (*Calvert vs. Gandy*, 1 Phillips, 518 ; *Medhurst vs. Allison*, 4 Hare, 497).

It is not quite clear that the first of these cases would be followed here, because the Judges felt themselves bound by the words of the Act under which the rules were framed ; and there can be no doubt, that, as a general principle, the Court may relax one of its own general rules under special circumstances. The second of the above cases also refers to the terms of an Act of Parliament.

When the plaintiff states the objection in his answer, and claims the same benefit as if he had demurred, the case comes within the rule. (*Grubb vs. Perry*, 7 Jurist, 637 ; *Young vs. Macdonell*, 14 Simons, 34).

The defendant cannot on the argument under this rule take an objection as to parties, which he has not taken by the answer. (*Lovell vs. Andrew*, 11 Jurist, 835).

The answer is taken to be true for the purpose of the objection. (*Richardson vs. Larpent*, 2 Younge and Collyer, 507).

As to who has the right to begin on the argument of the objection, the cases differ. See *Bradstock vs. Whatley*, 6 Beaven, 451; *Attorney General vs. Gardner*, 2 Collyer, 564; *Lovell vs. Andrew*, 11 Jurist, 835.

January, 1842. When the objection is not taken before the hearing, the Court has a discretionary power to make a decree without prejudice to the absent parties,

117.
Decree saving
rights of absent
parties.

That, if a defendant shall at the hearing of a cause object that a suit is defective for want of parties not having by plea or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the Court (if it shall think fit) shall be at liberty to make a decree saving the rights of absent parties.

Such decrees
rare.

It may be here observed that the Court seldom exercises this power, and more frequently adjourns cases to have parties added, although the objection has been taken neither by answer nor on the argument. It is always safe therefore to amend the record as soon as any defect for want of parties is apprehended.

The Order is copied from the English Order 40 of 1841.

The Court will be careful not to make the decree, if by it the absent party may be in any way prejudiced. (*Kimber vs. Emsworth*, 1 Hare, 293; *May vs. Selby*, 1 Younge and Collyer, 235; *Faulkner vs. Daniel*, 3 Hare, 199).

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CHAPTER XIII.

Speeding the Cause.

Before stating the practice after the hearing of the cause, it is as well to give the rules, under which, if the plaintiff is dilatory, the defendant can force the cause to a hearing, or get the Bill dismissed. The following Orders of 1850 settle the practice on this point.

Any defendant may upon notice move the Court that the bill may be dismissed with costs, for want of prosecution, and the Court may order accordingly.

1. If the plaintiff, having obtained no order to enlarge the time, does not obtain and serve an order for leave to amend the bill, or does not file the replication, or set down the cause to be heard on bill and answer, within four weeks after the answer, or the last of the answers has been filed, or after the filing of a traversing note : or—
2. If the plaintiff, having obtained no order to enlarge the time, does not amend the bill within fourteen days after the date of the order for leave to amend : or—
3. If the plaintiff, having obtained no order to enlarge the time, does not set down the cause to be heard, and obtain and serve a subpoena to hear judgment within four weeks after publication has passed.

Where the plaintiff has, after answer, amended his bill, any defendant may upon notice move to dismiss the bill with costs for want of prosecution, if the plaintiff, having obtained no order to enlarge the time, does not file the replication, or set down the cause to be heard on bill and answer within the times following, viz. :

1850.
LXIV.
Bill may be dismissed.

If Plaintiff does not move in four weeks after answer.

Or amend fourteen days after order to amend.

Or if the Plaintiff does not set down the cause in four weeks.

1850.
LXV.
When there has been amendment.

Fourteen days after the service of subpoena to answer amended Bill. Or fourteen days after the Master's refusal to allow further time to answer.

Or fourteen days after answer to amended Bill, except where re-amended.

1. Within fourteen days after service of a subpoena to answer the amended bill, in cases where the defendant does not desire to answer the amendments.
2. Within fourteen days after the Master's refusal to allow further time in cases where the defendant, desiring to answer, has not put in his answer within eight days after the service of the subpoena to answer the amended bill, and the Master has refused to allow further time.
3. Within fourteen days after the filing of the answer in cases where the defendant has put in an answer to the amendment, unless the plaintiff has within such fourteen days obtained from the Court a special order for leave to re-amend the bill.

If the Bill is re-amended, the practice after the re-amendment will be the same as above laid down to be followed after amendment.

Optional with Defendant, to move to dismiss, or set down the cause to be heard.

The 66th Order of 1850, already given, allows the defendant the option of moving to dismiss the Bill, or setting it down to be heard. A cause may, under many circumstances, be of such a nature that it is more to the defendant's benefit to have it disposed of on argument, than put out of Court. Suits for account for instance, where the defendant expects a balance in his favour; or a bill by a vendee for specific performance, where the defendant may be desirous of having the purchase completed, which has been hitherto delayed for want of the production of the money by the Plaintiff; and numerous other cases which might be mentioned.

It is provided, however, that the dismissal of the bill for want of prosecution is a bar to a subsequent suit for the same matter, unless the Court otherwise order.

The following is the Order :—

1850.
LXVII.
Bill dismissed, bar to future suit for same matter.

If the plaintiff, after the cause is set down to be heard, causes the bill to be dismissed on his own application, or, if the cause is called on to be heard in Court, and the plaintiff makes default, and by reason thereof the bill is dismissed, then and in such case such dismissal is, unless the Court otherwise orders, to be equivalent to a dismissal on the merits, and may be set up in bar to another suit for the same matter.

It will be seen that the above Order does not apply

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when the plaintiff dismisses his own Bill, but only to a dismissal after the cause is set down. The old practice still obtains, when the plaintiff dismisses his own Bill before the cause is set down. He may dismiss, before the defendant has appeared, without costs. (*Thompson vs. Thompson*, 7 Beaven 350). If after appearance, it must be on payment of costs, and, if a new Bill is filed for the same cause before such costs are paid, the Court will stay proceedings in the new suit, until they are paid. But on payment of such costs the plaintiff can (having dismissed his Bill before the cause is set down) file a new one for the same cause of suit without obtaining the leave of the Court. It is submitted, that it would have been better to carry the provision of the above 67th Order further, and to have prevented the plaintiff filing a new Bill, for the same cause, without leave of the Court, if he dismissed after appearance. Such a provision could work no hardship, because on a proper case made the Court could always order the dismissal without prejudice to a new suit. The benefit would be, that the defendant would be enabled to know, whether or not he was subject to be again made a defendant for the same cause of action.

The above Orders 64, 65, 66 and 67, are precisely like the English Orders 114, 115, 116 and 117, of 1845, with the following exceptions. In the first article of the English Order 114, which answers to the above Order 64, the words are "after the answer, or the last of the answers is found or deemed to be sufficient." This is varied in the above Order, because now, under the Order 30, of 1850, any answer is sufficient, exceptions for insufficient being by that Order abolished. Again in the Order 114 there is an article as follows, "If the Plaintiff, having undertaken to reply to a plea to the whole Bill, does not file his replication within four weeks after the date of his undertaking", &c. This is omitted in the Orders of 1850, because, by Order 25 of 1850 pleas are abolished. In the commencement of the English Order 115, which answers to the above

If cause not set down, Plaintiff may always dismiss without prejudice to filing a new bill.

Rule as to costs.

Question of the propriety of this indulgence to the Plaintiff.

Orders 64, 65, 66, and 67, compared with English Orders 114, 115, 116, and 117,

Order 65, are the words, "*Without requiring an answer to the amendments*", which are omitted in the above Order, because it is here optional with the defendant to answer or not, the process of contempt to compel an answer being under the 30th Order, of 1850, abolished, and the plaintiff has his remedy by the traversing note under the 23rd Order of 1850, or by proceeding to get the cause set down to be heard *pro confesso*, under the 33rd and following Orders of 1850.

In the English Order 116, which answers to the above Order 66 of 1850, the subpoena is directed to be served on the "*Plaintiff*". The above 66th Order requires its service on all parties to the cause, and such is the general practice in England, for it would be unreasonable to expect another defendant to be prepared for the argument of the cause without any notice.

Meaning of
Article One,
Order 64.

The above Orders then substantially assimilate the practice to the English practice under the Orders of 1845, upon which there have been some decisions. The words "*last of the answers*," in the first article of the English Order 114 (above Order 64), mean, the last of the answers of that defendant who is moving to dismiss. They might be supposed to mean the last answer filed by any defendant. (*Dalton vs. Hayter*, 7 Beaven, 586; *Sprye vs. Reynell*, 10 Beaven, 351.)

Any Defendant
may move to
dismiss, one
month after his
own answer in.

So it would appear, that after one month after the answer of any defendant (for, there being now no exceptions to the answer, each defendant will only file one, except a supplemental answer on leave of the Court), that defendant may move to dismiss; whether the other defendants have answered or not; or, if they have answered, no matter how recently. The Court can, however, give such time to reply, or to amend, as on the argument of the motion the Plaintiff may seem justly entitled to. It is not meant, that, as soon as the time arrives for the motion to dismiss, the defendant may insist on the Order, under any circumstances. And see Order 68 of 1850. The object of allowing the motion, is to enable the defendant to get the cause

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speeded, or to get the bill dismissed, as the circumstances may seem to justify. The Plaintiff can, in most cases, only obtain time on payment of costs.

It is only the reasonable construction of the Orders to hold, that the defendant may move to dismiss one month after his own answer; and the reason for such construction is stronger here than in England; for, it being no longer in the plaintiff's power to compel an answer, but other means of proceeding being open to him to proceed with the cause, it would be unfair, were it in his power to reply conclusively to the motion of one defendant to dismiss, that another defendant has not yet answered, or has not answered a month ago.

Reasonable
construction of
the Order.

An Order to amend, obtained after notice to dismiss is given, has been in England held to be, without any special circumstances against it, a sufficient answer to the motion. But after such notice no Order to amend can be obtained in England, *as of course*, under an Order of April 1847, which has not been adopted here. Under the 12th Order of 1850, an Order of course to amend can be obtained, if no Order of course to amend has already been taken, at any time within a month after the "*last of several answers*" has been filed, here meaning, the last of any answer of any defendant, (see *Arnold vs. Arnold*, 1 Phillips 805; decided before the Order of April 1847 was published). Then supposing a defendant A. to answer, and a month elapse, it seems he might give a notice of motion to dismiss, although B. has not answered. After the notice B. might answer, and the plaintiff might immediately take an Order to amend; but that would not necessarily form a conclusive answer to the motion, but the Court would probably grant time. The same might be the case, when B. had answered, but a month had not elapsed before the motion of A., and the plaintiff took his Order to amend. We have said such an Order would not form a conclusive answer to the motion; but it would no doubt have an effect upon the Order which the Court would make. The defendant would seem to have been

Question of
Order to amend
being an an-
swer to a mo-
tion to dismiss.

regular in giving his notice, and yet it might appear that the plaintiff was taking a step to get on with the suit, and that he was entitled to the Order to amend, which he had taken. The Court would not, therefore, dismiss the Bill, but would put the plaintiff on such terms as the case might warrant. In England the Order to amend in such a case being only obtainable on motion, under the Order of 1847, it being once obtained on such motion, after notice, it is much more reasonable to hold it to be an answer to the motion to dismiss; for the defendant must have become aware that the Court thought it a proper case for permitting the plaintiff to proceed by amendment. If the Order to amend is out, before the notice to dismiss is given, the case comes of course under the above 65th Order. The English decisions as to the Order to amend, being an answer to the motion to dismiss, are, *Lester vs. Archdale*, 9 Beaven, 156; *Findlay vs. Lawrence*, 11 Jurist, 705; *Raistrick vs. Elsworth*, 12 Jurist, 281.

English
decisions.

Discretion of
the Court when
there is delay.

It will be readily seen, that, if the Court were bound by any positive rules to refuse the motion to dismiss, on the ground of any proceedings taken on the part of the plaintiff, notwithstanding any delay he may have already been guilty of, injustice would be done. After long delay the plaintiff might take a proceeding merely to stop the motion, and again follow the same course when another motion was likely to be made. The Court will therefore put him on terms to speed the cause; and all doubt is removed on this head by the 68th New Order, which is as follows:—

1850.
LXVIII.
Motion to dis-
miss, when de-
lay takes place.

Discretionary
Order.

In every other case, where the plaintiff is unreasonably delaying the suit, any defendant may move to dismiss the bill for want of prosecution, after the expiration of four weeks from the time of his filing his answer, if the plaintiff, having obtained an order to enlarge the time, does not obtain and serve an order for leave to amend the bill, or does not file the replication, or set down the case to be heard on bill and answer, within that period; and upon the hearing of such motion, the Court may make such order for the dismissal of the bill, or for expediting the suit, and as

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This Order establishes a practice not in force in England. For here, it would seem, under the terms of the above Order, there may be a motion to dismiss, *at any stage of the cause*, if four weeks have elapsed after answer, if the plaintiff "is unreasonably delaying the suit." The words are "*in every other case*"—that is, in every case not provided for by the former Orders. It had been held in England, that a defendant could not move to dismiss during the pendency of a demurrer. Of course he cannot here, if it be his own demurrer, for he might set it down himself, but he is not prevented if the demurrer of another defendant is "unreasonably" delayed. It has been also held in England, that, pending a reference as to title, in a specific performance case, or after a decree or decretal order, there could be no motion to dismiss. (*Collins vs. Greaves*, 5 Hare, 596; *Bluck vs. Colnaghi*, 9 Simons, 411). But the above 68th Order seems to admit of a motion here, whether after or before any reference or decree, if the Plaintiff's delay is "unreasonable," and that the Court has power to decide on the question of the delay being reasonable or "unreasonable." And the Court would also consider, whether the cause is proper to be dismissed, or whether an Order to speed would not be more in furtherance of the ends of justice.

CHAPTER XIV.

Proceedings to hear Cause "Pro Confesso."

Pro confesso. Another mode of proceeding, when the defendant elects not to answer, is to procure the cause to be set down to be heard as if the defendant had confessed the truth of the matter in the Bill stated. This is done under the provisions of the following Orders:—

1850.
XXXIII. At the expiration of the time allowed to any defendant within the jurisdiction of the Court for answering the bill or at any time within three weeks afterwards, the plaintiff may cause such defendant to be served, personally, or by his solicitor (if he have one), with a notice of motion, to be made on some day not less than three weeks after the day of such service, that the bill may be taken *pro confesso* against such defendant; and thereupon, unless such defendant shall in the mean time have put in his answer to the bill, or obtained further time to answer the same, the Court, if it shall think fit, may order the bill to be taken *pro confesso* against such defendant, either immediately, or at such time and upon such terms and subject to such conditions as under the circumstances of the case the Court shall think proper.

XXXIV. Where a defendant shall not put in his answer in due time, after appearance entered by or for him, and he shall have no solicitor, and such defendant has either been served with subpoena out of the jurisdiction, or the plaintiff has been unable with due diligence to serve him personally with such notice of motion as is provided by Order XXXIII., by reason of his being concealed, or for any other cause, the plaintiff may cause to be inserted in the *Canada Gazette* a notice, that on a day to be named

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therein, not less than four weeks after the first insertion of such notice in the *Gazette*, the Court will be moved that the bill may be taken *pro confesso* against such defendant, which notice must be inserted at least once in every week from the time of the first insertion thereof up to the time for which the same shall have been given; and the plaintiff must, upon the hearing of such motion, satisfy the Court, either that such defendant has been served with subpoena out of the jurisdiction, or that the plaintiff has been unable with due diligence to serve such defendant personally with such notice of motion as aforesaid, by reason of his being concealed, or for some other cause, and in either case that he has no solicitor, and that such notice of motion as aforesaid has been inserted in the *Gazette* as herein provided. And the Court, being satisfied thereof, and no answer having been filed, may order the bill to be taken *pro confesso* against such defendant, either immediately or at such time, and upon such further notice as under the circumstances of the case may be deemed proper.

No cause in which an order is made, that a bill be taken *pro confesso* against a defendant, is to be heard on the same day on which the order is made; but the cause is to be set down to be heard; and the Court, if it so think fit, may appoint a special day for the hearing thereof.

A defendant, against whom an order to take a bill *pro confesso* is made, is at liberty to appear at the hearing of the cause, and, if he waives all objection to the order, but not otherwise, he may be heard to argue the case upon the merits as stated in the bill.

Upon the hearing of a case, in which a bill has been ordered to be taken *pro confesso*, such decree is to be made as to the Court seems just; and in the case of any defendant, who has appeared at the hearing and waived all objection to such order to take the bill *pro confesso*, or against whom the order has been made after appearance, by himself or his own solicitor, or upon notice served upon him or his solicitor, the decree is to be absolute.

In pronouncing the decree the Court may, either upon the case stated in the bill, or upon that case and a petition presented by the plaintiff for the purpose, as the case may require, order a receiver of the real and personal estate of the defendant, against whom the bill has been ordered to be taken *pro confesso*, to be appointed with the usual directions, or direct a sequestration of such real and personal estate to be issued, and may (if it appears to be just) direct payment to be made out of such real and personal estate of such sum or sums of money as, at the hearing

XXXV.
Cause not heard on same day as order made.

XXXVI.
Defendant may appear at hearing.

XXXVII.
If Defendant has appeared, the decree is absolute.

XXXVIII.
Court may make special Orders on such decree.

Security.

XXXIX.

Decree entered
as other
decrees.

XL.

If decree not
absolute under
37th Order.

Notice of de-
cree may be
served, to give
plaintiff oppor-
tunity to
answer, or that
he be excluded.

XLI.

Defendant sub-
mitting to costs
may have
rehearing.

Times within
which defend-
ant may pre-
vent decree
being absolute.

Two years.
In English
Order, three
years.

XLIII.

of any subsequent stage of the cause, the plaintiff seems to be entitled to ; provided that, unless the decree be absolute, such payment is not to be directed without security being given by the plaintiff for restitution, if the Court afterward think fit to order restitution to be made. A decree, founded on a bill taken *pro confesso*, is to be passed and entered as other decrees.

After a decree, founded on a bill taken *pro confesso*, has been passed and entered, if the decree be not absolute, under Order XXXVII., an office copy thereof may be served on the defendant, against whom the order to take the bill *pro confesso* was made, or his solicitor, together with a notice to the effect that, if such defendant desires permission to answer the plaintiff's bill and set aside the decree, application for that purpose must be made to the Court within the time specified in such notice, or that such defendant will be absolutely excluded from making any such application. If such notice as aforesaid is to be served within the jurisdiction of the Court, the time therein specified for such application to be made by the defendant is to be three weeks after service of such notice ; but, if such notice is to be served out of the jurisdiction of the Court, such time is to be specially appointed by the Court on the *ex parte* application of the plaintiff.

Any defendant, waiving all objection to the order to take the bill *pro confesso*, and submitting to pay such costs as the Court may direct, may have the cause reheard upon the merits stated in the bill, the petition for rehearing being signed by counsel as other petitions for rehearing.

In cases where a decree is not absolute under order XXXVII., the Court may order the same to be made absolute on the motion of the plaintiff :

1. After the expiration of three weeks from the service of a copy of the decree on a defendant, where the decree has been served within the jurisdiction.
2. After the expiration of the time limited by the notice provided for by order XL., where decree has been served without the jurisdiction.
3. After the expiration of two years from the date of the decree, where a defendant has not been served with a copy thereof.

And such order may be made either on the first hearing of such motion, or on the expiration of any further time which the Court may on the hearing of such motion allow to the defendant for presenting a petition for leave to answer the bill.

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such decree has been made, does not come in under some of the provisions in these orders contained, all future proceedings as to such defendant may be ex parte, unless where notice is by these orders specially provided or shall be directed by the Court. But, where the decree is not absolute under Order XXXVIII., and has not been made absolute under Order XLII., and a defendant has a case upon the merits not appearing in the bill, he may apply to the Court by petition, stating such case and submitting to such terms with respect to costs and otherwise as the Court may think reasonable, for leave to answer the bill; and the Court, being satisfied that such case is proper to be submitted to the judgment of the Court, may, if it thinks fit, and upon such terms as seem just, vacate the enrolment (if any) of the decree, and permit such defendant to answer the bill; and, if permission be given to such defendant to answer the bill, leave may be given to file a separate replication to such answer, and issue may be joined and witnesses examined, and such proceedings had as if the decree had not been made, and no proceeding against such defendant had been had in the cause.

The rights and liabilities of any plaintiff or defendant under a decree made upon a bill taken *pro confesso* extend to the representatives of any deceased plaintiff or defendant, and to any person or persons claiming under any person who was plaintiff or defendant at the time when the decree was pronounced; and with reference to the altered state of parties and any new interests acquired, the Court may, upon motion served in such manner, and supported by such evidence as under the circumstances of the case the Court deems sufficient, permit any party, or the representatives of any party, to adopt such proceedings as the nature and circumstances of the case require, for the purpose of having the decree (if absolute) duly executed, or for the purpose of having the matter of the decree and the right of the parties duly ascertained and determined.

The above Orders from 35 to 44 inclusive are copied mutatis mutandis from the English Orders of 1845, from 81 to 92 inclusive, excepting the 88th English Order which is not adopted, and excepting that the part above italicised in the 42nd Order is not in the English Orders. And instead of the time, two years, provided in the 3rd Article of the 41st Order, the English Order gives three years. The English 88th Order of 1845, which is not

When decree not yet made absolute, how defendant may obtain a hearing.

XLIV.

How decree *pro confesso*, affects representatives.

English Orders
on the subject.
1845.
88.

here adopted, is as follows: "No proceeding is to be taken, and no receiver appointed, under the decree, nor any sequestrator, under any sequestration issued in pursuance thereof, is to take possession of, or in any manner intermeddle with, any part of the real or personal estate of a defendant, and no other process is to issue to compel performance of the decree without leave of the Court, which is to be obtained on motion with notice served on such defendant or his solicitor, unless the Court dispenses with such service."

The cause of its omission probably is, that the other Orders seem to effect the same object sufficiently; for there seem to be no means of getting on with such proceedings without motion, and leave of the Court, unless the Court so decree under the above Order 38.

The English Orders to which the above 33rd and 34th Orders answer, but without closely following them, are as follows. It will be at once seen that the parts not adopted, are such as would be inconsistent with the other Orders of this Court.

English Orders.
1845.
76.

"Upon the execution of an attachment for want of answer against any defendant, or at any time within three weeks afterwards, the Plaintiff may cause such defendant to be served with a notice of motion to be made on some day not less than three weeks after the day of such service, that the Bill may be taken *pro confesso* against such defendant; and thereupon unless such defendant has, in the meantime, put in his answer to the bill, or obtained further time to answer the same, the Court, if it so thinks fit, may order the bill to be taken *pro confesso* against such defendant, either immediately, or at such time and upon such terms and subject to such conditions, as under the circumstances of the case the Court thinks proper."

77.

"In cases where any defendant, either being or not being within the jurisdiction of the Court, does not put in his answer in due time after appearance entered by or for him, and the plaintiff is unable, with due diligence, to procure a writ of attachment or any subsequent process for

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want of answer to be executed against such defendant by reason of his being out of the jurisdiction of the Court, or being concealed, or for any other cause, then such defendant is, for the purpose of enabling the plaintiff to obtain an Order to take the bill *pro confesso*, to be deemed to have absconded to avoid, or to have refused to obey, the process of the Court.

1845.
English Order.
77.

In cases where any defendant, who under Order 77 (*supra*) may be deemed to have absconded to avoid, or to have refused to obey, the process of the Court, has appeared in person or by his own solicitor, the plaintiff may serve upon such defendant or his solicitor a notice that on a day in such notice named (being not less than fourteen days after the service of such notice) the Court will be moved that the bill may be taken *pro confesso* against such defendant; and the plaintiff is, upon the hearing of such motion, to satisfy the Court that such defendant ought under the provisions of Order 77 to be deemed to have absconded to avoid, or to have refused to obey, the process of the Court; and the Court being so satisfied, and the answer not being filed, may, if it so thinks fit, order the bill to be taken *pro confesso* against such defendant, either immediately or at such time or upon such further notice as, under the circumstances of the case, the Court may think proper.

78.

In cases where any defendant, who under Order 77 (*supra*) may be deemed to have absconded to avoid, or to have refused to obey, the process of the Court, has had an appearance entered for him under Orders 29, 31, or 33, and has not afterwards appeared in person or by his own solicitor, the plaintiff may cause to be inserted in the *London Gazette* a notice, that on a day in such notice named (being not less than four weeks after the first insertion of such notice in the *London Gazette*), the Court will be moved that the bill may be taken *pro confesso* against such defendant; and the plaintiff is, upon the hearing of such motion, to satisfy the Court that such defendant ought, under the provisions of Order 77 (*supra*) to be

79.

deemed to have absconded to avoid, or to have refused to obey, the process of the Court, and that such notice of motion has been inserted in the *London Gazette* at least once in every week from the time of the first insertion thereof up to the time for which the said notice is given; and the Court being so satisfied, and the answer not having been filed, may, if it so thinks fit, order the bill to be taken *pro confesso* against such defendant either immediately, or at such time or upon such further notice as under the circumstances of the case the Court may think proper."

English
authorities on
the subject.

The practice is plainly enough laid down by the above Orders, and few doubtful cases can arise under them so as to call for decisions. Several cases have occurred in England in reference to the state of the cause with regard to the attachment; but, that being abolished, those cases are of no importance to us. There are some points, however, on which precedents may be useful. Under the 78th and 79th English Orders of 1845, which answer in many respects to the above 34th Order, the Court, when the evidence of the defendant's absconding was not quite satisfactory, refused to make an order to set down the cause *pro confesso*, but gave a day to show cause. (*Courage vs. Wardell*, 9 Jurist, 1055).

An Order to amend is an abandonment of the Order to take the bill *pro confesso*. (*Weightman vs. Powell*, 12 Jurist, 958).

A cause being set down *pro confesso* against an absconding defendant was struck out of the paper on account of Counsel's absence, and, on application of the Plaintiff alone, it was placed in the paper again. (*Harvey vs. Renon*, 12 Jurist, 445). But it is apprehended that such ex-parte application would not be treated in the same manner, if the defendants had appeared by Counsel under the above 36th Order.

Under the English Order 84, of 1845, answering to the above Order 38, the bond of the plaintiff himself may be held sufficient security, under the authority of *Lett vs.*

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Randall, 7 Jurist, 1075 ; where the plaintiff's own bond was held sufficient, under a provision of 1 W. 4.. ch. 36, similar to the provision of the above mentioned Orders. Still the Court has power, no doubt, to require further security, and, although this may seem hard on a plaintiff without means, a similar rule is enforced in the Queen's Bench under the absconding debtor's Act ; and it often happens there that a plaintiff is stopped for want of the security. In that case, however, the security is expressly named in the statute. The point will remain uncertain until a case arises, on which it can be seen whether the authority of *Lett vs. Randall* will be followed.

Under the 76th English Order of 1845, answering to the above Order 33, there are the following decisions. There being husband and wife defendants, and no Order for the wife to answer separately, the Order *pro confesso* should be against both (*Alexander vs. Osborne*, 16 Law Journal, new series, 368 ; 11 Jurist 444). A notice of motion having been given, and defendant having answered, pending the notice, the plaintiff may have the costs of the motion. (*Spooner vs. Payne*. 12 Jurist, 642).

CHAPTER XV.

Injunctions.

Common Injunctions to stay legal proceedings.

The frequent object of bills in Equity is to stay proceedings at law against the plaintiff in Equity, where the rule of law prevents a defence in that Court, but relief may be obtainable in Equity. The "Common Injunction" stays execution at law, but, generally, does not stay the proceedings down to judgment. As to the difference between common and special injunctions, see *Daniel's Chancery Practice*, vol. 3.

The following are the new rules on the subject of common injunctions:—

1850.
LXXI.
Injunction as of course for want of appearance ;

or answer.

LXXII.
Amendment.

Effect of.

The plaintiff in a bill praying an injunction to stay proceedings at law is entitled, as of course, on motion or petition, and without an attachment, to the common injunction for want of appearance, if a defendant has not appeared in person, or by his own solicitor, on or after the expiration of *fourteen* days from the service of the subpoena ; and for want of answer, if a defendant is in default for want of answer, on or after the expiration of *fourteen* days from the day on which an appearance was entered by or for him.

The plaintiff in an injunction cause, having obtained the common injunction to stay proceedings at law, may (either before or after the answer of a defendant is put in, and whether such injunction be or be not continued to the hearing of the cause) obtain one order as of course to amend his bill without prejudice to the injunction ; and, if such bill be amended pursuant to such order, such defendant may thereupon (and although he may not have put in his answer to such bill or the amendments thereof) move the Court on notice to dissolve the injunction, on the

ground the amendment.

On all as well as affidavits answer.

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ground that such bill as amended does not, even if the amendment be true, entitle the plaintiff thereto.

On all motions to obtain or dissolve a special injunction, as well as to dissolve or extend the common injunction, affidavits may be used either to support or contradict the answer.

LXXIII.
Affidavit to
support or con-
tradict the an-
swer.

In case an injunction to stay proceedings at law be prayed by the bill, and shall either not be allowed, or, having been obtained, shall have been dissolved upon the merits stated in the answer, and the plaintiff shall afterwards amend his bill, and the defendant shall not answer, or demur to the amended bill, within eight days after service of the subpoena to answer, the plaintiff shall be entitled to move for an injunction upon affidavit of the truth of the amendments.

LXXIV.
Amendment
when Injunc-
tion not grant-
ed.

The above Orders 71 and 72 are copies verbatim from the 59th and 60th English Orders, of 1845, with the exception, that eight days are named in the English Order instead of fourteen as in the above 31st Order.

The above 74th Order is copied from the 36th Article of the 16th English Order of 1845.

If within fourteen days from appearance the defendant demurs, or answers and demurs, the plaintiff, it seems, is not entitled to the Common Injunction under the 71st Order. See *Cousins vs. Smith*, 13 Vesey 164.

The 73rd Order is not from any English Order. The necessity for it arises from the new practice of permitting answers to be short, and not compelling a full discovery as formerly.

CHAPTER XVI.

Summary Decrees and Decretal Orders.

The Orders of 1845 have effected an entire change in the practice in suits merely for account, and in suits for the foreclosure and redemption of mortgages.

1850.
LXXVI.
Short Bill, in
suits for ac-
count,

and partly for
other purposes.

In suits for ac-
count, and
foreclosure and
redemption
suits, a decree
for reference,
on motion,

In suits for an account it shall not be necessary or proper to state in the pleadings any mere matter of charge or discharge ; neglect or misconduct in the accounting party may be insisted on in the Master's office, though not stated in the pleadings. Provided always, that nothing herein shall be construed to exempt the plaintiff from the necessity of showing upon his bill that the defendant is an accounting party, or from stating all such facts as may be necessary to enable the Court to determine the rights of all parties, and to adjudicate upon the whole case. Provided, also, that this order shall apply, whether the suit is for an account merely, or for an account and other purposes ; but, in the latter case, it shall apply only so far as the suit is one for an account, and this order shall not interfere with the rules of pleading further or otherwise than is expressly provided.

In suits for an account, or where an account is necessary before the Court can proceed to the ultimate decision of the case, and where the state of such account only, and not the accountability of the defendant, is the matter in question ; and in suits for the redemption and foreclosure of mortgages, where the state of the account, or the state of the account and the priority of the incumbrances form the only subject for enquiry, the plaintiff may apply to the Court, at any time after bill filed, but not earlier than fourteen days after service of the subpoena to appear upon the defendant, or upon the last of several defendants, by motion (of which notice may be served, together with

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the subpoena to appear, when that is practicable) that the matter may be forthwith referred, and the account proceeded with in the Master's office. And thereupon the Court may in its discretion, if satisfied that the case comes within the provisions of this order, pronounce such a decree as would have been made, had the cause proceeded to a hearing in the ordinary way; and the decree so pronounced may be either with or without a reservation of further directions and costs according to the nature and circumstances of the case. And the decree so pronounced shall be as effectual to all intents and purposes as it would have been, had the cause been brought to a hearing in the usual way; and the reference thereby ordered shall be proceeded with in the same manner provided with respect to ordinary references by orders (79, 80, 81, 82); and in proceeding with such reference the Master shall have all the power and authority which he would have had and exercised had the matter been referred to him by a decree pronounced according to the ordinary practice of the Court; and upon the signing of any report, made upon such reference, the case may be set down to be heard upon further directions, or otherwise; and all proper decrees and orders may be made in the same manner, and to the same extent, as fully and effectually to all intents and purposes as if the suit had proceeded according to the established practice. The pendency of any such motion, as aforesaid, shall not stay the progress of the cause, unless ordered by the Court.

In suits for the redemption or foreclosure of mortgages, the time allowed for the payment of the mortgage money shall in future be six months from the date of the Master's report; and, where there are several incumbrances, three months only shall in future be allowed to each successive incumbrancer after the first. The time so fixed shall not be further enlarged.

LXXVIII.

Time for payment of mortgage money.

CHAPTER XVII.

Discovery.

Practice in
Bills for dis-
covery, the
same as
formerly.

There is one description of Bill in Equity, with respect to which the practice remains as it was before the new Orders; namely the Bill for discovery in aid of an action at law. Bills generally were for discovery and relief, and the discovery was enforced under the interrogatories which formed part of the Bill. The same object, where relief is sought in Equity, is now obtained by examining the defendant. But, where no relief is sought in the Court, but only a discovery of facts is required in order to aid the plaintiff in prosecuting an action at law, the practice must be as formerly. The Bill will be framed with interrogatories, and, unless the defendant demurs successfully to the Bill, it is apprehended, that, notwithstanding the foregoing rules, an answer would be enforced by attachment, and exceptions might be entertained for insufficiency. In a suit for discovery, the answer being in, the suit proceeds no further, and the general practice is that the plaintiff pays the costs.

The above remarks as to Attachment and Exceptions would seem to be contradictory to the express words of the rules; but it has been ascertained that the Bill for Discovery is to be in the old form, and, if so, then to hold that a *sufficient* answer cannot be *enforced*, would be to permit any defendant to such a Bill to set it at defiance and render it useless.

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This branch of the jurisdiction will require some further Orders to render the practice clear and certain.

The new rule on the subject is the following :—

No Bill for discovery merely shall henceforward be filed, except in aid of the prosecution, or defence, of an action at law.

1850.
XLIX.
Bill of Dis-
covery.

“The Bill is commonly used in aid of the jurisdiction of some Court of Law, to enable the party who prosecutes, or defends an action at law, to obtain a discovery of the facts, which are material to the prosecution or defence thereof.” *Story's Equity Pleadings*, sec. 311.

“In general it seems necessary, in order to maintain a Bill of Discovery, that an action should be already commenced in another Court, to which it should be auxiliary. There are exceptions to this rule, as where the object of discovery is to ascertain who is the proper party, against whom the suit should be brought. But these are of rare occurrence.” *Story's Equity Jurisprudence*, v. 2, sec. 1483.

The Master's Office.

The cause having been heard, the Registrar enters in his book a short minute of the decision delivered. The Solicitor, who desires to take out the decree, makes an appointment with the Registrar for settling the "minutes," or a short draft of the decree, and gives a notice to the solicitors of all the other parties, of the time appointed. Any objection raised by either party to the form of the decree is disposed of by the Registrar, who, if he thinks fit, refers to the Court before deciding. In difficult cases the Judges frequently draw up the minutes themselves. Another appointment is made to "pass" the decree, on which occasion the Registrar has it drawn up in full, embracing short minutes of the evidence which has been read at the hearing. Each party sees that the decree is satisfactorily framed in accordance with the minutes which have already been settled, and it is then entered, and office copies delivered by the Registrar to the Solicitors who bespeak them.

The following English Order gives some idea of the form of the decree :—

That for the purpose of avoiding, as much as may be, expenses and delay in the drawing of the Decrees and Orders of this Court, it is hereby directed that (except in Orders for special injunctions, in which the usual recitals

shall be inserted in the answers, nor any original decree or report be stated in the Master's report to him; and the petitioners pray that the same Orders of the Court be consistent with which the original petitioning of this petition was drawn pursuant to the Statute in that behalf made. And it is hereby shewn that the petitioners are entitled to the same in all cases.

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shall be inserted as heretofore,) neither the bill, nor answers, nor any part thereof be stated or recited in the original decree or order; and that no part of the Master's report be stated in any decree upon further directions, except the Master's finding or opinion upon the subject referred to him; and that in order made upon petitions no part of the petition be stated or recited except the prayer; and that the same principle of brevity be observed in all the Orders of this Court made upon motion so far as may be consistent with a statement explaining the grounds upon which the order is made. And for the better understanding of this Order certain forms of decrees and orders drawn pursuant thereto are subjoined. And it is hereby directed that such forms shall be observed in all cases as nearly as may be.

The Form of an Original Decree.

(Date and Title).

This cause coming on the present day to be heard and debated before, &c., in the presence of Counsel learned on both sides, and the pleadings in this cause being opened, upon debate of the matter and hearing (here state in the usual form a description of the evidence which was read) and what was alleged by the Counsel on both sides, his Lordship doth order and decree, (or doth declare) &c.

Forms original
decree.

The Form of a Decree upon further Directions after a Master's Report.

(Date and Title).

This cause coming on the day of to be heard and debated before &c., his Lordship did order and decree or declare (here state the decretal part, except the words of course) that in pursuance of the said decree the said Master made his report, bearing date the day of, which stands absolutely confirmed by an order, dated the day of, and thereby found (here state the Master's finding or opinion only). And this cause coming on this present day to be heard before, &c., for further directions, and as to the matter of costs reserved in the said decree (if costs be reserved) in the presence of counsel learned on both sides, upon opening and debate of the matter, and hearing the

Decree on
further direc-
tions.

said decree &c. read and what was alleged by Counsel on both sides, his Lordship doth order, &c.

Order on
petition.

(Date and Title).
Whereas A. B. did, on the day of ,
prefer his petition unto, &c., setting forth as therein set forth, and praying (here state the prayer), whereupon all parties concerned were ordered to attend his Lordship on the matter of the said petition, and Counsel for the petitioner and for this day attending accordingly, upon hearing the said petition, &c. read, and what was alleged by the Counsel for the petitioner and the Counsel for , his Lordship doth order, &c.

The same form to be observed upon the decree for further directions, *mutatis mutandis*, where, upon the original hearing an issue or a case for the opinion of a Court of law is directed, or the bill is retained for twelve months with liberty to bring an action. The issue and verdict of the jury to be stated at length, but the judge's certificate upon the case only and not the case itself.

Further direc-
tions.

A decree "on further directions", of which the form is above given, is made under the following circumstances. In cases involving matters of account, the decree made on the first hearing, cannot, except rarely, finally dispose of the case. The accounts must be referred to be taken by the Master, and important questions may depend upon the finding of the Master. In such cases, then, the first decree "reserves the consideration of further directions", and often reserves also the question of costs. The Master having made his report, the case is set down to be heard "on further directions." Sometimes it may be necessary to bring the cause on more than once, in this manner, after the first decree. A mode of Appeal against the finding of the Master is pointed out by the following Orders.

The proceedings in the Master's Office are more summary than under the old practice, under the following Orders :

1850.
LXXIX.†
Bringing the
decree into the
Master's office.

Every decree or order, referring any matter to the Master, is to be brought into his office within 14 days after the decree or order shall have been pronounced, by the party having the carriage of the same ; otherwise any

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other party to the cause, or any party having an interest in the reference, may apply to the Court, as he shall be advised, for the purpose of expediting the prosecution thereof.

Upon the bringing in of every decree or order, the solicitor, bringing in the same, shall take out a warrant appointing a time, which is to be settled by the Master, for the purpose of taking into consideration the matter of the said decree or order, and shall serve the same upon the parties, or their solicitors, unless the Master shall dispense therewith; and upon the return of such warrant to consider, or upon the bringing in of the reference, when no such warrant shall have been issued, the Master shall proceed to regulate in all respects the manner of proceeding with such reference, and shall direct the time and manner in which such steps as may be required shall be taken by the respective parties, and shall further fix a time at which to proceed to the hearing and determining of such reference. And the Master, having determined the time and manner of proceeding with such reference, shall enter, in a book to be kept by him for that purpose, the name and title of the cause and the time fixed for proceeding in the matter.

Every reference appointed to be heard, as by Order LXXX provided, shall be called on and proceeded with at the day and time so fixed, unless the Master shall, in his discretion, think fit to postpone the same; and, in granting any application to postpone the hearing of any such reference, as aforesaid, the Master may make such order as to the costs consequent upon such postponement, and may impose such conditions upon the party applying for such postponement as he may think just. And, so soon as the Master shall have entered upon the hearing of any such reference, he shall proceed therewith to the conclusion, without interruption, where that is practicable; and, where any reference cannot be concluded on a single day, the Master shall proceed *de die in diem* without any fresh warrant, unless the Master shall be of opinion that an adjournment, other than *de die in diem*, would be proper and conducive to the ends of justice; and, when any such adjournment shall be ordered, the Master shall note in his book the time and reason thereof; and in no case shall any matter be discontinued or adjourned for the mere purpose of proceeding with any other matter, unless such course shall have become necessary.

So soon as the hearing of any matter pending before the Master shall have been completed, he shall so inform the

1850.
LXXX.
Considering the
decree.

LXXXI.
Proceedings de
die in diem.

LXXXII.
Completion of
reference.

parties to the reference then in attendance, and shall make a note to that effect in the book in which the proceedings shall have been entered; and after such entry no further evidence shall be received or proceeding had without the special permission of the Master; but the Master shall proceed to prepare his report, certificate or other determination in the matter, without further warrant except the warrant to settle, which shall be served on such parties as the Master shall direct. So soon as the Master's report; certificate or other determination shall have been prepared, it shall be delivered out to the party having the carriage of the reference, who shall be allowed a common attendance therefor.

1850.
LXXXIII.
Appeal from
finding of the
Master.

Objections, and exceptions to reports, are hereby abolished. Reports shall henceforth become absolute in fourteen days after the signing thereof, unless previously appealed from, as hereinafter provided. An appeal shall lie to the Court upon motion from all reports made by the Master within fourteen days from the signing thereof. Such appeal motion may be made by any party affected by such report; and, upon notice thereof being served, all the proceedings, which shall have taken place before the Master in the matter, and all papers and evidence relating thereto, shall, at the instance of any party interested therein, be handed by the Master to the Registrar, to be by him produced in Court upon the hearing of such motion.

LXXXIV.
States of facts
and charges.

No state of facts, charge, discharge, account or affidavit in the Master's office, shall set out any decree, order, Master's report, or other like document, or any part thereof, further than by stating the date of the same, nor shall it state any other state of facts, charge, discharge, account or affidavit, or any or either of them, or any part thereof further than as aforesaid; save that so much of any account brought into the Master's office may be incorporated in such charge as may be absolutely necessary for the proper stating of the said account; nor shall any state of facts, charge, discharge, account or affidavit, state any matter which may already appear by the pleadings or evidence, or otherwise in the cause, further than by referring thereto (if necessary) in such manner as may be requisite to explain other matter contained in such state of facts, charge, discharge, account or affidavit. Any matter set out in contravention of this order shall be deemed impertinence and dealt with according to Order XXX, save that the Master shall stand in the place of the Court. Provided that nothing herein shall prevent any charge or discharge from stating the gross amount appearing by the

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accounts, upon which the same shall be founded respectively, or the gross amount found due by any Master's report or other like document.

The practice has been little, if in any respect, altered by the above Order (84). The accounting party will be compelled to bring in his accounts upon oath, and the claimant will then base his charge upon such information as the accounts may give him. And the accounting party may be put on proof of his discharge. The charge will not recapitulate the accounts on which the charging party relies, but will merely state shortly the result.

Formerly the defendant often accounted fully in his answers. The Plaintiff could then base his charge on the schedules of the answer, but was not to set them out in full, but merely a short statement.

The following are the previous rules concerning the practice in the Master's office :—

That all parties accounting before the Master shall bring in their accounts in the form of debtor and creditor : and any of the other parties, who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party upon interrogatories as the Master shall direct.

That, when by any decree or order of the Court, books, papers, or writings are directed to be produced before the Master for the purposes of such decrees or orders, it shall be in the discretion of the Master to determine what books, papers, or writings are to be produced, and when, and for how long, they are to be left in his office, or, in case he shall not deem it necessary that such books, papers, or writings should be left or deposited in his office, then he may give directions for the inspection thereof by the parties requiring the same at such time and in such manner as he shall deem expedient.

That all accounts, when passed and settled by the Master, shall be entered in a Book to be kept for that purpose in the Master's office with indices in order to be referred to as occasion may require.

That in all matters referred to him the Master shall be at liberty, upon the application of any party interested, to make a separate report or reports from time to time as to him shall seem expedient, the costs of such separate reports to be in the discretion of the Court.

That, when a Master shall make a separate report of

July 1837.

XLV.

Mode of bringing in and proceeding on accounts.

July 1837.

Production and inspection of papers, &c.

July 1837.

Accounts to be entered in a book.

July 1837.

Separate Reports.

July 1837.

The Master

may certify
with respect to
the state of
assets.

debts or legacies, then the Master shall be at liberty to make such certificate as he thinks fit with respect to the state of the assets, and every person interested shall thereupon be at liberty to apply to the Court as he shall be advised.

The following Orders 160 and 161 are only in force so far as it does not contravene the above 85th New Order. The discharge and charge will be still in use; but the schedules to answers will seldom be available, in consequence of the defendant not being compellable to make full discovery in the answer.

January 1845.
Charge and
discharge.

That the party, wishing to proceed with the reference, shall bring in his charge or at once file interrogatories for the examination of the accounting party, and thereupon bring in discharge; and the schedules to the answer shall be used to substantiate the charge in the same way that is now the practice with respect to the accounts brought into the Master's office in the shape of debtor and creditor, and the discharge shall be brought in, and shall be dealt with in the same manner as is now done in respect of the debtor and creditor's account brought into the Master's office.

January 1845.
Schedule of
accounts.

That, upon a reference to the Master to take accounts between parties in all cases where there have been schedules of the accounts by the accounting party annexed to the answer, there shall be no warrants taken out to bring in any accounts except such accounts as are subsequent to the time of the schedules annexed to the answer.

April 1843.
Accounts to be
taken without
specific direc-
tions.

That, in the taking of accounts in the Master's office, it shall be within the cognizance of the Master to take the same according to the laws and practice of the Court of Chancery without any specific direction in the decree or order referring such accounts to the Master, and therein to take the same with rents, or otherwise to take account of rents and profits received, or that but for wilful neglect or default might have been received to set occupation rent to take into account necessary repairs and lasting improvements and expenses properly incurred otherwise, or claimed to be so, and generally in the taking of accounts to inquire and adjudge as to all matters relating thereto as fully as if the same had been specifically referred, subject nevertheless to the revision of the Court upon exceptions to the Master's report upon the matters aforesaid.

Provided nevertheless that no claim for improvements shall be entertained in the Master's office, unless the party making such claim shall before the pleadings have made

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such a case in respect thereof as was necessary under the previous practice of the Court.

That the Master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories, or *viva voce*, or in both modes as the nature of the case may appear to him to require, the evidence upon such examination being taken down at the time by the Master or by the Master's Clerk in his presence, and preserved in order that the same may be used by the Court, if necessary.

That, if any party wish to complain of any matter introduced into any state of facts, affidavit, or other proceeding before the Master, on the ground that it is scandalous or impertinent, or that any examination taken in the Master's office is insufficient, he shall be at liberty without any order of reference by the Court to take out a warrant for the Master to examine such matter, and the Master shall have authority to expunge any such matter which he shall find to be scandalous or impertinent.

That, whenever in any proceeding before the Master the same Solicitor is employed for two or more parties, such Master may at his discretion require that any of the said parties shall be represented before him by a distinct Solicitor, and may refuse to proceed until such party is so represented.

That every person, not being a party in any cause, who has obtained an Order or in whose favour an Order shall have been made, shall be entitled to enforce obedience to such Order by the same process as if he were a party to the cause, and every person, not being a party in any cause against whom obedience to the Order of the Court may be enforced, shall be liable to the same process for enforcing obedience to such Order as if he were a party in the cause.

That in the Reports made by the Master of the Court no part of any state of fact, charge, affidavit, deposition, examination or answer brought in or used before them, shall be stated or recited; but such state of facts, charge, affidavit, deposition, examination or answer shall be identified, specified, and referred to so as to inform the Court of what state of facts, charge, affidavit, deposition, examination or answer was so brought in or used.

That a creditor, who has come in and established his debt before the Master under a decree or order in a suit, shall be entitled to the costs of so establishing his debt, and the same shall be taxed by the Master and added to his debt.

(56).

July 1837.
May examine a Creditor or other person claiming, either upon interrogatories or *viva voce*.

(57).

July 1837.
Scandal or impertinence in proceedings before the Master, or insufficiency of examination.

(61).

August 1837.
Master may require parties to appear by distinct Solicitors.

(92).

January 1842.
Persons interested, but not parties to the cause.

(126).

January 1842.
Documents not to be recited in Master's Report.

(125).

January 1842.
Costs of establishing debts.

the Master shall be at liberty to proceed *ex-parte*, if he think it expedient, considering the nature of the case, so to do.

That, where the Master has proceeded *ex-parte*, such proceeding shall not in any manner be reviewed in the Master's office, unless the Master, upon a special application made to him for that purpose by a party who was absent, shall be satisfied that he was not guilty of wilful delay or negligence, and then only upon payment of all costs occasioned by his non-attendance, such costs to be certified by the Master at the time, and paid by the party or his Solicitor before he shall be permitted to proceed on the warrant to review.

(38).
Review of *ex-parte* proceedings.

That, where the party actually prosecuting a Decree or Order does not proceed before the Master with due diligence, then the Master shall be 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 Decree or Order to commit to him the prosecution of the said Decree or Order, and from thenceforth neither the party making default, nor his Solicitor shall be at liberty to attend the Master as the prosecutor of the said Decree or Order.

(40).
Course to be followed where a party, prosecuting a decree, does not proceed with due diligence.

That, when the Trustee is directed to settle a conveyance or to tax costs, in case the parties differ about same, then the parties claiming the costs, or entitled to prepare the conveyance, shall bring the bill of costs or the draft of the conveyance into the Master's office and give notice of his having so done to the other party, and at any time within six days after such notice such other party shall have liberty to inspect the same without fee, and may take a copy thereof, if he think fit, and at or before the expiration of the six days or such further time as the Master shall in his discretion allow. He shall then either agree to pay the costs or adopt the conveyance, as the case may be, or signify his intention to dispute the same; and, in case he dispute the same, the Master shall then proceed to tax the costs or settle the conveyance according to the practice of the Court.

(60).
July 1837.
Settlement of Conveyances.
Taxation of Costs.

That a creditor, whose debt does not carry interest, who shall come in and establish the same before the Master under a Decree or Order in a suit, shall be entitled to interest upon his debt at the rate of six per cent. from the date of decree out of any assets which may remain after satisfying the costs of the suit, the debts established, and the interest of such debts as by law carry interest.

(124).
January 1842.
Interest on debt from period of its proof.

That the Master shall be at liberty, upon the appointment of a Receiver, or at any time subsequent thereto, in

(47).
July 1837.
Receivers.

the place of annual periods for the delivery of the Receiver's accounts and payment of his balances, to fix either longer or shorter periods at his discretion ; and, when such other periods are fixed by the Master, the regulations and principles established by the practice of the Court of Chancery in England shall in all other respects be applied to the said Receiver.

(48).
July 1837.
Directions on
the appoint-
ment of a
Receiver.

That in every Order directing the appointment of a Receiver of a landed estate, there be inserted a direction that such Receiver shall manage as well as set and let with the approbation of the Master ; and that in acting under such an Order it shall not be necessary that a petition be presented to the Court in the first instance ; but the Master without special order shall receive any proposal for the management or letting of the estates from the parties interested and shall make his report thereon, which report shall be submitted to the Court for confirmation in the same manner as is done with respect to reports on such matters made upon special reference ; and until such report be confirmed it shall not give any authority to the Receiver.

(188).
February 1847.
Appointment of
Receiver,
Guardian or
Committee.

That upon a reference to the Master for the appointment of a Receiver, or of a Guardian, or of a Committee of the Estate of a Lunatic, the party proposing such Receiver, Guardian, or Committee shall bring into the Master's office a proposal for such appointment and for the sureties for the person or persons so proposed, and the Master upon approving any such proposal shall (without first approving such approval to the Court) proceed in the taking of the recognizances of such Receiver, Guardian, or Committee, and shall therefore proceed to the appointment of such Receiver, Guardian, or Committee, and to Report such appointment to the Court in like manner as is now done after a Report of the Master's approval of such proposal and the confirmation of such Report by the Court.

(189).
February 1847.
Master's Ad-
vertisements.

That, where advertisements are issued for the sale of an estate for creditors for next of kin or otherwise, it shall not in future be necessary to issue first a general and then a peremptory advertisement, but that one advertisement only shall be necessary, which advertisement shall be peremptory. Provided nevertheless that it shall be in the discretion of the Master to issue a general advertisement in the first instance in cases where he shall deem advisable so to do.

(190).
February 1847.
Sales before the
Master.

That, in proceeding before the Master for a sale by public auction, the party conducting such sale shall bring in before the Master a state of facts and proposal as to such sale embracing therein a proposal for an Auctioneer

or other person for such sale, to be made by such sale which shall be subject to the disposal of the Master, and where the Master shall further that no other person shall, if required, which warrants or orders

That every person who has obtained such Order by the cause, against the cause, may be enforced to the cause.

The following here, and may

That, where more Defendants are filed, or other Defendants separate and party of separate answer proper ; and, occasioned the incurred, the s

That every matter referred to the Order is brought in of every cause or matter several parties may exhibit at which is had matter.

That, where conveyance or the same, then prepare the draught of the

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or other person, if considered necessary for conducting such sale, together with the particulars and conditions of sale which shall be contained in one state of facts and proposal and be proceeded upon together except in cases where the Master shall see fit to direct otherwise, and further that no report of the appointment of an Auctioneer or other person to sell shall be necessary, but the Master shall, if required, certify that he has made such appointment, which certificate shall not require to be settled by warrants or otherwise.

That every person, not being a party in any cause, who has obtained an Order or in whose favour an Order shall have been made, shall be entitled to enforce obedience to such Order by the same process as if he were a party to the cause. And every person, not being a party in any cause, against whom obedience to any Order of the Court may be enforced, shall be liable to the same process for enforcing obedience to such Order as if he were a party to the cause.

(192).
February 1847.
As to parties
not on the
Record.

The following English Orders appear to be still in force here, and may be useful to observe in practice.

That, where the same Solicitor is employed for two or more Defendants, and separate answers shall have been filed, or other proceedings had by or for two or more defendants separately, the Master shall consider in the taxation of such Solicitor's bill of costs either between party and party or between Solicitor and client whether such separate answers or other proceedings were necessary or proper; and, if he is of opinion that any part of the costs occasioned thereby has been unnecessarily or improperly incurred, the same shall be disallowed.

English Order.
3rd April,
1828.
Separate costs
of several
defendants.

That every Master shall enter in a book to be kept by him for that purpose the name or title of every cause or matter referred to him, and the time when the Decree or Order is brought into his office, and the date and description of every subsequent step taken by him in the same cause or matter, and the attendance or non-attendance of several parties on each of such steps, so that such book may exhibit at one view the whole course of proceeding which is had before him in each particular cause and matter.

English Order.
3rd April,
1828.
Master to enter
proceedings in
a book.

That, where a Master (a) is directed to settle a conveyance or to tax costs, in case the parties differ about the same, then the party claiming the costs or entitled to prepare the conveyance shall bring the bill of costs or the draught of the conveyance into the Master's office, and give notice of his having so done to the other party; and

English Order.
3rd April,
1828.
Order 76.
(As amended
23rd Nov.
1831.)
Mode of pro-

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costs directed.

at any time within eight days after such notice such other party shall have liberty to inspect the same without fee, and may take a copy thereof if he thinks fit; and at or before the expiration of the eight days, or such further time as the Master shall in his discretion allow, he shall then either agree to pay the costs or adopt the conveyance as the case may be, or signify his dissent therefrom, and shall thereupon be at liberty to tender a sum of money for the costs, or to deliver a statement in writing of the alterations which he proposes in the draught of the Conveyance. But, if he make no such tender, nor deliver any such statement in writing, or if the other party refuses to accept the sum so tendered, or to adopt the proposed alterations in the draft of the Conveyance, the Master shall then proceed to tax the costs or settle the Conveyance according to the practice of the Court. And, in case the taxed costs shall not exceed the sum tendered or the Master shall adopt the proposed alterations in the draft of the Conveyance, then the costs of the proceeding with respect to the Conveyance shall be borne by the other party.

See *ante* Order 60 of the Court, which is very similar to the above.

English Order.
3rd April 1845.

Order 52.
Master may
fix time for
proceedings.

English Order.
24th March,
1814.

Particulars of
sale.

That upon any subsequent attendance before him in the same cause or matter, the Master, if he thinks it expedient so to do, shall fix a certain time or certain times within which the parties are to take any other proceeding or proceedings before them.

That the Solicitor for the party prosecuting any Decree or Order of the Court for sale shall be at liberty, in cases in which the Master shall think it fit, to print and disperse as many particulars as shall be thought beneficial under the direction of the Master in whose office such sale shall be, paying sixpence per side for so many printed copies as there shall have been actual bidders at the sale and no more, and that such payment shall be allowed the Solicitor upon taxation of his costs.

See *ante* Orders 189, 190, and 192, of 1847.

English Order.
21st December,
1833.

Order 24.

No fee for in-
spection of
entire of Mas-
ter's Orders.

Each party shall be at liberty to inspect the entry of all such (Master's) Orders in the said (Master's) Entering Book without fee.

In setting out the above Orders on the practice in the Master's office, it has not been deemed necessary, and it would extend this work to an inconvenient length to compare each of the above Orders with the English Orders

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and practice. They are in nearly all particulars copied from English Orders, but to enter into detail on the various proceedings before the Master would be here inconvenient.

The Rules as they stand lay down the practice with sufficient distinctness; and for more full information the reader is referred to that very useful work, "*Bennett's Chancery Practice in the Master's Office*," which is reprinted in the Philadelphia Law Library, and is in the hands of most practitioners; and to the other practice books. The full statement of the practice, requiring a volume in itself to explain it fully, may be a fair reason for the writer not attempting it here. A short summary may however be useful.

There is scarcely any matter which may be made the subject of a suit in the Court, which may not become the subject of a reference to the Master. To him are referred all matters of account—questions as to priority of encumbrances—of the validity of titles in specific performance and other cases—of legacies, and their payment in administration suits—the appointment of Receivers and Guardians,—enquiries as to the estates and the maintenance and education of Minors; and in short every subject matter which it is necessary to ascertain in order to the final settlement of the rights of parties, the Court by its Order or Decree determine that the parties have rights which entitle them to relief in the Court.

A copy of the Order or Decree having been carried into the Master's office, the warrant to consider above provided for is attended, and the Master fixes the days for bringing in the charges, claims or proposals, and proceeding with and determining the matter. The party claiming should take care to have his charge or state of facts brought in by the time appointed for that purpose; and a party entitled to bring in a discharge may lose the benefit of it, if he delays bringing it in without sufficient reasons. The state of facts and charge, as it is commonly called, is entitled in the cause, and sets forth in short

terms the nature and particulars of the party's claim. If any documents are relied on, they are merely referred to, if they should have already appeared in the pleadings; but, if not, such part of them as are relied upon should be set out. It is the practice to allow of amendments to the state of facts and charge without much restriction, if such amendments are required to make the charge square with the evidence. On the day appointed to hear and determine the parties should endeavour to be prepared with all their evidence, as if they were preparing for a trial at Nisi Prius, for the Master will only grant a postponement or adjournment on good cause shown, and not where there has been neglect or unnecessary delay. The witnesses are subpenæd in the same manner as at the hearing, the hearing appointment being signed by the Master. When the reference is for the appointment of a Receiver or Guardian, or a Trustee, instead of a charge, a proposal is brought in, and the opposite party can bring in a counter proposal, and the Master hears evidence to enable him to determine between them. He may reject any proposal, and then another must be brought in. The report of the Master as to a Receiver, Guardian or Trustee is final, and constitutes appointments without further Order.

In examining any party to the suit before the Master it was usual to file interrogatories, which were settled by the Master, or he might order the examination to be *viva voce*. But there will be no interrogatories under the present practice unless the Court so orders. See *ante* New Order 53. The examination of witnesses is under the above mentioned 53rd Order always *viva voce*. Evidence is often admitted on affidavit, but only by consent.

The manner of completing the Report is clearly enough laid down by the above New Orders.

The 48th New Order as to the admission of documents is not in its terms confined to any particular stage of the cause after replication, and would therefore seem to apply to examinations in the Master's Office.

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CHAPTER XIX.

Miscellaneous Orders.

The following Orders refer to proceedings which may have to be considered at various stages of the cause, and it was thought convenient to arrange them under this head.

In all cases where any person or party, having obtained from the Court or from a Master any Order upon condition, does not perform or comply with such condition, he is to be considered to have waived or abandoned such Order, so far as the same is beneficial to himself; and any other party or person interested in the matter may, on breach or non-performance of the condition, take either such proceedings as the Order may in such case warrant, or such proceedings as might have been taken if no such Order had been made, unless the Court order to the contrary.

There must, unless the Court give special leave to the contrary, be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion; and at least two clear days between the service of a petition and the day appointed for hearing the same; but in the computation of such two clear days Sundays, or days on which the offices are closed, are not to be reckoned. And all affidavits upon which any motion is founded must be filed at the time of the service of such notice of motion.

When any limited time from or after any date or event is appointed or allowed for doing any act or taking any proceeding, the computation of such limited 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 be done or taken at the latest on the last day of such limited time according to such computation.

1850.

LXXV.

Consequence of not complying with condition on which an Order obtained.

1850.

LXX.

Time for notices of motion.

1850.

VI, VII, VIII,
Computation of time.

When the time for doing any act or taking any proceeding is limited by months, not expressed to be calendar months, such time is to be computed by lunar months of twenty-eight days each.

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 is, so far as regards the time of doing or taking the same, to be held to be duly done or taken, if done or taken on the day on which the offices shall next open.

1850.
V.
The Vacation.

1850.
IX.
Time of vacation not to count in certain cases.

The long vacation is to commence on the 1st day of July, and to terminate on the 2nd day of August in every year.

The time of vacation is not to be reckoned in the computation of the times appointed or allowed for the following purposes:—

1. Amending, or obtaining orders for leave to amend bills.
2. Filing or referring exceptions, or obtaining the Master's report on exceptions, in cases where the time is not limited by the order of reference.
3. Setting down demurrers or objections for want of parties.
4. Filing replications, or setting down causes under the directions under article 3 of Order XLVI.

This is copied from the English Order 14 of 1845. On the principle *Expressio unius est exclusio alterius*, it would seem that the time of vacation does count for all proceedings except those above mentioned, which produces a somewhat anomalous result. For instance the time for answering must count, and so for want of answer a traversing note may be filed and followed up by a replication. Then the defendant would be put to a motion for leave to answer, and although vacation, if the Court should sit, the Plaintiff, for all that appears by the Orders, must appear and answer the motion or run the risk of its being granted. The time for passing publication also counts, and therefore the examination of witnesses may often be necessary in vacation; although it is generally supposed that the Court does not sit in vacation, except under circumstances of a special nature—such as to hear motions for injunctions which will not admit of delay. It

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is a question whether it would not be preferable to abolish the vacation, or extend its effect to other proceedings than those named in the Order.

That the penal sum in the bond to be given as a security to answer costs by any plaintiff who is out of the jurisdiction of the Court shall be seventy pounds.

1837.
Security for costs.

An Order for security for costs can always be obtained when the Plaintiff is beyond the jurisdiction of the Court.

The day on which an order that the plaintiff do give security for costs is served, and the time thenceforward until and including the day on which such security is given, is not to be reckoned in the computation of time allowed a defendant to answer or demur.

1850.
Order for security, stay of proceedings.

When any solicitor or party shall cause an appearance to be entered or an answer, demurrer, or replication to be filed, he shall on the same day give notice thereof to the solicitor of the adverse party, or to the adverse party himself, if he act in person.

1850.
XLVII.
Notice of all pleadings to be given.

The following is the interpretation clause governing the Orders of 1850.

In these Orders the following words have the several meanings hereby assigned to them, over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction, viz.—

1850.
Interpretation.

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.

And it may be pretty safely stated, that the same rules of interpretation may be applied to the other rules also.

That no Order shall be made for referring any pleading or other matter depending before the Court for scandal or impertinence unless exceptions are taken in writing and signed by Counsel describing the particular passages which are considered to be scandalous or impertinent, nor unless such Order be obtained within six days after the delivery of such exceptions.

(7).
June 1837.
Exceptions for scandal or impertinence and reference thereof.

It will be observed that the New Orders abolish ex-

ceptions to answers for insufficiency, but exceptions for scandal or impertinence are not abolished.

(8).

June 1837.
Time for pro-
curing Report
on reference
for Scandal or
Impertinence.

That, when an Order is made for referring an answer for *insufficiency* or for referring an answer or other pleading or matter depending before the Court for scandal or impertinence, the Order shall be considered as abandoned unless the party obtaining the Order shall procure the Master's Report within a fortnight from the date of such Order, or unless the Master shall within the fortnight certify that a further time to be stated in his certificate is necessary, in order to enable him to make a satisfactory Report, in which case the Order shall be considered as abandoned if the Report be not obtained within the further time so stated: and, where such Order relates to alleged insufficiency in an answer, such answer shall be deemed sufficient from the time when the Order is to be considered as abandoned.

June 1837.
Costs of setting
down cause
where it is
struck out of
the paper
through neglect
of Plaintiff.

That, when a cause which stands for hearing is called on to be heard, but cannot be decided by reason of a want of parties or other defect on the part of the Plaintiff, and is therefore struck out of the paper, if the same cause is again set down, the defendant or defendants shall be allowed the taxed costs occasioned by the first setting down although he or they do not obtain the costs of the suit.

The terms of this Order would seem to apply to the setting down a cause by a plaintiff only, but the same rule would no doubt be observed, when under the present practice a defendant sets down the cause, and he making default the plaintiff would, it is apprehended, be allowed costs according to the above Order.

(23).

July 1837.
Before whom
answers, &c.,
shall be taken.

That all answers, affidavits, depositions, and examinations to be made in any cause or proceeding by a party residing in the city of Toronto or within twenty miles thereof, shall be taken before a Master in ordinary of this Court; and all answers, affidavits, depositions, and examinations to be made in any cause or proceeding by a party residing in this Province beyond the limits aforesaid shall be taken before a Master Extraordinary of this Court.

(17).

June 1837.
Order *Nisi* for
dissolving com-
mon injunc-
tion.

That the Order *Nisi* for dissolving the common injunction may be obtained upon petition as well as by motion: and that every such Order be served two clear days at least before the day upon which cause is to be shown against dissolving the injunction.

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That, when any cause shall become abated or shall be compromised after the same is set down to be heard, the Solicitor for the plaintiff shall certify the fact to the Registrar of the Court, who shall cause an entry thereof to be made in his Cause Book, and the Solicitor for the plaintiff shall be allowed a fee of two shillings and sixpence for such certificate, if he shall certify the fact as soon as the same shall come to his knowledge.

(26).
July 1837.
Abatement or
Compromise of
a cause after it
is set down.

That, for the purpose of enabling all persons to obtain precise information, as the state of any cause and to take the means of preventing improper delay in the progress thereof, any Solicitor shall at the request of any person whether a party or not in the suit or matter inquired after procure and furnish a certificate from the Register-office specifying therein the dates and general description of the several proceedings which have been taken in any cause in the said office, whether such Solicitor be or not concerned as Solicitor in the cause, and that the Registrar shall be entitled to receive the sum of two shillings for such certificate and no more.

(29).
Solicitor at the
request of any
person to procure
certificate
of proceedings.

That, whereas the sum of twenty pounds required by the Rules of Practice in England to be deposited on petitions of re-hearing is unsuitable to the circumstances of this Province, and it is expedient to reduce the same. It is therefore ordered that henceforth it shall be sufficient to deposit with the Registrar of this Court on every petition of re-hearing the sum of ten pounds Halifax Currency.

(31).
August, 1841.
Deposition
on petition of
re-hearing.

That all writs, notices, orders, warrants, rules, and other documents, proceedings, and written communications which do not require personal service upon the party to be affected thereby, shall be deemed sufficiently served if such document, or a copy thereof as the case may be, shall be served on the Solicitor or his agent to be specified in the manner mentioned in the first Order by the Solicitor of the party serving the same or his agent; and, if any Solicitor shall neglect to cause such entry to be made as is required by the said first Order, then the leaving a copy of any such writ, notice, order, warrant, rule, or other document, proceeding or written communication for the Solicitor so neglecting as aforesaid in the Registrar office shall be deemed sufficient service on him unless the Court shall under special circumstances think fit to direct otherwise.

(85).
January 1842.
Service on
Solicitor or
Agent.

That clerical mistakes in Decrees or Decretal Orders or errors arising from any accidental slip or omission may be corrected at any time before enrolment be corrected upon petition without the form and expense of a re-hearing.

(31).
July, 1847.
Correction of
clerical and ac-
cidental errors
in Orders and
Decrees.

(65).
November,
1838.
Alimony.

That, whereas it is expedient to define and declare the form of proceeding to be adopted in matters of alimony, It is ordered that the same shall be by libel and plea, such libel to be sworn before the same shall be filed by the Registrar; and that the mode of bringing the defendant before the Court and the time for appearance and pleading the mode of taking the evidence, as well as the course of proceeding in the cause generally, shall be the same as those established by the Rules and Practice of the Court upon Bills in Equity. It is further ordered that the libel and plea shall be signed by Counsel.

(73).
August, 1839.
Paying money
into Court.

That upon paying money into Court the Solicitor shall furnish the Bank with a correct copy of so much of the order of Court as shall relate to such payment, which copy shall contain the names of the parties to the suit and the date of such order. And it is further ordered that all sums of money to be paid out under any order of Court shall be so paid out upon a cheque to be drawn out and signed by the Registrar and counter-signed by the Master, but not otherwise.

(78).
July, 1841.
Alimony.

That, whereas the order requiring proceedings for alimony to be by libel and plea is attended with inconvenience and it is expedient to alter the same, It is therefore ordered that suits for alimony shall henceforth be by bill for discovery and relief or either, and answer and other proceedings in the same manner as other suits in this Court. Provided nevertheless that each discovery shall be subject to the same objections as any other matters of discovery are by the rules and practice of the Court.

The Bill will now be for relief merely, being according to the new rules.

(71).
April, 1839.
Transmission
of papers to
Registrar.

That every answer, deposition or other proceeding in a cause which by the rules or practice of the Court are required to be transmitted to the Registrar by post by the officer of the Court taking the same, may in future be forwarded in a sealed envelope to the Registrar by a messenger or deposited in the Post-Office as may be most convenient, Provided nevertheless that in case such answer, examination, deposition or other proceeding as aforesaid shall be transmitted by a messenger, such messenger shall make oath before the Registrar that he received the same from the hands of the officer of the Court, and that it has not been out of his possession since he so received it, and that the same is in the like state and condition as when it was placed in his hands for transmission, and the Registrar shall forthwith endorse and sign a memorandum on the envelope containing the name, place of residence

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That no writ of execution, nor any writ of attachment, shall hereafter be issued for the purpose of requiring or compelling obedience to any Order or Decree of this Court; but that the party, required by any such Order to do any act, shall upon being duly served with such Order be held bound to do such act in obedience to the Order. (88.)

January, 1852.
Service of Order to have the effect of Writ of Execution.

That, if any party who is by an Order or Decree ordered to pay money or do any other act in a limited time shall after due service of such Order refuse or neglect to obey the same according to the exigency thereof, the party duly prosecuting such Order shall at the expiration of the time limited for the performance thereof be entitled to an Order for a Sergeant-at-Arms and such other process as he was formerly entitled to upon a Return *non est inventus* by the Commissioners named in a Commission of Rebellion issued for non-performance of a Decree or Order. (89.)

January, 1852.
Compulsory process for refusing obedience to Orders,

That every Order or Decree requiring any party to do an act thereby ordered shall state the time after service of the Decree or Order within which the act is to be done, and that upon the copy of the Order which shall be served upon the party required to obey the same there shall be endorsed a memorandum in the words or to the effect following, namely, "If you, the within A. B., neglect to perform this Order by the time therein limited, you will be liable to be arrested by the Sergeant-at-Arms attending the High Court of Chancery, and also be liable to have your estate registered for the purpose of compelling you to obey the same Order." (90.)

January, 1842.
Notice of liability for non-performance of Order.

That, upon due service of a Decree or Order for delivery of possession and upon proof made of demand and refusal to obey such Order, the party prosecuting the same shall be entitled to an Order for a writ of assistance. (91.)

January, 1842.
Writ of assistance.

That in all suits concerning real estate which is vested in Trustees by devise, and such Trustees are competent to sell and give discharges for the proceeds of the sale and for the rents and profits of the estate, such Trustees shall represent the persons beneficially interested in the estate or the proceeds of the rents and profits in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate, and in such cases it shall not be necessary to make the persons beneficially interested in such Real Estate or rents and profits (107.)

January, 1842.
Trustees of real estate to be made parties
Persons beneficially interested.

parties to the suit, but the Court may upon the consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

(108).

January 1842. That in suits to execute the trusts of a will it shall not be necessary to make the heir-at-law a party; but the plaintiff shall be at liberty to make the heir-at-law a party in suit to execute where he desires to have the bill established against trusts of will. him.

(109).

January 1842. That in all cases in which 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.

(121).

January 1842. That, where a defendant makes default at the hearing of a cause, the Decree shall be absolute in the first instance without giving the defendant a day to show cause, and such Decree shall have the same force and effect as if the same had been a Decree *nisi* in the first instance, and afterwards made absolute in default of cause shown by the defendant.

(128).

January 1852. That in any petition of rehearing of any Decree or Order of the Court it shall not be necessary to state the proceedings anterior to the Decree or Order appealed from or sought to be reheard.

&c.

(132).

March 1843. That all Solicitors, practising by agents having offices in the City of Toronto, and all Solicitors practising in the said Court, not having an office in the said city, shall enter their names in a book to be called the Solicitor's Book and to be kept publicly at the Registrar's Office to be there inspected without fee or reward; in which book the Solicitors aforesaid shall specify the name of an agent being a Solicitor of this Court, and having an office of business as such Solicitor in the said City of Toronto by whom such principal proposes to transact his Court business and upon whom all writs, notices, orders, warrants, rules, and other documents, proceedings, and written communications may be served.

(134).

March 1843. That, whereas heretofore it has been the practice for the Registrar of the Court to supply office copies of all proceedings and pleadings filed in his office, and it is convenient and desirable that such practice should be altered, It is therefore ordered that in future copies of all proceedings and pleadings to be made and delivered by the Solicitor or agent with whom the Draft or Drafts thereof shall originate, and that such copies before being delivered shall be examined and certified by the Registrar, for doing

which the solicitor's examination is thereof, satisfied that the same shall not to be allowed, notwithstanding that the minutes, decrees, and orders, in respect heretofore.

That from an affidavit in support of a motion, perused at the hearing, and the affidavit or affidavit received in the same manner before the Court, or affidavit within such time as may be ordered.

That from any affidavit or affidavit which an office copy may be read, a copy would be on the occasion of reading.

That in case of an office copy of a document shall not deliver two clear days spoken (as on preceding) any further of the same to whom such shall be written, as now practice.

That, whereof filed, and the opposite party hereafter be notified, the party to whom such shall be written, as now practice.

That in the case of an office copy of a document shall not deliver two clear days spoken (as on preceding) any further of the same to whom such shall be written, as now practice.

which the solicitor or agent procuring such certificate and examination shall, until further order be made in respect thereof, satisfy the Registrar therefor, the same however not to be allowed in taxation of costs—Provided nevertheless that this Order shall not apply to office copies of minutes, decrees, orders, depositions, reports, and certificates, in respect whereof the practice shall continue as heretofore.

That from henceforth the original or originals of any affidavit in support of or in opposition to any application by motion, petition, or otherwise to this Court may be read at the hearing thereof instead of office copies as heretofore, and that any party requiring a copy of any such affidavit or affidavits shall be entitled to demand and receive the same duly authenticated by the Registrar in manner before mentioned from the party filing such affidavit or affidavits, who shall be obliged to furnish the same within such time or times as by the present practice the same may be obtained from the Registrar.

That from henceforth it shall not be necessary to file any affidavit of the service of a notice of motion or any affidavit which proves the service of a paper and to take an office copy thereof for use, but the original affidavit may be read and used in the same manner as an office copy would be, and the said original shall be filed on the occasion of reading or using the same.

That in case the solicitor or agent, from whom any office copy of a pleading or proceeding may be be-spoken, shall not deliver the same upon or before the expiration of two clear days from the day of the same being so be-spoken (as on Thursday if be-spoken on the Monday preceding) any further time that may elapse before the delivery of the same shall not be computed against the party to whom such office copy is due, and such office copies shall be written in a clear legible character and in manner as now practised in the Registrar's office.

That, where a bill is amended on a re-engrossment thereof filed, and a copy of such re-engrossment served on the opposite party under the foregoing Orders, it shall not hereafter be necessary for the plaintiff to pay such opposite party the usual sum of twenty shillings unless a further answer be required.

That in the case of any person being committed to prison upon attachment or other process issued from this Court for a contempt or otherwise in not paying costs or any other sum of money directed or decreed to be paid by this Court, in case the party, at whose instance such

(136).
March 1843.
Affidavits and
office copies
thereof.

(137).
March 1843.
Office copies of
affidavits of
service not
necessary.

(138).
March 1843.
Delivery of
office copies.

(140).
April 1843.
Costs of
Amendment in
case of a re-
engrossment.

(145).
February 1844.
April 1843.
Examination of
prisoner in
contempt.

shall the Sheriff in executing such writ or process bring the party to the Bar of the Court, but he shall instead thereof commit the party to the gaol of the district, and the party so committed shall be dealt with according to the course and practice of the Court, as if he were brought to the Bar of the Court, and as provided for or as may be provided for by any Order of this Court.

That in no case shall the enrolment of any interlocutory Order in a cause be deemed necessary for any purpose, and that there shall be no enrolment of any proceedings or Orders in any case until after the final Decree in the cause be pronounced, and then after the expiration of thirty days from the time of the final Decree being entered by the Registrar in the Order-book, the date of which entry the Registrar shall state in the margin of such book opposite the entry thereof, if no petition for a rehearing shall have been presented, upon being required by any party in the cause, the Registrar shall attach together the Bill Pleadings and other proceedings in the cause and shall annex thereunto a fair engrossed copy of the Decretal Order or Decree of the Vice Chancellor signed by him and countersigned by the Registrar; and the papers and proceedings so annexed and signed shall then be filed by the Registrar and shall remain of Record in his office, and such filing shall be deemed and taken to be an enrolment of the Decree and proceedings, and shall have the same force and effect in every respect as the former method of enrolling Decrees.

It is hereby declared and directed by the Vice Chancellor that from and after Monday, the ninth day of June next, no persons be admitted to practice as Solicitors of the Court of Chancery except Solicitors of the said Court already admitted or who may be hereafter admitted as such Solicitors and Attornies of the Court of Queen's Bench admitted and sworn in before the ninth day of June next. Persons admitted Attornies of the Court of Queen's Bench after that period to be sworn in and admitted Solicitors of the Court of Chancery before they can practise as Solicitors of that Court either as principals or through agents.

That, where the plaintiff is directed to pay to the defendant the costs of the suit, there the costs occasioned to a defendant by any amendment of the bill shall be deemed to be part of such defendant's costs in the cause (except as to any amendment which may have been made by special leave of the Court, or which shall appear to have

(165).

January 1845.
Enrolment of
Decree.

(179).

May 1845.
Order in relation to the
Admission of
Solicitors in
Chancery.

English Order.
3 April, 1828.
Order 29.
Amendment of
Bill in Defendant's costs.

been rendered necessary by the default of such defendant) but there shall be deducted from such costs any sum or sums which may have been paid by the plaintiff, according to the course of the Court, at the time of any amendment.

English Order. That, when upon taxation a plaintiff, who has obtained
3 April, 1828. a Decree with costs, is not allowed the costs of any
Order 30. amendment of the bill upon the ground of its having been
Amendment of unnecessarily made, the defendant's costs occasioned by
Bill in Plain- such amendment shall be taxed, and the amount thereof
tiff's costs. deducted from the costs to be paid by the defendant to
the plaintiff.

English Order. That from and after the 26th day of October next, if a
5 Aug., 1818. party gives notice of motion, and does not move accord-
Costs of Aban- ingly, he shall, when no affidavit is filed, pay to the other
doned Motions. side forty shillings costs upon production of the notice of
motion; but, where an affidavit is filed by either party,
the party giving such notice of motion and not moving
shall pay to the other side costs, to be taxed by the Mas-
ter, unless the Court itself shall direct, upon production of
the notice of motion, what sum shall be paid for costs.

English Order. That, when a cause which stands for hearing is called
3 April, 1828. on to be heard, but cannot be decided by reason of a want
Order 34. of parties or other defect on the part of the plaintiff, and
Cause struck is therefore struck out of the paper, if the same cause is
out by default again set down, the defendant or defendants shall be
of Plaintiff. allowed the taxed costs occasioned by the first setting
down, although he or they do not obtain the costs of the
suit.

English Order. That, where a cause being in the paper for hearing is
3 April, 1828. ordered to be adjourned upon payment of the costs of the
Order 35. day, then the party to pay the same whether before the
Costs of day. Lord High Chancellor or the Master of the Vice Chan-
cellor shall pay the sum of ten pounds unless the Court
shall make other order to the contrary.

English Order. That, whenever upon the hearing of any cause or other
3 April, 1828. matter it shall appear that the same cannot conveniently
Order 36. proceed by reason of the Solicitor for any party having
Payment by neglected to attend personally or by some proper person
Solicitor of costs of hearing on his behalf or having omitted to deliver any paper ne-
deferred by his neglect.

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cessary for the use of the Court, and which according to its practice ought to have been delivered, such Solicitor shall personally pay to all or any of the parties such costs as the Court shall think fit to award.

CHAPTER XX.

Appeals.

It will be remembered, (see *ante*, Chap. 1), that the Act of 12 Victoria, Chap. 63, gives an appeal from the decisions of the Court to the Court of Appeals composed of all the Judges of the three Courts; and from that there is an appeal to the Judicial Committee of the Privy Council in England.

By the above mentioned Act the nine Judges were empowered to make rules regulating the conduct of Appeals, and several rules were passed, laying down the practice in appeals from all the Courts. These were confirmed by 13 and 14 Victoria, Chap. 51, and such of them as relate to appeals from Chancery are subjoined.

XXVIII.
Security for
costs--Affidavit
of justification.

That in Appeals in the Court of Chancery all securities under the fortieth section of the said Act of the Provincial Parliament, passed in the twelfth year of the reign of Her present Majesty, Chapter sixty-three, shall be in the form of a bond which, together with affidavit of Justification, shall be filed with the Registrar of the said Court, and notice thereof served on the respondent, his solicitor or agent, and the same shall stand allowed, unless the respondent shall within fourteen days after service of such notice move the said Court to disallow the same, a special application shall be necessary to stay proceedings under any of the exceptions in the said Section of the said Act.

XXIX.
Petition.
Service of
copy.

That the Petition of Appeal shall be in the form set forth in the Schedule to this Order. The petition of Appeal shall be filed with the Clerk of the Court, and a copy thereof together, with a notice of the hearing of the appeal shall be served on the respondent, his solicitor or agent,

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at least two months before the time named in such notice for the hearing of the appeal. Such petition shall not be answered, but at the time named in such notice the parties must attend to argue the appeal; and upon the filing of petition and service of a copy thereof, and of such notice, the appeal shall stand in the same plight as if the petition had been answered and such time appointed by this Court for the hearing thereof.

No answer.

The Schedule to the foregoing Order.

In the Court of Error and Appeal.

Between

Appellant,

and

Respondent.

To the Honourable the Judges of the said Court,

The humble Petition of the said (Appellant)

Form of
Petition.

Sheweth :

That a (Decree or an Order) was lately and on
pronounced by Her Majesty's
Court of Chancery for Upper Canada in a certain cause
depending in the said Court, wherein your petitioner was
and the above named
was

which said (Decree or Order) has
since been duly entered and enrolled.

That your petitioner feels himself aggrieved by the said
(Decree or Order), and he hereby appeals therefrom, and
humbly prays that the same may be reversed or varied, or
that your Lordships will make such other Order or Decree
in the premises as to your Lordships shall seem meet.

And your petitioner will ever pray, &c.

(Certificate of Counsel.)

The printed "Case," which is done away with by the
following Order, consisted of a statement of the proceed-
ings had in the Court below. The Appendix, which is
still to be used as the "Case," is a copy of the pleadings
and evidence. This will be much shorter than formerly,
in consequence of the new Rules shortening the pleadings
in Chancery.

That the printed Cases shall be and are hereby abolish-
ed, but copies of the pleadings and evidence shall be
printed as is at present done in the Appendix to the Case,
to which the Reasons of Appeal and for supporting the
Decree or Order shall be appended; and the same rules
shall apply to such printed copies and reasons as now
apply to the printed cases, and the same shall for all pur-

XXX.
Printed Cases
abolished.

poses be considered the printed cases of the appellant and respondent respectively.—Provided always, that nothing herein contained shall prevent the parties from joining in printing such copies as they now do in printing the Appendix if they shall be so disposed. Such printed cases must be deposited with the Clerk of the Court for the use of the Judges, at least four days before the hearing of the appeal.

XXXI.

Appeals to the
Privy Council.

Security for
costs.

That, when it shall be intended to appeal to Her Majesty in the Privy Council, the securities required by the Statute twelfth Victoria, Chapter sixty-three, Section forty-six, shall be personal and by Bond to the Respondent or Respondents, such Bond to be executed by the Appellant or Appellants, or one of them, and two sufficient sureties (or if the Appellant or Appellants be absent from or do not reside in Upper Canada, then by three sufficient sureties) in the penal sum of Five hundred Pounds in Cases coming within the first part of the said Section forty-six, the condition of which Bond shall be to the effect that the Appellant (or Appellants) shall and will effectually prosecute his (or their) appeal and pay such costs and damages as shall be awarded in case the judgment (or Decree) appealed from shall be affirmed or in part affirmed, and that execution shall not be stayed in the original cause until security shall further be given by Bond, in conformity to the sixth, seventh and eighth Rules, when from the nature of the case such further security shall be requisite: And in cases from Chancery, application to the Court of Appeal to stay proceedings shall be by motion or notice, which motion, if granted, shall be upon such terms as to security under the Statute or otherwise as the circumstances and nature of the case require.

[The 6th, 7th, and 8th Rules above cited, refer to the Common Law Courts.]

XXXII.

That the Bond or security referred to in the last Rule Form of Bond, shall be in the following form:

Know all men by these presents that We, A. B., of
C. D., of
and E. F., of
are jointly and
severally held and firmly bound unto G. H., of
in the penal sum of
of lawful money of Canada, for which payment well and
truly so be made, we bind ourselves and each of us by
himself, our and each of our heirs, executors and adminis-
trators respectively, firmly by these presents, witness
our hands and seals respectively, the
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Whereas (the Appellant) alleges and complains that in the giving of Judgment in a certain Suit, in Her Majesty's Court of Error and Appeal in Upper Canada, between (the Respondent) and (the Appellant) manifest error hath intervened, wherefore the said (Appellant) desires to appeal from the said Judgment to Her Majesty in Her Majesty's Privy Council; Now the condition of this obligation is such, that, if the said (Appellant) do and shall effectually prosecute such appeal and pay such costs and damages as shall be awarded, in case the Judgment aforesaid to be appealed from shall be affirmed, or in part affirmed, then this obligation shall be void, otherwise shall remain in full force.

That in every Case of Appeal to Her Majesty in Council, the obligors, parties to any bond as sureties, shall justify their sufficiency by Affidavit in the manner and to the same effect as is required by Rule number nine of this Court.

XXXIII.
Affidavit of
justification.

In cases appealed from either of the Courts of Common Law or from the Court of Chancery, the same fees and allowances shall be taxed in appeal by the Clerk of the Court of Error and Appeal for Attornies and Solicitors, or any Officer of the said Court as are allowed for similar services in the Court from which the appeal shall have been brought. And that Counsel's fees shall be taxed in the discretion of the Clerk, provided that no fee to Counsel exceeding Ten Pounds shall be taxed without an order of the Judge who presided in the argument or, in his absence, of the next Senior Judge.

XXXIV.
Fees taxable.

That the regular and appointed days or time of sitting of this Court shall be the second Thursday after the several terms of Hilary, Easter and Michaelmas, as appointed by the Statute twelfth Victoria, Chapter sixty-three, Section thirteen, at eleven o'clock in the forenoon; Provided, however, that the said Court may adjourn from time to time and meet at such other periods as shall be appointed for the hearing and disposing of any business brought before it.

XXXV.
Times of
sitting of the
Court.

The form of the Affidavit of Justification, referred to in the above Order 33rd, is as follows:—

In the (Style of Court).

A. B., Plaintiff, }
vs. E. F. of
C. D., Defendant, } and G. H. of

Form of Affidavit of Justification.

severally make Oath and say: and first this Deponent E. F. for himself saith that he is a resident inhabitant of

Upper Canada, and is a House-holder in (or a Free-holder in) and that he is worth the sum of (the sum in which he stands bound by the penalty) over and above what will pay all his Debts, and this Deponent G. H. for himself saith, that he is a resident inhabitant of Upper Canada, and is a House-holder in (or Free-Holder in) and that he is worth the sum of (as the case may be) over above what will pay all his Debts.

[Signed,] E. F.
G. H.

Sworn by the above named.

Deponent E. F. and G. H. at

in the County of

the day of

18 before me, X. Y.

A Commissioner, &c.

Orders of
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CHAPTER XXI.

Orders of January, 1851.

Orders of January 1851, extending the practice under the 77th Order of May, 1850, and for other purposes:—

Whereas it is expedient to extend the principle of the Order comprised in the General Orders of the 7th of May, 1850, numbered LXXVII., and to further regulate the practice thereunder. The provisions of the Order comprised in the General Orders of the 7th of May, 1850, numbered LXXVII., shall be applicable in any of the following cases, that is to say, in any case where the plaintiff is—

Jan. 17, 1851.
The 77th Order of May, 1850, extended to certain cases, on the principle of the English Orders of April, 1850.

1. A creditor upon the estate of any deceased person seeking payment of his debt.

2. A legatee under the will of any deceased person seeking payment or delivery of his legacy.

3. A residuary legatee, or one of the residuary legatees of any deceased person, seeking an account of the residue and payment or appropriation of his share therein.

4. The person or any of the persons entitled to the personal estate of any person who may have died intestate, and seeking an account of such personal estate, and payment of his share thereof.

5. An executor or administrator of any deceased person seeking to have the personal estate of such deceased person administered under the direction of the Court.

6. A legal or equitable mortgagee, or judgment creditor, having duly registered his judgment, or a person entitled to a lien for security for a debt, seeking foreclosure or sale, or otherwise to enforce his security.

7. A person entitled to redeem any legal or equitable mortgage, or any charge or lien, seeking to redeem the same.

8. A person entitled to an account of the dealings and transactions of a partnership, dissolved or expired, seeking such account.

9. A person entitled to an equitable estate or interest, and seeking to use the name of his trustee in prosecuting an action for his own sole benefit.

For the prayer for subpoena see form under the 77th Order. The only difference, in substance, between the above form, and the form given in the English Orders of April, 1850, is, that the above seeks relief against both real and personal assets, the English form being confined to the latter.

Compared with English form.

By a legatee, under the will of any deceased person, seeking payment or delivery of his legacy out of the testator's personal assets.

2.
Bill for a legacy.

IN CHANCERY.

To the Honourable, &c.

Humbly complaining, &c., your orator, &c., that he is a legatee to the amount of £——, under the will, dated the —— day of ——, of ——, late of ——, deceased, who died on the —— day of ——, and that C. D., the defendant hereinafter named, is the executor of the said ——, and that the said legacy of £——, together with interest thereon from the —— day of ——, (*the day mentioned in the will for the payment of the legacy, or the expiration of twelve calendar months from the testator's death*), is now due and owing to him the said A. B., (*or unpaid or unsatisfied*) (*or unappropriated or unsecured*). To the end therefore that the said A. B. may be paid (*or satisfied*) the said legacy and interest, (*or may have the said legacy and interest appropriated and secured*), and in default thereof may have the personal estate of the said —— administered in this Court on behalf of himself and all others the legatees of the said ——, and for that purpose that all proper directions may be given and accounts taken.

(*And for further relief (as in form 1) pray subpoena,*
&c.

NOTE.—This form may be varied according to the circumstances of the case, where the legacy is an annuity or specific, or where the plaintiff is not the legatee, but has become entitled to or interested in the legacy, in which case the character in which the plaintiff claims is to be stated, as before mentioned.

For the form of prayer for further relief, see form under the 77th Order.

This form (2) follows the English form of claim, No. 2, excepting only as in the other cases, the difference arising from the latter being in the form of a "claim", and the above in the form of a bill—a difference which applies to the mere formal parts.

Compared with English form.

3.
Bill by residu-
ary legatee.

By a residuary legatee or any of several residuary legatees of any deceased person, seeking an account of the residue, and payment or appropriation of his share therein.

IN CHANCERY.

To the Honourable, &c.

Humbly complaining, &c., your orator, &c., that he the residuary legatee (*or one of the residuary legatees*) under the will dated the _____ day of _____, of _____, late of _____, who died on the _____ day of _____, and that C. D., the defendant herein-after named, is the executor of the said _____, and that the said C. D. has not paid to the said A. B. the (*or his share of the*) residuary personal estate of the said testator. To the end therefore that the said A. B. may have the personal estate of the said _____ administered in this Court, and may have his costs of this suit, and for that purpose that all proper directions may be given and accounts taken.

(And for further relief: pray subpœna, &c.)

NOTE.—This form may be varied according to the circumstances of the case, where the plaintiff is not the residuary legatee, but has become entitled to or interested in the residue, in which case the character in which he claims is to be stated, as before mentioned.

Similar to
English form.

This form follows the English form of claim No. 3.

4.
For an account
of the personal
estate of an
intestate; by
one entitled
under the
statute of
distributions.

By the person or any of the persons entitled to the personal estate of any person who may have died intestate, and seeking an account of such personal estate and payment of his share thereof.

IN CHANCERY.

To the Honourable, &c.

Humbly complaining, &c., your orator, &c., that he is the next of kin (*or one of the next of kin*) according to the statutes for the distribution of the personal estate of intestates, of _____, late of _____, who died on the _____ day of _____, intestate, and that the said A. B. is entitled to (*or to a share of*) the personal estate of the said _____, deceased, and that C. D., the defendant hereinafter named, is the administrator of the personal estate of the said _____, and that the said C. D. has not accounted for or paid to the said A. B. the (*or the said A. B.'s share of the*) personal estate of the said intestate. To the end therefore that the said A. B. may have the personal estate of the said _____ administered in this Court, and may have his costs of this suit, and for that purpose that all proper directions may be given and accounts taken.

And for further relief; pray subpœna, &c.

NOTE.—If assignee of the described, as "trator of E. F., kin, or one of the tor de bonis non who was the ne as such executor bonis non, or estate, &c.

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NOTE.—If the plaintiff is the executor or administrator, or assignee of the next of kin, or one of the next of kin, let him be so described, as “that he, the said A. B., is the executor or administrator of E. F., deceased, or assignee of E. F., who was the next of kin, or one of the next of kin,” &c.; or “that he is the administrator de bonis non, or the executor of the executor of E. F., deceased, who was the next of kin,” &c. and that the said A. B. is entitled, as such executor or administrator, or assignee or administrator de bonis non, or executor of the said E. F., to a share of the personal estate, &c.

Alterations according to circumstances.

The above follows, in the body of it, the English form No. 4, but the foot-note is not appended in the English Order.

Similar to English form.

By the executor or administrator of a deceased person claiming to have the personal estate of the testator administered under the direction of the Court.

5.
Executor's Bill.

IN CHANCERY.

To the Honourable, &c.

Humbly complaining, &c., your orator, &c., that he is the executor (or administrator) of E. F., late of ———, but now deceased, who departed this life on or about the ———, and that he has possessed the personal estate of the said E. F. to some amount, and that he is willing and desirous to account for the same, and that the whole of the personal estate should be duly administered in this Court for the benefit of all persons interested therein or entitled thereto, and that C. D., E. F., and G. H. are interested in the said personal estate as the next of kin (or residuary legatees) of the said E. F. To the end therefore that the said A. B. may have the personal estate of the said E. F. applied in a due course of administration under the direction of this Court, or that the said C. D., E. F., and G. H. may show good cause to the contrary, and that the costs of this suit may be provided for, and for these purposes that all proper directions may be given and accounts taken.

(And for further relief; pray subpoena, &c.)

This is similar to the English form No. 5.

Similar to English form.

By a legal or equitable mortgagee or person entitled to a lien as security for a debt seeking foreclosure or sale, or otherwise to enforce his security.

6.
Foreclosure Bill.

IN CHANCERY.

To the Honourable, &c.

Humbly complaining, &c., your orator, &c., that under and by virtue of an indenture (or other document), dated, &c., and made, &c. (and a transfer thereof, made by indenture, dated, &c., and made, &c.) the said A. B. is a mortgagee (or an equitable mortgagee) of (or, is en-

tilled to hold a lien upon) certain freehold property (or leasehold, or other property, as the case may be) therein comprised, for securing the sum of £— and interest; and that the time for payment thereof has elapsed; and that C. D., the defendant hereinafter named, is entitled to the equity of redemption of the said mortgaged premises (or, the premises subject to such lien). To the end therefore that the said A. B. may be paid the said sum of £— and interest, and the costs of this suit, and in default thereof that the equity of redemption of the said mortgaged premises may be foreclosed (or that the said mortgaged premises may be sold, or that the premises subject to such lien may be sold, as the case may be, and the produce thereof applied in or towards the payment of his said debt and costs.), and for that purpose that all proper directions may be given and accounts taken.

(And for further relief; pray subpœna.)

• The names only of the parties are to be set out, not the substance or effect of the document. If there is no written security to be referred to, the property is to be described generally.

Compared with
English form.

The above follows the English form of the same number, with the addition of the explanatory note. There is no doubt however, that under the English form, or under the above form independently of the direction contained in the note, the most proper mode of pleading would have been to have stated only the names, dates, and amount secured. The date should of course be inserted, though not named in the above note.

8.
Bill to redeem.

By a person entitled to the redemption of any legal or equitable mortgage, or any lien, seeking to redeem the same.

IN CHANCERY.

To the Honourable, &c.

Humbly complaining, &c., your orator, &c., that under and virtue of an indenture (or other document) dated the — day of —, and made between (parties) (and the assurances hereinafter mentioned—that is to say, an indenture dated the — day of —, the will of —, dated the — day of —), the said A. B. is entitled to the equity of redemption of certain freehold property (or leasehold, or other property, as the case may be) therein comprised, which was originally mortgaged (or pledged) for securing the sum of £— and interest; and that C. D., the defendant hereinafter named, is now, by virtue of the said indenture, dated the — day of — (and of

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subsequent assurances), the mortgagee of the said property (or holder of the said lien), and entitled to the principal money and interest remaining due upon the mortgage (or lien); and the said A. B. believes that the said amount of the principal money and interest now due upon the said mortgage (or lien) is the sum of £—, or thereabouts: and he has made, or caused to be made, an application to the said C. D. to receive the said sum of £—, and any costs justly payable to him, and to reconvey to the said A. B. the said mortgaged property (or property subject to the said lien), upon payment thereof, and of any costs due to him in respect of this security, but that the said C. D. has not so done. To the end therefore that the said A. B. may be let in to redeem the said mortgaged property (or property subject to the said lien), and that the same may be reconveyed (or delivered up) to him upon payment of the principal money and interest, and costs due and owing upon the said mortgage (or lien); and for that purpose that all proper directions may be given and accounts taken.

(And for further relief; pray subpœna.)

The above follows the English form No. 7.

Compared with English form.

These forms will all necessarily have to be varied according to circumstances, and such variance will be no violation of the above Order 2, which says that bills may be in such forms; and see *Hanson vs. Games*, 14 Jurist, 543. As an instance of the necessity for varying the form, may be named, the case of a bill to redeem where the mortgagee has been in possession, and has overpaid himself out of the rents and profits of the estate. In such a case it would be clearly wrong to use the above form 8, where it tenders costs. That part of it must be omitted, and an allegation inserted of the special circumstance, see *Toon vs. Cotterill*, 14 Jurist, 846. It will be seen by subsequent Orders that ample care is taken that the pleadings shall not be extended to an undue length. See the Orders as to costs. At the same time it is very evident, that, where the parties to a bill are numerous, and the circumstances complicated, it must be impossible to compress the pleading into anything like the short forms here given.

Necessity for sometimes varying the forms.

9.
Bill for an account of partnership dealings.

By a person entitled to an account of the dealings and transactions of a partnership dissolved or expired, seeking such account.

IN CHANCERY.

To the Honourable, &c.

Humbly complaining, &c., your orator, &c., that from the _____ day of _____, down to the _____ day of _____ he and C. D., the defendant hereinafter named, carried on the business of _____ in co-partnership, under certain articles of co-partnership, dated the _____ day of _____, and made between (parties), (or under a verbal agreement made between the said A. B. and C. D., or through their respective agents E. F. and G. H.), on the _____ day of _____; and he says that the said co-partnership was dissolved (or expired, as the case may be) on the _____ day of _____. To the end therefore that an account of the partnership dealings and transactions between the said A. B. and the said C. D. may be taken, and the affairs and business of the said partnership wound up and settled under the direction of this Court, and for that purpose that all proper directions may be given, and accounts taken.

(And for further relief; pray subpoena.)

The above follows the English form No. 9.

Similar to
English form.

10.
To compel a Trustee to allow the plaintiff to use his name in an action at law.

By a person entitled to an equitable estate or interest, and claiming to use the name of his trustee in prosecuting an action for his sole benefit.

IN CHANCERY.

To the Honourable, &c.

Humbly complaining, &c., your orator, &c., that under an indenture, dated the _____ day of _____, and made between (parties), he is entitled to an equitable estate or interest in certain property therein described or referred to; and that C. D., the defendant hereinafter named, is a trustee for him of such property; and that being desirous to prosecute an action at law against _____ in respect of such property, he has made, or caused to be made, an application to the said defendant to allow him to bring such action in his name, and has offered to indemnify him against the costs of such action, but that the said defendant has refused or neglected to allow his name to be used for that purpose. To the end therefore that the said A. B. may be allowed to prosecute the said action in the name of the said defendant, he hereby offering to indemnify him against the costs of such action.

(And for further relief; pray subpoena.)

Similar to
English form.

The above follows the English form No. 10.

By a person in a co-creation the point

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By a person entitled to have a new trustee appointed in a case where there is no power in the instrument creating the trust to appoint new trustees, or when the power cannot be exercised, and seeking to appoint a new trustee.

11.
Bill for appointment of a new Trustee.

IN CHANCERY.

To the Honourable, &c.

Humbly complaining, &c., your orator, &c., that under an indenture, dated the _____ day of _____, and made between (parties), (or will of _____, or other document, as the case may be), he, the said A. B., is interested in the certain trust property therein mentioned or referred to; and that C. D., the defendant hereinafter mentioned, is the present trustee of such property (or, is the real or personal representative of the last surviving trustee of such property, as the case may be); and that there is no power in the said indenture (or will, or other document) to appoint new trustees (or that the power in said indenture, or other document, to appoint new trustees cannot be exercised). To the end therefore that the said A. B. may have new trustees appointed of the said trust property, in the place of, &c. (or to act in conjunction with) the said C. D.

(And for further relief; pray subpena.)

The above follows the English form No. 11.

Similar to English form.

Under the English Order of April, 1850, there are two forms not here adopted as applicable under the 77th Order. One is a "claim" for specific performance. This is not adopted, because, as it will be seen by the Order 1, of January, 1851, specific performance cases are not brought under the operation of the 77th Order; while in England they do form a class of cases in which the proceedings may be by "claim." The Order in England is to the effect, that a claim may be filed, instead of a bill, "in any case where the plaintiff is or claims to be." [Then follow the cases enumerated in the above Order 1—except that the words referring to real assets of deceased parties are admitted, and there is no reference to judgment creditors, as in the 6th article—with the addition of the following clause (8). "A person entitled to the specific performance of an agreement for the sale or purchase of any property, seeking such performance."] Forms in English Orders, not adopted here.

Specific performance cases not within Order I. of January, 1851.

Within the operation of English claim orders.

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In specific performance cases, proved in the ordinary way. The proceeding in specific performance cases will here be, by going on to decree in the usual way. A form of a bill for the purpose is given in these Orders, under the latter clause of the above Order 2, which is italicised.

No form of claim to revive here required. The other form, given in the English Order, is of a claim in the nature of a bill of revivor. It is not here adopted because the old proceedings to revive suits are done away with, and amendments are substituted, by the Orders of May, 1850.

Case of judgment creditor. In the English Order there is no "claim" for the lien of a judgment creditor, and the article 6 of the above Order 1 differs from the English article of the same number, in containing a reference to that class of cases. This addition was for the purpose of providing for the cases arising under the Registration Act of this Province, which is in part set forth in the first chapter of this volume.

Files bill under Provincial statute. The form of bill in such case is given in Schedule A, under the first part of the above Order 2, and is as follows :

7.
Bill to establish lien of judgment creditor.

By a judgment creditor, who has registered his judgment, seeking a sale or otherwise to enforce his charge or lien.

IN CHANCERY.

To the Honourable, &c.

Humbly complaining, &c., your orator, &c., that in ——— term, in the year ——— (or *G. H. late of ———, deceased, of whom the said A. B. is the executor, or administrator, or assignee, under an assignment, dated, &c., and made, &c., or of whose executor or administrator, or administrator de bonis non, the said A. B. is the assignee under,* &c.*), recovered a judgment in the Court of ——— against C. D., the defendant hereinafter named, for the sum of £——, in an action theretofore brought by the said A. B. against the said C. D., which judgment was duly registered in the Registry of the county of ———, on the ——— day of ———, at which time the said C. D. had divers lands, tenements and hereditaments in the said county, and that the said C. D. is now the owner of the same lands, tenements and hereditaments, subject to the said judgments; to the end, therefore, that the said A. B. may be paid the amount of the said judgment, together with interest thereon, and his costs of this suit, or in de-

* The character of the plaintiff must be described, without detailing the transactions whereby he acquired such character.

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fault thereof that the said lands, tenements and hereditaments, or a competent part thereof, may be sold for the satisfaction thereof, and the proceeds of such sale applied accordingly; and for that purpose that all proper directions be given and accounts taken.

(And for further relief; pray subpœna)

We now come to the forms in Schedule B, under the last clause of the above Order 2. In the numerous cases not provided for by these forms, the pleadings should be drawn on the same principles, and any such departure from them as would lead to unnecessary prolixity may subject a party to the extra costs, occasioned thereby. If a "more detailed statement" is "necessary to the due development of the case," it should still be set forth according to the rules here observed, the leading principle of which appears to be, to reduce the pleading as nearly as possible to the concise form of a declaration at law.

Forms of bills
in cases not
provided for by
Order I. of
January, 1851.

By a person entitled to the specific performance of an agreement for the sale or purchase of any property, seeking such specific performance.

IN CHANCERY.

To the Honourable, &c.

Humbly complaining, &c., your orator, &c., that by an agreement, dated the — day of —, and signed by C. D., the defendant hereinafter named, the said C. D. contracted to buy of the said A. B. (or to sell him) certain freehold property (or leasehold, or other property, as the case may be) therein described or referred to, for the sum of £—; and that he has made or caused to be made to the said C. D. an application specifically to perform the said agreement on his part, but that he has not done so; to the end therefore, that the said agreement may be specifically performed, and for that purpose that all proper directions may be given, he, the said A. B., hereby offering to perform the said agreement specifically on his part.

1.
Bill for specific
performance.

(And for further relief; pray subpœna.)

The above is taken from the form already referred to, under the English Claim Order.

2.
Similar to
English Order.

The following forms are not after any English Order.

For the specific performance of a parol agreement partly performed.

IN CHANCERY.

To the Honourable, &c.

Humbly complaining, &c., your orator, &c., that on

Specific performance of
parol agree-
ment.

the ——— day of ——— your orator being seised in fee simple in possession (or C. D., the defendant hereinafter mentioned, being or pretending to be seised in fee simple in possession, or in fee tail, or for years, or in remainder expectant upon the determination of a certain estate for the life, &c., as the case may be)* of lot number ——— your orator and the said C. D. entered into a verbal agreement for the sale and purchase of the said premises at or for the price or sum of £—— payable by equal annual instalments with interest, upon the payment whereof a proper conveyance was to be executed of the said premises, free from incumbrances : (here state acts of part performance, as) that your orator, or the said C. D., was accordingly admitted and entered into possession of the said lot, and has continued in possession thereof ever since, and is still in possession thereof, and has made divers and considerable improvements thereon, and has paid the sum of £—— part of the said purchase ; and your orator submits that under the circumstances aforesaid the said agreement has been partly performed, so as to entitle your orator to a specific execution thereof ; for which purpose your orator has made frequent applications to the said C. D. but without effect ; to the end therefore that the said contract may be specifically performed by the said C. D., your orator being ready and willing and hereby offering to perform the same in all respects on his part, and that your orator may have such further and other relief.

(Pray subpoena).

For dissolution of a co-partnership.

IN CHANCERY.

To the Honourable, &c.

3
Bill to dissolve
a partnership.

Humbly complaining, &c., your orator &c., that your orator and C. D., the defendant hereinafter named, are and have been, since the ——— day of ———, co-partners in the trade or business of ——— under certain articles of co-partnership, dated, &c. (or under a verbal agreement made between them, on the ——— day of ———), which partnership was to continue for ——— years, (or for an indefinite time) ; that the said business was carried on under the said agreement until ——— without any difficulty (here state the facts relied on as warranting dissolution,* as) ; that from the

* If either party fills a representative character, say that the said ——— died on the ——— day of ———, and the said ——— is his executor, or administrator, or heir-at-law.

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last mentioned day until the present time the said C. D. has greatly misconducted himself in the said business by removing the books of the co-partnership from the shop or counting-house of the said firm, and denying your orator or debarring him from access thereto; by discharging the clerks and servants of the said firm, and engaging others in his own interest in their room; by making false entries in the said books, or improperly keeping the same; all which was done with the view and has had the effect of excluding your orator from his due share in the management of the said business; by using the name of the firm for his own private purposes, and applying the moneys of the partnership to his own individual use: that there is nothing in the said articles, or in the said agreement, to justify such conduct; and your orator has made frequent applications to the said C. D. to desist therefrom, and to act in accordance with the said agreement and with his duty as a partner, but without effect; on which account your orator on the _____ day of _____ gave notice to the said defendant that the said partnership should be dissolved from the _____ day of _____. To the end therefore that the said partnership may be dissolved, and that the accounts of the said business may be taken from the commencement thereof, and the affairs thereof wound up and adjusted, and that your orator may have (such further relief, &c.), may it please, &c.

(Pray subpoena.)

Bill to stay waste.

IN CHANCERY.

To the Honourable, &c.

Humbly complaining, &c., your orator, &c., that your ⁴ To stay waste.
orator is and has been, from before the acts hereinafter complained of until the present time, seised in fee simple (or in tail, or for life in possession, or remainder expectant upon the determination of an estate for the life of, &c., under and by virtue of an indenture of settlement dated, &c., or possessed for the remainder of a term of _____ years, under and by virtue of an indenture of demise, dated, &c., and made, &c.) of lot number _____; and C. D., the defendant hereinafter named, is in possession of the said lot, as tenant, for a term of _____ years (or from year to year, or at will) of your orator, under and by virtue of an indenture of demise (or an agreement, dated, &c., and made, &c.) between your orator, (or E. F. deceased, whose estate has come to your orator by descent, or devise, or purchase, or under and by virtue of his last will, dated, &c.) and the said

C. D. (or G. H. whose estate has come to the said C. D. by operation of law, as executor, or administrator, or assignee in bankruptcy of insolvency of the said G. H., or by devise or purchase under and by virtue of the will of the said G. H., or an indenture of assignment, dated, &c., or as tenant for life, impeachable for waste, under and by virtue of the aforesaid indenture of settlement) has since the _____ day of _____ committed waste on the said lot by cutting down and removing from the said lot, and applying to his own use, a large number of the timber and other trees standing, growing and being thereon, and quarrying a large quantity of stone, being on and part of the said lot, and by pulling down, &c., houses, &c., and he continues and threatens and intends to continue to commit such waste as aforesaid, and other waste and destruction on the said lot, although frequently requested by your orator to desist therefrom. To the end therefore that the said C. D. may be restrained by the order and injunction of this honourable Court from committing such waste as aforesaid, or any other waste, spoil, or destruction on the said premises, and may account, &c., and that your orator may have such further and other relief in the premises.

(Pray subpoena.)

Bill to stay trespass in the nature of waste.

IN CHANCERY.

To the Honourable, &c.

5.
To stay trespass.

Humbly complaining, &c., your orator, &c., that your orator was at the time of acts hereinafter complained of, and has been since up to the present time, the owner in fee simple (or seised in tail, or for life, or possessed for the remainder of a term of years under and by virtue of an indenture, dated, &c., and made, &c., as the case may be), and in possession of lot number _____ and that A. B., the defendant hereinafter named, has, from the _____ day of _____ until the present time continually trespassed on the said lot by cutting down and removing from the said lot, and applying to his own use, divers valuable timber and other trees which were growing, standing and being on the said lot (by quarrying and removing from the said lot and applying to his own use large quantities of stone which were on and part of the said lot), and he continues and threatens and intends to continue to trespass on the said lot, in like manner, although frequently requested by your orator to desist therefrom. To the end therefore that the said defendant may be restrained by the order and injunction of this honourable Court from committing the acts aforesaid, and

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Bill to re-

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other acts of a like nature, and may account for the value of the timber and other trees cut down (*or stone quarried*), removed and applied to his own use aforesaid, and that your orator may have such further and other relief as may seem meet.

(*Pray subpoena.*)

Bill to rescind contract.

IN CHANCERY.

To the Honourable, &c.

Humbly complaining, &c., your orator, &c., that on the _____ day of _____ your orator entered into an agreement with C. D., the defendant hereinafter named, for the sale to him of lot number _____ in the _____ concession of the township of _____ in the county of _____ at or for the price or sum of £ _____ payable by _____ equal annual instalments with interest, upon payment whereof a proper conveyance was to be executed of the said premises, by your orator, to the said defendant, and he was in the mean time to be let into possession thereof; which agreement was reduced into writing (*in the form of a bond*) and signed by the said defendant (*or was verbal, and made between the said parties on the day and year aforesaid*), and that the said C. D. accordingly was admitted by your orator, and entered into possession of the said premises, and he has been in possession of the said premises ever since (*or, and remained in possession thereof until _____ when he abandoned the same and departed this Province, and has remained out of the same ever since*) and he has never paid any part of the said purchase money, except the sum of £ _____ which he paid on the _____ day of _____ and has wholly neglected and refused to perform the said agreement, except as aforesaid, although frequently requested thereunto by your orator, who has been always ready and willing, and frequently offered to the said defendant, while he could communicate with him, to perform the same on his part. To the end therefore that the said agreement may be specifically performed within a reasonable time, to be fixed by this honourable Court for that purpose, or in default thereof that the same may be declared to be rescinded and to be at an end, and that the said agreement may be delivered to be cancelled.

(*And for further relief; pray subpoena.*)

By a vendee to rescind contract.

IN CHANCERY.

To the Honourable, &c.

Humbly complaining, &c., your orator, &c., that on the _____ day of _____ your orator entered into

6.
To rescind a contract, by the venditor.

7.
Same by the vendee.

a contract with C. D., the defendant hereinafter named, for the purchase of lot number _____, in the _____ concession of the township of _____, in the county of _____, at or for the price or sum, &c., (as in the last preceding form, according to the facts), which contract was reduced into writing and signed by your orator, (or by your orator and the said C. D.), and dated the day and year aforesaid, (or is as reduced into writing in the form of a bond, or of two bonds, with conditions thereunder written for the conveyance of the purchase, and the payment of the purchase money, upon the terms, at the times, and in manner aforesaid, respectively, signed and sealed by your orator and the said defendants and dated the day and year aforesaid, and delivered by your orator and the said defendant, each to the other respectively); that a duplicate or counterpart of the said agreement (or the said bond for the payment of the said purchase money and interest), remains still in the possession of the said defendant, and the said agreement (or bond, or bond for the conveyance of the said premises) remains in the possession of your orator, that (here state the reason why it is desired to rescind the contract, as) your orator thereupon caused the necessary steps to be taken for the investigation of the title of the said defendant to the said premises, and had the same duly investigated; whereby it appeared, as the fact is, that the said defendant cannot make a good title to the said premises by reason (here state the defect of the title,) on which account your orator applied to the said defendant to deliver up the said duplicate or counterpart of the said agreement (or the said bond,) to be cancelled, offering at the same time to deliver up the said agreement (or bond, or bond for the conveyance of the said premises,) for the same purpose; but that the said defendant refused, and still refuses to comply with such application, and has lately brought an action against your orator upon the said agreement, (or bond, or bond for the payment of the said purchase money and interest). To the end therefore that the said contract may be specifically performed if the said defendant can make a good title to the said premises, or in default thereof, that the said agreement (or bond, or bonds,) may be delivered up to be cancelled, your orator being ready and willing, and hereby offering to do all necessary acts for that purpose; and that the said action, or any other action in respect of the matters aforesaid, may be restricted by the order and injunction of this honourable Court.

(And for further relief; pray subpena.)

NOTE.—Let the form be varied according to circumstances.

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If upon
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On moving the reference, under the 77th Order, it will be recollected, the plaintiff was to support his motion by an affidavit in proof of the bill. This affidavit may now be in the short form prescribed by the following Order :

This affidavit of verification upon motions for a summary reference in the cases enumerated in Order I. may be in the form set forth in Schedule C, hereunder written.

III.

IN CHANCERY.

Between A. B. plaintiff,
and

C. D. defendant.

A. B. of, &c., the above-named plaintiff, maketh oath and saith, that the allegations contained in the bill of complaint of this deponent hereto annexed, are, and that each of them is true in substance and in fact, to the best of this deponent's knowledge, sworn, &c., and belief.

The power of the Court, to make such Order as may be right under all the circumstances, is placed on the same footing as in England under the "Claim" Orders, by the following :—

Upon the hearing of any motion for a decree, under the provisions of the 77th of the Orders of the 7th of May, 1850, the Court may, if it shall think fit, make an Order granting or refusing the relief prayed, or may direct the examination of either parties or witnesses, or further inquiries, or other proceedings, to be had for the purpose of ascertaining the plaintiff's title to the relief claimed : and further, the Court may direct such (if any) persons, or classes of persons as it shall think necessary or fit, to be made parties to the suit, or to be summoned to attend any proceedings before the Master with reference to any accounts or inquiries directed to be taken or made, or otherwise.

IV.

Order that may
be made on
motion for
reference.

This is copied, *mutatis mutandis*, from the English Order 13, of April, 1850.

Compared with
English Order.

The frequent delays which occurred in consequence of all parties interested in the subject matter of a suit, not being before the Court, rendered necessary such Orders as the following, to obviate in some degree, the difficulty.

Parties.

If upon the proceedings before the Master under any decree made under the provisions of the 77th Order of the 7th of May, 1850, or of Order I. comprised in these

V.

Parties may be
subpoenaed

when the case
is in the
Master's office.

VI.
Form of pro-
cess.

Orders, it shall appear to the Master that some persons not already parties ought to attend, or to be enabled to attend the proceedings before him, he is to be at liberty to order the same; and thereupon the plaintiff may sue out a writ of subpoena, requiring the persons named to appear to the writ, and such persons are thereupon to be named and treated as defendants to the suit, and bound thereby as other parties.

Such last mentioned writ of subpoena is to be in the form and to the effect in that behalf set forth in Schedule D, hereunder written, with such variations as circumstances may require.

The following is the form :—

IN CHANCERY.

CANADA.

Victoria, &c.

[*L.S.*] To _____ Greeting,

Whereas A. B. hath caused to be filed a bill against C. D., praying (*set forth the prayer of the bill*); and whereas by an Order made in the said cause, dated the _____ day of _____, it was ordered (*set out the ordering part of the Order*); and whereas Mr. _____, the Master to whom the said Order stands referred, hath by Order, dated the _____ day of _____, directed that you should be a party to the said cause, and to be served with a writ of subpoena therein; therefore we command you that within _____ days after service of this writ upon you, exclusive of the day of such service, you do cause an appearance to be entered for you in our Court of Chancery of Upper Canada, and that you do attend the proceedings in the said cause as a party defendant thereto, and do and observe such things as are by our said Court ordered and directed in the said cause; and herein fail not.

Witness, &c.

The following memorandum to be placed at foot :—
Appearance to be entered at the Registrar's office, at Osgoode Hall in the City of Toronto (or at the office of Deputy Registrar [the name of the Deputy Registrar resident in the same county, with the Deputy Master to whom the cause stands referred] in the City of _____, in the County of _____); and, if you neglect to appear, the proceedings will be carried on without further notice to you.

VII.
Parties served,
may attend in
Master's office.

The persons served with such last mentioned subpoena having appeared are to be at liberty to attend, and to be

entitled to be
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entitled to notice of the proceedings before the Master, subject to such directions as the Master may make in respect thereof.

The above Orders 5, 6, and 7, are after the English Orders 18, 19, and 20, of April, 1850.

English
Orders.

It may often appear, that the Order for a summary reference to the Master may on the coming in of the answer, or upon view of other circumstances, appear to be erroneous. It may happen that evidence is necessary to be taken before the hearing, in furtherance of justice. In such cases, and others, it would be injurious to hold the Order made, as final. The following Order then provides for relief, under such circumstances, by another motion :—

Relief against
proceedings
under these
Orders.

Any Order or proceeding made, or purporting to be made in pursuance of these Orders, may be discharged, varied or set aside, on motion ; and any Order for accelerating proceedings may be made by consent.

VIII.
Motion to set
aside or
vary Order.

This is after the English Order 29 of April, 1850.

English Order.

If, at any time after these Orders come into operation, any suit for any of the purposes to which the forms set forth in the Schedule A are applicable shall be prosecuted to a hearing in the usual course, and upon the hearing it shall appear to the Court that a decree to the effect of the decree then made, or a decree equally beneficial to the plaintiff, might have been obtained in the manner authorised by the 77th of the Orders of the 7th May, 1850, the Court may order that the increased costs which have been occasioned by the proceedings adopted, beyond the amount of costs which would have been sustained in the proceedings under the said Order, shall be borne and paid by the plaintiff.

IX.
Parties ne-
glecting to pro-
ceed under
these Orders,
when practica-
ble, subject to
costs.

The following Order, regulating the proceedings before the Master, taken from the 17th English Order, is little more than a confirmation of the powers which that officer already possessed, but may be taken as explanatory of the other Orders governing the Master's practice, which are given in a former chapter, and which are still in force except where they are at variance with the following. One effect however of this Order, will be to shorten the forms

Master's
Office.

of decrees, and decretal Orders, for under this the Master has power to take proceedings, which it was formerly customary to direct him specially to take, in the Decree or Order.

X.

Master may compel production of books, &c., and order advertisements, and proceed as under the "usual directions" in a decree.

Under every Order of reference to the Master, the Master is, unless the Court otherwise orders, to be at liberty to cause the parties to be examined, and to produce deeds, books, papers and writings, as he shall think fit, and to cause advertisements for creditors; and if he shall think it necessary, but not otherwise, for heirs or next of kin, or other unascertained persons, and the representatives of such as may be dead, to be published in the usual forms, or otherwise, as the circumstances of the case may require; and in such advertisements 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, they are to be excluded the benefit of the decree: and in taking any account of a deceased's personal estate under any Order of reference, the Master is to inquire and state to the Court what part, 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 to compute interest on legacies from the end of one year after the deceased's death, unless any other time of payment is directed by the will, but in that case according to the will: and under every Order whereby any property is ordered to be sold with the approbation of the Master, the same is to be sold to the best purchaser that can be got for the same, to be allowed by the Master, wherein all proper parties are to join as the Master shall direct.

Practice compared with that of England.

The above constitute all the Orders in which the principle of Lord Cottenham's Orders of April, 1850, is adopted. Those Orders, with the forms above referred to, are to be found in the *London Jurist* of 27th April, 1850, pages 143 to 151.

The practice here established however differs in some leading features from that of England.

Difference, between the "bill" and "claim" not material.

The difference in form between the "Bill" here, and the "Claim" in England, is merely in a few words, and is of no importance. And the practice on the coming on of the motion here, is very similar to the English practice, when the defendant shows cause to the summons which

has been given.
Order, which

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has been granted on filing the claim. See the above 4th Order, which is copied from the English 13th Order.

One particular in which the practice will be found to vary, is this. Here the original plaintiff is still a bill, and may be answered; and it remains to be seen how far an answer filed will operate as an objection to the motion, or whether the Court will look into it, and consider whether under the facts disclosed the cause ought to be brought to a hearing on evidence, instead of a summary reference being made. It is apprehended, that the Court must discharge the motion, if the answer sets up a substantial defence to the relief sought, and that in short the answer will be treated as an affidavit made to oppose the motion. The Court has intimated that the answer will be looked upon as an affidavit; and therefore, it is supposed, it may be rebutted by affidavits of the plaintiff. In England, it seems, there can be no *answers* properly so called, but, under Order XV. of April, 1850, the Court, if the case seems one which should be proceeded with by bill and answer, and evidence, in the old way, directs a bill to be filed. The practice here, giving, as it does, a large discretion to the Bench in dealing with each case, will probably be found more speedy than the other. But here, if on the answer, or defendant's affidavit, it seems doubtful whether the case requires evidence, the Order for the summary reference will not, it seems, be made. The disposition of the Court appears to be, to confine these references, to cases which are in the main points undisputed.

Effect of
answer filed
before motion.

Practice in
England when
bill considered
requisite.

Another leading distinction is, that in England the proceeding is still by bill with interrogatories, and answer, except in cases coming under the provisions of Order 1, or where the Court gives leave to file a claim. This leave is asked for by an application of the plaintiff *ex parte*, and the Court gives the permission or refuses it, on reading the proposed claim, (English Order 6.) Here, on the contrary, the old form of bill and answer is completely abolished; and the practice by summary reference is confined to the cases coming within Order 1. It

Leave to file
claims in
England.

Bills and answers likely to be still further abolished in England.

is believed that the practice in England, by bill and answer in the old form, will be done away with to a greater extent than is yet effected. Upon the whole, it would appear, that the reform here has been carried further than in England, but not further than will there be attempted, and most probably effected. On this subject the reader is referred to an article in the *London Jurist* of the 14th September, 1850. In both countries, however, the change is much in the nature of an experiment, and requires to be worked under for some time, before a clear opinion can be formed as to its efficiency.

Again ; in England, there is an Order (31) in the following terms :

Exception in the English practice.

“ If any of the cases enumerated in Order 1 involve or are attended by such special circumstances affecting either the estate or the personal conduct of the defendant, as to require special relief, the plaintiff is at liberty to seek his relief by bill, as if these Orders had not been made.”

No such exception here.

There is no analogous Order here, and therefore, in every case coming under Order 1, the plaintiff must, on peril of being subject to costs, attempt his motion for a reference.

Points on which doubts have arisen in England.

The doubts which have arisen in practice in England have been chiefly of these classes. First ; what evidence is required on each side, on the coming of the first motion—that is, how far may the case be resisted by affidavits, and to what extent must, or may, the plaintiff rebut the affidavit of the defendant ? Secondly ; how far can the Court go in deciding the cause, under the 13th English Order, (copied in the above Order 4,) which has been spoken of as being “ so wide in its language that it in effect amounts to saying, that the Court may at the hearing *do anything*,” (see *Jurist*, November 23rd, 1850, page 451) ? And thirdly ; what cases are proper for the Court to grant leave to file a claim ? The two first mentioned questions will arise here, and require some decisions to set them at rest. As to the affidavit in answer, see

Hubbard vs. not, of course only—namely a claim,—the Orders have them. Some useful. At the instance, the court vs. *Davies*, reference, it is only the affidavit made for the a claim, although *Bickford* vs. specially for : Beaven, 329. accounts was *Woodman* vs. important in the English 13th that, when the produce an affidavit similar to that vit above given 845. An Injunction to a hearing being applicable *craft*, 14 Jurist. A case in June, 1850, is a mode of stating the performance. But the better here as closely. Where there for life, and the claim, the case (see Sec. 2 of

Hubbard vs. Child, 14 Jurist, 544. The third class cannot, of course, arise here; and as it is on this question only—namely in what cases leave can be obtained to file a claim,—that nearly all the English decisions since the Orders have turned, it cannot be of any service to cite them. Some decisions, partly on other points, may be useful. At the hearing of a claim for specific performance, the contract must be produced and proved, *Marshall vs. Davies*, 14 Jurist, 997. Here on the motion for a reference, it is not necessary to produce the exhibit but only the affidavit in the form above given. An Order was made for the appointment of a Receiver, at the hearing of a claim, although not asked for, as it seems, in the claim, *Bickford vs. Chalker*, same page. See as to asking specially for a Receiver, in a bill, *Barlow vs. Gains*, 8 Beaven, 329. A special direction not to disturb settled accounts was refused, when not asked for by the claim, *Woodman vs. Farley*, 14 Jurist, 898. This decision is important in reference to the 4th Order, (answering to the English 13th Order). It has been decided in England, that, when the claim is unopposed, the plaintiff must still produce an affidavit. This renders the practice so far similar to that which obtains here, (see the form of affidavit above given.) *Hutchinson vs. Taylor*, 14 Jurist, 845. An Injunction case, under either practice, must go to a hearing on evidence, the summary proceeding not being applicable. The English case is *Hölden vs. Chalcraft*, 14 Jurist, 846.

A case in England, *Davies vs. Marshall*, decided in June, 1850, is said to have given rise to a doubt as to the mode of stating documents in the claim (or bill) for specific performance, (see *Jurist*, June 22nd, 1850, page 222). But the better practice, it is apprehended, will be to adhere as closely as possible to the direction of the form.

Where there was a devise to executors in trust for one for life, and then for her children, the children filing a claim, the case was decided to be within the Order 1, (see Sec. 2 of that Order). It was said that the Orders

Which of these doubts may arise here.

English authorities.

Proof of contract.

Receiver.

Special direction.

Unopposed claim.

Injunction.

Stating documents under new forms.

Construction of Section 2, of Order 1.

"must be liberally interpreted." *Smith vs. Smith*, 14 Jurist, 518.

As to service a-
broad of notice
of motion ;

The 22nd Order of May, 1850, giving the Court power to order the service of the subpoena out of the jurisdiction, says nothing of the notice of motion for a reference in cases under the 77th Order. The Court would probably, however, permit such service on such a case being made out as to authorise the service of a subpoena abroad, in accordance with *M Coy v. Cross*, 14 Jurist, 613, where the summons issued on a claim was ordered to be so served, though not strictly within the Orders as to absent defendants. The subpoena under the above Orders 5 and 6 of 1851, might, with still more reason, be ordered to be served according to the 22nd Order of 1850, for it is to all intents and purposes a writ of similar effect to the subpoena obtained on filing a bill.

and subpoena
issued under
Master's Order
for new parties.

Case as to affi-
davit in
answer.

In one case, it is said, that the affidavit in answer to the application for a reference "must clearly be entered as an answer or as evidence, or in a manner analogous to both." *Hubbard v. Child*, 14 Jurist, 545. It is here taken as an affidavit, see *Ante*. In *Hubbard v. Child*, the defendant, an Executor, made an affidavit on the subject of the account. The account was ordered, but costs reserved. The inference is, on this latter point, that it would be clearly regular for the Court here to reserve costs, in making an Order for a reference. And so it seemed to be conceded, provided a proper case was made on the affidavits for reserving costs. *Gooderham v. De Grassi*, not yet reported, where the costs were reserved, the defendant, a mortgagor, swearing that the assignee of the mortgagee had received rents and profits, sufficient to have paid off the mortgage.

Reserving
costs ;

Regular, under
77th Order.

These appear to be all the cases as yet decided, which can be of any service in throwing light upon the construction to be given to the New Orders here.

Country prac-
tice.

We now proceed to the Orders under which the business of the Registrar's and Master's Offices is to be done, to a great extent, by Deputies in the country. This is

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considered a very satisfactory change. The Orders are not, so far as they relate to Deputy Officers, after any English practice, and are as follow :—

Deputy Masters and Deputy Registrars respectively shall 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 Registrar respectively; and all orders, rules and regulations in force respecting the Master and Registrar respectively, and respecting the regulation of their respective offices, shall be in force and applicable to the Deputy 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 Registrar respectively shall, in relation to similar matters, be payable to the Deputy Masters and Deputy Registrars respectively.

XI.

Duties of Deputy Masters and Registrars.

Bills may be filed either with the Registrar or with a Deputy Registrar, at the option of the plaintiff, unless the Court shall think fit to order otherwise. All the pleadings in each cause must be filed at the same office. Subpœnas to appear and answer, or to appear, as also subpœnas authorised by Order V., shall be issued by the Registrar in whose office the bill may have been filed, or in whose county the reference is being conducted. Appearances are to be entered at the office of the Registrar by whom the subpœnas may have been issued, unless otherwise directed; and the memorandum at the foot of every subpœna that may have been issued by any Deputy Registrar shall be varied accordingly. All Orders of course in the progress of a cause, which under the practice heretofore existing might have been drawn up by the Registrar without the special direction of the Court, may henceforward be drawn up by any Deputy Registrar with whom the pleadings in such cause may have been filed.

XII.

Pleadings may be filed with Deputy Registrars, and Subpœnas issued.

In future, references may be either to the Master in Ordinary of this Court, or to one of the Deputy Masters, as the Court shall direct; and all applications in the course of a cause, which, under the practice heretofore existing, would have been made to the Master in Ordinary, shall henceforward be made to the Deputy Master in the county where the pleadings in such cause may have been filed.

XIV.

Causes may be referred to any of the Masters.

All documents, of whatever nature, required to be transmitted to this Court by any Deputy Master or Deputy Registrar, may be so transmitted either through the Post-office, under cover, directed to the Registrar, and sealed with the seal of the party required to transmit the

XV.

Transmission of documents.

same, or they may be forwarded by special messenger, in like manner as answers and depositions are now forwarded.

XVI.
Books to be
kept by Deputy
Registrars.

Each Deputy Registrar shall keep in his office a book, to be called "The Solicitor's and Agent's book," in which solicitors residing elsewhere than in the county in which such Deputy Registrar's office may be, and being solicitors in any proceeding in this Court conducted in such county, shall respectively 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, notices, orders, pleadings, warrants, rules, and other documents and written communications in relation to proceedings conducted in the office of the Deputy Master or Deputy Registrar of such county, may be served.

XVII.
Practice in the
Office of Deputy
Registrars.

All writs, notices, orders, pleadings, warrants, rules, and other documents and written communications in the next preceding order specified, 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 upon the agent of such solicitor, named in "The Solicitor's and Agent's book," as hereinbefore provided, where such solicitor does not reside in the county where such proceedings are conducted. And, if any such solicitor shall neglect to cause such entry to be made in "The Solicitor's and Agent's book," then leaving a copy of any such writ, notice, order, pleading, warrant, rule, or other document or written communication for the solicitor so neglecting as aforesaid in the office of such Deputy Registrar, shall be deemed sufficient service, unless the Court, or, in the case of a Deputy Master's warrant, the Deputy Master shall think fit to direct otherwise.

It will be seen, that these Orders render the offices of the Registrars and Masters in the country open for nearly all the proceedings that can become necessary in the conduct of a cause. A Decree, or Decretal Order, may be made at Toronto, directing accounts to be taken and enquiries made before any Deputy Master, in the same manner as a reference may be made to the Master in Ordinary. In the same manner pleadings may be filed with the Deputy Registrars, as with the Registrar in Toronto. For the practice before these Deputy Officers

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then, the reader is referred to the foregoing chapters, and especially to that on the subject of the "Master's Office."

The following Orders are on the subject of Costs.

The sum of twenty shillings shall be allowed for drawing every bill, but no greater sum than thirty shillings shall be taxed by the Master for drawing any bill, without the special direction of one of the Judges of the Court upon the application of the solicitor requiring the same, for which application no charge is to be made. No greater sum than thirty shillings is to be taxed for drawing any answer, petition, or affidavit without the special direction of a Judge of the Court in manner aforesaid; and no greater sum is to be allowed for drawing any answer, petition or affidavit, than would have been taxed irrespective of this order.

Costs.
XVIII.
20s. or 30s.
Costs of Bill,

or Answer.

The sum allowed for copying and briefing shall be sixpence per folio, provided that the same shall not in any case exceed one-half of the amount which shall be allowed for drawing what shall be so copied or briefed.

XIX.
Briefing.

No copies of pleadings (except briefs) shall in future be allowed in taxation other than the copy to file and the office copy. No copies or briefs of affidavits upon the hearing of any motion or petition, and no copies or briefs of depositions, shall be allowed in taxation without the special direction of one of the Judges of the Court, upon the application of the solicitor demanding the same, for which application no charge is to be made.

XX.
No copies of
pleadings.

The copy of the prayer of the bill and title of the cause hitherto furnished for the use of the Court upon the hearing, and all other copies of pleadings or other documents for the use of the Court, shall henceforward be dispensed with, unless specially required, and the Master shall on taxation disallow any charge for the same.

XXI.
Papers for
Court dispensed
with.

It needs hardly be said that the above significant Orders have given rise to some discussion in the profession. The difference between their effect, and that of the Tariff appended to Lord Cottenham's Orders, is, that these Orders apply to all cases, however special and complicated, whereas the English Tariff, which, it may be observed, is not nearly as low as the above, applies only to the limited number of cases coming under the Claim Orders. In England also there is an Order (10, of June, 1850), under which a Master may allow Counsel fees in his discre-

Remarks on
the New Orders
as to costs.

tion on arguments before him. There is no such protection here. It must be conceded on all sides, that a right object to be kept in view in every step taken towards the reform of our system of jurisprudence, is the rendering the proceedings as inexpensive as is consistent with a proper and not exorbitant remuneration to the profession. But there is some reason to fear, that under the above Orders the result will be, that large Counsel fees will be taken in order to make up for the small amount of taxable costs, and these Counsel fees cannot be recovered by the successful from the defeated party. It can hardly be expected by the Court, that a cause can be conducted throughout for some four or five pounds, which would be the effect of a strict compliance with these Orders; and especially when the disbursements in the course of the cause, for Examiner's and other fees, may often amount to £20 or £30. As regards Counsel fees, it will be seen by the tariff, that the largest amount taxable on an argument is £2 2s. On the motions for references under the New Orders, the Master has taxed 10s. as a Counsel fee. A revision of the Tariff is spoken of; but it is submitted, that such a modification of it as would reduce the disbursements to, say, one-third or one-half of their present amount, even at the expense of the "Fee Fund," would be, to the public as well as the profession, the most acceptable revision which could be effected. It would, however be out of place to pursue the subject further here.

Tariff.

Part of the duty of the Masters in the country will be, to tax costs; and they are referred for their guidance to the above Orders, and to the following schedule which, except as modified by the Orders, is still in force.



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SCHEDULE OF FEES.

151

SOLICITOR.

	s.	d.	
Instructions for Bill or Answer,	7	6	Costs to be taken by Solicitor.
Letter of Notice before filing Bill,	2	6	
Instructions for Petition when no Bill is filed, .	5	0	
Drafting Bills, Answers or other Pleadings, Petitions, Special Affidavits and Interrogatories, including Copy to Keep, per folio,	1	0	
<i>Note.</i> —This charge is subject to the restrictions of Order 18 of January, 1851, as to the Bills and Answers; and to the Orders of 1850 abolishing interrogatories.			
Engrossing same, and making other copies when necessary (other than Office copies to be authenticated by the Registrar) per folio,	0	6	
<i>Note.</i> —See as to this charge Order 20 of January, 1851, Office copies to be authenticated by Registrar, per folio,			
Præcipe for Subpœna or other process, entering Appearance, including attendance,	1	3	
<i>Note.</i> —One Subpœna only allowed to each County, which shall include the names of all the defendants in such District.			
Every necessary attendance to serve Process or for other purposes,	1	3	
Special attendance on the Master's Warrant, or on Examination of Witnesses, or on Hearing of Cause, or Demurrer, or Special Motion,	5	0	
Attendance on Warrant before Master, or on Examination of Witnesses, every extra hour,	5	0	
Instructions for Brief, and for Interrogatories,	5	0	
<i>Note.</i> —See Orders of 1850 as to Interrogatories.			
Brief, per folio, including fair copy, subject to be reduced by the Master, if the same contains superfluous matter or is of unnecessary length,	0	6	
Copy of Brief for second Counsel when required, per folio,	0	6	
Copy of Orders, Petitions, or other papers or documents (not Office copies), required to be served, per folio,	0	6	

	s.	d.
Fee on settling Minutes of Decree or Special Order, and attending the Registrar; and fee on passing same,	5	0
Drawing Bill of costs and attending taxation,	5	0
Postages actually paid,	0	0

Note.—The folio consists of 100 words.

COUNSEL.

Counsel fees.	Fee to Counsel for settling and signing Pleadings, Petitions or Interrogatories,	10	0
	<i>Note.</i> —See Orders of 1850, under which pleadings need not be signed by Counsel.		
	Fee on Common Motions and Motions of Course,	10	0
	Special Applications, Arguments, Hearing,	25	0
	To be increased at the discretion of the Master to (being the highest fee allowed by the Statute)	42	0
	<i>Note.</i> —It is submitted that, although it has not been done as yet, the Masters have it in their discretion to apply the two last charges to the motions, which are undoubtedly "special applications" for summary reference, under the 77th new Order.		

MASTERS AND DEPUTY MASTERS.

Master's fees.	Every Summons or Warrant,	1	3
	Administering Oath, or taking Affirmation,	1	0
	Marking every Exhibit,	1	0
	Drawing Depositions, Reports, or Deeds, per folio,	0	6
	Every attendance upon a reference,	5	0
	For each additional hour,	5	0
	Preparing, Engrossing and Signing each Advertisement,	5	0
	Every Certificate,	2	6
	Filing each Paper,	0	4
	Taxing Costs, including Attendance,	5	0
	Making up and forwarding Answers and Depositions,	1	3

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	Every necessary special attendance out of Office
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	Every additional mile above two, 1 0

REGISTRAR AND DEPUTY REGISTRARS.

		Registrar's fees.
Entering parties' names and filing Bill, Answer or Demurrer,	2 6	
Entering and filing all other Pleadings, Interroga- tories, Depositions or other Evidence,	1 0	
Filing and Registering Affidavits, Exhibits, or other Papers,	0 4	
Entering Appearance,	2 6	
Every Subpœna,	3 0	
Special Writ, Writ of Execution or Commission, Office Copy of Papers required to be given out, per folio,	5 0 0 6	
Examining and authenticating same, when Office copy prepared by Solicitor, per folio,	1 0	
Attendance on appointment of Guardian,	2 6	
Amendment of Record when re-engrossment not necessary, per folio,	1 0	
Drawing fiat to Petition,	1 0	
Attending the Chancellor for his signature to any document or paper, or on leaving abstract of proceedings,	1 3	
Making up and forwarding Interrogatories,	1 3	
Setting down cause,	2 6	
Certificate of pleadings being filed,	2 0	
Certificate of state of cause,	2 6	
Drawing Minutes of Decree or special Order, per folio,	1 0	
Drawing Decree or Order, per folio,	1 0	
Entering same, per folio,	0 6	
Receiving and paying out deposit,	5 0	

In cases when the examination of witnesses is before the Court, the fees of 1s. per folio for taking down the depositions are saved ; but there still remains the 6d. per folio to the Registrar for the Office copy given out to the Solicitor. And, when the examination is before a Deputy Master, the disbursements remain as before. These, and several other items in the Master's and Registrar's tariff, tend to raise the necessary disbursements in the manner to which we have referred in speaking of the Orders of January, 1851, as to costs. Where the evidence extends to some length, the items referred to, will, under the New Rules, constitute by far the greater amount of taxable costs in the cause.

Miscellaneous
Orders.

The following Miscellaneous Orders complete the set issued in January, 1851.

XIII.
Affidavits filed
as under former
practice.

The affidavits, either in support of or opposition to any special motion or petition, must be filed, as heretofore, with the Registrar ; and notice of any such motion may be served according to the now existing practice.

XXII.
Form of peti-
tion for re-hear-
ing.

Petitions of re-hearing shall henceforward be in the form and to the effect in that behalf set forth in schedule E. hereunder written.

A first petition to re-hear a cause.

IN CHANCERY.

Between A. B., complainant,
and
C. D., defendant.

To the Honourable, &c.

The humble petition of the above-named A. B. or C. D. sheweth :

That a decree was lately pronounced in this cause by this Honourable Court, whereby, among other things, it was ordered that (*here state the particulars in which the petitioner was dissatisfied with the decree*) that your petitioner considers himself to be aggrieved by the said decree, in the particulars aforesaid ; and he therefore humbly prays that the said cause may be re-heard, and the said decree rectified in the matter before-mentioned.

And your petitioner will ever pray, &c.

We conceive that this cause is proper to be re-heard, touching the matter mentioned in the petition, if the Court shall think fit.

(Signature of two
Counsel.)

E. F.
G. H.

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may require.

Know all
named A. B.
E. F., of, &c
name to dem
fendant C. D
whom it may
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In witness,

Letters of attorney to receive mortgage money or other sum ordered to be paid shall henceforward be in the form and to the effect in that behalf set forth in schedule. F. hereunder written, with such variations as circumstances may require.

XIII.
Form of power
of Attorney to
receive mort-
gage money

IN CHANCERY.

Between A. B., complainant ;
and
C. D., defendant.

Know all men by these presents, that I, the above-named A. B., do hereby nominate, constitute and appoint E. F., of, &c., my true and lawful attorney, for me in my name to demand and receive from the above-named defendant C. D. and all and every other person and persons whom it may concern, the sum of £——, being the sum reported due to me for principal, interest and costs, and directed to be paid to me on the —— day of ——, by the Master's report made in this cause, and dated the —— day of ——; and upon payment thereof, to make and give receipts, acquittances and other discharges for the same, and to do all acts necessary to the premises as fully and effectually as I myself could do the same if personally present, and for the purposes aforesaid to appoint any substitute or substitutes, and such substitution at pleasure to revoke.

In witness, &c.

THE END.

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ADDITIONS AND CORRECTIONS.

1. At page 5, the first line should read "is said to deal with it" &c., instead of "deals" &c.

2. At page 19, the last paragraph would seem to refer to some mode of proceeding different from the practice by "Bill". It was written before the New Orders were issued, when it was believed the "Claim" would be adopted, as in England, and hence the inaccuracy; but the last Chapters afford sufficient explanation on the point.

3. At page 24, in the last paragraph but one, read "all such applications" &c., instead of "all applications for leave" &c.

4. At page 49, the Order 157 of 1850, is stated as repealed, instead of the 157th of 1845.

5. On the subject of the production of documents (Chapter X.) the reader is referred to an Essay, in which the cases are fully considered, in several consecutive numbers of the *London Jurist* for 1851, Vol. 15, part 2, continued from Vol. 13, part 2.

6. The Order set out at page 67, is the 116th Order of 1842, the number having been inadvertently omitted in the margin.

7. At page 96, for "it does", read "they do".

8. At page 103, in the third paragraph, for "determine", read "determining".

9. At page 104, in the first paragraph, for "the hearing appointment", read "the appointment"; and for "constitutes appointments", read "constitutes the appointment".

10. As to Counsel fees (page 150), the Master has allowed a larger fee than there stated on the motion under the 77th Order. See page 152. The view there stated seems to have been that acted upon.

In addition to the above, the Editor has to apologise to his readers for several misprints, which have passed unobserved until it was too late to correct them, and as they will be at once seen to be mere typographical errors, they need not be here particularized.

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