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A TREATISE ON THE PRACTICE OF THE COURT OF CHANCERY, WITH AN Appendix of Precedents.

BY OLIVER L. BARBOUR, COUNSELLOR AT LAW.

IN TWO VOLUMES. VOL. I.

ALBANY: W. & A. GOULD & Co., 104 STATE-STREET.
NEW-YORK: GOULD, BANKS & Co. 144 NASSAU-STREET.


1843.
A FEW words in explanation of the nature and scope of the present treatise, and its arrangement, may perhaps be expected. Its object is to give, in concise terms, a comprehensive view of the present practice of the Court of Chancery, strictly so styled, and as contradistinguished from pleading, and the topics collaterally connected therewith. Doubtless the subjects of jurisdiction, pleading, parties, and evidence are of great importance, and very necessary to be understood by the practitioner. But it does not follow that they are entitled to a place here. It has become too common a custom with modern writers to jumble discordant materials together. As a division of labor tends to the perfection of each part of the thing produced, so does a division of subjects promote clearness and accuracy in the method of treating them. In addition to this consideration it may be mentioned, that jurisdiction, pleading, parties and evidence have been separately treated of, in a most thorough and able manner, by several distinguished writers, both American and English, whose works are in the hands of the profession.

Having determined to limit the range of the present treatise, in the manner above mentioned, the next step was to fix upon a
method of arrangement for carrying out the general plan, in a
clear and convenient manner. Nor was this so easy a matter as
may be supposed. Of all the treatises written upon the practice
of the court of chancery, no two are alike, or even similar, in
the general plan or the arrangement. Considering it a mat-
ter of great importance, however, at the outset, to adopt a
proper method of arrangement, as well for my own conve-
nience as for that of those who should use my work, I de-
voted considerable time to the subject; carefully collating the
several treatises on the practice of the court which had pre-
viously been published. The result was the adoption of the
present plan; which seems to me the most natural and
simple division of the subject treated of.

The work consists of two volumes, and is divided into six
Books, for the purpose of marking the several stages of a suit,
or indicating the nature of the proceedings treated of. These
Books are divided into Chapters, which are subdivided into
Sections.

The First Book describes the method of instituting and de-
fending a suit in the court of chancery, and the mode of conduc-
ting it, from its commencement to, and including the decree.

The Second Book details the proceedings subsequent to the
decree. The various Chapters of this Book describe the prac-
tice upon appeals; the method of executing decrees; and the
proceedings under decrees and orders—embracing issues at
law, seigned issues, actions at law, and proceedings in the
Master's office.

The Third Book is a sort of omnium gatherum, embracing
various matters which could not well be introduced into either
of the preceding Books without interrupting the regular chain
of proceedings. The several Chapters of this Book describe
the points of practice arising upon the various interlocutory
applications and other incidental proceedings, which from
time to time occur in the progress of a cause—such as motions, petitions, affidavits, injunctions, ne exeats, receivers, abatement and revivor, &c.

It is believed it will be found a great convenience to the practitioner to have all matters of this nature thrown together in one Book, instead of finding them scattered through the whole work.

The Fourth Book relates to the different kinds of Bills; the object of which is, without encroaching too much upon the subject of pleading, to describe the peculiar practice incident to each species of bill.

The Fifth Book embraces proceedings in special cases—such as suits by judgment creditors; suits relating to mortgages; proceedings by and against infants; proceedings respecting idiots, lunatics and habitual drunkards; bills for divorce; contempts; partition suits; proceedings to prove wills in the court of chancery, &c.

The Sixth Book relates to costs—the most important branch of the whole subject—as it will perhaps be considered.

The first three Books are contained in the first volume, and the remainder in the second. The text, or treatise, is followed by a collection of forms. These have been collected from various sources, and have been prepared with great care, and with a view to conciseness. They are arranged in the same manner as the treatise, by Books and Chapters corresponding with those in the body of the work.

It will be observed from these remarks, that the plan of the present work is tolerably extensive. Indeed it has been my intention to include in it every species of proceeding, and every point of practice, usually occurring, either in the solicitor's or master's office. Yet it is not supposed that every thing will be found in this treatise which it ought to contain. There is reason to fear that much which deserves a place there
will be found to have been omitted. Yet there is perhaps more reason to apprehend censure on account of the imperfections in what is therein contained, than because of the omissions.

A copious index is annexed to each volume; and to increase the facilities of reference, still further, each volume contains an analysis, or skeleton, of the several Books, Chapters, and Sections, with the subdivisions of the latter, contained in such volume.

I have occasionally availed myself of the labors of my predecessors who have written upon the same subject, so far as the practice laid down by them corresponds with that now prevailing, but no farther. The author whose plan appeared to me the best, and from whom I have derived the greatest assistance, is Mr. Daniell, a recent English writer. He has gone over the whole ground of practice, including pleading and parties, in a very accurate and methodical manner; and as his work embodies all the recent English decisions, it is very valuable; but it is much too diffuse. I have in general gone to the fountain head—the reports themselves—to ascertain what was the true practice.

I have also availed myself of the manuscript decisions of the Chancellor, made from time to time, and not yet reported. The accuracy of the references to decisions of this nature may be relied upon: as I have had access to the original drafts of all the opinions delivered by Chancellor Walworth. And I take this method of acknowledging my obligations to his honor the Chancellor, for the interest he has manifested in this work from the commencement, and for the valuable advice and information he has repeatedly given.

Books of practice are usually cited merely by the name of the writer, without any addition. The Revised Statutes are cited with reference to the marginal paging in the second edition, and the numbering of the sections in both editions; so
that a person possessing either the first or second edition will be able to find the reference.

I am aware of many of the imperfections of this work, though perhaps not of all. These will be discovered by the practitioner, from time to time in the course of his practice. And I shall esteem it a particular favor if my professional brethren will point out to me such errors and omissions as they may discover; to the end that they may be corrected or supplied in a second edition, should the favor of the profession enable this work to reach that honor. For an obvious reason, however, I must request that communications of this nature may come to me free of charge. A burden which, divided among many, would scarcely be felt, might be intolerably onerous if imposed upon one only.

If the present treatise does not come up to the expectations or wants of the profession, or realize their ideas of what such a book should be, I trust they will at least consider the magnitude of the subject, and reflect upon its complicated difficulties; and that, giving me credit for at least an honest wish and a laborious endeavor to serve them, they will not condemn the book entirely. I have endeavored to make it in some measure worthy of acceptance by the bar of New-York, and if it shall be so considered, I ask no higher honor.

In conclusion, I beg leave to acknowledge my obligations to Julius Rhoades, Esq. of Albany, for his valuable advice and assistance. He has done me the honor to read the whole work in manuscript, and has made many important suggestions, not only by way of correcting errors, but for the purpose of supplying additional matter acquired by him in the course of an extensive practice, a large share of which practice, as is well known, has been in the Court of Chancery. O. L. B.

Salatoga Springs, October 9, 1843.
ERRATA.

Page 55, line 17 from top, after "has," add "not."
78, line 3 from bottom, after "notice of" add "such of." !
---- line 4 from bottom, after proceedings" add "as may affect his rights or interests."
203, line 6 from bottom, strike out "costs of exceptions to answer."
405, line 13 from top, strike out "to."  
408, note (c), add "399."
491, note (g), after "Ante, p." add "405."
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OF THE

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TREATISE.

BOOK I.

Proceedings in a Cause from its commencement to a Decree.

CHAP. I.

BILL OF COMPLAINT.

Sect. 1. NATURE AND OFFICE OF A BILL.

2. DIVISION OF BILLS.

3. CONSTITUENT PARTS OF AN ORIGINAL BILL.

4. MATTER OF A BILL.

5. BY WHOM, AND HOW, BILLS ARE DRAWN.

6. ENROSSING, SIGNING, AND SWEARING TO.

7. NUMBERING, MARKING FOLIOS, ENDORSING, AND FILING.

8. WHEN TO BE ACCOMPANIED BY AN AFFIDAVIT.

SECTION I.

NATURE AND OFFICE OF A BILL.

A suit in chancery is commenced by the filing, in the proper office, of a bill of complaint. This bill of complaint is in the nature of a petition, addressed to the chancellor, and contains a statement of the facts out of which the complainant's claim arises, and prays the relief to which he considers himself entitled.

This petition when preferred by a private citizen, is called in the old Vol. I.
English books an *English Bill*, by way of distinction from the proceedings in suits within the ordinary or common law jurisdiction of the court, which were entered and enrolled, more anciently, in the French or Norman tongue, and afterwards in Latin.\(^{(a)}\) If it is instituted in behalf of the state or of those whose rights are under its particular protection, it is exhibited in the name of the Attorney General, and is styled an Information.\(^{(b)}\) An information differs from other bills little more than in name; and the rules of practice incident to ordinary bills may be considered applicable to Informations, except where a distinction is expressly mentioned in the following pages.

An original bill in chancery is in the nature of a declaration at common law.\(^{(c)}\)

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**SECTION II.**

**DIVISION OF BILLS.**

Bills, if they relate to matters which have not previously been brought before the court are called original bills, and form the foundation of the greater part of the business of the court of chancery.

Besides original bills, there are other bills in use in courts of equity, which are filed when it becomes necessary to supply any defects existing in the form of the original bill, or which may have been produced by events subsequent to the filing of it. Bills of this description are called bills which are not original.

Sometimes a person not a party to the original suit seeks to bring the proceedings and decree in the original suit before the court, for the purpose either of obtaining the benefit of it, or of procuring a reversal of the decision made in it. The bill which he files for this purpose is styled a bill in the nature of an original bill.\(^{(d)}\)

Original bills are usually divided into 1. Original bills praying relief, and 2. Original bills not praying relief.

1. Original bills praying relief are of two kinds: 1st. Bills praying the decree of the court touching some right claimed by the complainant in opposition to rights claimed by the defendant; and 2d. Bills of interpleader.

2. Original bills not praying relief are also of two kinds: 1st. Bills

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\(^{(a)}\) Mist. Eq. Pl. 7. \(^{(c)}\) 3 Black. Com. 449.

\(^{(b)}\) Id. ib. \(^{(d)}\) I Dan. 409.
PROCEEDINGS TO A DECREE.

to perpetuate the testimony of witnesses; and 2d. Bills of discovery. (e)

In the present Book the practice upon original bills praying relief, which are those most usually filed in this court, will be considered. In a subsequent Book we propose to treat of the several other sorts of bills and of the peculiar practice incident to each class. (f)

SECTION III.

CONSTITUENT PARTS OF AN ORIGINAL BILL.

A bill in chancery consists of nine parts, viz:

First. The address. "To the Chancellor of the state of New-York," without the addition of his name, or any other title or designation.

Second. The introduction. "Complaining sheweth unto your honor." This part contains the name, description, and place of abode of the complainant (who is styled "your orator.") It is necessary the place of the complainant's residence should be stated, in order that the defendant may know where to resort to compel obedience to any order or process of the court; especially for the payment of costs, should any be awarded; and that if he is a non-resident of the state he may be compelled to give security for costs.

Third. The stating part. "That your orator being," &c. or, "That C. D." &c. This part of the bill states the facts upon which the complainant relies for relief. It should be sufficiently full, so that each interrogatory may be supported by the statement. Otherwise the defendant will not be bound to answer the interrogatory. (g)

Fourth. The confederating part. "But now so it is," &c. This charge is unnecessary, and might as well be omitted. (h)

Fifth. The charging part. "Whereas, your orator expressly charges," &c. This is used for the purpose of charging the untruth of the pretences set up or intended to be set up by the defendant. This part of the bill concludes with the words, "All which actions, doings, and pretences are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator."

The charging part of a bill should not contain any statement which

(f) See post, Book IV. Pl. 10.
(g) Attorney General v. Whorwood, 1 Ves. Sen. 534.
is not true; as, if the bill is sworn to, it is perjury for the complainant knowingly to make a false charge or averment in the charging, as much as if he makes a false statement in the stating part.(i)

Sixth. The clause of jurisdiction. "In tender consideration whereof, and forasmuch," &c. This is an averment that the complainant has no remedy, save in a court of equity. The omission of this clause, however, will not render the bill defective; as it cannot confer jurisdiction. The bill must show a state of facts from which it is apparent that the court has jurisdiction.(k)

Seventh. The interrogating part. "To the end therefore," &c. This contains a prayer that the defendants may answer all the matters contained in the former part of the bill, not only according to their respective knowledge and remembrance of the facts stated, but also according to the best of their several and respective hearsay, information, and belief. The bill usually requires the answer to be upon oath; but the plaintiff may, if he thinks proper, waive the necessity of its being put in upon oath; and in such case the answer will have no other or greater force, as evidence, than the bill.(l)

The general interrogatory in a bill is sufficient to entitle a party to a full answer to all the matters stated.(m) But this fact has not, in practice, precluded the use of special interrogatories; which are sometimes of great importance in enlarging a general charge and extending it to all the minute and collateral circumstances attending the fact.

The interrogatories must be founded upon the statements or charges in the bill, and cannot be more extensive than these.(n) But upon a general statement of a fact, every circumstance connected with it, and tending to prove or disprove it, may be inquired into.(o) If there is nothing in the prior part of the bill to warrant an interrogatory, the defendant is not bound to answer it;(p) but if he does answer it, the matter is put in issue; Lord Hardwick having held that a matter may be put in issue by the answer as well as the bill, and if replied to, either party may examine to it.(q)

Eighth. The prayer for relief. "And that the said defendants may be decreed," &c. This usually consists of two parts, viz. the

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(i) Smith v. Clark, 4 Paige, 368.
(k) Misf. Eq. Pl. 35.
(l) Rule 40. 2 R. S. 175, § 49, (orig. § 44.)
(m) Jaques v. Meth. Church, 1 John. Ch. R. 75.
(n) Id. 76. Muckleston v. Brown, 6 Ves. 63.
(p) If a bill contains interrogatories which are not founded upon the previous statements or charges, exceptions will lie to it for impertinence. Small v. Atwood, cited in Wigram on Disc. 74.
prayer for such specific relief as the complainant considers himself entitled to, and a prayer for such relief in the premises as the court shall think proper to grant, and as shall be agreeable to equity.

The prayer for special relief is usually inserted for greater caution; and as a matter of convenience, it is better that it should be introduced in connection with the general prayer. Yet it is not absolutely essential to the validity of the bill; as, under the prayer for general relief, the complainant may claim, at the hearing, a particular relief. But such relief must be consistent with the relief specifically prayed, and the case made by the bill. (r)

Ninth. The prayer of process. “May it please your honor, the premises considered, to grant unto your orator,” &c. This part prays the court to enforce the appearance and answer of the defendants by the writ of subpoena. If the plaintiff wishes an injunction against the defendant, he must not only pray for it in the prayer for relief, but also in the prayer of process. (s)

An injunction cannot be granted unless expressly prayed by the bill. (t) A prayer for general relief will not be sufficient to authorize it. (u) If only a temporary injunction is wanted, the bill must also contain a formal prayer for it. (v) And where an injunction is sought, not as a provisional remedy, but as a continued protection to the rights of the complainant, the prayer of the bill must be framed accordingly. (w)

A writ of ne exeat may also be asked for in this prayer of process. The prayer for this writ resembles that for an injunction, mutatis mutandis, and, like that, it usually precedes the prayer for process. (x) But though it is usual, it is not necessary that the bill should pray for this writ; as the intention to go abroad may arise in the progress of the cause. And if, when the bill is filed, the defendant does not intend to leave the country, it would be highly improper to pray the writ; as a groundless suggestion that the defendant means to abscond would press too harshly, and would also operate to create the very mischief which the court, in permitting the motion for it to be made without notice, means to prevent. (y)

The prayer for process indicates the persons who are intended to be

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(r) Wilkinson v. Beal, 4 Madd. 408.
(u) Savory v. Dyer, Amb. 70.
(s) Wright v. Atkyns, 1 Ves. & B. 314.
(x) Mitf. Eq. Pl. 38.
(y) Collinson v. —— 18 Ves. 353.
(a) Hinde, 18.
made defendants to the suit. It was formerly held that they only are defendants to a bill against whom process of subpoena is prayed. (z)
But it has been decided in this state that persons may be implicated and treated as defendants by a clear statement in the bill to that effect, without praying for a subpoena against them. (a) It is, however, much the most convenient in practice, that the parties should be named in the prayer for process.

In England it is said not to be necessary to pray process against persons who are charged to be out of the jurisdiction of the court; but it is the practice, where any of the defendants are out of the jurisdiction, for the plaintiff to state the fact and to pray process against them when they shall come within the jurisdiction. (b) In this state no special provision in the prayer of process seems necessary to reach such a case; as under the rules of the court relative to publication of orders to appear against absent defendants, they are bound to enter their appearance without any service of process upon them.

Where a corporation is made defendant, the bill should pray that it may appear according to law. (c)

When the United States or a state is a party defendant, the bill does not pray any subpoena against them, but that the District Attorney of the United States, or the Attorney General of the state, on being attended with a copy of the bill, may appear and put in an answer there-to, &c. (d)

SECTION IV.

MATTER OF A BILL.

Degree of certainty.] The bill must have a reasonable certainty, but need not set out the matter with that decisive and categorical certainty which is requisite in pleading at common law. (e) It should, however, state the right, title, or claim of the complainant, with accuracy and clearness; and it should in like manner state the injury or grievance complained of, and the relief asked of the court. The other material facts ought to be plainly yet succinctly alleged, and with all necessary

(a) Fawkes v. Pratt, 1 Peere Wms. 593. Windsor v. Windsor, 9 Dick. 707.
(c) 1 Hoff. Pr. 53.
(d) Id. App. X. Mitf. Eq. Pl. 37.
(e) 3 Woodes. Lect. 55, p. 370.
and convenient certainty as to the essential circumstances of time, place, manner, and other incidents.\(^{(f)}\)

**Statement of complainant's residence.** The bill should commence with stating the residence of the complainant. If this statement is omitted, the defendant may apply to the court and obtain an order that the complainant give security for costs.\(^{(g)}\)

**Must state a case within the jurisdiction of the court.** It must also state a case within the appropriate jurisdiction of a court of equity. If it fails in this respect, the error is fatal in every stage of the cause, and cannot be cured by any waiver or course of proceedings by the parties; for consent cannot confer a jurisdiction not vested by law.\(^{(h)}\)

And the case stated in the bill must not only be of a nature properly within the cognizance of a court of equity, but the amount claimed must be such as not to be beneath its dignity. For the court of chancery will not entertain jurisdiction of a suit concerning property where the matter in dispute, exclusive of costs, does not exceed the value of $100.\(^{(i)}\)

**Bill must state a sufficient matter.** The bill must also state sufficient matter to entitle the complainant to a decree; as no relief can be granted except for matters stated therein.\(^{(k)}\)

**Interest of parties.** And the bill must show that the complainant has an interest in the suit;\(^{(l)}\) as well as that the defendant has an interest, and is liable to answer to the complainant therefor.\(^{(m)}\)

The statement showing the rights of the complainant, by whom and in what manner he is injured, or in what he wants the assistance of the court, and a prayer for relief suitable to his case, and for that purpose that the process of the court may issue to bring the defendants before it, form the substance and essence of every bill; and must not, by any means be omitted.\(^{(n)}\)

There are also other parts which, although of a more formal nature, are nevertheless, as we have seen in the next preceding section, necessary to the constitution of a bill.

The complainant must not only show an interest in the subject matter of the suit, but it must be an actual existing interest. A mere possibility, or even probability of a future title will not be sufficient to sustain a bill.\(^{(o)}\) And this interest must not be capable of being defeated by the

\(^{(f)}\) Story's Eq. Pl. 206; Mitf. Eq. Pl. 41; Cooper's Eq. Pl. 5.

\(^{(g)}\) Howe v. Harvey, 8 Paige, 73.

\(^{(h)}\) Story's Eq. Pl. 6; Mitf. 141.

\(^{(i)}\) 9 R. S. 173, § 40, (orig. § 37.)

\(^{(j)}\) Crockett v. Lee, 7 Wheat. 592; Norbury v. Mead, 3 Bligh. 911.

\(^{(k)}\) Mitf. Eq. Pl. 156, 7.

\(^{(l)}\) Att'y Gen. v. Whorwood, 1 Vea. sen. 534.

\(^{(m)}\) 1 Dan. 419.

\(^{(n)}\) Mitf. Pl. 127.
act of the defendant.(p) The bill must also aver the performance of all preliminary acts necessary to complete the complainant’s title.(q)

The same precision in showing an interest, which is required in setting out the complainant’s case is not requisite in setting out that of the defendant against whom the relief is sought, because a complainant cannot always be supposed to be cognizant of the nature of a defendant’s interest.(r) And even where it is evident, from the nature of the case, that the complainant must be cognizant of the defendant’s title, and sets out the same informally, yet if he alleges enough to show that the defendant has an interest, it will be sufficient.(s)

Prayer for relief.] The bill, as has been already stated, must also pray the court to grant the proper relief suited to the case as made by the bill; and if, for any reason founded on the substance of the case as stated in the bill, the complainant is not entitled to the relief he prays, either in whole or in part, the defendant may demur.(t)

Bill must be brought for the whole subject.] The bill must also be brought for the whole subject in dispute. The court will not permit a bill to be brought for part of a matter only, so as to expose a defendant to be harrassed by repeated litigations concerning the same thing.(u) Nor for one of two claims upon the same defendant.(v)

Must state the whole case.] Care should be taken in framing the bill that every thing which is intended to be proved, be stated upon the face of it; otherwise evidence cannot be admitted to prove it.(w) Nor will even an inquiry be directed before the master, unless a foundation for such inquiry is laid in the pleadings.(x)

Multifariousness.] As the bill should not omit any thing which it is material to state, it is equally important that it should not run into the opposite defect, and attempt to embrace too many objects; it being a rule in equity that two or more distinct subjects cannot be included in the same suit. The offence against this rule is termed multifariousness, and will render a bill liable to demurrer.(y) Joint and separate demands cannot be joined in a bill without rendering it multifarious.(z) And as a bill by the same complainant against the same defendant for different matters would be considered multifarious, so a fortiori, would a bill by several complainants, demanding distinct matters against the same

(p) Lord Dursley v. Fitzhardinge, 0 Ves. 283.
(q) Walburn v. Inglisby, 1 Mylne & Keen, 61.
(s) Roberts v. Clayton, 3 Anst. 715.
(t) Mitf. Eq. Pl. 133.
(u) Id. 14.
(v) Parefoy v. Parefoy, 1 Ves. 299.
(w) Gordon v. Gordon, 3 Sim. 472.
(x) Hall v. Malby, 6 Price, 240. 18 Ves. 392. 6 Sim. 555.
(y) 1 Dan. 437.
(z) Holloway v. Millard, 1 Mad. 414.
(u) Harrison v. Hogg, 9 Ves. jun. 293. 2 Anst. 498.
defendants. (a) But a bill does not become multifarious because all the complainants are not interested to an equal extent. (b)

Scandal and impertinence.] Another important matter to be attended to in framing a bill, is to see that it does not contain statements or charges which are scandalous or impertinent; for if it does, it may be excepted to by the defendant, and if on a reference to a master, he reports that the bill contains scandalous or impertinent matter, the court will order such parts to be expunged with costs. (c)

Scandal consists in the allegation of any thing which is unbecoming the dignity of the court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause. (d) To which may be added that any unnecessary allegation bearing cruelly upon the moral character of an individual is also scandalous. (e)

Impertinence is the same kind of fault in pleadings in equity which in those at common law is denominated surplusage. This at law, taken in its largest sense, includes the introduction of unnecessary matter of whatever description, and includes the admission of matter wholly foreign as well as of matter, which though not wholly foreign, does not require to be stated, or which, if stated, should be stated with conciseness. (f)

It is not impertinent in a bill amended after answer, to adopt the language of the answer, and set forth its averments by way of pretence, with a charge to meet them. (g)

In a bill to remove a trustee, it is not scandalous or impertinent to challenge every act of the trustee as misconduct, nor to impute to him corrupt or improper motives in the execution of his trust; nor to allege that his conduct is the vindictive consequence of some act on the part of the cestui que trust, or of some change in his situation. But it is impertinent and may be scandalous to state any circumstances as evidence of general malice or personal hostility; because the fact of malice or hostility, if established, affords no necessary or legal inference that the conduct of the trustee results from such motives, and because such a course tends to render a bill in equity an instrument of inquisition into the private life of every trustee. (h)

Setting out deeds and documents.] The 17th rule of the court au-

(a) Jones v. Garcia Del Rio, 1 Turn. & Ram. 301.
(b) Kaye v. Moore, 1 Sim. & Sta. 61.
(c) 1 Dan. 451, 2.
(d) Prac. Reg. 383.
(e) Coffin v. Cowper, 6 Ves. 514.
(f) Steph. on Pl. 429.
(g) Seeley v. Boehm, 9 Mad. 176.
(h) Earl of Portsmouth v. Fellows, 8 Mad. 450.
thorizes certain deeds or instruments in writing to be read upon a hear-
ing on bill and answer, provided they are stated or set out in the bill of
complaint. It has been decided, under this rule, that in order to enable
the complainant to read such documents at the hearing, the complainant
must not only set out the deed or other instrument in his bill, but that
he must also state therein that it has been duly acknowledged or proved,
in such a manner as to entitle it to be read in evidence without further
proof.(44)

SECTION V.

BY WHOM, AND HOW, BILLS ARE DRAWN.

Unless the complainant intends to appear in person and conduct the pro-
cedings himself, the first step to be taken by him, on instituting a suit
in chancery, is to employ a solicitor and counsel to commence and con-
duct it on his behalf. Though the complainant has a right to appear in
person, and manage his cause without the assistance of a solicitor or
counsel, yet it is not usual for a party to appear in person, unless he is
himself a solicitor, at least, of the court. Nor would it be quite safe,
indeed, for a complainant, not familiar with the practice of the court, to
hazard his rights by attempting to draw his bill and carry on the suit
without professional assistance.

If a solicitor is employed, it is not necessary that his retainer should
be in writing.(i) Though, as a matter of evidence and convenience, it
would doubtless be better for solicitors, before commencing suits, to
require a written authority to do so. But whether the authority is in
writing or by parol, it should be special; as it has been held that a gen-
eral authority to act as solicitor for a party is not sufficient to warrant
the solicitor in commencing a suit on his behalf;(k) though the rule is other-
wise as to defending suits.(l) The rule requiring a special authority in the
solicitor to commence a suit, applies not only to cases where the party
is to sue alone, but where he is to sue as a co-complainant, with others,
and even to cases where his name is merely made use of pro forma.(m)

If a party sole complainant in a bill swear that he did not authorize the

(i) Lord v. Kellett, 2 My. & Keen, 1. (m) 1 Jac. & Walk. 467.
attorney to file it, the proceedings, on application, will be stayed, and
the attorney made liable for the costs, unless he produce a written au-
thority for commencing the suit. (a) And where a suit is commenced
in the names of several persons by their solicitor, the court will not in-
quire whether such suit was authorized by all; unless some of them
object to the proceedings, or the adverse party shows affirmatively that
the suit is commenced and carried on in the names of some of the par-
ties without authority. (o) If a bill be exhibited in the name of a
married woman, against her husband, it may, upon affidavit that she
knew nothing of it or had not consented to it, be dismissed. (p)

The solicitor being duly authorized to commence a suit, the next step
is to draw the bill, from the facts stated by the complainant, or other-
wise. In ordinary suits, it is usual for the solicitor to draw the bill,
afterwards submitting it to counsel for his approval and signature. In
cases of great importance or difficulty, however, it is safer to have the
bill drawn by counsel; as the success of the suit may depend, in a great
measure, upon the manner in which the bill is framed.

SECTION VI.

ENGROSSING, SIGNING, AND SWEARING TO.

Engrossing.] The bill having been drawn, submitted to the com-
plainant or person who is to swear to it, and found to be correct in its
statement of the facts and in the charges therein contained, is, in the
next place, to be engrossed, in order that it may be signed, sworn to,
filed and served. The draft being preserved in the office of the solicitor.

A rule of the court requires that all bills, answers, and other proceed-
ings, and copies thereof shall be fairly and legibly written; and if not
so written, the register, assistant register and clerks shall not file such
as may be offered to them for that purpose. (q)

Signing.] Except in cases where an injunction is asked for, or a dis-
covery, or an answer on oath is required from the defendant, bills are
usually signed by the solicitor and counsel alone, and not by the party. (r)
If the complainant sue in person, however, it must be signed by him

(b) Bank Commissioners v. Bank of
Buffalo, 6 Paige, 497.
(p) Prac. Reg. 60.
(q) Rule 95.
(r) Hatch v. Eastphieve, 1 Clarke, 69.
And in that case, it seems that the bill need not be signed by counsel. (s)
The general rule, however, is that the bill must be signed by counsel. And if it is not so signed, it will be ordered to be taken off the files; or it may be demurred to for that cause. (f)

In a suit by a corporation, the bill, if it is not a sworn one, is signed by the solicitor and counsel of the corporation. In case the bill is to be sworn to, it should be signed by the officer making the oath.

Swearing to bill.] Bills in which the answers of the defendants on oath is not waived, must be verified by the oath of the complainant, or in case of his absence from the state, or other sufficient cause shown, by the oath of his agent, attorney, or solicitor. And all bills for discovery merely must be verified in the same manner. (u)

The oath administered to the party must be in substance, that he has read the bill, or has heard it read, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated to be on his information or belief, and that as to those matters he believes it to be true. And the substance of the oath administered must be stated in the jurat. (v)

The following is the form of a jurat to a bill under the above rule of court:

STATE OF NEW-YORK, \{ 
Saratoga county, \{ ss: On this .... day of ...., 1841, before me personally appeared the above named A. B. and made oath that he has read the above bill subscribed by him, (or, has heard it read,) and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on his information or belief, and as to those matters he believes it to be true.

C. D., master in chancery.

Where a corporation aggregate is complainant, the bill, from the necessity of the case, must be verified by some officer or agent of the corporation. (w)

Bills which are to be verified by the oath of an agent or attorney for a complainant, should be drawn in the same manner as bills which are to be sworn to by the complainant himself; stating those matters which are within the personal knowledge of such agent or attorney positively;

(s) See 1 Hoff. Ch. Pr. 97.  
(u) Rule 17.  
(v) Rule 18.  
and those which he has derived from the information of others should be stated or charged upon the information and belief of the complainant. And the oath of the agent or attorney verifying the bill, should state that the agent has read the bill, or heard it read, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on the information and belief of the complainant, and that as to those matters the deponent believes it to be true.(x)

The jurat should not be drawn in the form of a separate affidavit.(y)

In verifying a bill, under the 17th rule, for the mere purpose of calling for an answer on oath, it is not necessary that the allegations in the bill should be sworn to positively. It is sufficient if the person verifying the bill swears to his belief of the charges contained in it.(x)

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SECTION VII.

NUMBERING AND MARKING FOLIOS, ENDORSING, AND FILING.

Numbering and marking folios.] The solicitor or counsel who draws a bill must distinctly number and mark each folio (of 100 words) in the margin thereof; and all copies, either for the parties or the court, must be numbered or marked in the margin so as to conform to the original draft, and to each other. No allowance will be made on taxation of costs for copies not thus numbered and marked.(a) It is not necessary to number the pages of the bill, in addition to numbering the folios. The word folio was formerly used to denote a page, and it may be conveniently employed for that purpose still.

Endorsing.] The register and assistant register are required, by rule, to keep the papers filed before the chancellor separate from those filed before a vice chancellor. And to enable them to do so, the solicitor filing a bill or other paper must designate, on the back thereof, whether it is filed "before the chancellor" or "before the vice chancellor".(b) As bills and petitions are addressed to the chancellor, in all cases, the marking of the paper in conformity with this rule is the only

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(x) Bank of Orleans v. Skinner, 9 Paige, 305. See further as to jurats, post Chap. VI. Sec. 5. (Book I.)—jurate to answers.

(y) Stafford v. Bryan, 3 Paige, 46. (a) Rule 95.

(z) Veedo v. Moritz, 9 Paige, 371. (b) Rule 7.
mode of determining whether it was the intention of the party to institute his proceedings before the chancellor or before the vice chancellor, when the bill is filed in the first or third circuits. And the court has decided that in case of dispute as to the person before whom the suit is instituted, the marking of the bill or petition must determine the question. (c)

In the entitling and endorsement of papers by either party, the complainant's name must be placed first. (d)

The endorsement upon the back of a bill is in this form:

In chancery.
Before the chancellor,
(or, Before the vice chancellor of the .... circuit.)

John Rodgers
v.
Timothy Jackson.

Bill,
J. E.
Sol. for comp't.

Filing:] The next step is to cause the engrossed copy of the bill to be filed in the proper office. If the suit is commenced before the chancellor, the bill is to be filed in the office of the register or assistant register. If before a vice chancellor, it must be filed in the office of the clerk of that circuit. If the bill is filed with the register, or assistant register, all subsequent pleadings and proceedings must be filed with one of them, unless the cause is referred to a vice chancellor. If so referred, all papers filed therein while it remains before the vice chancellor may be filed with the clerk of his circuit. (e)
SECTION VIII.

WHEN BILL TO BE ACCOMPANIED BY AN AFFIDAVIT.

In bills of particular descriptions, it is necessary that an affidavit should be annexed to them, on their being filed. Thus, on a bill of interpleader, there must be an affidavit that the complainant does not collude with any of the defendants. (f) In a bill by a party in a suit at law to examine witnesses de bene esse, there must be an affidavit that the witness proposed to be examined is of the age of seventy—that the matter to be proved is material, and lies within the knowledge of one person only—that the witness is going out of the jurisdiction, and not likely to return in time to be examined—or the other special circumstances on which it is proposed to apply to the court for leave to examine him de bene esse. (g) In a bill to obtain the benefit of an instrument on which an action at law would lie, alleging that it is lost, or if the bill is filed for the discovery of an instrument, suggesting that it is in the power or custody of the defendant, and praying relief that might be had at law if the instrument were in the hands of the complainant, there must be an affidavit annexed to the bill, in the former case, that the instrument is lost; and in the latter instance, that it is not in the custody or power of the complainant, and that he knows not where it is, unless it is in the hands of the defendant. In any of these instances, the want of the requisite affidavit makes the bill demurrable. But if the relief sought extends merely to the delivery of the instrument, or is otherwise such as can only be given in a court of equity, such an affidavit is not necessary. (h)

Affidavits are also frequently annexed to the bill for another object. Thus, where a bill is filed for any purpose other than a discovery, the complainant may, if he thinks proper, waive the necessity of the answer being made on oath of the defendant, to avoid the necessity of disproving it when responsive to the bill. (i) But as the defendant may, by the 36th rule, still answer on oath, notwithstanding an oath is waived by the bill, for the purpose of moving to dissolve an injunction or discharge a ne exeat, it is provided by rule 37, that if, in addition to the usual oath of the complainant, the material facts in the bill, on which the injunction or ne exeat rests, are duly verified by the oath of a

(f) Mitf. Eq. Pl. 49.  
(g) Atk. Ch. Pr. 4.  
(h) Id. 5. 1 Newl. 70.  
(i) 2 R. S. 175, § 40, (orig. § 44.)
creditable and disinterested witness, annexed to, and filed with the bill, it shall not be a matter of course to dissolve the injunction, or discharge the *ne exeat* on the oath of the defendant; but the court may, in its discretion, retain it till the hearing.

Where the whole equity of the bill is denied by the sworn answer of the defendant, and no affidavit of a disinterested witness is annexed to the bill, the injunction will be dissolved on bill and answer, although security for the debt and costs in the suit at law has been given, under the provisions of the revised statutes on that subject.({footnote})

So where it is intended to apply for an injunction or *ne exeat* upon a bill sworn to by an agent or attorney of the complainant, if any material allegation or charge that it is necessary to be sworn to positively, to authorize the issuing of the injunction or *ne exeat*, is not within the personal knowledge of the agent or attorney, he should, in addition to his own verification, annex the affidavit of the person from whom he derived his information; swearing that he knows such allegation or charge to be true. (I)

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**CHAP. II.**

**PROCESS FOR APPEARANCE.**

Sect. 1. **Subpœna.**

2. **Attachment.**

3. **Attachment with Proclamations.**

4. **Commission of Rebellion.**

5. **Sergeant at Arms.**

6. **Sequestration.**

7. **Process against Corporations.**

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**SECTION I.**

**Subpœna to Appear.**

The complainant's solicitor having filed the bill, in the next place proceeds to apprise the defendant thereof, in order to compel his ap-

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pearance and to procure from him an answer if it is desired, or at least to give him an opportunity to defend the suit if he wishes to do so. For this purpose, in pursuance of the prayer of the bill, he sues out a subpœna; which is a writ issuing out of, and under the seal of the court; commanding the defendant personally to appear in court, before the chancellor or the proper vice chancellor, on a certain day, to answer to such bill of complaint.

This writ now issues of course, upon filing the bill, without entering any order for that purpose; though the practice was formerly otherwise.

The register, assistant register and clerks are to furnish to any solicitor when required, and upon payment of the fees allowed by law, blank process to appear and answer to bills, with the seal of the court impressed thereon, and with the name of the process printed on the body of the seal. (a) But it is provided by another section of the statute that process for appearance shall not issue from the court until the bill praying the same shall have been filed. (b) By the words "issue from the court," as used in the statute, must be meant, not the sealing and delivering of the process out of the office of the register or clerk, but the filling it up, and serving, or putting it in a way to be served. As at law a writ is only considered as issued when it is delivered to the sheriff, or put in a regular course to reach him. (c) And in point of fact it is the constant practice in the register's, assistant register's and clerks' offices to deliver out sealed writs of subpœna to appear, whenever applied for, without waiting for a bill to be filed.

Form of.] The subpœna is required, by the 19th rule, to be in the same form substantially, expressive of the intent, as that heretofore used in this court. (d) And a form is given, at length, in rule 20. It must be in the name of the people. (e) It must contain the names of all the defendants; and it is advisable, if not necessary, to name all the complainants.

Where the complainant wishes to make an unbaptized infant a party defendant, it seems the subpœna should describe him as the last born child of A. B. and C. D.—his father and mother. (f)

A subpœna must be in the English language, and in a fair, legible character. (g)

(a) 2 R. S. 179, § 75, (orig. § 69.)  (e) Id. 275, § 8.
(b) 2 R. S. 179, § 76, (orig. § 70.)  (f) Eley v. Broughton, 2 Sim. & Stu.
(c) See 1 Hoff. Ch. Pr. 106, note (5.)  (g) 2 R. S. 275, § 9.
(d) See 2 R. S. 276, § 9.

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When to be tested and made returnable.] The subpoena must be tested in the name of the chancellor, on the day it is issued, and be made returnable according to the fact, either before the chancellor or before the vice chancellor having jurisdiction, in the court of chancery, wherever the court shall then be; and, unless otherwise directed, it may be made returnable on any day except Sunday, either in vacation or in term. If the chancellor is a party, or interested in the suit, the subpoena must be tested in the name of the vice chancellor before whom the suit is pending.

Where the complainant made his subpoena returnable on Sunday, and afterwards took out an attachment thereon, against the defendant, for not appearing, the court set aside the attachment as irregular.

Sealing and signing.] The subpoena must be sealed with one of the seals of the court; signed with the name of the register, assistant register or clerk, from whose office it issues, and subscribed or endorsed with the name of the solicitor, or of the complainant, in case he prosecutes in person.

It is not necessary the register or clerk should personally sign the subpoena. His name is usually signed by the complainant's solicitor.

Service of.] The subpoena may be served by delivering a copy thereof subscribed by the complainant or his solicitor, and inscribed "copy;" and by showing the original, under the seal of the court, at the time of such delivery, to the defendant, or in case of his absence, to his wife or servant, or some member of his family, at his dwelling house or place of abode.

On married women. In a suit against husband and wife, the service of the subpoena on the husband alone is good service on both, unless the complainant seeks relief against the estate of the wife; in which case the service must be on her, as well as on the husband, and she may put in a separate answer.

Where defendant is absent from home. When a defendant is absent from home, and no person can be found at his place of abode, the subpoena may be served on his clerk or servant, at his store or place of business.

On a prisoner. It is not irregular to serve a subpoena personally upon

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(k) Rule 19.
(i) Gould v. Spencer, 5 Paige, 541.
(j) 2 R. S. 179, § 73, (orig. § 66.)
(l) Id. 278, § 9.
(m) Rule 21.
a defendant who is imprisoned in the state prison for a term of years, on a conviction for a crime.\(^{p}\) And service upon the keeper of a prison will be ordered to be good service upon a prisoner in his custody.\(^{q}\)

*Where defendant has no family.* Where the defendant has no family, but boards or makes it his home in the family of another, a subpoena may, in his absence from home, be served upon either of the heads of the family at such place. But to make such service regular, the place of service must be his actual place of residence at the time of service; and his absence therefrom must be merely temporary.\(^{r}\)

*Service out of the state.* The service of a subpoena upon a defendant out of the state is irregular.\(^{s}\)

*When to be served.* The service may be on or before the day of appearance mentioned in the subpoena.\(^{t}\) And it may be made at any hour of the night. It seems a service on the return day, before 12 o'clock at night, is valid; as the legal day does not close until that hour.

A subpoena cannot regularly be served on Sunday.\(^{u}\)

If the copy served is not filled up with the return day, the service will be irregular, and the proceedings will be set aside, although the original shown to the party was properly filled up.\(^{v}\)

Where a *ne exeat* is issued at the same time with the subpoena, it is not necessary that the subpoena should be served first. Thus, where the complainants took out a subpoena when the *ne exeat* was issued, and made a *bona fide* attempt to serve the same, but were unable to do so previous to the service of the *ne exeat*, the court held there was no irregularity which could entitle the defendants to have the latter writ set aside.\(^{w}\)

*On infants.* If an infant is made a defendant, the subpoena must be served upon him personally, in the same manner as upon adults.\(^{x}\) But it is recommended, in such cases, to accompany such service with a notice to the parent, or guardian of the infant, or some competent person of the family, of the nature of the writ, and of the necessity for the infant's having a guardian appointed to appear and defend his interests.\(^{y}\) Where the infant cannot be found, so as to be served, or is ab-

\(^{(p)}\) Phelps v. Phelps, 7 Paige, 150.
\(^{(q)}\) 1 Dan. 566. Hinde, 83. Joyce v. Joyce, 1 Hogan, 121.
\(^{(r)}\) People v. Craft, 7 Paige, 395.
\(^{(s)}\) Dunn v. Dunn, 4 Paige, 495.
\(^{(t)}\) Creed v. Byrne, 1 Hogan, 70. 1 Moll. 243.
\(^{(u)}\) Rule 91.
\(^{(v)}\) 1 R. S. 875, § 58, (orig. § 60.)
\(^{(w)}\) Arden v. Walden, 1 Edw. 631.
\(^{(x)}\) The Georgia Lumber Co. v. Bissell, 9 Paige, 395.
\(^{(y)}\) 1 Dan. 929, 583.
sent from the state, the complainant must proceed by advertisement under
the statute relative to non-resident, absent, or concealed defendants;(x) in
the same manner as if he were an adult; and if, upon the expiration
of the time, no one applies in his behalf, the complainant may move that
a guardian ad litem be appointed for him.(a)

On lunatics. The subpoena against a lunatic must be served upon
him personally, as in the case of an infant. And it should be in the
presence of some competent person, or with notice to his committee;
who must also be made a party defendant, as such committee, to suits
respecting the lunatic's estate, and who is bound to appear and answer,
with and for the lunatic, or be attached.(b)

On a corporation. If a bill be filed against a corporation, the sub-
poena must be served upon some one of the members,(c) usually upon
the president, cashier, secretary, or other principal officer.

On the United States or state. When the United States or the
state is interested, the district attorney or the attorney general must be
served with a copy of the bill. If he omits to enter an appearance, an
order may be obtained, on petition, that he appear within a certain time,
or that the bill be taken as confessed.(d)

Extraordinary, or substituted service. A service by any of the
means above pointed out is called the ordinary service. Where the
subpoena cannot be served by either of these ordinary methods, extraor-
dinary means may be resorted to. Such service, however, ought, in
general, to be warranted by a previous order of the court; though
sometimes, where an extraordinary service has been effected, the court
have considered it to be good. Thus, where the person who served the
subpoena deposed that he hung the same upon the defendant's door, and
within half an hour afterwards saw him abroad with a writ in his hand,
which he supposed to be the subpoena, the court granted an attach-
ment.(e) And it has been has held good service if a person keeps the door
of his house shut and refuses to open it, to leave the writ under seal
hanging upon the door of the house, or to put it into the house under
the door, or within the windows. But none of these are good service
unless it can be proved that such subpoena afterwards came to the de-

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(a) 2 R. S. 186. Laws of 1842, p. 301.
(b) Bank of Ontario v. Strong, 9 Paige, 201.
Chan. Jan'y, 1843, (ex relations Julius Rhoades, Esq.) Ferguson v. Smith, 9
John. Ch. Rep. 139. 1 Paige, 423. And see post, Book I, Ch. VI, Sec. 5.
(d) Gray's Sol. Pr. 50. Hinds, 87.
(e) 1 Hoff. Ch. Pr. 108.

fendant's hands, or that he was in the house at the time, or had notice of it; as where a complainant made oath that he had heard the defendant confess that he had been served with a subpoena. (f) And so where a person made oath that he showed and offered to deliver the subpoena to the defendant, but that he refused to accept it, and did not appear, an attachment was issued. (g)

In England, where an injunction is sought to restrain proceedings at law by a party who is abroad, the court will order service upon the attorney or agent of such party, to be good service of the subpoena upon the client and principal. (h) And in some cases also where injunctions are not sought, the court have permitted service upon the agent or factor of a defendant abroad, acting in respect of the property in dispute, to be good service upon the principal. (t) But as our revised statutes provided a mode of compelling the appearance of a defendant in every case, whether he be absent, concealed, or non-resident, or in default thereof, allow the complainant to take the bill as confessed against him, it is doubtful whether such substituted service would be allowed here, unless it were upon an attorney specially empowered to appear and defend. And it has been decided that where a solicitor has been specially authorized to appear in the very suit, if he refuses to do so, he cannot be compelled. (k)

In general, if an extraordinary or substituted service is necessary, the safest course is for the complainant to apply in the first instance to the court, by motion, supported by affidavit stating the circumstances, for an order that the particular mode required, may be good service. (l) Thus, where a defendant has quitied his residence, and cannot be found, orders have been made, in England, that service at his last place of abode might be good service. (m) So, an order has been granted, on motion, that service at the last place of abode of the defendant's wife might be good service. (n)

By whom served. A subpoena may be served by any person. (o)

Alias or pluries writ. It is never necessary to use an alias or pluries writ of subpoena. If the subpoena has not been served upon any of the defendants, the return day may be altered by the solicitor, at any

Haw v. Maddock, id. 115.
Perin v. Thomas, id. 134.
(l) Id. 566.
(0) Willings v. Loman, Hinde's Pr. 91.
(1) 1 Dan. 566.
(m) Parker v. Blackburne, 3 Vern. 369.
(n) Pulteney v. Shelton, 5 Ves. 147
time, to a day sufficiently distant to enable him to get it served before the time thus fixed. But if the subpoena has been served on a part of the defendants, so that the return day cannot be altered, the practice is to issue another subpoena returnable at a future day.

SECTION II.

ATTACHMENT.

When proper.] Upon the service of the subpoena on the defendant, he is bound to enter his appearance in the proper office within twenty days after the appearance day mentioned in the writ. And if the appearance is not so entered, the complainant, on filing proof of the service of the subpoena, may have an order of course that an attachment issue to compel an appearance, if the subpoena has not been personally served. An order of course for an attachment may also be entered where there has been personal service of the subpoena, upon filing an affidavit that a discovery from the defendant is necessary.(p)

An attachment is the first process that issues against a defendant in cases of contempts. It is issued under the seal of the court, and is directed to a sheriff, commanding him to attach the party, so that he may have his body before the court to answer touching his contempt, &c.

This process issues for a contempt, as well in not appearing as in not answering after appearance; and as the rules of proceeding in both cases are similar, the following observations will apply to both species of contempt, except where a distinction is pointed out.

Against whom issued.] An attachment for not appearing, or for not answering, cannot issue against the attorney general; whose non-appearance, on being attended with a copy of the bill, will not be considered as a contempt, but as a nil dicit; (q) nor can such a process be issued against a corporation aggregate; which being an ideal or invisible person existing only in contemplation of law, cannot be attached or apprehended. (r)

Ordinarily, if a feme covert be in contempt, the husband must be included in the attachment. (s) The court has, however, stayed process

(p) Rule 32.
(r) Id. 189, 575.
(s) Proc. Reg. 53.
of contempt against him for want of his wife's answer, where it has appeared by affidavit that she had left him and that he had no power over her. (t) And cases may exist where she may be attached alone; as where her husband is out of the state, and she is sued in respect of a debt on her separate estate; (u) or where she obstinately refuses to join with her husband in his defence, or has committed a tortious act; (v) or where she has obtained an order to answer separately and does not put in her answer in conformity with such order. (w)

It is the duty of the husband, however, as a general rule, to take care that the wife's appearance is entered as well as his own. (x) And it is also a general rule that process of contempt may be executed against him alone for the contempt of his wife, unless a special order to the contrary is obtained. (y) All the defendants residing in the same county, liable to the attachment, must be named in one writ. (z)

How obtained.] The rule authorizing attachments to issue to compel an appearance of the defendant, contemplates two cases in which it may be desirable to seek the aid of this process: 1. Where the subpoena has been personally served; and 2. Where the subpoena has been personally served, but the complainant wishes a discovery from the defendant. In the first case an appearance is necessary, to enable the complainant to take the bill pro confesso; unless there has been an order for advertising under the statute. (a) An affidavit should, therefore, be made by the person who served the subpoena, showing the service of the same on or before the appearance day therein mentioned; the manner in which it was served; and an affidavit or other evidence that no appearance has been entered by the defendant. It is not sufficient for the affidavit to state that the subpoena was duly served, or that the defendant was served with a true copy of a subpoena. The time and mode of service, as well as the cause in which the writ issues must be specified. (b) The affidavit should state the requisition of the writ, or the subpoena should be annexed. (c)

In the second case provided for in the 22d rule, i. e. where the subpoena has been personally served, the affidavit should state that the subpoena was served personally upon the defendant, on or before the appearance day therein mentioned—that no appearance has been entered—and that

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(t) Leithly v. Taylor, 1 Dick. 373.
Lloyd v. Banet, id. 143. Garey v.
Whittingham, 1 Sim. & Sta. 163.
(u) Dubeis v. Hole, 2 Vern. 613.
(v) 1 Dan. 296, 375.
(x) Leavitt v. Cruger, 1 Paige, 421.
Rule 26.
(c) Sawyer v. Sawyer, 3 Paige, 263.
(b) Hinchcliff v. Gracie, 1 McCle. &
(c) Rogers v. Rogers, 2 Paige, 458.
a discovery is necessary from the defendant as to the matters of the complainant's bill. To obtain an order for an attachment for not answering an affidavit showing the defendant's default, is also necessary.\(^{(d)}\)

On filing the affidavit, in either of these cases, the complainant may enter an order of course, that an attachment issue. This order may be drawn either by the complainant's solicitor, or drawn and entered by the register or clerk. Upon the entry of which the latter will seal the attachment; which is generally prepared previously by the solicitor. The affidavit must be filed before the process is issued.\(^{(e)}\)

**When to be tested and made returnable.** The attachment must be tested in the name of the chancellor on the day it issues ;\(^{(f)}\) and it must be made returnable on a regular motion day, or some day in term, unless otherwise specially ordered by the court.\(^{(g)}\) The rules prescribe no particular time which shall intervene between the test and return of this writ. By the English practice, where the party in contempt resides in, or within twenty miles of London, the attachment may be made returnable immediately; and in other cases there must be fifteen days between the test and return.\(^{(h)}\)

**To whom directed.** The attachment should be directed and delivered to the sheriff of the county in which the defendant resides, to be executed by him or one of his deputies.

**Order to fix amount of bail.** Before delivering the process to the sheriff, the complainant should apply to the chancellor or vice chancellor before whom the suit is pending, for an order fixing the amount of bail to be taken.\(^{(i)}\) If no order is procured, the defendant will be entitled to be discharged from arrest on the attachment, on giving a bond to the sheriff in the penalty of $100, with two sureties, conditioned for his appearance on the return day.\(^{(k)}\)

**Writ how endorsed.** For the reason just stated, if bail to a greater amount than $100 is required, the attachment should be endorsed as follows, before being put into the hands of the sheriff:

[Title of cause.] "Attachment for not appearing to the bill of A. B., returnable the ... day of ..., 1842. Let the defendant C. D. give security for his appearance in the sum of $.... Dated ..., 1842. J. W., Vice Ch."

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\(^{(d)}\) Rule 24.  
\(^{(e)}\) Broomhead v. Smith, 8 Ves. 357.  
\(^{(f)}\) Rule 19.  
\(^{(g)}\) Rule 26.  
\(^{(h)}\) 1 Dan. 577, 8.  
\(^{(i)}\) 9 R. S. 536, § 10, 11.  
\(^{(k)}\) Id. 537, § 15.
How executed.] The sheriff or deputy to whom the attachment is delivered ought to execute the same with all speed and secrecy; and he cannot dispute the authority of the court out of which it issues; but he is, at his peril, to execute the same according to the command thereof. (l)

An arrest on a Sunday is absolutely void. (m) If, however, a defendant arrested on a Saturday escapes, he may be retaken on a Sunday; for that is not an execution of the process, but a continuance of the former imprisonment. (n)

No arrest can take place under an attachment after the return day mentioned therein. (o) If the sheriff does not receive the attachment in time to arrest the defendant and bring him into court on the return day, at the place where the attachment is returnable, he should not arrest him thereon, but should return the process tarde. (p) Where the sheriff neglected to serve an attachment until it was too late for the defendant to appear at the time and place where it was returnable, the court set aside the arrest of the defendant thereon. (q)

A sheriff or other officer employed to make an arrest under an attachment, cannot justify breaking doors for that purpose. And although the arrest is made by a deputy sheriff or other officer, it is considered as the act of the sheriff, who makes his return accordingly. (r)

Upon arresting the defendant on an attachment, it is the duty of the sheriff to keep him in his actual custody, and bring him before the court issuing the writ; and to keep and detain him in his custody until the court makes some order in the premises; unless the defendant entitles himself to be discharged by giving a bond for his appearance. (s)

If the sheriff lets the defendant go at large without any sureties, it is at his peril; for after once taking him, the sheriff is bound to keep him safely, so that he be forthcoming in court. (t) And for this purpose he is authorized to keep him in prison till the return day, if necessary to secure his personal attendance. (u)

Putting in bail.] In cases where a sum has been endorsed on an attachment issued by the special order of the court, or where any sum has been so endorsed by any judge or other officer as prescribed by the statute, the defendant must be discharged from arrest on such attachment, upon executing and delivering to the officer making the same, at any time before the return day in the writ, a bond with two sufficient sure-
ties in the penalty endorsed on such writ, conditioned that the defendant will appear on the return of such attachment, and abide the order and judgment of the court thereupon.\(^{(w)}\) We have seen that where no order specifying the amount of bail is endorsed upon the attachment, the defendant must be discharged from arrest on giving a bond in the penalty of $100.\(^{(w)}\)

Return of.] The officer executing the attachment must return the same by the return day specified therein, without any previous rule or order for that purpose. And he must return it to the court itself, i. e. to the place where the court is sitting on the return day. In case of default, an attachment may forthwith issue against the officer; which will not be bailable.\(^{(x)}\) But he may return the same at any time during the actual sitting of the court on the return day thereof, unless he is specially directed by the court to return it immediately. It is therefore irregular to take out an attachment against him \textit{ex parte} during the sitting of the court on that day.\(^{(y)}\) If the party prosecuting the attachment wishes to expedite the proceedings, however, he may, upon an affidavit of the delivery of the attachment to the proper officer a sufficient time before the return day to have enabled him to serve and return it, and that it has not been returned, move the court, previous to its adjournment on the return day, for an order that such officer return the attachment \textit{sedente curia} on that day, or that an attachment issue against him, upon filing the register's or clerk's certificate of his default.\(^{(x)}\)

If the sheriff does not receive the process in time to arrest the defendant and bring him into court on the return day, he should return it \textit{tarde}.\(^{(a)}\)

Where the sheriff takes a bond from the defendant on letting him to bail, he must return it with the attachment, and they are to be filed together.\(^{(b)}\)

Where the defendant, on being arrested upon an attachment, refuses to give bail for his appearance, the sheriff endorses upon the writ that he has taken the body; and for want of bail has him before the court, in custody.

\textit{Proceedings on return of writ.}] 1st. Where defendant makes default. If the defendant, on being served with the attachment, gives security for his appearance at the return day, and makes default, the bond be-

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\(^{(v)}\) 2 R. S. 536, § 13.  
\(^{(w)}\) See ante, p. 56; 2 R. S. 537, § 15.  
\(^{(x)}\) 2 R. S. 537, § 17. People v. Elmer, 3 Paige, 85.  
\(^{(y)}\) People v. Wheeler, 7 Paige, 433.  
\(^{(z)}\) Id. ib.  
\(^{(a)}\) Stafford v. Brown, 4 Paige, 360.  
\(^{(b)}\) 2 R. S. 443, § 16.
comes forfeited and the complainant may prosecute it. And he may have a special order that the defendant's appearance be entered by the register or clerk, or that his bill be taken as confessed, as the case may be; or he may take out an alias attachment. If defendant makes default a second time, the complainant may have a pluries attachment which will not be bailable. (c)

Where the defendant fails to appear at the return day, the complainant usually waits until the close of the sitting of the court and then moves, upon the attachment and return, that the defendant be called. This is accordingly done by the sergeant at arms, register, or clerk; stating the title of the cause, and for what the attachment issued. The court then, (upon the defendant's not answering,) grants an order that the defendant's appearance be entered and the bond be prosecuted; or for an alias attachment, or both. The order that the bond may be prosecuted by the complainant operates as an assignment thereof to him, and he may maintain an action upon it in his own name as assignee of the sheriff. (d)

Though the complainant is authorized, under the 27th rule, to make it a part of the order entered on the return of the attachment, that an alias issue, this writ is but seldom resorted to; as under the same, an order may be obtained that the register or clerk enter an appearance for the defendant. Whenever it is issued, however, it must be returnable on a motion day or in term, unless specially ordered otherwise by the court. (e) There must be the same length of time between the teste and return of this writ, and the same proceedings as to bail, return, &c. as upon the original attachment.

If the defendant gives a bond for his appearance and makes default a second time, a pluries attachment may issue, as before observed, which will not be bailable. This writ should not be issued without the special order of the court; and the certificate of the register or clerk that it is so issued, should be endorsed upon it. And if such certificate specifies no sum in which the defendant shall be held to bail, he is not bailable. (f) If it is issued without the special order of the court, and no sum is endorsed thereon, the defendant will be entitled to be discharged on giving bail in §100. (g)

The court should fix the return day of the pluries attachment. It is

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(c) Rule 27. 2 R. S. 179, § 79, (orig. § 73.)  
(d) 2 R. S. 539, § 97.  
(e) Rule 26.  
(f) 2 R. S. 537, § 14.  
(g) Id. § 15.
not strictly within the 26th rule; as it is not for a bailable contempt; and it may be made returnable in vacation.\(^{(A)}\)

This writ should be endorsed, "By the special order of the court not bailable."

If the defendant is taken on the **pluries**, the proceedings will be the same as where he is taken and not bailed on an original attachment; the fact of its being a **pluries** being noticed in the proceedings.\(^{(i)}\)

2d. **Where defendant appears personally, or is brought in by sheriff.** If the defendant appears personally or is brought into court by the sheriff on the return of an attachment for not appearing or not answering, he must enter his appearance or put in his answer and pay the costs incurred by his contempt instantaneously, or within such time as the court shall then appoint, or be committed until he complies. Or the complainant may have an order that the bill be taken as confessed, and that the defendant be committed until the costs are paid.\(^{(k)}\)

This rule applies only to cases in which the defendant, on being brought before the court upon an attachment, or appearing therein, admits his contempt. If he denies it, the court will cause interrogatories to be filed specifying the facts and circumstances alleged against the defendant, and requiring his answer thereto; to which the defendant may be required to make written answers on oath within such time as the court shall fix. The court may receive any affidavits or other proofs contradictory, or in confirmation of the answers of the defendant; and upon such evidence must determine whether the defendant has been guilty of the misconduct alleged. If the court adjudges that he is guilty, and that the misconduct was calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of any party in a cause or matter depending in the court, such court will then proceed to impose a fine, or to imprison him, or both.\(^{(l)}\) But the fine cannot exceed \(\$250\), over and above the costs and expenses of the proceedings. And the defendant is to be imprisoned only until he shall have entered his appearance and paid such fine and costs.\(^{(m)}\)

The mittimus or warrant under the order for imprisonment must be under the seal of the court. And the process of commitment, as well as the order therefor, must specify the act to be performed, viz. that the defendant enter his appearance and pay the fine and costs; and that he be detained until he do so.\(^{(n)}\) The costs must be taxed before the

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\(^{(A)}\) 1 Hoff. Ch. Pr. 125.  
\(^{(i)}\) Id. 127.  
\(^{(k)}\) Rule 28.  
\(^{(l)}\) 2 R. S. 537, §§ 19, 20.  
\(^{(m)}\) Id. 538, §§ 22, 23.  
\(^{(n)}\) Id. ib. § 24.
order is entered or process issued, so that the amount may be inserted therein.

Practice where defendant is already in custody for other causes.] If, when the attachment is issued against a defendant, he is already in custody of the sheriff by virtue of any execution against his body, or by virtue of any process for other contempts or misconduct, he returns the attachment c(1) ep(2) i(3) corpus, and stating that the defendant is in his custody charged at the suit of others. Upon this return, a habeas corpus is issued by the court, directing the sheriff to bring up the body of the defendant to answer for such misconduct. If it be a case in which the party is entitled to an attachment without the special order of the court, the writ of habeas corpus may be allowed by any judge of the court, or by any officer authorized to perform the duties of such judge in vacation; i.e. by the chancellor or by a vice chancellor.

It may be remarked here that a vice chancellor has no right to allow a habeas corpus except in cases where he is specially authorized to do so by statute. The article of the revised statutes respecting the constitution of the court of chancery, &c., in defining the powers of the circuit judges as vice chancellors, only confers upon them, as such vice chancellors, the original jurisdiction and powers possessed by the chancellor, in causes and matters in equity, and such as may be vested in him by virtue of any statute. And the right of the chancellor to allow a writ of habeas corpus does not spring from his equity jurisdiction; nor is the proceeding, in such cases, on the equity side of the court, but on the common law side, and is had under the ancient common law jurisdiction of the court. Vice chancellors having only the equity powers of the court of chancery, cannot therefore allow a common law writ of habeas corpus, but only such statutory writs as are incidental to the exercise of their equity powers in suits and proceedings pending before them.

The writ of habeas corpus when issued as above mentioned will, authorize the sheriff in whose custody the defendant is, to remove and bring him before the court, and to detain him at the place where it is sitting until some order is made for his disposition.

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(o) 2 R. S. 536, § 7.
(p) Id. ib. § 8.
(q) Id. 168, § 2 of art. 1, title 2.
(r) The powers of the vice chancellor and assistant vice chancellor of the first circuit and of the vice chancellor of the eighth circuit, are no more extensive in this respect than those conferred upon the other vice chancellors. See 2 R. S. 168, § 8; Laws of 1839, p. 85, 86.
(s) 2 R. S. 536, § 9.
The practice is similar to the above where the defendant is in custody on process from this court for contempt, or otherwise.\\(^c\\)

Where the defendant is in custody on criminal process, the practice is the same.\\(^u\\)

So, it seems, the defendant may be charged in custody. That is, if he is already in custody for other causes, the attachment may be left with the sheriff in whose custody he is, and he will be bound to detain him upon it until he complies with its exigency, although discharged upon the other causes of imprisonment.\\(^v\\)

\[\text{SECTION III.}
\]

\[\text{ATTACHMENT WITH PROCLAMATIONS.}\]

If the sheriff to whom the writ of attachment is directed, is not able to take the defendant under it, he returns \textit{non est inventus}; upon which a writ called an attachment with proclamation, issues against the party, also directed to the same officer, who is commanded by it to cause public proclamation to be made in all places within his bailiwick, wheresoever he shall think it most convenient, that the defendant do, upon his allegiance, appear in the court of chancery on a certain day therein named, and nevertheless in the meantime to attach the defendant if he can be found. To obtain this writ, the attachment, with the return of \textit{non est inventus} endorsed thereon, must be filed in the office of the registrar, assistant register, or clerk. Upon which the writ may be issued, without the entry of an order for that purpose.\\(^w\\)

The writ of attachment with proclamations is in nearly the same form as the ordinary attachment, with the exception of the introduction of the command to the sheriff to cause the defendant to be proclaimed in the manner before specified.

The writ must be endorsed, \textit{"By the court, for not appearing,"} (or, \textit{"not answering,"} \\&c.);\\(^x\\) and must be tested, signed, and made returnable in the same manner as the original attachment.

This process is bailable.\\(^y\\)

A sheriff cannot justify breaking open doors, in executing this process.\\(^z\\)

\\(^u\\) 1 Dan. 698. 1 Ves. & B. 77.
\\(^v\\) 1 Hoff. Ch. Pr. 133. Dick. 698.
\\(^w\\) Gilb. For. Rom. 77. 1 Dan. 606.
\\(^x\\) Hinde, 113.
\\(^z\\) Gilb. For. Rom. 78.
If the sheriff cannot succeed in taking the defendant under the writ of attachment with proclamations, he must make the following return: "By virtue of this writ to me directed, I have caused public proclamation to be made within my bailiwick, that the within named C. D. do appear on the day and at the place within written, as within I am commanded. And I further certify that the within named C. D. is not found in my bailiwick."(a)

If the defendant comes in upon the proclamations, or is arrested under the attachment, the return is cepi corpus.

The proceedings upon the return of this writ are the same with those upon the first attachment. It is to be observed, however, that after the return of this writ when issued for want of an answer of the defendant, he can only answer. He cannot demur or plead, or plead and answer, except by the special leave of the court.(b)

SECTION IV.

COMMISSION OF REBELLION.

If a defendant, after proclamation made, (whereby he is cited to appear, &c. upon his allegiance,) still continues to disobey, he is considered as a rebel and a contemner of the laws; and the next process which issues against him is a commission of rebellion; which is a writ issuing out of and under the seal of the court, directed to special commissioners therein named, commanding them jointly and severally to attach, or cause to be attached, the defendant wherever he shall be found within the state, as a rebel and contemner of the laws, &c.(c)

To whom directed.] This writ, it is to be observed, is not usually directed to the sheriff, but to commissioners named in the writ; and the reason why it is so directed is stated to be, because the sheriff cannot be supposed to execute such process in person, and it may be inconvenient to lodge the discretionary powers thereby conferred in the deputies of a ministerial officer; "wherefore the court appoints its own commissioners, who are enjoined to do every thing very carefully, and are answerable for their misbehavior."(d)

(a) Imp. Off. Sheriff, 338. (b) Sanders v. Murney, 1 Sim. & Stu. 925. 1 Dan. 608.
(c) Hinde, 117. (d) Id. 116. 1 Dan. 810.
How issued.] This process, like the previous processes of contempt, may issue without any order.\(^{(e)}\) But it seems there must be fifteen days between the issue and return, unless a special order is obtained; and it appears to be the better opinion that it cannot be made returnable at any other time than in term.\(^{(f)}\) It is therefore a safer course to apply to the court \textit{ex parte}, for an order that the commission issue.

The commission is usually directed to two, three, or four commissioners, in the discretion of the complainant; and they are named by him.\(^{(g)}\)

How executed.] Upon the receipt of this writ, the commissioners are bound to arrest the defendant wherever they can find him; and it seems that they may, for this purpose, break open his house, or the house of any other person in which he may happen to be;\(^{(h)}\) because the object of the writ is to deprive him of protection by law, to which, as "a rebel and contemner of the law," he is no longer considered entitled; and therefore it implies an authority to enter into the house.\(^{(i)}\) It seems, however, to be considered that in such a case it is advisable for the commissioners making the arrest to have a peace officer with them;\(^{(k)}\) and for this purpose, the commission commands all mayors, sheriffs, bailiffs, and constables, and all other officers and citizens to render their aid and assistance to the commissioners in the execution of their duty.

In England, a defendant may be arrested upon a commission of rebellion on a Sunday, but only in cases of necessity.\(^{(l)}\) In this state, however, it seems clear the arrest, even upon this process, cannot be lawfully made on Sunday, in any case.\(^{(m)}\)

The commissioners have power, under the commission, to call in the aid of the sheriff, or any other peace officer, to assist them in taking the party.\(^{(n)}\)

If the defendant is taken, under a commission in term time, the commissioners should bring him before the court immediately;\(^{(o)}\) but if the arrest takes place in vacation, and good security is offered for the defendant's appearance, the commissioners not only may, but ought to, take

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\(^{(f)}\) See 1 Hoff. Ch. Pr. 140. 1 Dan. 618.

\(^{(g)}\) 1 Fow. Exch. Pr. 157. Hinde's Pr. 123.

\(^{(h)}\) Prac. Reg. 199. 1 Dan. 613.

\(^{(i)}\) 1 Newl. 14.

\(^{(k)}\) Hinde, 116.


\(^{(m)}\) See 1 R. S. 675, § 58, (orig. § 69.) Unless indeed it is a crime to rebel against and contempt the laws. If so, this process may, upon that ground be executed on Sunday, under the section referred to.

\(^{(n)}\) 1 Fow. Ex. Pr. 162.

\(^{(o)}\) Prac. Reg. 199.
it. If bail is not offered, in such a case, the commissioners, in analogy with the practice upon attachments, ought to keep the defendant in their actual custody until the sitting of the court, and then to bring him personally before the court, and to keep and detain him in their custody until the court shall have made some order in the premises. And it is presumed the commissioners would not be required or even authorized to confine the defendant in prison or otherwise restrain him of his liberty, except so far as necessary to secure his personal attendance.

Though the English practice is to lodge the defendant either in the Fleet prison or in the custody of the sheriff, for safe keeping.

If the commissioners permit the defendant to escape after they have arrested him, they will be committed till they produce him. If he be rescued, the rescuer will be committed.

Return.] The return to this process is made by two or more of the commissioners who act under it. When the commissioners are unable to find the defendant, the return should be endorsed upon the writ in the following form:

"We whose names are hereunto subscribed, being two of the commissioners within named, do hereby certify to this honorable court that we have made diligent search and inquiry after the within named C.D.; but notwithstanding all our endeavors for the purpose, we cannot meet with him, so as to attach his body by virtue of this commission. Witness our hands this day of ....

A. B. 
C. D. Commissioners."

Return, how compelled.] By the English practice, if the commissioners neglect or refuse to make a return to the commission, the court, on motion or petition, will order them to return it; and upon disobedience to the order, the court will, upon motion, grounded on affidavit of service of the order, commit them; for not being parties to the suit, no writ of execution of the order is required to bring them into contempt.

Under the revised statutes, the order would be that they return the writ by a certain specified day, or that an attachment issue against them.

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(q) Tothill’s Trans. 37.
(r) See 2 R. S. 536, § 12.
(s) Id. 540, § 37.
(t) 1 Harr. Ch. Pr. 129.
(u) Cary, 115.
(v) Sacherell v. Sacherell, Toth. 3.
(w) Hinde, 118.
(x) 1 Smith, 118.
(y) 1 Dan. 615.
(z) 2 R. S. 536, § 6; 534, § 1, sub. 1.
Cepi Corpus.] Where the party is arrested upon a commission and brought before the court, the practice is substantially the same as that upon the return of an attachment. (z)

SECTION V.

Sergant At Arms.

By the English practice, upon a return of non est inventus by the commissioners, or any two of them, the court will, on motion, order the party to stand committed, and for that purpose grants a warrant to the sergeant at arms to take him into custody. (a) It seems, however, from Mr. Hoffman's Practice, that the English course in this respect cannot be pursued here; our statute having virtually taken away from the serjeants at arms the power of executing the process of the court. (b) The sheriffs of the respective counties are made officers of the court of chancery for the purpose of executing the process thereof. (c) And the sheriff of the county in which any stated term shall be held by the chancellor, or by any vice chancellor, is required to attend during its sitting, and to execute all the powers and duties of a sergeant at arms, and may execute the lawful process and orders of the court in any county of the state. (d)

Under these provisions of the statute, Mr. Hoffman lays it down that upon the return of a commission of rebellion non est, the court on application made in term, may issue a warrant to the attending sheriff, describing him as "the sheriff attending the court and executing all the powers and duties of a sergeant at arms," directing him to apprehend the defendant. (e)

The practice of sending the sergeant at arms, when the ordinary processes of contempt have failed, has been adopted by the court, ex abundanti cautela, lest there may have been any negligence in the ordinary officers or ministers of justice to whom the execution of the writs of attachment are entrusted, or lest the commissioners of rebellion (persons nominated by the complainant,) should collude with, or be warped by, their employer to the prejudice of the defendant. To guard against which, the court, to satisfy its conscience, and to be informed whether

(z) See ante. p. 58 et seq.
(a) 1 Dan. 616.
(b) See 1 Hoff. Ch. Pr. 126, n.
(c) 2 R. S. 173, § 39, (orig. § 99.)
(d) Id. ib. § 34, (orig. § 31.)
(e) 1 Hoff. Ch. Pr. 144.
the defendant doth actually hide himself from justice or not, sends an officer of its own; upon whose return only can a regular sequestration be issued.\(^{(f)}\)

No return day is fixed in the order for this process; but it should be made returnable immediately.\(^{(g)}\)

The duty of the sergeant at arms, or sheriff acting as such, upon receiving the warrant, is to arrest the defendant wherever he can find him; and it appears that he is armed with very extensive powers for that purpose.\(^{(h)}\)

Bail. The sergeant at arms can take no bail bond. Therefore if he takes a party in execution, he must keep him in custody until the return, if any return day is specified, and if not, he must bring him up to the bar of the court immediately. But if the defendant be taken for want of appearance or answer, he may, upon entering his appearance or filing his answer and paying the costs of his contempt, be discharged. And if the complainant's solicitor refuses to discharge him, the court will, upon motion or petition, order his discharge.\(^{(i)}\)

Where the sergeant at arms has been sent, for a contempt in not putting in an answer, the defendant is entitled to his discharge immediately on putting in his answer and clearing his contempt; and is not to be kept in custody until the sufficiency of the answer has been decided upon. And if in such a case, the sergeant at arms refuse to discharge him, the defendant must apply, by motion or petition, upon a certificate from the register or clerk, that the answer has been filed and the costs of the contempt have been tendered or paid (as the case may be;) and the court will make an order for his discharge; which must be served upon the sheriff or his deputy having the defendant in his custody. And a refusal to obey such an order would be a contempt of court.\(^{(k)}\)

When the party is brought up to the bar of the court by the sergeant at arms, he will be dealt with in the same manner as upon an attachment; the style of the process being changed.

If the sergeant at arms cannot succeed in arresting the defendant, he makes a certificate or return of non est inventus upon the back of the warrant; which must be filed in the proper office before a writ of sequestration, which is the next process, can regularly issue.\(^{(l)}\)

\(^{(f)}\) 1 Dan. 617. Hinde, 193.  \(^{(i)}\) Id. ib. Hinde, 196.
\(^{(g)}\) 1 Hoff. 144.  \(^{(k)}\) Waters v. Taylor, 16 Ves. 418.
\(^{(h)}\) 1 Dan. 625.  \(^{(l)}\) Hinde, 190.
SECTION VI.

SEQUESTRATION.

After the sergeant at arms has been ordered to take a defendant into custody for a contempt upon mesne process, and has returned non est inventus, or, "a rescue," or, "that he has been resisted in the execution of his duty," the next process which issues to compel the obedience of the party is a sequestration.

**Nature of the process.** The process of sequestration is a writ or commission issuing out of, and under the seal of the court, directed to the sheriff, or, (which is most usual,) to certain persons of the complainant's own nomination, empowering him or them to enter upon and sequester the real and personal estate and effects of the defendant, (or some particular part or parcel of his lands,) and to take, receive, and sequester the rents, issues, and profits thereof, and keep the same in their hands, or pay the same in such manner and to such persons as the court shall, in its discretion, appoint, until the defendant shall have appeared to or answered the complainant's bill, (or performed some other matter which has been ordered and enjoined by the court, in the process specifically mentioned,) and for not doing whereof he is in contempt. (m)

**To whom directed.** A sequestration upon mesne process is usually directed to four sequestrators; and care ought to be taken that the persons named are such as are able to answer for what shall come to their hands in case they should be called upon to account. (n)

**When issued.** A sequestration may not only be issued upon a return of non est inventus by the sergeant at arms, but it may issue where the defendant resists the sergeant at arms, or makes a rescue. (o) And in cases of contempts in the non-performance of a decree or order of the court, sequestrations may be issued, although the sergeant at arms has not been sent; as where a defendant is already in custody under an attachment or other process of contempt, and obstinately persists in his contempt. It may also be issued to enforce a decree or order where the defendant is in custody in another suit, either at law or in equity, or upon criminal process. (p)

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(m) Hinde, 127.
(n) 1 Har. 143.
(o) Dan. 630.
Obtained upon motion only.] This writ is always obtained upon motion. If it be moved for upon a return of non est inventus by the sergeant at arms, the return must be filed before the motion is made. If the party in contempt has resisted the sergeant, or having been taken has made his escape and stands out in contempt, the motion should be supported by an affidavit of the facts.

Order for.] The motion for a sequestration having been granted, the order is drawn and entered, and the writ made out in the proper form and sealed by the register or clerk.

Writ, how endorsed.] The writ having been sealed, and signed by the register or clerk, and the solicitor for the complainant, is to be endorsed as follows: "A commission of sequestration against C. D. defendant, at the suit of A. B. complainant."

When to be executed.] An opinion formerly prevailed in the profession that a sequestration upon mesne process ought not to be executed, and that the complainant, instead of having it carried into effect, ought merely, upon its issuing, to proceed to take the bill pro confesso against the defendant. The practice, whatever doubt there might have been about it formerly, appears to be now settled that if the process is for an appearance, the court will authorize the execution of it by directing the sequestrators to take possession of what is tangible, to sequester rents or money in the hands of others, by notice and service of the order; and will follow this up if necessary by the usual order to attorn, or for payment into court.

If the process issues for want of an answer, the complainant has an option whether he will proceed to take the bill pro confesso or to compel an answer. If the circumstances of the case are such that justice can be obtained by taking the bill pro confesso, he ought not to cause the sequestration to be executed; but if the case is such that an answer is necessary, he may enforce it in this manner. The cases, however, in which a complainant can have occasion to compel an answer from a defendant, instead of taking the bill pro confesso against him, are comparatively rare; and are in general confined to bills of discovery, where the answer is wanted, to be read at law, or to obtain some admission on which to found some application to the court. Except in such cases, the proper course is to take the bill pro confesso.
How to be executed. Where a sequestration upon mesne process is to be executed, it should be delivered by the solicitor to the sequestrators, with proper instructions for carrying it into effect.\(^{(w)}\)

Notice should be given to any persons holding funds or property of the defendant not to pay over or deliver the same to him or for his use. Regularly, a copy of the commission should be served with this notice.\(^{(x)}\)

The sequestrators are officers of the court, and, as such, are amenable to its authority, and are to act from time to time in the execution of their office as they shall be directed. They are to account for what comes to their hands, and are to bring the money into court as they shall be directed. Such money, however, is not usually paid to the complainant, but is to remain in court until the defendant has appeared, or answered, or cleared his contempt; and then whatsoever has been seized shall be accounted for and paid over to him.\(^{(y)}\) In this respect, there is a difference between a sequestration upon mesne process and a sequestration to compel the payment of money under an order or decree. In the latter case, after the process has been executed and goods and estate sequestered under it, the complainant may have them applied to satisfy his demand; which cannot be done upon process of contempt.\(^{(z)}\) It is said, however, that even in the case of a sequestration upon mesne process, the court has the whole under its power, and may do therein as it pleases, and as shall be most agreeable to the justice and equity of the case.\(^{(a)}\) And, in one case,\(^{(b)}\) where a defendant in contempt for want of an answer, had stood out the whole process to a sequestration, whereupon the bill was taken *pro confesso* against him, and a decree made *ad computandum*, the court refused to discharge the sequestration on the defendant's paying the costs of contempt only; but kept it on foot as a security for his appearing before the master to account.\(^{(c)}\)

What things may be seized under sequestration.] Under a sequestration upon mesne process, the sequestrators may take possession of all the defendant's goods and chattels.\(^{(d)}\) By this is meant those goods and chattels only which are in the possession of the defendant, or which can

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\(^{(w)}\) 1 Dan. 635.  
\(^{(x)}\) Simmons v. Kinnaird, 4 Ves. 743.  
\(^{(y)}\) Rowley v. Ridley, Dick. 632.  
\(^{(z)}\) Hinde, 135.  
\(^{(a)}\) 1 Dan. 635.  
\(^{(b)}\) Maynard v. Pomfret, 3 Atk. 468.  
\(^{(c)}\) See also Shaw v. Wright, 3 Ves. 292.  
\(^{(d)}\) 1 Barnard, 431.
be reached without suit, or action; for choses in action cannot be sequestrated.(e)

Powers and duty of sequestrators.] Sequestrators have the power to break open doors, in the execution of their duty.(f) So they may open boxes and rooms that are locked, if the keys are denied them, and schedule the goods in them. But they have no right to remove any thing from the house without the special order of the court.(g) Indeed, it seems, that if the sequestrators take upon themselves to remove the defendant's property, they will be liable to an attachment.(h) They are bound, however, to keep the defendant not merely nominally, but really out of possession of his property. The court must not be trifled with, and its process must be made effectual.(i)

The sequestrators are authorized to enter into the possession of such parts of the defendant's real estate as are in his own occupation, whether freehold or copyhold.(k)

Attornment of tenants.] On entering upon a defendant's estate, the sequestrators should serve the tenants in possession, if there are any, with a notice in writing to attorn and pay their arrears and growing rents to them. This may be done either personally, by serving the tenant with the notice and at the same time showing him the sequestration under seal; or by leaving the notice at his dwelling-house, with some member of his family, together with a copy of the sequestration, and showing the original writ to the person served.(l) Upon an affidavit of this service, an order will be granted that the tenants attorn, and pay their rents to the sequestrators.(m) This order should be made upon the tenants by name, and not upon the tenants of the defendant generally.(n)

The tenants will be protected if they voluntarily pay their rents to the sequestrators.(o) And if they refuse to attorn or pay their rents, after service of the order, they may be proceeded against as for a contempt.

Where the sequestration is for the non-performance of a decree, the court will, on proper application, give them authority to let the proper-

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ty; (p) but no such authority will be given where the sequestration is upon mesne process. (q)

Sale of goods.] As the sequestrors, upon mesne process, have no power to remove goods, much less have they power to sell them. If a sale is necessary, application should be made to the court for permission to sell; but an order for the sale of goods taken upon mesne process, will scarcely ever be made, unless for the purpose of raising money to pay the expenses of the sequestration, or where the goods are of a perishable nature, such as rents paid in kind, or the natural produce of a farm. (r) And whenever an order to sell property taken under a sequestration to enforce a decree or order is applied for, it must be upon notice. (s) Whether such an order can be made without notice, upon a sequestration on mesne process, does not appear. If notice is necessary, however it can only be where the process was issued to compel an answer, after appearance. Where the process is to compel appearance, no personal notice can be given, because there is no person upon whom it can be served. (t)

The application for a sale may be made either by motion or petition. (u)

Sequestrors to account, &c.] Sequestrors upon mesne process are accountable for all that they receive, and can only retain so far as to satisfy for the contempt. (v) They are bound, from time to time, to make returns to the court of what comes to their hands under the sequestration. (w) And if they omit to do so, they will not be permitted to set off their fees. (x)

Upon the sequestrors returning that they have money in their possession, the court will, upon application, order it to be paid into court, to the credit of the cause, and invested; but the costs may be previously taxed and retained. (y)

Writ of assistance.] If the sequestrors are obstructed in the execution of their duty, the court will grant a writ of assistance to the sheriff, to aid them. (z) And it is a contempt of court to disturb them in their possession of property taken under the sequestration. (a)

(e) Harvey v. Harvey, 2 Ch. Rep. 49.
(q) Ray v.__, 3 Swanst. 306, n. (a).
(s) Mitchell v. Draper, 9 Ves. 206.
(t) 1 Dan. 640.
(u) 9 Ves. 908. Abn. 491.
(v) Gibson v. Scoevengton, 1 Vern. 247.
(w) Desbrow v. Crommie, Bubn. 272.
(x) Hawkins v. Crook, 3 Atk. 394.
(a) Angel v. Smith, 9 Ves. 336. 3 Swanst. 290. n.
Examination pro interesse suo.] Where any person claims title to an estate or other property sequestrated, whether by mortgage or judgment, lease or otherwise, or he has a title paramount to the sequestration, the proper course for him is to apply to the court to direct the complainant to exhibit interrogatories before a master, in order that the party applying may be examined as to his title to the estate.(b) An examination of this sort is called an examination pro interesse suo, and an order for it may be obtained as well where the property consists of goods and chattels, or personality, as where it is real estate.(c)

An order for the examination of a party pro interesse suo may be obtained as a matter of course by the party claiming. But it cannot be granted until after the sequestrators have made a return; because, till then, it cannot appear to the court what is sequestrered.(d) The application for this order may be made either by motion or petition.(e) If made by the former, it should be supported by affidavit, stating the facts under which the claim arises. If made by the latter, the petition ought to state the circumstances of the case.(f)

An order for the examination of a party pro interesse suo may not only to be granted upon his own application, but upon the application of the complainant in the suit.(g)

In all orders for the complainant to examine a party pro interesse suo, there should be a time limited within which the interrogatories must be exhibited.(h) According to the English practice, the interrogatories must be settled by a master;(i) and if the claimant, after the interrogatories have been exhibited and settled, neglects to put in his examination, the court will order him to do so, and to procure the master's report within a specified time.(k) When the examination has been put in, the complainant, if he disputes its truth, must reply to it; otherwise it will be conclusive;(l) and the complainant may then apply for a reference to a master to look into the interrogatories and the examination, and to certify whether the claimant has made out a title or not.(m)

If the examination is replied to, leave will be given to either party to examine witnesses; and this will be done by order made upon mo-

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(c) Lord Falmham v. The Duchess of Newcastle, 3 Swanst. 990, n. 1 Pow.
(e) Hunt v. Priest, 2 Dick. 540.
(g) Bird v. Littlehales, 3 Swanst. 999, 300, n. (a). Hamlyv. Lee, Seaton on
(f) 1 Dan. 644.
(3) Bowles v. Parsons, 1 id. 149.
(k) Cooper v. Thornton, id. 79.
(l) Attorney Gen. v. Mayor of Coventry, 3 Swanst. 311, n.
(m) Seaton on Decrees, 415. 1 Dick. 143.
tion without notice.(n) After the witnesses have been examined, publication passes, by order; and an order is then entered to refer it to a master to look into the examination and depositions, and to certify whether the claimant has made out any, and what, interest in the premises, or in any, and what, part thereof.(o)

When the master has made his report, the case should be set down for hearing upon the report. This report cannot be excepted to: if either party objects to the master's finding, the matter should be discussed upon hearing the report.(p) Upon the hearing on the report, the court will either make a final order,(q) or send it back to the master to make further inquiries, or to compute principal and interest upon the amount due to the claimant.(r) If it is sent back to the master, it may, if necessary, be heard upon further directions.(s)

When it appears that a party who has been examined pro interesse suo has a plain title to the property, and is not affected by the sequestration, then it is to be discharged against him, with or without costs, as the court shall determine upon the circumstances of the case; and so vice versa.(t)

Injunction to stay proceedings at law.] Where sequestrators or a receiver are in the possession of property belonging to a defendant, and a party claiming that property adversely to the defendant brings an action of ejectment against the sequestrators or receiver, for the purpose of enforcing his claim, the court will interfere by injunction, to prevent the party claiming from proceeding with the ejectment; for although the court will sometimes permit the party to proceed at law against the sequestrators or receiver, where a matter is in a fit state for the right to be ascertained by a trial at law, such a proceeding cannot be adopted unless the permission of the court has been first obtained.(u)

When trial at law, or reference will be directed.] Where a party claiming the legal right to property sequestered has made an application to be examined pro interesse suo, the court has sometimes, instead of granting the order prayed for, given the party leave to try his title at law either by ejectment or in such other manner as may be necessary for the purpose of deciding the point.(v) And sometimes the court

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(n) Rowley v. Ridley, 3 Swanst. 308, n.
(o) Hunt v. Priest, 2 Dick. 541.
(p) 1 Dan. 649. Cooper v. Thornton, 1 Dick. 73. Hamlyn v. Lee, id. 94.
(q) 1 Dick. 73.
(r) Id. 94.
(s) Id. ib.
(t) 1 Dan. 649. Gilb. For. Rom. 81.
(v) Walker v. Bell, 2 Mad. 21. 1 P. Wms. 308.
has at once referred it to the master to inquire whether the party claiming is entitled to any interest in the property; and where the right of the party has been clear and undisputed, the court has at once made the order in his behalf, without either directing an examination pro interesse suo, or referring it to the master to inquire into the existence of the right.\(w\)

Effect of appointing a receiver.] The appointment of a receiver of the rents and profits of lands of which sequestrators are in possession, will discharge the sequestration.\(x\)

Abatement of suit by death of parties.] A sequestration against a defendant upon mesne process abates on the death of the complainant, but it is revived with the suit, if that is revived;\(y\) and the court will not, immediately upon the abatement of the suit, turn the sequestrators out of possession, but will give time for the revival of the suit.\(z\) Where the defendant himself, against whom the sequestration has issued, dies, the process, being personal, not only abates, but falls altogether, and cannot be revived; though it is otherwise where it has issued for the non-performance of a decree.\(a\)

Sequestrator abusing his power.] Where a sequestrator abuses his power, the court will, upon a representation of the facts, make an order that he shall show cause on a particular day why he should not be committed, and pay the costs to the party complaining.\(b\)

Costs.] The costs of a sequestration are not liquidated, but are costs to be taxed by one of the masters of the court. Sometimes the sequestrators are allowed a poundage, and sometimes, under circumstances of trouble and expense, a specific sum in solido.\(c\)

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SECTION VII.

PROCESS AGAINST CORPORATIONS.

A corporation aggregate, being an ideal and invisible person, existing only in contemplation of law, cannot be attached or apprehended. The proceedings against them, either for the purpose of compelling an ap-

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\(w\) Dixon v. Smith, 1 Swanst. 457.  
\(x\) Dickinson v. Smith, 4 Mad. 177.  
\(y\) Heyn v. Heyn, Jac. 49.  
\(z\) Hyde v. Forster, 1 Dick. 139.  
\(a\) White v. Hayward, 2 Ves. 461.  
\(b\) Hawkins v. Crook, 3 Atk. 594.  
\(c\) Lord Pelham v. Lord Harley, 3 Swanst. 291, n.  
\(d\) 1 Dan. Ch. Pr. 650.
pearance or an answer, are therefore commenced by distraining the property of the corporation. For this purpose a writ of distringas is the first process. It is a writ directed to the sheriff, commanding him to distrain the land, goods, and chattels of the corporation, so that they may not possess them till the court shall make other order to the contrary; and that in the meantime the sheriff do answer to the court for what he so distrains, so that the defendant may be compelled to appear in chancery and answer the contempt. 

_Teste and return._] By the English practice, there must be fifteen days between the teste and return of this writ. It is made out by the register or clerk, upon an affidavit of the proper service of the subpoena.

An order must be entered before this writ issues; and it would be the safest course to apply to the court, _ex parte_, for such order, and have the return day fixed by the court.

_Alias and pluries distringas._] Upon a distringas, if the corporation has property, the sheriff usually levies 40s. only, and makes his return accordingly; and if this execution does not procure the obedience of the corporation, an alias distringas may be obtained. This is a writ commanding the sheriff again to distrain the goods and chattels, lands and tenements of the corporation. Upon this writ, the sheriff usually levies 4l.; and if, after that, the corporation still continues disobedient, a pluries distringas issues, upon which he levies on the whole property.

_Sequestration._] If the pluries distringas fails of effect, upon its being returned by the sheriff, a commission of sequestration may be obtained against the corporation. This commission is usually directed to five persons named by the complainant, directing them to sequester the goods and chattels, the rents and profits and real estate of the corporation, until they shall appear or answer the complainant's bill, or the court make further order to the contrary. A sequestration cannot be discharged till the corporation have performed what they are enjoined to do, and paid the costs of the several distringases, and of the sequestration, including the commissioners' fees. But upon their doing this, they may, upon motion, get the sequestration discharged.

After a sequestration has been issued against a corporation, the complainant may, if he pleases, set down the cause to be heard, and have

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(d) 1 Dan. 190.  
(e) 1 Harr. Ch. Pr. 197.  
(f) 1 Hoff. Ch. Pr. 164.  
(g) 1 Dan. 190. 1 Hoff. Ch. Pr. 164.  
(h) Id. ib.
the bill taken pro confesso against them in the same way as may be done in the case of an ordinary person.\(^{(i)}\)

Process to compel appearance of corporation where it has no property.\(^{(k)}\) In the case of Curzon v. The African Company,\(^{(k)}\) Lord Keeper North is reported to have said, that he did not see how a company who had no property could be compelled to appear. In answer to which it was said, in argument, that in such a case the complainant might sue out a distingas against the company and have it returned nihil, and so get a sequestration against them; and then by the course of the court, the complainant need not bring them to a hearing.

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CHAP. III.

APPEARANCE.

Sect. 1. Of appearance in general.
2. Voluntary appearance.
3. Compulsory appearance.
4. Appearing gratis.
5. Appearance by married women.
6. Appearance by infants.
7. Appearance by idiots, lunatics, &c.
8. Appearance by corporations.

SECTION I.

Of appearance in general.

Nature of.\(^{]} \) Appearance is the formal proceeding by which the defendant submits himself to the jurisdiction of the court.

Formerly an appearance was absolutely necessary to be entered, before a decree pro confesso could be had against the defendant. But the rule is now otherwise, as we shall see in a future Chapter.

Appearances are either voluntary or compulsory—voluntary, when the

\(^{(i)}\) 1 Dan. 190. \(^{(k)}\) Vern. 132.
defendant comes in upon the return of the subpoena; compulsory, where the appearance is the consequence of any of the processes of contempt before mentioned.

A defendant may also appear gratis; which takes place where he does so before he has been served with a subpoena.\(^{(a)}\)

What amounts to.] Putting in an answer is an appearance on the records of the court.\(^{(b)}\) So if a party is named as defendant in the bill, but no subpoena is served nor appearance entered, yet if he appear by counsel at the hearing and consent to be bound by the decree, no objection can be taken.\(^{(c)}\) And although the defendant has not appeared, yet he may move to dissolve an injunction or set aside an attachment on the ground of an insufficient service of the subpoena.\(^{(d)}\)

When the defendant applies to set aside proceedings to compel his appearance, upon a service of the subpoena on his servant, at his place of residence, on the ground of an alleged irregularity, he must, by the English practice, enter a conditional appearance in the suit, so that the complainant may proceed thereon if the defendant's application is not successful.\(^{(e)}\)

Effect of.] The entry of an appearance at the time the defendant serves notice of a motion to set aside process for want of an appearance, on the ground of irregularity, is no waiver of the irregularity complained of; but the motion may be made before the appearance is entered.\(^{(f)}\)

An appearance cures all defects in the process or its service.\(^{(g)}\)

Where a solicitor or other officer of the court neglects to appear in the cause, after personal service of the subpoena, he will not be entitled to the service of subsequent notices and papers upon him or his agent.\(^{(h)}\).

But a party who has appeared in the cause is entitled to notice of the subsequent proceedings, although he is in contempt and the bill has been taken as confessed against him for want of an answer.\(^{(i)}\)

\(^{(a)}\) 2 Dan. 4, 5. See also Georgia Lumber Co. v. Bissell, 9 Paige, 225.

\(^{(b)}\) Livingston v. Gibbons, 4 John. Ch. Rep. 94. And in a suit brought in the supreme court of the United States, against a state, a demurrer to the bill signed by the attorney general of the state, is a sufficient appearance by such state. State of New-Jersey v. State of New-York, 6 Pet. 323.

\(^{(c)}\) Capel v. Butler, 2 Sim. & Sta. 469.


\(^{(f)}\) Halpin v. Hamilton, 1 Hogan, 103.

\(^{(g)}\) Stange's Rep. 155. 1 Annt. 76.

\(^{(h)}\) Parker v. Williams, 4 Paige, 439.

\(^{(i)}\) Wells v. Cruger, 5 Paige, 164.

\(^{(i)}\) King v. Bryant, 3 Myl. & Craig, 191.
SECTION II.

VOLUNTARY APPEARANCE.

A voluntary appearance is where the defendant, on being served with a subpoena, obeys its injunction by entering his appearance in the proper place, and serving notice thereof on the complainant's solicitor, within the time limited by the rules of the court.

Where to be entered.] If the suit is before the chancellor, the defendant's appearance must be entered with the register or assistant register: if before a vice chancellor, it must be entered with the clerk residing in the circuit where the suit is pending. (k)

When to be entered.] The appearance is to be entered within twenty days after the appearance day mentioned in the subpoena. (l)

How to be entered.] The appearance is usually entered in this manner. The solicitor for the defendant sends a written request to the register or clerk in this form:

[Title of the cause.]

Sir,

Please to enter my appearance for the defendant in the above cause. Dated ..., 1843.

Yours, &c.

E. F. Sol'r for deft.

To J. M. D. Esq., Register,
(or clerk.)

Upon receiving which request, the register or clerk will enter the appearance of the defendant by his solicitor.

[Notice of appearance.] The defendant's solicitor should then give notice of his appearance, to the complainant's solicitor, as follows:

[Title of cause.]

Sir,

You will please take notice that my appearance for the defendant in this cause has been this day entered with J.
M. D. Esq., the register (or clerk) of this court, at his office in Albany.
Dated ...., 1843.

Yours, &c.

E. F. Sol'r for deft.

To G. H. Esq.

Sol'r for compt.

A defendant may appear in person, if he chooses to do so; but in case he employs a solicitor, he cannot appear on the record in person. (m)

SECTION III.

COMPULSORY APPEARANCE.

A compulsory appearance is where the defendant is either taken and brought in upon an attachment, or other process of contempt, and is thereby compelled to enter an appearance for himself; or where, upon the service of an attachment, the defendant gives bail for his appearance at the return day thereof, and failing to do so, the court orders that his appearance be entered by the proper officer thereof. (n)

If the defendant appears personally, or is brought into court by the sheriff on the return of an attachment for not appearing, he must enter his appearance and pay the costs incurred by his contempt, instanter, or within such time as the court shall then appoint, or be committed until he complies. (o)

So where a defendant brought into court by writ of habeas corpus or other process, shall neglect or refuse to enter his appearance, according to the rules of the court, the court shall order his appearance to be entered; and the suit shall then proceed, as if the party had actually appeared. (p)

(m) 2 R. S. 276, § 11.  
(n) See Rules 97, 98.  
(o) Rule 89.  
(p) 2 R. S. 179, § 72, (orig. § 73.)
SECTION IV.

APPEARING GRATIS.

Appearing gratis, is where the defendant, on being informed that a bill has been filed against him, causes an appearance to be entered for him without waiting to be served with a subpoena.

This method of appearing is generally resorted to where a complainant serves only a part of the defendants, with a subpoena, and a defendant who is not served wishes to make an immediate application to the court in the cause. Thus a defendant may appear gratis, in order to move to refer the bill for impertinence. So he may appear gratis for the purpose of ascertaining whether the bill was on file at the time of issuing the subpoena, and in order to prevent its being ante-dated. And a defendant arrested upon a ne exeat, but upon whom no subpoena has been served, may also appear gratis and demand a copy of the bill, in order to move to be discharged from the ne exeat. So a defendant may appear gratis for the purpose of moving to dissolve an injunction affecting his rights.

A party may likewise, in certain cases, appear gratis at the hearing, and consent to be bound by the decree. But in such cases it is necessary that the party should be named as a defendant upon the record. Thus where a person not a party to the suit was interested in a question, and appeared by counsel and submitted to be bound by the decision, the court held that they could not hear him without the consent of the other defendants. But it seems that if, in such a case, all parties consent, the record may be brought into court and the defendant's name inserted therein.

It is to be observed, however, that by appearing gratis, the defendant cannot deprive the complainant of his right to move for an injunction, ex parte. Therefore, where a motion was made for an injunction to restrain the cutting of timber, and the defendant, on the day before the

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(r) 2 Dan. 8, 16.
(t) Waffle v. Vanderheyden, 8 Paige, 45.

(w) Id. ib.
motion was made, entered an appearance gratis, Lord Eldon nevertheless granted the injunction; observing, that if a person about to commit waste, and against whom a bill is filed, could, by appearing the evening before the motion, prevent it, he would get two days for cutting timber. (x) His lordship, however, said, that perhaps it might be different where the defendant had appeared so long before the motion, that the complainant might have given him notice. And there is no doubt that if a complainant serves a defendant with a subpoena, he thereby puts him in a situation which entitles him to notice of the application to be made against him. (y) Such notice, however, before the defendant has appeared is irregular, unless it have the previous leave of the court to sanction it. (z)

Whether a defendant appears gratis, or after service of the subpoena, he has forty days to put in his answer after service of a copy of the bill and notice of the order to answer. (a)

By appearing gratis, the defendant does not lose his costs. (b) And after appearing in this manner, he is as much amenable to the court for contempts as if the subpoena had been served upon him. (c)

SECTION V.

APPEARANCE BY MARRIED WOMEN.

Where a bill is filed against husband and wife, the husband is bound to enter a joint appearance for himself and wife. (d) And if the husband only be served, and has notice that his wife is also a defendant, he must enter an appearance for her: otherwise an attachment will issue against him, even though he appear and answer the bill. (e) And if an appearance is entered for the wife, and she does not answer, an attachment will issue against both. (f)

But where a man's wife refuses to join with him in his defence, or lives separate from him, and is not under his influence or control, he may apply to the court, by motion, for leave to put in a separate an-

(b) Berry v. Weller, supra. (d) Lawitt v. Cruger and wife, 1 Paige, 491. Cary, 92.
(c) Hill v. Rimell, 2 My. & Craig, 641. (e) Tott. Proceed. 11.
(d) Rule 94. (f) Ibid. 1 Dan. 217. (b) 1 Dick. 38.
swear from her, which will be granted, and in the meantime process will be stayed against him. And it seems the like order may be obtained where he has already answered without having made such an application previously. (g) But in all cases after due service, process of contempt may be awarded against the husband for the default of the wife, unless an order be obtained to the contrary. (h)

If the bill be brought against husband and wife for a demand against the separate estate of the wife, and the husband is abroad and not amenable to the process of the court, the subpoena may be served upon the wife alone, and she must appear and answer the bill. (i) In such a case the proper course is for the complainant to make an application to the court, by petition, upon notice to the wife, for an order that she appear and answer separately; and that if her appearance be not entered within such time as the court shall appoint, an attachment may issue. (k)

The husband has the right to appear for his wife in all cases, even where she is sued as executrix. (l)

Whenever a married woman appears separately from her husband, she appears without a guardian, unless she is an infant.

SECTION VI.

APPEARANCE BY INFANTS.

Guardian ad litem.] In this state, the appearance of an infant is entered by his guardian ad litem; who is appointed by the court, on petition for that purpose.

How appointed. The petition for the appointment of a guardian ad litem must be by the infant in person, if he is of the age of fourteen or upwards; but if he is under fourteen, it must be presented by his next of kin, or some other friend who has no interest in the suit adverse to that of the infant. If the infant, or some disinterested relative or friend in his behalf, does not procure the appointment of a guardian ad litem within the usual time for appearance, the complainant may apply to the court to appoint a suitable person as the guardian of such infant. The

(g) 1 Dan. 209, 217.  
(h) Ibid.  
(i) Banyan v. Mortimer, 6 Mad. 278.  
(k) Ibid.  

Bell v. Hyde, Prec. in Ch. 328.
petition for this purpose must briefly state the age and residence of the infant, the general object of the suit or proceeding, and the nature of the infant's interest therein.\(m\)

The order entered under this rule, when the complainant applies for the appointment of a guardian, is not absolute in the first instance, but only nisi; i.e. that the person designated by the court be appointed guardian, unless the infant, within ten days after service of a copy of such order, shall himself procure a guardian to be appointed. A copy of such order may be served personally upon the infant, if he is of the age of fourteen years; and if he is under that age, then upon his general guardian, or his relative, friend, or other person with whom he resides.\(n\)

At the expiration of the ten days, upon an affidavit of the service, and that no notice of the appointment of a guardian by the infant has been received, the complainant may have an order of course that the former order be made absolute.\(o\)

In partition suits, if an infant defendant does not procure a guardian ad litem to be appointed, the court, upon the petition of the complainant, will appoint the register, assistant register, or a clerk of the court, as such guardian.\(p\)

An order for the appointment of a guardian ad litem, except in a partition suit, may be entered of course, on filing the petition of the infant, if he is over fourteen years of age, or of some person in his behalf, if under fourteen, together with the consent of the guardian and the usual affidavit, and the certificate of a vice chancellor or master endorsed thereon, that he has examined into the circumstances, and that the guardian proposed is a suitable and proper person, and has no interest in the suit in opposition to the interest of the infant.\(q\) But to authorize the entry of an order of course, appointing a guardian ad litem under this rule, the petition should distinctly show an authority to make the appointment on the ground that the infant had been served with process to appear in the suit, or that he had been proceeded against as an absentee, and an order obtained for his appearance, under the statute.\(r\)

Who may be appointed. No person can be appointed guardian ad litem for an infant, unless he be the general guardian of the infant, or a master, solicitor, or other officer of the court, who is fully competent to

\(m\) Rule 144.
\(n\) Knickerbacker v. De Freest and al. 2 Paige, 304.
\(o\) Id. ib.
\(q\) Rule 146.
\(r\) Grant v. Van Schoonhoven and al. 9 Paige, 255.
understand and protect the rights of the infant, and who has no interest adverse to his, and is not connected in business with the solicitor or counsel of the adverse party. He must also be of sufficient ability to answer to the infant for any damage which may be sustained by his negligence or misconduct in the defence of the suit.\(^{(s)}\)

If an infant defendant is a married woman, her husband may be appointed her guardian \textit{ad litem}, in case he has no interest in the suit adverse to hers, and is competent in other respects. And it is usual to appoint him the guardian in such cases.

The court will not appoint a guardian for an infant upon the nomination of the complainant.\(^{(t)}\) That is the complainant has no right to select the guardian.

\textit{Duty, compensation, and liability of guardian \textit{ad litem}.} It is the duty of every master, solicitor, or other officer of the court, to act as guardian \textit{ad litem} for an infant defendant, whenever appointed by the court. And it is his duty to examine into the circumstances of the case, so far as to enable him to make the proper defence when necessary for the protection of the rights of the infant.

He is entitled to such compensation for his services as the court may deem reasonable.

If he improperly subjects the infant or his estate to cost or expense, or neglects to make a proper defence when necessary, he will be personally responsible to the infant for such misconduct or neglect.\(^{(u)}\) And he may also be punished by the court for his misconduct.\(^{(v)}\)

Where a special answer is necessary or advisable, to bring the rights of the infant properly before the court, it is the duty of the guardian \textit{ad litem} to put in such an answer.\(^{(w)}\) But the guardian \textit{ad litem} and his counsel may exercise a discretion in taking proceedings in a cause; and may decline doing so, where they are satisfied it is a clear case against the infant.\(^{(x)}\)

The guardian \textit{ad litem} is responsible for the propriety and conduct of the defence; and if the answer put in by him for the infant is reported scandalous or impertinent, he is liable for the costs of it.\(^{(y)}\)

Sometimes the guardian is ordered or decreed to perform a duty on behalf of the infant; his refusal or neglect to do which will subject him to the censure of the court.\(^{(z)}\)

\(^{(z)}\) Rule 148. \(^{(t)}\) Knickerbacker v. De Freest, 2 Paige, 304. \(^{(u)}\) Knickerbacker v. De Freest, supra. \(^{(w)}\) Id. ib. \(^{(x)}\) Levy v. Levy, 3 Mad. Rep. 945. \(^{(y)}\) Hinde, 311. \(^{(z)}\) Id. ib.
If a guardian \textit{ad litem} does not do his duty, or other sufficient ground be made out, the court will remove him.\((a)\)

\textit{Appearance, how entered by guardian \textit{ad litem}.} In ordinary cases, the guardian \textit{ad litem} employs a solicitor to enter the appearance of the infant, and to defend the suit for him; but where a solicitor or other officer of the court is appointed guardian, it is usual for him to enter the appearance himself with the register or clerk.

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\textbf{SECTION VII.}

\textbf{APPEARANCE BY IDIOTS, LUNATICS, \&C.}

An idiot or lunatic, when made a defendant to a suit, must appear and defend by the committee of his estate, if one has been appointed.\((b)\)

In cases where there is a committee, he generally applies by motion or petition to be appointed guardian to answer and defend the suit; which is ordered of course.\((c)\)

If it happens that the idiot or lunatic has no committee, or the committee has an interest opposite to that of the idiot or lunatic, an order may be obtained, on affidavit of the defendant's incompetency, for appointing another person as guardian for the purpose of defending the suit against him.\((d)\)

If a bill is brought against a lunatic, stating him to be such, it is a motion of course to apply to the court for a commission to assign him a guardian, and to take his answer by such guardian. But if the bill does not state the defendant to be a lunatic, an affidavit, or other evidence, will be required to show the defendant's lunacy, before he will be permitted to answer by guardian.\((e)\)

The application for the appointment of a guardian to appear and answer for the defendant may, in some cases, be made by the complainant.\((f)\)

Where the defendant has a committee, and he refuses to appear, an application should be made that he appear within a limited time, or that a new committee be appointed.\((g)\)

\((a)\) Russell \textit{v.} Sharpe, 1 Jac. \& W. 482.

\((b)\) Mitf. Eq. Pl. 82.


\((d)\) Mitf. 82.

\((e)\) 1 Faw. Ex. Pr. 477.

\((f)\) 1 Dan. 220.

\((g)\) Snell \textit{v.} Hyat, id. 287. 1 Coll. Lu. 353; Shelford, 496.
A similar practice is to be pursued in order to procure the appointment of a guardian for the defendant, in cases where such defendant is so infirm in body and mind as to be incapable of putting in an answer; (4) or where he is deaf and dumb. (5)

The application, whether made by the complainant or by some person on behalf of the defendant, may be either by petition, or by motion founded on an affidavit of the facts. In the former case, it would probably be considered necessary that notice should be given to the relative of the defendant, or the person with whom he resides.

SEC T I O N  VIII.

A P P E A R A N C E  B Y  C O R P O R A T I O N S.

Corporations aggregate appear by a solicitor in the same manner as civil persons.

C H A P. IV.

P R O C E E D I N G S  T O  C O M P E L  A N  A N S W E R.

The writ of subpoena taken out by the complainant on filing his bill, not only commands the defendant to enter his appearance, but also requires him to answer the bill. Accordingly, after the defendant's appearance has been entered, the complainant may have an order of course that he put in his answer in forty days after service of a copy of the bill and notice of the order, or that the bill be taken as confessed. Or, in case the complainant wishes a discovery, on filing an affidavit that it is necessary, the order may be varied so as to require the defendant to answer, in like manner, or that an attachment issue. And in either case, if the defendant does not file his answer and serve a copy thereof, within the forty days, the complainant, on filing an affidavit showing the defendant's default, may have an order to take the bill as confessed, or that

an attachment issue, as the original order may be.(a) And the court will not, in that stage of the cause, inquire whether an answer is actually necessary for the purposes of the suit.(b)

The attachment issued under this rule is in the same form as the process for not appearing.(c) The endorsement of the writ, recitals, &c. should state it to be issued for not answering.

If the defendant appears personally, or is brought into court by the sheriff on the return of the attachment for not answering, he must put in his answer and pay the costs incurred by his contempt, instanter, or within such time as the court shall appoint, or be committed until he complies.(d) Or, if the contempt is persisted in, the court may commit the defendant; and upon a certificate of the sheriff of his detainer, and proof by affidavit of his continued contempt in not filing his answer, a sequestration may be granted.(e)

Where a party is in contempt, the court will not grant an application in his favor which is not a matter of strict right, until he has purged his contempt.(f) He must clear his contempt before he can take any effectual proceedings in the cause; and if he be in custody for want of an answer, he cannot be liberated therefrom before he has filed his answer, paid or tendered the costs of his contempt, and obtained an order for his discharge.(g)

The complainant, by amending his bill, waives his process of contempt;(h) but he will be allowed, upon motion or petition, and giving personal notice to defendant, to amend his bill without its operating as a discharge of such contempt, and to commence de novo, where the defendant, upon being brought to the bar of the court for his contempt refuses to put in his answer.(i)

If the complainant accepts the defendant’s answer, or replies, or moves upon it, which implies acceptance, he cannot use the process of contempt for the purpose of getting costs.(k)

The same proceedings are also had to compel the several answers of a married woman, an infant, a person of unsound mind, and a corporation, as are used to enforce their appearance.(l)

In a suit against husband and wife, if an order to answer separately,
has not been obtained, the husband must put in a joint answer for himself and wife, or the bill may be taken pro confesso against both.\(^m\)
And process for an answer may go against both.\(^n\) If the wife is absent, the husband may obtain time to issue a commission to obtain her oath to the answer.\(^o\) If he has not control over her, he must, upon affidavit, obtain an order to exempt him from the process of contempt, and that the wife may answer separately, and then (an order for the purpose being obtained,) the attachment and other process will go against the wife. If a bill is filed against husband and wife in respect of a demand against her out of her separate estate, or in her character of executrix, &c., and the husband is out of the jurisdiction of the court, the complainant, before he can issue an attachment against the wife, must obtain an order for her to appear and answer separately; and then the proceedings are the same as where the husband obtains the order.\(^p\)

In cases where infants or lunatics are defendants, the guardian ad litem of the former and the committee of the latter may be proceeded against in order to compel an answer, in the same manner as other persons.

The answer of a corporation is enforced by process of distringas and sequestration.\(^q\)

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\(^m\) Bilton v. Bennett and wife, 4 Sim. 17. Leavitt v. Cruger and wife, 1 Paige, 431.
\(^n\) Leavitt v. Cruger and wife, supra.
\(^o\) Gray's Solicitor's Prac. 165.
\(^p\) See ante, p. 88. Gray's Solicitor's Prac. 165.
\(^q\) See ante, p. 88. Gray's Solicitor's Prac. 165.
CHAP. V.

TAKING BILLS AS CONFESSIONED.

Sect. 1. Nature of the proceeding.
2. For want of an Appearance.
3. For want of an Answer.

SECTION I.

Nature of the proceeding.

In previous chapters we have pointed out the methods which the court adopt to compel a defendant to appear, or to put in his answer. As it is obvious, however, that in a court of equity, where the nature of the relief to be granted frequently depends upon the discovery to be elicited from a defendant by his answer, the mere taking a party into custody, or sequestrating his property, will not accomplish the object of doing complete justice to the complainant, the court has adopted a method of rendering its process effectual by treating the defendant's contumacy as an admission of the complainant's case. It will therefore in certain cases, hereafter specified, make an order that the facts stated in the bill shall be considered as true, and decree against the defendant according to the equity arising upon the case stated by the complainant. This proceeding is termed taking a bill pro confesso, or as confessed.

This practice is not of very ancient standing. Formerly no bill could be taken as confessed unless an appearance had been entered.\(^{(a)}\)

The revised statutes empower the chancellor to establish rules from time to time for taking bills as confessed, in all cases not otherwise provided for by law.\(^{(b)}\) Under this section, rules have been made for

\(^{(a)}\) 1 Dan. 679, 680. \(^{(b)}\) 2 R. S. 179, § 80, (orig. §7 4.)
taking bills as confessed for want of an appearance in the following cases:—on personal service of the subpœna;—where the defendant is taken on an attachment for not appearing, and being bailed, he makes default;—or where he appears personally on the return of the attachment or is brought in by the sheriff, but refuses to enter his appearance. The bill may also be taken as confessed against non-resident, absent, or concealed defendants who fail to appear after the publication of notice of an order to appear against them.

And the bill may be taken as confessed for want of an answer, after the defendant's appearance has been entered.

SECTION II.

FOR WANT OF AN APPEARANCE.

Where the subpœna has been personally served.] When the subpœna is served on the defendant in person, if he does not appear within twenty days after the appearance day mentioned therein, the complainant, on filing proof of the service of the subpœna, may have an order of course to take the bill as confessed. (c)

Where defendant is taken on an attachment, and being bailed, he fails to appear.] If an attachment for not appearing is served, and the defendant gives security for his appearance at the return day of the attachment, as required by law, if he does not comply with the condition of the bond, the complainant may have a special order that his bill be taken as confessed against the defendant. (d) The complainant may at the same time have leave to prosecute the bond for his costs. The order authorized by this rule should be applied for upon affidavit showing that an attachment has been issued, returnable at such a time, that the defendant has been taken upon it, and has given a bond for his appearance, &c. as required by law; but that he has not complied with the condition thereof by appearing in court and causing his appearance to be entered and clearing his contempt, &c.; or if he has appeared, his refusal to enter his appearance. And the order should recite the same facts, and thereupon direct the bill to be taken as confessed.

Where defendant appears personally on return of attachment, or is

(c) Rule 23. Sawyer v. Sawyer, 3 Page, 363. (d) Rule 27.
brought in by sheriff, but refuses to enter his appearance.] The statute provides that when a defendant brought into court upon habeas corpus or other process, shall neglect or refuse to enter his appearance according to the rules of the court, the court shall order his appearance to be entered; and the suit shall then proceed as if the party had actually appeared. (e) And the 28th rule requires that if the defendant appears personally, or is brought into court by the sheriff, on the return of an attachment for not appearing, he shall enter his appearance and pay, the costs of his contempt instanter; or the complainant may have an order that the bill be taken as confessed, and that the defendant be committed until the costs are paid.

When the appearance is entered by the court, under the above section of the statute, the proceedings to take the bill pro confesso may be had under the 24th rule. In such case the usual order to answer, &c. should be entered, and a copy of the bill and notice of the order must be served either personally or at his residence or place of business in case he is absent, or by putting them in the post office, as directed by rule 16.

Against non-resident, absent, or concealed defendants.] The manner in which bills may be taken pro confesso against absent, concealed and non-resident defendants upon whom process of subpoena cannot be served, is prescribed by the statute and rules of the court as follows:

There are five cases in which an order for the appearance of defendants may be made and directed to be published by the court. 1. When the defendant resides out of the state. 2. When he is a resident of this state, but process cannot be served upon him by reason of his absence from it. 3. Where process cannot be served by reason of his concealment within this state. 4. Where process cannot be served by reason of the defendant's continued absence from his place of residence. (f) 5. When the defendant's last known place of residence was within this state, but his residence at the time cannot, on due inquiry, be ascertained by the complainant or his solicitor. (g)

If the defendant resides out of the state, there must be proof, by affidavit, of the fact. It is not sufficient for the complainant to state, in his affidavit, that he is informed and believes the defendant lives out of the state; but he must swear from whom he received his information. (h) And the affidavit should state the place of the defendant's residence, as particularly as possible.

(e) 2 R. S. 179, § 79, (orig. § 73.)  
(f) 2 R. S. 186, § 128, (orig. § 129.)  
(g) Laws of 1848, p. 363, § 1.  
(h) Burton v. Maloon, Barnard, 403.
To obtain an order for publication against a defendant who resides in the state but who is absent therefrom, or concealed within the same the affidavit should state the place of residence of the defendant, the particular circumstances of his absence, and the probable duration thereof, and if the person making the affidavit is not himself knowing to the facts, it should state the names and residences, or other descriptions of the persons from whom the information of such absence or concealment was obtained; to enable the court to judge of the necessity or propriety of proceeding against the defendant by a publication of the notice, instead of a personal service of the subpoena. An affidavit which merely states that the deponent believes the defendant resides in the state, and that the subpoena could not be served on him by reason of his concealment within the state, or of his continued absence from the place of his residence, is not sufficient to authorize the court to grant an order of publication. (i) The affidavit should state all the particulars as to the place and manner of the defendant's residence, and the length of time it has continued in the place sworn to; whether the defendant is a household, or has a family, &c.; so that the court may see whether he was an actual resident of the state at the commencement of the suit.

Where process cannot be served, by reason of the defendant's continued absence from his place of residence, the affidavit should state the party's place of residence in this state, and his continued absence therefrom. What is to be deemed a continued absence has not been decided, and must depend upon the particular circumstances of each case. A mere temporary absence, with the intention of returning within the two months specified in the order for his appearance, would not probably authorize a publication of notice of the order. But if the party is expected to be absent such a length of time as to produce an unreasonable delay in the cause, the court would undoubtedly consider this a "continued absence" within the statute. In determining, as to the propriety of granting an order for publication, the court will consider the question whether it is necessary, for the purpose of expediting the proceedings.

Order to appear.] Upon this affidavit a motion must be made to the court, either in term or on a motion day, for an order that the defendant appear and answer the complaintant's bill. (k) This order requires the defendant to appear and answer the bill as follows: 1. If he be a resident of the state, within two months from its date. 2. If his last known

(i) Evarts et al. v. Becker, 8 Paige, 580.
(4) Rule 25.
place of residence was in this state, but his present place of residence
cannot, on due enquiry, be ascertained; or if he be a resident of some
other of the United States, or of one of the territories thereof, or of
either of the British provinces in North America, or the Republic of
Texas, within three months of its date. 3. If he be a resident of any
other state or country, not before mentioned, within six months from its
date.(l)

Publication of notice of order.] Instead of requiring the order itself
to be published, as was formerly necessary, the act of 1842 directs that
within twenty days from the date of such order a notice thereof shall be
inserted in the state paper, and in such other public newspaper printed
in this state as the court shall direct. Such publication must be contin-
ued in each of such papers once at least in each week, for three weeks
in succession; which notice must be substantially in this form: "Before
the chancellor," or, "Before the vice chancellor of the —— circuit,"
as the case may be. "A. B. v. C. D. and others. Bill for foreclosure
of mortgage," or, "Bill for partition of lands," as the case may be.
"E. F. of ———, complainant's solicitor. G. H., one of the defendants
in this cause, whose place of residence is in ———," or, "whose place
of residence is unknown"—"is required to appear in this cause by the
——— day of ——— next, or the bill filed therein will be taken as con-
fessed by him."

But such publication will not be necessary, provided a copy of such
order shall have been personally served on the defendant at least twen-
ty days before the time prescribed for his appearance.(m)

The above provisions of the act apply to suits instituted for the par-
tition of lands as well as to all other suits instituted in this court, and to
unknown owner in partition suits.(n)

The chancellor may, if necessary, by further order, extend the time
for the appearance of the defendant, and may direct the publication of
such further order for so long a time as he shall see fit to fix.(o)

Order to take bill as confessed.] If the defendant fails to appear
within the time limited in the order, on due proof of the publication for
the time directed, or of the personal service of the order, the bill may
be taken as confessed; and the court will direct a reference to a master
to take proof of the facts and circumstances stated in the bill.(p) The
publication of the order must be proved by affidavits of the printers of

(m) Id. ib. § 3.
(n) Id. ib. § 4.
(o) 9 R. S. 188, § 131, (orig. § 195.)
(p) Id. § 132, (orig. § 126.)
the papers or their foreman or principal clerk. If the order is served personally upon the defendant, the affidavit of the person serving it will be necessary. An affidavit that the defendant has not appeared must also be filed.

An order of reference as to the rights of an absent defendant may be entered of course under the 25th rule, at any time after the bill has been taken as confessed against the absentee, although there are other defendants who appear and contest the suit.

The master to whom the reference is made is to take such proofs as may be offered. The bill is not to be considered as evidence of any fact stated in it; but when so directed by the chancellor, the master may receive the testimony of the complainant as evidence.

This order directing the master to receive the testimony of the complainant as evidence, can only be obtained by a special application to the court.

Whenever the bill is for the payment or satisfaction of any sum of money, the court shall direct that the complainant be examined by the master as to any payments that may have been made to him or to any person for his use, on account of the demand mentioned in the bill, and which ought to be credited on such demand.

The direction to examine the complainant under this section is usually made a part of the order of reference, and under the 25th rule is an order of course.

The master must report the proofs and examinations had before him; and on the coming in of his report, the court will make such order thereupon as shall be just.

Infant defendants. Where there is an infant absentee, the course under the statute must be pursued; and on the expiration of the time fixed for his appearance, if no one applies in his behalf, the complainant may move, as in ordinary cases, for a guardian ad litem.

Proceedings may also be had by publication under the statute where the infant is concealed.

Lunatic Absentee. And the court has directed a similar course to be pursued where the defendant was a resident of another state and a lunatic.

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(p) 3 R. S. 463, § 68, (orig. § 56.)
(2) Page, 170.
(s) Corning v. Baxter, id. 178.
(t) 2 R. S. 186, § 133, (orig. § 197.)
(u) Rule 25.
(2) 2 R. S. 186, § 134, (orig. § 198.)
(w) Id. ib. § 135, (orig. § 199.)
(y) Mortimer v. Copsey, 1 Hoff. Ch. Pr. 104.
(z) Otis v. Wells, id. ib.
FOREIGN CORPORATION.] In a suit against a foreign corporation an affidavit should be made of the place of its institution, and that no officer has been found within this state upon whom the subpoena could be served. Upon this an application should be made to this court, by petition or motion, for an order to advertise that the corporation appear pursuant to the statute.

SECTION III.

FOR WANT OF AN ANSWER.

Where defendant appears voluntarily.] If the complainant has received notice of the defendant's appearance, he may have an order of course that he put in his answer in forty days after service of a copy of the bill and notice of the order, or that the bill be taken as confessed. If the defendant does not file his answer and serve a copy thereof within the forty days, or such further time as may be allowed him for the purpose, the complainant, on filing an affidavit showing the defendant's default, may have an order to take the bill as confessed. (a)

In a suit against husband and wife, if an order to answer separately has not been obtained, the husband must procure the joint answer of himself and wife to be put in, or the bill may be taken as confessed against both. (b)

When a joint answer by husband and wife is put in, it must be sworn to by both. If not so sworn to, and no valid defence is set up therein, it will, on motion, be taken off the files for irregularity, and the bill be taken as confessed. (c)

And although an answer on oath is waived, the answer must be actually signed by the defendant, or it will be taken off the file for irregularity and the bill be taken as confessed, if no valid defence is set up therein. (d)

The complainant, by amending his bill, waives his process of contempt; (e) but he will be allowed, upon motion or petition, and giving personal notice to defendant, to amend his bill without its operating as

(a) Rule 24.
(b) Bilton v. Bennett and wife, 4 Sim. 17.
(c) New-York Chemical Co. v. Flow
491.
(d) Denison v. Bassford, 7 id. 370.
(e) Gray v. Campbell, 1 Russ. & My. 393.
a discharge of such contempt, and to commence de novo, where the defendant, upon being brought to the bar of the court for his contempt, refuses to put in his answer.(f)

Where defendant is taken upon an attachment.] If an attachment for not answering is served, and the defendant gives security for his appearance at the return day of the attachment, as required by law, if he does not comply with the condition of the bond, the complainant may have a special order that his bill be taken as confessed. Or if the defendant appears personally, or is brought into court by the sheriff, on the return of the attachment, he must put in his answer and pay the costs of his contempt instanter, or within such time as the court shall appoint, or the complainant may have an order that the bill be taken as confessed.(g)

Where the defendant's appearance is entered by the court under the authority of the statute before referred to,(h) the complainant may proceed, under the 24th rule, to take the bill as confessed for want of an answer.

The same proceedings, substantially, are to be had to take the bill as confessed for want of an answer, as for want of an appearance.

When the defendant puts in his answer without discharging the costs of his contempt, and the complainant files his replication, he thereby waives the process of contempt.(i)

Where the defendant has appeared to the complainant's bill, and proceedings are had under a decree taking the bill as confessed for want of an answer, in a foreclosure suit, the defendant, notwithstanding he be in contempt, ought to be regularly served with process to attend the master. The court punishes the defendant's default in refusing to answer, by giving to the complainant the benefit of a decree upon the bill as confessed; but there the advantage stops. And when the decree is once pronounced, the subsequent duty of the court and its officers is to execute that decree in the ordinary way. Therefore an absolute order in the first instance, to confirm the master's report made under a decree taken pro confesso for want of an answer, is irregular.(k)

If an answer is put in which is considered insufficient by the complainant, he may except to it for that reason. And if the exceptions are submitted to by the defendant, or a part are submitted to and the rest are abandoned, or are disallowed on reference, the complainant may

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(f) Golds. Doct. of Eq. 136.  (i) Golds. Doct. of Eq. 137.
(g) Rules 27, 28.  (k) King v. Bryant, 3 My. & Craig, 191.
have an order of course that the defendant put in a further answer within twenty days, and pay the costs of the exceptions, or that the bill be taken as confessed.\(^{(f)}\)

Where the complainant amends his bill, so as to require an answer to the amendments, as well as to the exceptions, the defendant must put in a further answer and pay the costs within the time required by the rules; or the complainant, upon filing an affidavit of such default, may have an order of course to take the bill as confessed.\(^{(m)}\)

By the practice in England, if the order to amend the bill requires a further answer to the amendments, the complainant takes out a subpoena for such further answer, and if the defendant does not put in his further answer within the time allowed by the rules of the court for that purpose, the whole bill as amended may be taken as confessed, for want of a full and perfect answer thereto.\(^{(n)}\)

The practice of this court was settled by the chancellor, as follows, in the case of *The Trust and Fire Ins. Co. v. Jenkins*.\(^{(o)}\) Upon an amendment of the bill of course after answer, if the complainant does not intend to waive a further answer to the amendments, he may enter the usual order, of course, in conformity with the principles of the 24th rule, that the defendant answer the amendments in forty days after service of a copy thereof, or that the bill as amended be taken as confessed; or that an attachment may issue, as the case may be. But where an amendment is allowed by a special order of the court, if an answer to the amendments is required, the order should contain the usual directions requiring the defendant to answer, or that the bill as amended be taken as confessed.

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\(^{(f)}\) Rule 58.  
\(^{(m)}\) Rule 61.  
\(^{(n)}\) 1 Dan. 509.  
\(^{(o)}\) 8 Paige, 594.
CHAP. VI.

THE DEFENCE TO A SUIT.

Sect. 1. PROCEEDINGS BY DEFENDANT PREVIOUS TO PUTTING IN HIS DEFENCE.

2. THE DIFFERENT SORTS OF DEFENCE.
3. DEMURRER.
4. PLEA.
5. ANSWER.
6. DISCLAIMER.
7. JOINDER OF SEVERAL DEFENCES.

SECTION 1.

PROCEEDINGS BY DEFENDANT PREVIOUS TO PUTTING IN HIS DEFENCE.

Thus far the attention of the reader has been principally directed to the case on the part of the complainant; the method of bringing it before the court; and the means for compelling the defendant to submit himself to its jurisdiction, or of enabling the complainant to proceed with the suit, without his appearing therein. We are now to consider the course of proceeding on the part of the defendant who is willing to submit himself to the authority of the court and to abide its decision.

Before proceeding, however, to a consideration of the several kinds of defence which may be resorted to by the defendant, it will be necessary to notice certain preliminary steps which may be taken by him before pleading.

Employing a solicitor.] The first step usually taken by a defendant who intends to defend the suit, if he is not himself a solicitor, is, after he has been served with a subpoena, to employ a solicitor to appear for him. A special authority is not necessary to enable a solicitor to appear in the cause. He may do so under a general authority to act as
solicitor for his client. (a) A solicitor, however, ought not to take it upon himself to appear for a defendant without some authority; and where one, without any instruction, had caused an appearance to be entered for an infant defendant, the appearance was ordered to be set aside, and the solicitor to pay the costs. (b)

The practice upon this point is thus laid down by the chancellor, in a case recently before him where the defendants denied the authority of the solicitor to appear for them: "As a general rule when a suit is commenced or defended, or any proceeding is had therein by a solicitor of the court, it is not the practice to inquire into his authority to appear for his supposed client. But if the party for whom he appears or assumes to act denies his authority, and applies to the court for relief before the adverse party has acquired any right or suffered any prejudice in consequence of the acts of the solicitor, the court may correct the proceeding and compel the solicitor to pay the costs to which the parties have been subjected. If the adverse party has acquired rights or been subjected to costs by proceedings in the name of a party who afterwards denies the authority of the solicitor or attorney, the courts are in the habit of permitting the proceedings to stand, where the solicitor or attorney is a responsible person; leaving the party injured by such unauthorized proceedings in his name, to seek his redress against such solicitor or attorney, by a summary application to the court, or otherwise."(c) A defendant may appear in person, however, if he chooses.

**Motion to deliver copy of bill.** After the defendant has caused his appearance to be entered, he may have an order of course that the complainant deliver a copy of the bill in twenty days, or that the suit be dismissed; and if such copy is not delivered within twenty days after service of notice of such order, or within such further time as may be allowed, the defendant, on filing an affidavit of the service of such notice, and that no copy of the bill has been served, may have a decree of course, dismissing the suit, with costs, for want of prosecution. (d)

**Motion to take bill from files.** So the defendant may move that the bill be taken off the files of the court if it has been filed in the name of a person in a state of mental imbecility. This motion should be made before answer; as the putting in an answer to it may be considered as admitting the complainant's competency. But it seems that a suit properly instituted and conducted cannot be dismissed on account of imbecility subsequently arising. (e)

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(a) Wright v. Castle, 3 Mer. 12.  
(b) Richards v. Dasley, 9 Dan. 1.  
(c) American Ins. Co. v. Oakley, 377.  
(d) Rule 29.  
(e) Wartnaby v. Wartnaby, Jacob, 9 Paige, 496.
Excepting to bill for scandal or impertinence.] If the bill contains any scandalous or impertinent matter, the defendant may, before putting in his defence, take exceptions to the bill; to the end that the scandalous or impertinent matter may be expunged.

Exceptions to a bill for scandal or impertinence are to be taken in the same manner as exceptions to an answer for insufficiency; and may be submitted to in like manner and within the same time. If they are not submitted to, the defendant must refer them in the same manner, or they will be considered as abandoned. (f)

If the defendant designs to except to the bill, he must do so before putting in his answer, or submitting to answer by obtaining an order for further time; as by answering or submitting to answer the bill, he waives all objections to it. (g)

The practice upon exceptions to bills for scandal or impertinence being, under the 53d rule, the same as that upon exceptions to answers, it will be sufficient to refer the reader to that part of this work where exceptions to answers are spoken of. (h)

Motion for production of papers.] The court only orders the production of books and papers previous to the final hearing of a cause, upon two principles: security pending the litigation, and discovery or inspection for the purposes of the suit. (i) Therefore the court will not, on the motion of the defendant, order a deed mentioned by the complainant's bill as being in his possession, to be produced for the defendant's inspection; (k) neither will the court, upon motion by the defendant, in a bill for a partnership account, direct the production of accounts, before answer. But it seems that after answer, if he swears to his belief that the books are in the possession of the complainant, and that he, the defendant, cannot answer fully without them, then the court will restrain all proceedings for want of a sufficient answer, until he has been assisted with the inspection. (l) And the court will, upon the application of the defendant, before answer, under special circumstances, order that the complainant should not compel him to answer until within a given time after the production of certain documents set forth in the bill, when it appears that their production is essential to enable the defendant to put in his answer. (m) And if the complainant suffers

(f) Rule 53.
(g) Anon. 2 Ves. sen. 631. Woodward v. Asley, Bunn. 304. 5 Ves. jun. 656. 1 Fow. Ex. Pr. 443.
(h) See post, Book I, Chap. VII, secs. 1 and 2.
(i) Watts v. Lawrence, 3 Paige, 159.
(m) Sed vide Pickering v. Rigby, 18 Ves. 484.

Princess of Wales v. Earl of Liverpool, 1 Swanst. 114. 1 Wilson, 115.
fifteen months to elapse without making the production, he will be ordered to produce the documents on or before a certain day; and if the production is not then made, the bill will be dismissed with costs.(a)

In the case of Jones v. Lewis,(o) the production of an instrument in the complainant's possession was ordered, upon motion, supported by affidavit that the defendant believed the instrument to be forged, and that he could not fully answer the bill before he inspected it.

A defendant is not entitled to a bill of particulars of the complainant's demand, previous to putting in his answer; the forms of the court rendering a bill of particulars unnecessary.(p)

Security for costs.] In certain cases particularly specified in the statute, the defendant may, after his appearance has been entered, compel the complainant to give security for the costs before he can be allowed to proceed any further with the suit.(q)

To obtain an order for this purpose, the defendant presents a petition or affidavit, either in term or on a motion day, stating that his appearance has been entered, and that the complainant is a non-resident. He thereupon moves that the complainant file security within a limited time, or that the bill be dismissed with costs; and that in the meantime proceedings be stayed on the part of the complainant, and that the sureties shall justify if objected to.(r)

If the order is granted, and not complied with within the time limited in it, the bill will be dismissed with costs.(s) But to obtain an order dismissing the bill for want of security, a special application should be made to the court, upon an affidavit of service of a copy of the order, and that no security has been given.

Where the defendant is entitled to security for costs at the commencement of the suit, the complainant's solicitor is liable for the costs to an amount not exceeding $100, unless security is filed as provided by the statute; whether such security has been required by the defendant or not.(t)

But unless all the complainants are non-residents, security for costs cannot be required.(u) In case some of the complainants, therefore, are residents of the state, the solicitor is not liable.
Notwithstanding the liability of the solicitor for costs to the amount of $100, the defendant may apply for other security in a larger sum. (v)

The solicitor may relieve himself from his liability for costs by filing security, and the sureties therein justifying, if excepted to, without being required to do so by the defendant, and by giving notice thereof to the defendant. (w)

By the English practice, if the fact of non-residence appears on the bill, or is known to the defendant, he must apply for security before answer, or time given to answer, and before a demurrer or plea. (x) But our statute is general, authorizing the defendant to require security in the cases specified, without mentioning any time when the application is to be made. It has therefore been decided by the vice chancellor of the first circuit, that the defendant may require security for costs, at any stage of the suit, from a non-resident complainant who resides out of the jurisdiction at the commencement of the suit, and continues so. (y)

As to the kind of non-residence which will entitle the defendant to require security for costs, it is settled that the complainant must be an actual resident abroad. The mere fact that he has gone abroad is not sufficient. The intention to reside abroad for the present, and removal with his family, if the complainant has one, is requisite. (z) But if the complainant has actually removed from the state with his family, and changed his residence, the defendant is entitled to security for costs, although there is a probability that the complainant may return at some future day. (a)

Security will not be required of a complainant about to go abroad. (b) The second section of the statute, which allows the defendant to require security for costs where the complainant becomes a non-resident after the commencement of the suit, will afford an ample remedy, in such cases. (c)

Nor can security be required of an officer in the army or navy, or a consul. (d) But where it appears upon the bill that the complainant is an officer of the army out of the jurisdiction, the defendant will be entitled to the usual security for costs, unless it be distinctly stated that the

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(e) Baldwin v. Williamson, Hopkins, 117.
(f) 2 R. S. 691, 58.
(j) Gilbert v. Gilbert, 2 Paig, 603.
(k) Willis v. Garbutt, 1 Young & Jer. 511.
(l) See 2 R. S. 690, § 2.
complainant is on actual service. It is not sufficient to state that the complainant is an officer of a particular regiment and residing at a particular place out of the jurisdiction, although the regiment may, in fact, be stationed at that place. (e)

Upon a bill filed by the wife against her husband for a separation or limited divorce, if the next friend of the wife, who prosecutes the suit, is irresponsible or insolvent, all proceedings may be stayed until security for costs is given, or a responsible person is substituted in his place; and if such security is not given, or substitution made within a reasonable time, the bill will be dismissed. (f)

The statute directs that the security for costs shall be in the form of a bond, with one or more sufficient sureties, in a penalty of at least $250, to the defendant, conditioned to pay, on demand, all costs that may be awarded to the defendant in the suit. (g) Under this section the court has the power to require security in a larger sum than $250, if it thinks proper to do so. But unless special circumstances are shown, this sum is usually fixed upon as the amount of the penalty of the bond.

The court may either fix the amount itself, or refer it to a master. (h) In one case (i) the amount of the security was fixed by the court at $250, the bond to be approved by the register.

The bond must be filed with the register, assistant register or clerk, and notice thereof given to the defendant or his solicitor. And within twenty days after the service of such notice, the defendant may except to the sufficiency of the sureties, by giving notice of such exception to the complainant's solicitor. (k)

The manner in which this exception is to be taken is pointed out in the statute, "by giving notice of such exception," &c. Of course no exception need be filed.

Within twenty days after notice of such exception, the sureties in the bond must justify, by an affidavit that they are worth double the penalty of such bond, over and above all debts; of which affidavit a copy must be served on the defendant or his solicitor. This justification will operate to discharge the order to stay proceedings. (l)

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(c) Lillie v. Lillie, 2 My. & Keene, 418.
(f) Lawrence v. Lawrence, 3 Paige 287.
(g) 2 R. S. 620, § 4.

(i) Gilbert v. Gilbert, 2 Paige, 603.
(l) Id. ib. § 6.
SECTION II.

THE DIFFERENT SORTS OF DEFENCE.

The defence to a suit in equity may be either by demurrer, by plea, by answer, or by disclaimer. By a demurrer the defendant demands the judgment of the court whether he shall be compelled to answer the bill or not. This species of defence is resorted to where it appears upon the face of the bill itself that there is no equity in the case, on the part of the complainant.

By a plea, the defendant may show some cause why the suit should be dismissed, delayed, or barred. A plea sets up matter of defence not appearing in the bill.

By answer, controverting the case stated by the complainant, the defendant may confess and avoid, or traverse and deny the several parts of the bill; or, admitting the case made by the bill, may submit to the judgment of the court upon it, or upon a new case made by the answer, or both.

By a disclaimer, the defendant may at once terminate the suit by disclaiming all right or interest in the matter sought in the bill.\(^{(m)}\)

And all or any of these modes of defence may be joined; provided each relates to a separate and distinct part of the bill.

A cross bill may also be considered a species of defence.\(^{(n)}\)

SECTION III.

DEMURRER.

*Its nature and uses.* Whenever any ground of defence is apparent upon the bill itself, either from the matter contained in it, or from defect in its frame, or in the case made by it, the proper mode of taking advantage of it is by demurrer.\(^{(o)}\)

\(^{(m)}\) Mitf. Eq. Pl. 106.
\(^{(n)}\) Mitf. Eq. Pl. 107.
\(^{(o)}\) See Galatian v. Erwin, Hopk. 49, 58.
A demurrer is so termed because the party demurring, *demoratur*, or will go no further; (p) the other party not having shown sufficient matter against him. It is an allegation by a defendant which, admitting the matters of fact in the bill stated to be true, shows that they are insufficient for the complainant to proceed upon, or to oblige the defendant to answer; or that, for some reason apparent on the face of the bill, or because of the omission of some matter which ought to be contained in it, or for want of some circumstance which ought to be attendant thereon, the defendant ought not to be compelled to answer. It therefore demands the judgment of the court, whether the defendant shall be compelled to answer the complainant’s bill, or some certain part thereof. (q)

The principal ends of a demurrer are, to avoid a discovery which may be prejudicial to the defendant, to cover a defective title, or to prevent unnecessary expense. (r)

A demurrer to a bill must be founded upon a point of law which goes to the absolute denial of the relief sought. (s) It must express the grounds upon which it is founded; and in doing this it must be positive, explicit, and certain, leaving nothing to supposition or inference. (t)

As a demurrer lies merely upon matter apparent on the face of the bill, so much of the bill as the demurrer extends to is taken for true. Thus, if a demurrer is to the whole bill, the whole bill is taken to be true; if it is to any particular discovery, the matter sought to be discovered, and to which the demurrer extends, is taken to be as stated in the bill; and if the defendant demurs to relief only, the whole case made by the bill to ground the relief prayed, is considered as true. A demurrer is therefore always preceded by a protestation against the truth of the matter contained in the bill—a practice borrowed from the common law and probably intended to avoid conclusion in another suit. (u)

If the demurrer does not go to the whole bill, it must express to what particular parts it is meant to extend; otherwise the court cannot determine the validity of the demurrer without reading the whole bill. (v) And the court is not to be put to the trouble of looking into the bill or answer to see what is covered by the demurrer; but it ought to be expressed in clear and precise terms what part the defendant re-

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(p) 3 Black. Com. 314.  
(q) Mitf. 107, 8.  
(r) Id. 108.  
(s) Verplank v. Caines, 1 John. Ch. 57.  
(t) Barton, 108. 2 Ves. 83. Edsel v. Buchanan.  
(u) Mitf. 211.  
fuses to answer; so that the master, upon a reference to him, upon exceptions, may ascertain precisely how far the demurrer goes, and what is to be answered. It is not a proper way of demurring, therefore, to say that the defendant answers to such a particular fact and demurs to all the rest of the bill. (w)

Demurrer to discovery must be special.] Where a defendant, to a bill praying relief, demurs to the discovery only, he cannot do so under a general demurrer for want of equity, but must make it the subject of special demurrer. (x)

Speaking demurrers.] Care must be taken, in framing a demurrer that it be made to rely only upon the facts stated in the bill; otherwise it will be what is termed a speaking demurrer, and will be overruled. (y) A speaking demurrer is one which introduces some new fact or averment which is necessary to support the demurrer, and which does not distinctly appear upon the face of the bill. (z)

Several causes of demurrer.] A defendant is not limited to show one cause of demurrer only. He may assign as many causes of demurrer as he pleases, either to the whole bill, or to each part of the bill demurred to; and if any one of the causes assigned hold good, the demurrer will be allowed. (a)

Separate demurrers.] A defendant may also put in separate demurrers to separate and distinct parts of a bill, for separate and distinct causes; (b) for the same grounds of demurrer, frequently, will not apply to different parts of a bill, though the whole may be liable to demurrer; and in such a case one demurrer may be overruled, upon argument, another allowed. (c)

Demurrer cannot be good in part and bad in part.] It has been repeatedly determined that a demurrer cannot be good in part and bad in part. (d) If it is general to the whole bill, and there is any part, either as to the relief or the discovery, to which the defendant ought to put in an answer, the demurrer, being entire, must be overruled. (e)

(w) Devonsher v. Newman, 2 Sch. & Lef. 199, 205.
(y) Brownsworth v. Edwards, 2 Ves. 945.
(z) Brooks v. Gibbons, 4 Paige, 374.
(a) Davies v. Williams, 1 Sim. 5. Cawthorn v. Chalier, 2 Sim. & Stu. 137.
(d) 3 Peer Wms. 148.
(e) Shed v. Garfield, 5 Verm. Rep. 39. Verplanck v. Caines, 1 John. Ch. 57. 5 id. 188. In this respect there is a difference between a plea and a demurrer. Mayor, &c. of London v. Levy, 8 Ves. 403. Baker v. Mellish, 11 id. 70.
But a demurrer may be good as to one of the defendants demurring, and bad as to others. (f)

Where coupled with an answer.] When a demurrer is to part of the bill only, the answer to the remainder usually follows the statement of the causes of demurrer and the demand of judgment whether the defendant ought to be held to make further or other answer. But as a demurrer asks the judgment of the court whether the defendant shall make further or other answer to the bill, or to that part which he has demurred to, it would be inconsistent if the defendant, after making such submission, were to be permitted to answer the bill or that part of it which is intended to be covered by the demurrer. (g) It is, for this reason, well settled that an answer to any part of a bill demurred to will overrule the demurrer; (h) even though the part answered be immaterial. (i) But a demurrer for multifariousness is not overruled by an answer denying confederacy. (k) Nor is a demurrer to relief only overruled by an answer as to the discovery. (l)

When a demurrer is put in to part only of the bill, and is accompanied by an answer, it should be entitled "The demurrer of C. D., &c. to part of the bill of complaint of A. B., and the answer of the said C. D. to the remainder of the said bill of complaint." (m)

Where a demurrer and answer are put in, they are filed as one record, and the demurrer is set down for argument, as if it stood alone, and not incorporated with the answer. (n)

By married women.] In a suit against husband and wife, she cannot demur separately from her husband, without a previous order of the court to warrant it. (o)

Demurrer ore tenus.] A defendant may, at the hearing of his demurrer, orally assign another cause of demurrer, different from, or in addition to, those assigned upon the record, which, if valid, will support the demurrer, although the causes of demurrer stated in the demurrer itself are held to be invalid. This oral statement of a cause of demurrer at the bar, is called demurring ore tenus.

A defendant cannot demur ore tenus, however, unless there is a de-

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(g) Jones v. Earl of Strathm, 3 P. Wms. 81.
(i) Mitf. 172. Savage v. Smalebroke, 1 Vern. 90.
(k) Tomlinson v. Swinney, 1 Keen, 913.
(m) Tidd v. Clare, 2 Eq. Abr. 76.
(n) 1 Fow. Ex. Pr. 359.
nurrrr on the record. Upon this ground, where a defendant had plead-
ed, and upon the plea being overruled, offered to demur ore tenus for want of parties, he was not permitted to do so.(p)

Although a defendant may, either upon the record or ore tenus, assign as many causes of demurrer as he pleases, such causes of demurrer must be co-extensive with the demurrer upon the record. Therefore causes of demurrer which apply to part of the bill only, cannot be joined with causes of demurrer which go to the whole bill.(q)

On the argument of a demurrer, the complainant is bound by the case stated in the bill in relation to the discovery sought, and will not be allowed to maintain his right to discovery, upon a suggestion ore tenus at the bar, not consistent with the case made in the bill.(r)

Under the general demurrer for want of equity, a demurrer for want of parties may be made ore tenus.(s)

A demurrer ore tenus must extend to the whole bill, and cannot be made to a part only.(t) But it seems that after a demurrer to part of the bill has been overruled the defendant may demur ore tenus to the same part.(u)

Where a general demurrer to the whole bill is overruled for want of equity, the defendant may demur ore tenus, upon the ground that the suit is brought by a feme covert in her own name, when she should have prosecuted by her next friend.(v) A defendant who has pleaded to a bill cannot demur ore tenus to it, on his plea being overruled; because there is no demurrer on the record.(w)

This kind of demurrer is only allowed upon new grounds; not where a written demurrer on the same point has already been overruled.(x)

Demurrer, how signed.] A demurrer must be signed by counsel; but is put in without oath, as it asserts no fact, and relies merely upon matters apparent on the face of the bill.(y) It neet not be signed by the defendant; though it is customary for his solicitor to sign it, as well as the counsel.

When to be filed.] A demurrer may be filed at any time within the forty days allowed the defendant to put in his answer. And it seems that it may be filed at any time afterwards, until the defendant is affect-

ed with process of contempt by the return of an attachment with proclama-
tions, or the entry of an order to take the bill as confessed.(x)

In certain special cases, such as surprise, the court will allow a de-
fendant to put in a demurrer, even after he has obtained an order for
time.(a) But the general rule is that the defendant, after having ob-
tained time to answer, cannot demur.(b)

It is always made the special condition of an order giving the de-
fendant time to demur, plead, or answer the complainant’s bill, that he shall
not demur alone. Whenever, therefore, the defendant has obtained an
order for time, and is afterwards advised to demur, he must also plead
to, or answer, some part of the bill.(c) It has been held that answering to
some fact immaterial to the cause, and denying combination, do not
amount to a compliance with the terms of such an order.(d) But in
another case,(e) which was a bill for a discovery, the answer gave no
information, but simply stated the death of a person, and denied combi-
nation. Lord Eldon said that according to the practice of the court, if the
defendant had been under the order not to demur alone, the addition of
this short answer would have saved the terms of that order. But
though an answer as to a single fact will be a sufficient compliance with
the condition, such fact must not be one which is covered by the de-
murrer; otherwise the demurrer will be overruled by the answer.(f)

If the defendant omits to put in his demurrer, or to answer within the
time limited by the order, and an attachment is in consequence issued against him for want of an answer, a demurrer, even though coupled
with an answer, will be irregular; and in such a case the proper course is
to move that the demurrer and answer be taken off the file, and not
that the demurrer be overruled.(g)

Service of.] The demurrer having been filed in the proper office, a
copy is served upon the complainant or his solicitor.

Noticing for argument.] The complainant has ten days after the
service of the copy of the demurrer to amend his bill; and if he fails to
do so, either party may notice the demurrer for argument, at the next
or any subsequent term.(h) The party noticing the demurrer must
then furnish the register or clerk with a note of issue, four days previ-

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(b) Mitf. Eq. Pl. 209.
(c) Id. ib. 2 P. Wms. 286.
(d) Tompkin v. Lethbridge, 9 Vea. 169.
(e) Bruce v. Allen, 1 Mad. Rep. 556.
(f) Dyson v. Benson, Coop. Ca. 110; 2 Dan. 81.
(g) Burrel v. Rainetiaux, 2 Paige, 331. 2 193. 2 Dan. Pr. 81.
(h) Rule 47.
ous to the commencement of the term, to the end that the cause may be put upon the calendar for hearing. (i)

Either party has a right to notice the demurrer for argument. And although it is usually noticed by the complainant, the defendant may give the notice if he pleases; and in some cases it becomes necessary for him to do so, in case of the complainant's neglect; as otherwise he will not be in a situation to have the bill dismissed for want of prosecution until the demurrer has been disposed of. (k)

Withdrawal of demurrer. Where the demurrer is defective in form, the court will grant the defendant permission to withdraw and file a new one, on payment of costs. (l) So after it has been noticed for argument, the defendant may, by motion, obtain an order to withdraw it, on payment of costs to be taxed. (m)

Hearing. In hearing a demurrer, the argument is strictly confined to the case appearing upon the record; and for the purposes of the argument, the matters of fact stated in the bill are admitted to be true. (n)

Amending demurrer. Where it has appeared, upon the hearing of a demurrer to the whole bill, that the defendant is entitled to demur to some part only, the court has permitted the demurrer to be amended, so as to confine it to the parts to which the defendant has a right to demur. (o) In such cases, however, the most usual course is to overrule the demurrer and to give the defendant leave to put in a new demurrer to such part of the bill as he may be advised. (p)

Effect of allowing demurrer. On a demurrer to the whole bill being allowed, the cause is out of court, and no subsequent proceedings can be taken therein. (q) But the allowance of a partial demurrer is not attended with such a consequence. The bill, or that part of it, which was not covered by the demurrer, still remains in court, and the complainant may obtain an order to amend, or to refer the answer upon exceptions, or adopt any other proceedings in the cause, in the same manner that he might have done had there been no demurrer. (r)

A demurrer being frequently on matter of form, is not, in general, a bar to a new bill; but if the court, on demurrer, has clearly decided

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(i) Rule 92.  
(k) Dowse v. Allen, 1 Dick. 55. Anon. 3 Ves. 287.  
(l) Devonsh. v. Newenham, 2 Sch. & Lef. 199.  
(m) Downes v. East India Co. 6 Ves. 586.  
(n) East India Co. v. Hinchman, 1 Ves. jun. 280.  
(o) Glegg v. Legh, 4 Mad. 193.  
(p) 2 Dan. 87.  
(r) Mutl. Eq. Pl. 214.
upon the merits of the question between the parties, the decision may be pleaded in another suit.\(^{(s)}\)

**Effect of overruling a demurrer.** If the demurrer is overruled as frivolous, the complainant may have an order to take the bill as confessed, or he may compel the defendant to answer the bill, at his election.\(^{(t)}\)

A frivolous demurrer or plea to a bill for the foreclosure of a mortgage may be noticed for argument as frivolous, by the complainant, on any motion day as well as in term; and the complainant may thereupon move for a final decree in the cause as upon a bill taken as confessed.\(^{(u)}\)

But to entitle the complainant to such a decree, he must give special notice to the defendant that he intends to move for an order to overrule the plea or demurrer as frivolous, and to take the bill as confessed, and for a final decree thereon.\(^{(v)}\)

Whenever a demurrer is overruled for any other cause than as being frivolous, (e. g. upon the merits,) no other demurrer will be received; and the defendant must answer the bill and pay the costs of the hearing within twenty days after notice of the order overruling the demurrer, or such other time as may be prescribed by the court, in the order. If he fails to put in his answer and pay the costs within the time prescribed, the bill may be taken as confessed; or the complainant may have an attachment to compel an answer.\(^{(w)}\)

After a demurrer has been overruled, the defendant cannot have an *ex parte* order for further time to answer, beyond the time allowed by the order overruling the demurrer.\(^{(x)}\)

The 49th rule is not applicable to the case of a demurrer to a part of the bill only, and an answer to the residue. In such a case, if the demurrer to a part of the bill is overruled, the complainant must except to the answer already put in, for insufficiency, when he wishes to obtain a further answer to the part of the bill which was attempted to be covered by the demurrer.\(^{(y)}\) But it is to be observed that the complainant should not except to the answer before the demurrer has been argued; otherwise he will admit the demurrer to be good.\(^{(z)}\) It is said, however, that if the demurrer is to the relief only, and not to any part

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\(^{(s)}\) Mitf. Eq. Pl. 214.  
\(^{(t)}\) Rule 49.  
\(^{(u)}\) Bowman v. Marshall, 9 Paige, 78.  
\(^{(v)}\) Id. Ib.  
\(^{(w)}\) Rule 49.  
\(^{(y)}\) Knypers v. Reformed Dutch Ch. 6 
\(^{(z)}\) London Assurance Co. v. East 
India Co. 3 P. Wms. 326. Mitf. Pl. 
317. 13 Ves. 85.
of the discovery, the complainant may take exceptions to the answer before the demurrer is argued. (a)

A demurrer, being a mute thing, cannot, like a plea, be ordered to stand for an answer. (b)

**Taking demurrer off the files.** If the defendant omits to put in his demurrer, or to answer within the time limited by the order, and an attachment is in consequence issued against him for want of an answer, a demurrer, even though coupled with an answer, will be irregular; and in such a case the proper course is to move that the demurrer and answer be both taken off the files, and not that the demurrer be overruled. (c) The distinction between taking a demurrer off the files, and simply overruling it, is, that the former course is adopted in all cases where there has been an irregularity in the filing of the demurrer, and the latter, wherever it has been properly filed, but the court is of opinion that it is insufficient, or that it has been overruled by the answer. (d)

Where a demurrer has been taken off the files for irregularity, it ceases to be a record of the court, and the defendant may, therefore, put in a plea or another demurrer, (if his time for demurring has not expired,) as if no demurrer had been filed. (e) The demurrer is not taken off the files, however, by the mere pronouncing of the order, but it must be actually withdrawn from the files. To effect this, the order, when drawn up, should be carried to the register or clerk, who will withdraw the demurrer—annexing the order to it. (f)

**Amending bill after demurrer.** After a demurrer has been put in, and before it is set down for hearing, the complainant may apply for leave to amend his bill, and by the English practice, such leave will be given as a matter of course, on condition only of the complainant’s paying to the defendant twenty shillings costs. (g) But after the order for setting it down for argument, the court requires that it should be upon payment of five pounds, for the costs of the demurrer, in addition to the twenty shillings costs for the amendment. (h) If a complainant wishes to amend his bill after a demurrer has been set down, he must obtain leave to do so before it is *called on for argument*; otherwise he will not be permitted to do so—unless in a clear case of omission by oversight. (i)

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(a) Mist. Eq. Pl. 317. 3 P. Wms. 297.
(b) Anson, 2 Atk. 530.
(c) Carson v. De la Zouch, 1 Swanst. 185.
(d) Id. ib. 2 Dan. 81.
(e) Cust v. Boode, 1 Sim. & Sta. 91.
(f) Id. ib.
(g) Parker v. Aloych, 1 Young & Jer. 194. 1 Har. Pr. 61.
(h) 1 Dan. 594.
(i) Holmes v. Waring, 8 Price, 604.
Where a demurrer for want of parties is allowed, the court generally gives the complainant leave to amend his bill by adding parties as he may be advised.\(^{(k)}\) Thus, in the case of McElwain v. Willis,\(^{(l)}\) where it appeared that the complainant's counsel acted under a mistake, the court, upon the allowance of a demurrer for a mere formal defect of parties, allowed the complainant to amend his bill upon terms. But this rule of practice is not obligatory upon the courts; and will be departed from where it is clear that the complainant cannot obtain relief against the defendant demurring, even after an amendment of his bill.\(^{(m)}\) Where the demurrer has been *ore tenus*, leave will be granted to the complainant to amend, without his paying the costs of the demurrer; though if he seeks, under such circumstances, to amend more extensively than by merely adding parties, he must pay the defendant the costs of the demurrer.\(^{(n)}\)

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**SECTION IV.**

**Plea.**

*Nature and uses of pleas.* Where an objection to the bill is not apparent on the bill itself, the defendant, if he wishes to take advantage of it, must show to the court the matter which creates the objection, either by answer or plea. A plea is a special answer showing or relying upon one or more things as a cause why the suit should be either dismissed, delayed, or barred.\(^{(o)}\)

The defence proper for a plea is such as reduces the cause, or some part of it, to a single point, and from hence creates a bar to the suit, or to the part of it to which the bill applies.\(^{(p)}\) But it is not necessary that it should consist of a single fact; for though a defence offered by way of plea consists of a great variety of circumstances, yet if they all tend to one point, the plea may be good.\(^{(q)}\)

The defences which may be set up by plea are either founded upon some matter not apparent upon the face of the bill—in which case the

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\(^{(k)}\) 2 Dan. 89.  
\(^{(l)}\) 3 Paige. 505.  
\(^{(m)}\) Tyler v. Bell, 2 My. & Craig. 89.  
\(^{(n)}\) Newton v. Lord Egmont, 4 Sim. 585.  
\(^{(o)}\) Mis. Eq. Pl. 218. Heartt v. Corning. 3 Paige. 565.  
\(^{(p)}\) Id. 219.  
\(^{(q)}\) Id. 296. Cann v. Cann. 1 P. Wms. 795. Ashurst v. Eyres, 3 Atk. 341. 15 Ves. 79, 89.
plea is called an affirmative plea—or upon some new fact or claim of facts not apparent upon the face of the bill, or upon a denial of the truth of some matter stated in the bill, upon which the complainant’s right depends. A plea of this sort is styled a negative plea.

A plea will be overruled if it does not set up any new matter, although the objection raised by it would have been valid if it had been urged by way of demurrer to the bill.\(^{(r)}\)

One of the uses of a plea is to raise the objection of a want of proper parties. Thus, where the complainant has omitted to bring before the court persons who are necessary parties, but the objection does not appear upon the face of the bill, so as to allow the defendant to demur, the objection may be made by plea or answer, in a plain and explicit manner, showing who are the necessary parties.\(^{(e)}\)

Another of the uses of a plea is to object to the jurisdiction of the court. Thus, where the matter in dispute does not exceed one hundred dollars, if that fact does not appear on the face of the bill, the defendant may plead it in bar of the suit.\(^{(t)}\)

Form of.\(^{\text{[.]}\)} A plea is preceded by a title in this form: “The plea of C. D., a defendant, to the bill of complaint of A. B., complainant,” or, “The joint and several plea of C. D. and E. F., defendants,” &c. Where it is the plea of husband and wife, the words “and several” should not be inserted; though these words will not vitiate the plea—being mere surplusage.\(^{(u)}\) Where a plea was prepared as a joint plea of a husband and wife, but the wife refused to swear to it, whereupon the husband put in the plea and applied that it should stand for himself, it was so ordered.\(^{(v)}\)

When a plea is accompanied by an answer, it must be entitled “The plea and answer,” or, “The joint plea and answer,” or, “The joint and several plea and answer,” according to the circumstances.

A plea, like a demurrer, is introduced by a protestation against the confession of the truth of any matter contained in the bill. The plea next states how much of the bill it is intended to cover, and what part in particular; and this must be clearly and distinctly shown.\(^{(w)}\) Therefore, a plea to such parts of the bill as are not answered, will be overruled as too general.\(^{(x)}\)

\(^{(r)}\) Cozine v. Graham, 2 Paige, 177.
\(^{(s)}\) Robinson v. Smith, 3 Paige, 293.
\(^{(e)}\) Pain v. ——. 1 C. C. 269.
\(^{(t)}\) Mitchell v. Lenox, 2 id. 290.
\(^{(f)}\) Smith v. Williams, 2 Paige, 364.
\(^{(e)}\) Id. ib. Anon. 3 Atq. 70.
\(^{(u)}\) Fitch v. Chapman, 2 Sim. & Stu. 31.
Where a plea is to the whole of the relief sought by the bill, but it is necessary that the defendant should support his plea by an answer as to facts stated, which may avoid the bar, the plea should not extend to the whole bill, but should be in the form of a plea to all the relief and all the discovery sought by the bill, except certain parts of the discovery which are to be answered.(y)

The matter relied upon as an objection to the suit or bill generally follows, accompanied by such averments as are necessary to support it.(z) And where a plea is of matter which shows an imperfection in the frame of the suit, it should point out in what that imperfection consists. Where, for instance, a plea is for want of parties, it must not only show that there is a deficiency of parties, but should point out who the parties are that are wanting.(a)

The plea commonly concludes with a repetition that the matters so offered are relied upon as an objection or bar to the suit, or so much of it as the plea extends to; and prays the judgment of the court whether the defendant ought to be compelled further to answer the bill, or such part as is thus pleaded to.(b)

If the plea is double, i. e. tenders more than one defence as the result of the facts stated, it will be bad;(c) and if filed without leave, it is irregular, as well as liable to be overruled.(d) Thus, two distinct pleas in bar, different in their nature, as a plea of the statute of limitations and a discharge under the insolvent act, cannot be pleaded together, without the previous leave of the court.(a) But in some cases the court, on a special application, upon notice, will allow the defendant to put in a double plea.(f)

A plea is not rendered double by the mere insertion therein of several averments that are necessary to exclude conclusions arising from allegations which are made in the bill, to anticipate and defeat the bar which might be set up in the plea.(g)

The rule that a defendant cannot plead double, is not to be understood as precluding the defendant from putting in several pleas to different parts of the same bill. It merely prohibits his pleading, without

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(y) Lord Portarlington v. Soulby, 6 Sim. 356.
(z) Mitf. 300.
(a) Merewether v. Mellish, 13 Ves. 436.
(b) Mitf. 300
(c) Nobkissen v. Hastings, 2 Ves. jun. 84.
(e) Kay v. Marshall, 1 Keen, 192.
(f) 4 Mad. 241. Hardman v. Ellam's, 5 Sim. 640.
(g) Saltus v. Tobias, 7 Johns. Ch. 214.
(f) 1d. ib. 7 Johns. Ch. 241.
(g) Bogardus v. Trinity Church, 4 Page, 178.
previous leave, a double defence to the whole bill or to the same portion of it. A defendant may plead different matters to separate parts of the same bill, in the same manner as he may demur to different portions of the bill.\(^{(k)}\)

A defendant may, in like manner, plead and demur, or plead and answer, to different parts of the same bill, provided he points out distinctly, the different portions of the bill which are intended to be covered by the plea, the demurrer, and the answer. He must likewise, where he puts in several pleas to the same bill, point out to which particular part of the bill each plea is applicable. But the rule which has been stated as applicable to a demurrer, viz. that it cannot be good in part and bad in part, is not applicable, with the same strictness, to a plea; for it is well settled that a plea may be bad in part and not in the whole; and the court will allow it to so much of the bill as it is properly applicable to.\(^{(i)}\)

The rule that a plea may be allowed in part only is to be understood with reference to its extent, i.e. to the quantity of the bill covered by it, and not to the ground of defence offered by it. If any part of the defence made by the plea is bad, the whole must be overruled.\(^{(k)}\)

In addition to the requisites of a plea already mentioned, it may be stated that a plea must be certain. It must tender issuable matter, the truth or falsehood of which may be replied to or put in issue; and that not in the form of general propositions, but specifically and distinctly.\(^{(l)}\)

Where the plea is accompanied by an answer, the answer must follow the conclusion of the plea. If the answer is merely to support the plea, it is stated to be made for that purpose, "not waiving the plea." If the plea is to part of the bill only, and there is an answer to the rest, it is expressed to be an answer to so much of the bill as is not before pleaded to; and is preceded by the same protestation against waiver of the plea.\(^{(m)}\)

**Signature.** A plea must be signed by counsel; except when it is taken under commission; in which case it is held unnecessary.\(^{(n)}\)

Where pleas are not to be sworn to, they need not be signed by the defendant—the signature of counsel being sufficient.

**When plea must be upon oath.** Pleas in bar of matters in pais, which matters, to render the defence complete, would require to be

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\(^{(l)}\) Mitf. Pl. 927.

\(^{(m)}\) Mitf. Eq. Pl. 300.

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\(^{(n)}\) Simes v. Smith, 4 Mad. 396.
proved at the hearing, must be put in upon the oath of the defendant; but pleas to the jurisdiction of the court, or in disability of the person of the complainant, or pleas in bar of any matter of record, or of matters recorded, or as of record in the court itself, or any other court, need not be upon oath. (o) But if there are necessary averments of matters in pais, supporting a plea of a record, it must be on oath. (p) So a plea of the statute of limitations, or of any other statute which requires averments to bring the defendant’s case within their operation, must be upon oath. But a mere averment of identity will not render it necessary that a plea of matter of record should be put in upon oath. Therefore, where a plea of the complainant’s conviction for forgery was put in without oath, the court held it sufficient, although there was an averment of the identity of the complainant. (q) And so the circumstance of a plea of outlawry containing such an averment will not render it necessary that it should be upon oath. (r)

In all cases where a plea is accompanied by an answer, it must be put in upon oath. Thus, where an answer and plea were taken by commission, and the return was, “This answer was taken upon oath,” so that the plea did not appear to have been upon oath, it was rejected, though without costs, as the court thought it might have been owing to an error of the commissioners. (s)

It is to be observed, that where a plea which ought to be upon oath is put in without one, the irregularity is not one which can be waived by the complainant’s taking any proceeding upon it—such as setting it down, &c. (t)

A plea must be verified by oath, although the complainant has expressly waived an answer from the defendant on oath. (u) If a plea is not sworn to, the complainant may apply for an order to set it aside, or to have it taken off the files of the court; but he cannot make the objection upon the argument of the plea. (v) If the negative averment in a plea by an executor relate to transactions in the lifetime of the testator, or acts done by others, it is not necessary they should be sworn to positively. It is sufficient if they are made upon the defendant’s belief only. (w) A plea is not evidence in behalf of the defendant, as to the facts stated in it, so as to require the testimony of more than one.

(q) —— v. Davies, 19 Ves. 81.
(s) Jefferson v. Dawson, 3 id. 306.
(u) Heart v. Corning, 3 Paige, 566.
(v) Id. ib. 2 Ves. & B. 354.
(w) Id. ib. Poole v. Poole, 1 Younge, 331.
witness to contradict it; even where it negatives a material averment in the bill. (x)

When to be filed.] No plea can be received after the return of an attachment with proclamations, unless with the special leave of the court, granted upon motion. (y) Up to that point of process, a plea, whether accompanied by an answer or not, may be received; but if filed after that time, it may be taken off the file upon motion. (z) If, however, after an attachment with proclamations returned, a defendant succeeds in obtaining an order for time to answer, he may, under such order, put in any plea which requires the sanction of an oath, but not one which is not upon oath, such as a plea of outlawry, or a former decree. (a) And this is doubtless for the reason that for many purposes, a plea is considered a special answer. (b)

The plea being filed, a copy must be served on the complainant or his solicitor.

Replication to plea.] The complainant has ten days after notice of the plea being filed, to file a replication thereto or to amend his bill. If he does not take issue on the plea, or amend his bill within that time, either party may notice the plea for argument at the next, or any subsequent, term. (c)

If the complainant, without argument, thinks the plea, though good in form and substance, not true in point of fact, he may take issue upon it by filing a replication, and proceed to examine witnesses, as in the case of an answer, to disprove the facts upon which it is endeavored to be supported. (d) The effect of filing a replication to a plea is, that the complainant admits the plea to be good; and its truth is the only matter in question. (e) When issue is thus taken upon the plea, the defendant must prove the facts it sets up. (f) If he succeeds in proving the truth of the matter pleaded, the suit, so far as the plea extends, is barred. (g)

A replication puts in issue nothing except what is distinctly averred in the plea. (h)

(c) Heartt v. Corning, 3 Paige, 569.
(y) Lloyd v. Gunter, 1 Vern. 275.
Newton v. Dent, 1 Dick. 334. Sanders v. Murney, 1 Sim. & Stu. 295.
(x) Id. ib. 1 Dan. 606, 9.
(e) Id. ib. 2 Dan. 218. 3 Paige, 566.
(d) See Heartt v. Corning, 3 Paige, 566.
(z) Rule 47.
 Mitf. Eq. Pl. 301, 2.

(c) Id. ib. Prec. in Ch. 58. Harris v. Inglewed, 3 P. Wms. 95. Daniels v. Taggart’s adm’r. 1 Gill & John. 311.
(h) Fish v. Miller, 5 Paige, 96.
Amendment of bill after plea.] If the complainant amends his bill, under the 47th rule, it will be considered as an admission of the validity of the plea as if the same had been allowed on argument.

It has been held that if the complainant, after a plea has been filed, amends his bill, thereby allowing the plea to be good, the defendant will be entitled to the same time to answer, as he would have upon an original bill; the amended bill, in such a case standing in the place of a new bill—the amendment being permitted only to save expense.(i)

Where, after a plea had been set down for hearing, the complainant obtained and served an order to amend his bill, and when the plea came on to be heard did not appear, the plea was allowed with costs; the lord chancellor saying that he much doubted whether an order to amend, without more, would strike the plea off the record.(k)

Withdrawing plea.] If a defendant, after a plea has been set down, should not wish to urge it, he may apply for liberty to withdraw his plea, on payment of taxed costs.(l) Thus, where a plea has offered a substantial defence, but has been so informally pleaded that it would be difficult or impossible to amend it, the court has given the defendant leave to withdraw it, and plead de novo.(m)

Argument of plea.] The proceedings upon the argument of a plea are nearly the same, mutatis mutandis, as those upon the argument of a demurrer; which have been already referred to. It may be observed, in addition to what has been stated, that if a plea is supported by an answer, upon the argument of the plea, the answer may be read to counterprove the plea; and, if the defendant appears not to have sufficiently supported his plea by his answer, the plea must be overruled and ordered to stand for an answer only.(n) And where a defendant had answered to an original bill, which was afterwards amended, whereupon the defendant put in a plea to the amended bill, the complainant was permitted to read the answer to the original bill, to counterprove the plea to the amended bill.(o)

Upon the argument of a plea, every fact stated in the bill, and not denied by the averments in the plea and by the answer in support of the plea must be taken as true.(p)

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(i) Spencer v. Bryan, 9 Ves. 231.  
(k) 1 Smith, 234.  
(m) Watkins v. Stone, 2 Sim. & Stu. 560.  
(n) Mitf. Eq. Pl. 304. 3 Atk. 304.  
(o) Hildyard v. Cressy, 3 Atk. 304.  
(p) Boganus v. Trinity Church, 4 Paige, 178.
If a plea be set down for argument by the complainant, without replying to it, the matter contained in it must be considered as true.\\(^q\)\\n
Where issue is taken upon a plea, and the truth of such plea is established by the proofs, the bill must be dismissed; as the court, in that stage of the proceedings, does not inquire or decide as to the validity of the matters pleaded, as a defence to the suit.\\(^r\)\\n
A plea, upon argument, may be either allowed simply; or the benefit of it may be saved to the hearing; or it may be ordered to stand for an answer; or it may be overruled. The effect of each of these judgments will now be stated.

**Effect of allowing plea.** If, upon argument, a plea is allowed, it is thereby determined to be a full bar to so much of the bill as it covers, if the matter pleaded, with the averments necessary to support it, be true. If, therefore, the plea is allowed, the complainant may, within ten days after notice of such allowance, take issue on the plea (by replying to it) on payment of the costs of the hearing thereupon.\\(^s\)\\n
If the complainant files a replication to the plea, within the ten days after notice of its allowance, the defendant will be obliged to prove the truth of the facts set up in the plea.\\(^t\) If the complainant omits to file a replication in such a case, not only the validity of the plea as a bar is admitted, but the truth of the facts set up in it; and of course the suit is at an end.

If the plea has been replied to, the complainant may, if he pleases, go into evidence to disprove it; and if he has, in his bill, alleged any matter, which, if true, may have the effect of avoiding the plea, such as notice, fraud, &c. he may examine any witnesses he may have, to support his allegation. And where the plea introduces matter of a negative nature, such as denial of notice, fraud, &c. it will be necessary for him, in case sufficient is not admitted by the answer in support of the plea to show the existence of the notice or fraud, to go into evidence in support of the affirmative of the proposition.\\(^u\)

When a plea is allowed, it is considered as a full answer; and an injunction obtained until answer will be dissolved upon application, as a matter of course.\\(^v\)

**Saving the benefit of a plea, to the hearing.** It sometimes happens that upon the argument of a plea, the court considers that, although so

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\(^r\) Dews v. McMichael, 6 Paige, 139.
\(^s\) Rule 47.
\(^t\) See Miffl. 309.
\(^u\) Eyre v. Dolphin, 2 Ball & B. 303.
\(^v\) Philips v. Langhorn, 1 Dick. 149.
Proceedings to a Decree.

far as then appears, it may be a good defence, yet there may be matter disclosed in evidence, which, supposing the matter pleaded to be strictly true, would avoid it. In such a case the court, in order that it may not preclude the question by allowing the plea, directs that the benefit of it shall be saved to the defendant at the hearing. Thus in the case of Heartt v. Corning, a plea of settled partnership accounts was held to be well pleaded; but as facts might be disclosed justifying a decree to surcharge and falsify, the benefit of it was saved until the hearing. To have allowed it, simply, would have made it a conclusive bar.

The effect of an order for this purpose is to give the complainant an opportunity of replying and going into evidence, without overruling the plea.

When the benefit of the plea is reserved to the hearing, such part of the bill as is covered by the plea is not to be answered.

Neither party recovers costs on the argument of a plea where the benefit of it is saved to the defendant until the hearing.

Ordering a plea to stand for an answer. When a plea is allowed to stand for an answer, it is determined that it contains matter which, if put in the form of an answer, would have constituted a valid defence to some material part of the matters to which it is pleaded as a bar, but that it is not a full defence to the whole matter which it professes to cover, or that it is informally pleaded, or is improperly offered as a defence by way of plea, or that it is not properly supported by answer. But a plea which sets up no valid defence to any part of the matter it professes to cover, will not be permitted to stand for an answer. If a plea to the whole bill, unaccompanied by an answer, is allowed to stand for an answer, without reserving to the complainant the right to except, it is to be deemed a full answer, though not necessarily a perfect defence. But where a plea is ordered to stand for an answer with liberty to except, or the plea is accompanied by an answer, which will enable the complainant to except without special leave, the master, upon a reference of the exceptions, must decide as to the sufficiency of the answer, considering the plea as a part thereof.

Where a plea is ordered to stand for an answer, without its being

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(x) 3 Paige, 572.
(z) For. Rom. 64.
(a) Heartt v. Corning, 3 Paige, 566.
(b) Orrett v. Orms, 3 Paige, 461.
(c) Id. 459. Mitf. 304.
(d) Id. 1b.
mentioned in the order whether the complainant may except, he will not be allowed to except; because by the terms "for an answer" in the order, a sufficient answer is meant—an insufficient answer being no answer.(e)

And liberty to except is sometimes qualified so as to protect the defendant from any particular discovery which he ought not to be called upon to make.(f)

When a plea has been ordered to stand for an answer, with liberty to except, the complainant must proceed to deliver his exceptions within the usual time allowed for excepting to an answer;(g) otherwise the answer will be deemed sufficient.(h)

Costs.] When a plea is ordered to stand for an answer, the complainant is entitled to the usual costs of overruling a plea.(i)

Overruling plea.] If upon argument the court is of opinion that the plea cannot, under any circumstances, be made use of as a defence, it is simply overruled, and the complainant may proceed to have his costs taken, and to issue process for the recovery of them. He may also, if the plea has been to the whole bill, and the defendant's time for answering has expired, issue an attachment for want of an answer,(k) unless the defendant has obtained either from a master or from the court at the hearing,(l) an extension of time to answer. In such case the attachment must not be issued till the extended time for answering has expired.

Overruling plea as frivolous.] If a plea is overruled as frivolous, or, upon issue taken thereon, is found to be untrue, the complainant may have an order to take the bill as confessed; or he may compel the defendant to answer, at his election.(m) A frivolous plea may be noticed for argument as frivolous by the complainant, on any motion day, as well as in term; and the complainant may thereupon move for a final decree in the cause, as upon a bill taken as confessed.(n) But to entitle the complainant to such a decree, he must give special notice to the defendant that he intends to move for an order to overrule the plea as frivolous, and to take the bill as confessed, and for a final decree thereon.(o)

Whenever a plea is overruled for any other cause than as being frivo-

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(e) Sellon v. Lewen, 2 P. Wms. 239.
(f) Burb. 265. 2 Atk. 340. 3 P. Wms. 315. 4 Bro. C. C. 439. 6 Ves. 586.
(g) See Rule 50.
(h) Idem.
(j) Hinde, 234.
(k) Waterton v. Croft, 6 Sim. 439.
(l) Rule 49.
(m) Rule 49.
(n) Bowman v. Marshall, 9 Paig. 78.
(o) Id. 19.
lous, (e. g. upon the merits,) no other plea will be received; and the defendant must answer the bill and pay the costs of the hearing, within twenty days after notice of the order overruling the plea, or such other time as may be prescribed by the court, in such order. If he fails to put in his answer and pay the costs within the time prescribed, the bill may be taken as confessed, and the matter thereof decreed accordingly; or the complainant may have an attachment to compel an answer.(p)

After a plea has been overruled, the defendant cannot have an ex parte order for further time to answer, beyond the time allowed by the order overruling the plea.(q) The 49th rule is not applicable to the case of a plea to a part of the bill only and an answer to the residue. In such a case, if the plea to a part of the bill is overruled, the complainant must except to the answer already put in, for insufficiency, when he wishes to obtain a further answer to the part of the bill which was attempted to be covered by the plea.(r)

As no other plea or a demurrer can be received after a plea has been overruled, the only effect of overruling it is to oblige the defendant to put in an answer and pay the costs, or in default thereof, to have a decree pro confesso entered against him.

If the plea was to part of the bill only, accompanied by an answer to the rest, the complainant may proceed to compel an answer to the part intended to be covered by the plea, by exceptions to the answer.(s) The complainant has twenty days, after the plea is overruled, in such a case, to except to the answer; at the expiration of which time, if no exceptions are taken, and no order for further time has been granted, the answer will be deemed sufficient. If the complainant excepts to the answer for insufficiency, the defendant may, within eight days thereafter, give a written notice of his submission to answer all or any of such exceptions; and he will be liable for the costs of the exceptions which he submits to answer.(t)

Where there is a plea to a part of the bill, and an answer to the residue, the complainant may except to the answer before the argument of the plea. But the effect of such exceptions is to admit the validity of the plea.(u)

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(p) Rule 49.
(r) Kuyper v. Reformed Dutch Church, 6 Paige, 570.
(s) Strickland v. Mackenzie, 1, Dick.
(t) Rule 50.
The answer of an infant by his guardian ad litem cannot be excepted to for insufficiency.\(^{(v)}\)

A defendant in a bill of revivor cannot plead to the original bill a plea which has been pleaded by the original defendant and overruled;\(^{(w)}\) but if a plea has been put in, and the original defendant has died before argument, the defendant to the bill of revivor may plead the same matter de novo.

*Where plea is found to be false.* If at the hearing the plea is not found to be true, it will be overruled as false, and the complainant will be entitled to a decree as on a bill taken as confessed. But in such a case the complainant will not lose the benefit of an answer, if a discovery is necessary. He may have an order to examine the defendant on interrogatories, before a master, as to the discovery sought by the bill.\(^{(x)}\) And where a plea contains several distinct averments or allegations of fact, all the allegations must be supported by the proofs, or the plea will be overruled as false.\(^{(y)}\)

*Plea of former decree, &c.* If the defendant pleads a former decree, another suit pending for the same cause, or other matter of record, in the court of chancery, he must, at the time of filing such plea, obtain an order of reference to a master to examine and report whether the plea be true; and he must procure the master’s report within twenty days thereafter. If he neglects to procure the master’s report within that time, or the report is against the verity of the plea, the plea will be considered as overruled, and the complainant may proceed as if no such plea had been filed. But if the master’s report establishes the truth of the plea, either party may notice it for argument, at any time after the report is confirmed.\(^{(z)}\)

Where, upon such a plea, the defendant obtains the master’s report in favor of the truth of the plea, he cannot have an order to dismiss the complainant’s bill, on motion. But he must bring the case on to be heard upon the plea and the master’s report, to enable the court to decide upon the validity of such plea.\(^{(a)}\)

Although it is necessary that the first suit should be for the same matter as the second, it is not requisite that the second suit should be for the whole matter embraced by the first.\(^{(b)}\) It is, however, requisite that

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\(^{(v)}\) Samuda v. Furtado, 3 Bro. C. C. 70.
\(^{(w)}\) Dows v. McMichael, 2 Paige, 345.
\(^{(y)}\) Dows v. McMichael, 2 Paige, 139.
\(^{(z)}\) Rule 48. Beams’ Orders, 176.
\(^{(a)}\) Hart v. Phillips, 9 Paige, 393.
\(^{(b)}\) Moore v. Welsh Copper Co. 1 Eq. Co. Abr. 39.
the whole effect of the second suit should be attainable in the first. (c) And if, after the plea has been set down for argument, it appears upon its face that this is not the case, the court will at once overrule the plea. (d) It sometimes happens, however, that the second bill embraces the whole subject in dispute more completely than the first. In such cases the practice appears to be to dismiss the first bill, with costs, and to direct the defendants in the second cause to answer, upon being paid the costs of a plea allowed; which puts the case upon the second bill in the same situation that it would have been in if the first bill had been dismissed before the filing of the second. (e)

A plea of another suit depending will not be good if the suit is depending in a court in another country. (f) Where the original suit has been commenced in a court of inferior jurisdiction, the plea will not be good if the defendant has avoided the effect of the suit, by going out of the jurisdiction of that court. (g)

To afford a good ground for a plea of another suit pending, the suit must be in a court of equity. (h) If the suit is in a court of law, the defendant has a different remedy, viz. by putting the plaintiff to his election.

There are some cases, however, in which the court will interfere to restrain a second suit brought against the defendant for the same matter, upon motion, without requiring him to plead the pendency of the former suit; as in the case of two or more suits instituted on behalf of an infant for the same matter. (i) So in the case of creditors suing an executor or administrator, after a decree for an account, at the suit of other creditors, the court will, upon motion by the defendant, stay the proceedings in the second cause without requiring him to plead the pendency of the first suit. (k)

It is not necessary to a plea of this nature that the former suit should be between precisely the same parties as the latter. (l)

A decree or order of the court by which the rights of the parties have been determined, or another bill for the same matter dismissed, may be pleaded to a new bill for the same matter; and this even if the party bringing the new bill were an infant at the time of the former decree. (m)

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(c) Law v. Rigby, 3 Bro. Ch. Ca. 60. (h) Howell v. Waldron, 2 Ch. Ca. 85.
(d) 5 Sim. 193. (i) 9 Mif. Eq. Pl. 27.
(e) Crofts v. Wortley, 1 Ch. Ca. 941. (k) Paxton v. Douclass, 8 Ves. 590.
(\textit{f}) 9 Mif. 249. See also Pickford v. Hunter, 5 Sim. 193.
(\textit{g}) 9 Mif. 246. Neve v. Weston, 3
357. Foster v. Vassall, 3 Atk. 587. (m) Id. 237.
But a decree or order dismissing a former bill for the same matter, can only be pleaded in bar to a new bill where the dismissal was upon hearing, and was not in terms directed to be without prejudice.\(\text{a}\) The former decree will be a bar, however, though it was made merely for want of evidence.\(\text{b}\) A decree, to be a bar in another suit, must be for the same matter as the bill to which it is pleaded;\(\text{p}\) must be conclusive of the rights of the complainants in the bill to which it is pleaded, or of those under whom they claim;\(\text{q}\) and it must be in its nature final, or afterwards made so by order;\(\text{r}\) and it must be signed and enrolled.\(\text{s}\)

Amending plea.\(\text{a}\) It sometimes happens, that where there is evidently a material ground of defence disclosed in the plea, but owing to some evident slip or mistake, the plea had not been correctly framed, the court, in this respect, following the courts of law, will exercise a discretion in allowing it to be amended.\(\text{t}\) Thus, where a plea which in substance showed a defect of parties, instead of stating that additional parties were necessary, and naming them, prayed judgment whether the defendant ought to be called upon for further answer, the court, upon the argument, instead of overruling the plea on the ground of informality, gave the defendant leave to amend it.\(\text{u}\)

Pleading de novo.\(\text{v}\) In some cases, where a plea has offered a substantial defence, but has been so informally pleaded that it would be difficult or impossible to amend it, the court instead of allowing the defendant to amend his plea, has given him leave to withdraw it altogether, and plead de novo.\(\text{v}\)

We have already seen that if a plea is overruled, the defendant will not be allowed to put in a second plea.\(\text{w}\)

Liberty to amend, or to plead de novo will only be granted in cases where there is an apparent good ground of defence disclosed by the plea, but owing to some incident or mistake, it has been informally pleaded. Where a substantial ground of defence has been omitted, such permission will not be given.\(\text{x}\)

\(\text{a}\) Mitf. 237.
\(\text{p}\) Minor Canons of St. Paul's v. 59.
\(\text{c}\) Crickett. Wightw. 30.
\(\text{e}\) Mitf. 237.
\(\text{g}\) See ante, p. 123.
\(\text{h}\) Freeland v. Johnson, 1 Anst. 276.
\(\text{i}\) Beamess on Pleas, 321.
\(\text{j}\) Merrewether v. Mellish, 13 Ves.
\(\text{k}\) See also Waters v. Mayhew, 1 S. C. 2 id. 407.
Although where the error is very palpable, the court will give the defendant leave to amend at the argument of the plea, the most usual course is for the defendant to make a subsequent motion for leave to amend his plea. This form of proceeding is rendered necessary by the circumstance that the court always requires to be told precisely what the amendment is to be, and how the slip happened, before it will allow the amendment to take place. (y) And, in one case, Lord Thurlow refused to entertain the question whether the plea might be amended or not upon the argument, because no motion had been made on the subject; and he said he should expect that whenever such a motion should be made, the form of the plea intended to be put in should be laid before the court; for amendments, when moved, ought to be stated, that the court may see whether it is material that the cause should be delayed for the purpose of admitting them. (x)

But an amendment of a plea will not be allowed, if it has not been amended once before. (a)

When plea must be supported by answer.] Where there is any statement or charge in the bill which affords an equitable circumstance in favor of the complainant’s case, against the matter pleaded, (such as fraud, or notice of title,) that statement or charge must be denied by way of answer, as well as by averment in the plea. (b)

In general, an answer in support of a plea cannot be required in those cases where such negative averments as those above stated are not necessary. Where the defence can be made by a pure plea, that is, a plea which merely suggests matter in avoidance of the complainant’s right to sue, as stated in the bill, an answer in support of the plea is not required. In such a case, the defendant, by his plea, admits the complainant’s case; and so full and complete is the admission, that if, after argument, issue be joined upon the truth of the plea, and the plea be found false, there is an end of the dispute, and the complainant is entitled to a decree upon this implied admission of his case. (c)

The cases in which it is necessary that a plea should be supported by answer have been very conveniently divided into—1st. Those where the complainant admits the existence of a legal bar, and charges some equitable circumstances to avoid its effect; and 2d. Those where the

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complainant does not admit the existence of any legal bar, but states some circumstances which may be true, and to which there may be a valid ground of plea, together with other circumstances which are inconsistent with the substantial validity of a plea. (d)

An answer in support of a plea is no part of the defence. The defence is the matter set up by the plea; the answer is that evidence which the complainant has a right to require and to use, to invalidate the defence made by the plea; and the complainant is entitled to make use of it not only upon the hearing of the cause, upon the issue raised by the plea, after the plea shall have been decided to be a good bar upon argument, but upon the argument of the plea itself, before any evidence can be given; (e) for the purpose of counterproving the plea, by reading from it any facts or admissions which may negative the matters pleaded or averred in the plea. (f)

The answer in support of the plea being no part of the defence, but only what the complainant has a right to require, to enable him to avoid that defence, it follows that it must be full and clear; otherwise it will not support the plea; for the court will intend all matters charged in the bill, to which the complainant is entitled to an answer, to be against the pleader, unless they are fully and clearly denied. (g)

But although an answer in support of a plea is required to be full and clear, yet if the equitable matters charged are fully and clearly denied, it may be sufficient to support the plea, although all the circumstances charged in the bill may not be precisely answered. (h) In such cases, however, the complainant is not precluded by the circumstance of the court having held, upon the argument of the plea, that the charges in the bill are sufficiently denied to exclude intentment against the pleader, from afterwards excepting to the sufficiency of the answer, in any point in which he may consider it defective. (i)

Where the complainant waives the necessity of an answer being put in on oath, if the defendant puts in a plea to the bill, he need not support it by answer. (k)

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(d) Hare on Disc. 30.
(e) Mitf. 244, n.
(f) Hildyard v. Cressy, 3 Atk. 303.
Hony v. Hony, 1 Sim. & Sitn. 569.
(g) Mitf. 244. 3 Atk. 303.
(i) Id. ib.
(k) Heart v. Corning, 3 Paige, 586.
SECTION V.

ANSWER.

Nature and uses.] If the case stated by the complainant's bill is not such as to render a resort to a demurrer or plea necessary or advisable, or if either of those methods of defence has been adopted, and the plea or demurrer overruled either wholly or in part, the defendant, unless he disclaims, must put in his answer to the facts in the complainant's bill; provided such facts are essential to enable the complainant to obtain a decree, and are not such as the defendant is excused from answering. By which answer, as has been before observed, the defendant, controveting the case stated by the complainant, may confess and avoid, or traverse and deny the several parts of the bill; or admitting the case made by it, may submit to the judgment of the court upon the bill, or upon a new case made by the answer or both.

An answer is the most usual method of defence to a bill in chancery. And it may be put in either to the whole bill, or to such parts of it as are not covered by plea or demurrer. As it is capable of embracing more circumstances than a plea, it may for this reason be used with much greater propriety in cases where the defendant is not anxious to prevent a discovery, although the plea might be a complete bar. But where, by introducing additional circumstances, he has a good opportunity of showing his case in a more favorable light, the answer is the best mode of defence.

An answer serves a double purpose: first, that of answering the complainant's case as made by his bill; and second, that of stating to the court the nature of the defence upon which the defendant means to rely.

These twofold properties of an answer will now be considered.

First, of the manner of answering the complainant's case.] The defendant must answer all the facts charged in the bill. Though it is customary for the bill, in order more particularly to direct the defendant's attention to the parts to which the complainant requires an answer, and to prevent evasion on the part of the defendant, to add a repetition by way of interrogatory, of the matters most essential to be answered, which interrogatories must be fully answered; yet a mere answer to those interrogatories only will not be a sufficient compliance with the requisition in the bill, unless they go to all the facts stated or
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carried in the bill to which the complainant has a right to require an
answer. (l)

The defendant is not bound to answer an interrogatory, unless it is
founded upon some charge in the bill. (m) And if a bill contains inter-
rogatories which are not founded upon the previous statements or
charges, exceptions will lie to it for impertinence. (n) It is sufficient,
however, if the interrogatory is founded upon a statement in the bill
which is inserted therein merely as evidence in support of the main
charges. (o) Where a fact is stated in the bill by way of recital merely,
without any interrogatory calling for an answer as to that fact, the de-
fendant is not bound either to admit or deny the same. And if he ad-
mits the main fact charged in the bill, he need not answer to the other
matters which are merely stated as evidence of that fact. (p).

If any facts are stated in the bill which are material to the com-
plainant's case, they must be answered, even though the complainant
does not call the defendant's attention to them by specific interro-
gatories. The general interrogatory or requisition in the bill that the de-
fendant "may full answer make to all and singular the premises," &c. is
sufficient to entitle the complainant to a full disclosure of the whole
subject matter of the bill, equally as if he had specially interrogated the
defendant to every fact stated in the bill. (q)

The rule is well settled that a defendant who submits to answer must
answer fully; (r) that is, he must answer the whole of the statements
and charges contained in the bill, and all the interrogatories properly
founded upon them, at least so far as they are necessary to enable the
complainant to have a complete decree against him in case he succeeds
in the suit. (s)

This rule, that where a defendant submits to answer he must answer
fully, applies to all cases where the defence intended to be set up by
the defendant extends to the entire subject of the suit; such for in-
stance as that the complainant has no title to equitable relief—or that
he has no interest in the subject—or that the defendant himself has no
interest in the subject—or that he is a purchaser for a valuable con-
sideration—that the bill does not declare a purpose for which equity will
assume a jurisdiction to compel a discovery—or that the complainant is

(l) 1 Dan. 487. 2 id. 246.
(n) Wigram on Disc. 74.
(o) 3 Paige, 606.
(p) Id. ib.
(q) 1 John. Ch. Rep. 68.
(r) Cayler v. Bogen, 3 Paige, 386.
(s) Bank of Utica v. Messereau, 7 Paige, 517.
under some personal disability, by which he is incapacitated to sue; in all these cases a defendant who does not avail himself of the objection to answering, either by demurrer or plea, but submits to answer the bill, must answer fully; unless he comes within some or one of the exceptions to the rule, which furnish a special ground for objecting to the discovery sought.\(^{(t)}\) These exceptions are twelve in number: 1. Where the answer would criminate the defendant;\(^{(u)}\) 2. Where he is a purchaser for a valuable consideration without notice;\(^{(v)}\) 3. Where the complainant has no title;\(^{(w)}\) 4. Where executors are defendants and the demand has become stale from the great lapse of time;\(^{(x)}\) 5. Where the answer of the defendant will subject him to a penalty;\(^{(y)}\) 6. Where the defendant is a judgment creditor, and the bill is filed by a subsequent purchaser, and seeks to impeach the consideration or validity of the judgment;\(^{(z)}\) 7. Where a defence is set up which meets and controverts the complainant's title;\(^{(a)}\) 8. Where the bill is filed for an account of partnership transactions, and the defendant denies the partnership;\(^{(b)}\) 9. Where the defendant is called upon to answer whether his transactions with third persons were usurious or not, at the instance of a creditor of that third person, who does not himself complain, or seek a discovery, especially if there is no charge of fraud;\(^{(c)}\) 10. Where certain documents are set forth historically, in the stating part of the bill, the defendant is not bound to answer to the facts contained or stated in such documents, unless particularly stated, distinct from the documents; yet he must answer to the fact of the existence of such documents according to his knowledge or his information and belief;\(^{(d)}\) 11. Where the facts charged are not material or necessary for the complainant's decree;\(^{(e)}\) 12. Where the matters as to which an answer is sought were reposed in the defendant as counsel, attorney, solicitor, arbitrator, grand-juror, physician, minister, &c.\(^{(f)}\)

A defendant cannot, however, in his answer, excuse himself from making a full discovery by merely denying the complainant's title to discovery and relief; as the complainant is entitled to a discovery of all matters which will be essential to the relief claimed, in case he should

\(^{(t)}\) Hare on Disc. 256. \(^{(u)}\) 1 John. Ch. Rep. 65. 2 Paige, 598. 1 Hayw. 168. \(^{(v)}\) Root, 310. \(^{(w)}\) Id. ib. \(^{(x)}\) 4 id. 205. \(^{(y)}\) Id. ib. 6 id. 137. \(^{(z)}\) 2 Har. & Gill, 382. 4 John. Ch. Rep. 432. 6 Conn. Rep. 361. \(^{(a)}\) Davis v. Mapes, 2 Paige, 105. \(^{(b)}\) Mitf. Eq. Pl. 234.

succeed in showing that the particular defence set up in the answer is false or unfounded.\textsuperscript{(g)}

The complainant is entitled to an answer to every fact charged in the bill, the admission or proof of which is material to the relief sought, or is necessary to substantiate his proceedings, and make them regular;\textsuperscript{(A)} or to enable the court to make a decree against the defendant.\textsuperscript{(i)} But the defendant need not answer questions which, though material to the general object of the suit, do not affect himself.\textsuperscript{(k)} And where the defendant who is a trustee, or in the nature of one, states in his answer generally that he is a stranger to the several matters in the bill mentioned, and that he cannot set forth any further or other answer thereto, either as to his knowledge, belief, or otherwise; it seems, that where it appears clearly no benefit would result to the complainant from requiring an answer to each fact and interrogatory, the answer will be considered sufficient.\textsuperscript{(l)}

When it is said that a defendant who undertakes to answer should answer fully, it must be understood to apply only to matters which are well pleaded; that is to the facts stated and charged. To matters of law, or inferences of law drawn from the facts, he need not answer. Thus, a defendant ought to answer, when required to do so, whether a will was published by the testator in the presence of three witnesses; but he is not obliged to answer to an interrogatory requiring him to say whether the publication was such as is required by law to pass freeholds by devise. Sometimes a defendant, instead of answering such interrogatories, submits the point to the judgment of the court; but it is not necessary to do so.\textsuperscript{(m)}

A defendant must answer "as to his knowledge, remembrance, information and belief," according to the general requisition in the bill. And, in general, where matters charged in the bill as the acts of the defendant himself, are of such a nature that he can be presumed to recollect them, if they ever took place, a positive answer is required.\textsuperscript{(n)} Thus, on a bill filed charging usury, an answer that the defendant does not remember the terms on which the money was lent, will be considered evasive, and tantamount to an admission of usury.\textsuperscript{(o)} So where the

\textsuperscript{(g)} Bank of Utica v. Messereau, 7 Paige, 517.
\textsuperscript{(l)} See Jones v. Wiggins, 2 Young & Jer. 385; 1 id. 340.
\textsuperscript{(A)} 2 Dan. 253.
\textsuperscript{(i)} Hall v. Wood, 1 Paige, 404.
\textsuperscript{(k)} Sloan v. Little, 3 id. 103. Prac. Reg. 13.
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bill directly charged upon the defendant that he had made and entered into a certain agreement, it was held that a simple denial by the defendant in his answer, "according to his recollection and belief," was insufficient, and ought to be treated as a mere evasion. (p) And where any thing is alleged in the bill as the act or deed of the defendant, or as a matter within his personal knowledge, if he does not deny such allegation, in his answer, according to his recollection and belief, the allegation in the bill will be considered as admitted, for all the purposes of the suit. (q) But where the facts are such that it is probable the defendant cannot recollect them, so as to answer more positively, a denial of the facts according to his knowledge, recollection and belief will be sufficient. (r)

Where the defendant denies all knowledge of a fact charged in the bill, but admits his belief as to the fact charged, it is not necessary for him to deny any information on the subject. (s)

To a bill filed for relief against a usurious mortgage, charging the usurious acts as having been done by the defendant in person, he cannot answer that he has no knowledge, information, recollection, or belief, other than that derived from the facts stated in the complainant's bill, and that therefore he neither denies or admits the same; but the defendant, although the facts are not charged to have occurred within seven years, (which was formerly necessary under the 54th of Lord Clarendon's orders,) must at least admit or deny the facts according to the best of his knowledge and belief. But if the defendant never heard of or knew the facts charged, except as they are stated in the complainant's bill he is not bound to admit or deny them, or to express any belief one way or the other. (t) If he has any information on the subject, however, other than such as is derived from the bill, he must answer as to such information, and as to his belief or disbelief of the facts charged. (u)

Where the defendant has no knowledge as to the facts stated in the bill, he may deny generally, all knowledge or information of the same, without answering to each charge separately, and may put the allegations of the complainant in issue by the general traverse at the end of his answer. (w)

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(s) Davis v. Mapes, 3 Paige, 105. (e) Id. ib.
(t) Sloan v. Little, 3 Paige, 103. Ult-
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As to matters which are not alleged to be the defendant's own acts, or to be within his personal knowledge, it is sufficient if the defendant, in his negative averments, denies the facts charged, upon his belief only; but he must so frame his averments that the complainant can put the facts in issue by a replication.(w)

It is not a sufficient answer to the matters charged in the bill for the defendant to aver that he has no knowledge or information of the same, except what is derived from certain depositions taken previous to the filing of the bill; which depositions are not annexed to the answer nor the substance thereof stated therein.(x)

Where a defendant is answering as to his own acts, or as to other matters either known to him or charged in the bill to be within his personal knowledge, he must answer the substance of each charge distinctly and particularly.(y)

It is not a sufficient answer to certain specific facts charged in the bill, to say "that they may be true, &c. but the defendant has no knowledge of, but is a stranger to the foregoing facts, and leaves the plaintiff to prove the same."(z) Nor is it sufficient to say that "the defendant has not any knowledge of the foregoing matters but from the statement thereof in the bill;" but the defendant should answer as to his information and belief, and admit or deny any information dehors the bill; as that he has no information, or is utterly and entirely ignorant, &c.(a) And if the facts stated in the bill are not within his personal knowledge, but he has had information concerning them, aside from the bill, he must state his belief in regard to such matters.(b)

It is also to be observed that a defendant is bound to make use of due diligence to acquire the information necessary to enable him to make the discovery called for. Thus, it has been held that a defendant must answer not only as to all facts within his knowledge, but as to those which he can ascertain from an inspection of books and papers in his possession or under his control.(c) So where defendants, filing the character of trustees, are called upon to set out an account, they cannot frame their answer so as merely to give a sufficient ground for an account in the master's office. They are bound to give the best account they can by their answer, not in an oppressive way, but by referring to books, &c. suffi-

(w) Bolton v. Gardner, 3 Paige, 279. (a) Id. ib.
(x) Cayler v. Bogart, id. 186. (b) Devereaux v. Cooper, 11 Verm.
ciently to make them parts of their answer, and afford the complainant an opportunity of inspection, in order that he may be able to ascertain whether that is the best account the defendants can give.\(^{(d)}\) But where executors or other trustees are called upon to set out accounts, they must set them forth; although for the purpose of rendering their schedules less burthensome, they may, instead of going too much into particulars, refer to the original accounts in their possession in the manner above stated. And when it is said that a defendant may refer to accounts in his possession, it must not be understood as authorizing him to refer, by his answer, to accounts made out by himself for the purposes of the case, but only to accounts previously in existence.\(^{(e)}\)

The complainant may call for an answer on oath not only to the main charges in the bill, upon which his claim to relief is founded, but also as to matters of evidence and collateral facts stated in the bill which are material in establishing the main charges, or in ascertaining the nature or kind of relief to which he is entitled.\(^{(f)}\)

To so much of the bill as is material and necessary for the defendant to answer, he must reply directly, without evasion, and not by way of negative pregnant. He must not answer the charges merely literally, but he must confess or traverse the substance of each charge positively and with certainty. Particular and precise charges must be answered particularly and positively, and not in a general manner, even though the general answer may amount to a full denial of the charge.\(^{(g)}\) But if any of the particular inquiries in the bill are as to matters which are totally immaterial to the case, the defendant need not answer them. Thus, where a bill required the defendant to set forth whether certain bonds were not given for a valuable and \textit{bona fide} consideration, and if not, for what consideration they were given? and the defendant denied that such bonds (if given) were given for a valuable consideration, but did not answer as to any other consideration, it was held that the question need not be answered; because the law knows of no other consideration than a \textit{bona fide} consideration.\(^{(h)}\) If the charge in the bill embraces several particulars, the answer should be in the disjunctive, denying each particular; or admitting some and denying the others, according to the fact.\(^{(i)}\) And where a defendant is asked by

\(^{(d)}\) White v. Williams, 8 Ves. 193.

\(^{(e)}\) See Alsager v. Johnson, 4 Ves. 294.


\(^{(g)}\) Woods v. Morrell, 1 Johns. Ch. 103. 1 Sim. & Stu. 235. 6 Ves. 792.

\(^{(h)}\) Daniel v. Bishop, 13 Price, 15.

\(^{(i)}\) Davis v. Mapes, 2 Paige, 105.
the bill whether he has not received certain sums of money specified in the bill, the mere setting forth a general account by way of schedule to the answer, and referring to it as containing a full account of all sums of money received by the defendant, will not be sufficient. The defendant is bound to answer as to the specific sums, and all the circumstances attending them, which may be inquired after in the body of his answer. (k)

An answer will be sufficient to dissolve an injunction, although it do not positively deny the facts in the bill, provided it set forth circumstances which disprove them. (l)

To so much of the bill as it is necessary and material for the defendant to answer; he must speak directly and without evasion; and must not merely answer the several charges literally, but he must confess or traverse the substance of each charge. (m) And if called upon to set out a deed or other instrument in the words and figures thereof, he should do so, or give some reason for not complying with the requisition. (n) But he may avoid this by admitting that he has the deed, &c. in his possession, and offering to give the complainant a copy of it. (o) It is said to be a proper precaution, where a defendant sets out a deed or other instrument in his answer, whether in haec verba, or by way of recital, to crave leave to refer to it; as by so doing, the defendant makes it a part of his answer, and relieves himself from any charge in case it should be erroneously set out. (p)

Secondly, of the manner of stating the defendant's defence.] Besides answering the complainant's case as made by the bill, the defendant must state to the court, in his answer, all the circumstances of which he intends to avail himself by way of defence; for it is a rule that a defendant is bound to apprise the complainant by his answer, of the nature of the case he intends to set up; and that too in a clear, unambiguous manner; and that he cannot avail himself of any matter in defence which is not stated in his answer, even though it should appear in his evidence. (q)

The complainant has a right to be informed by the answer not only of all the facts to be proved, but of the use to be made of them, and of

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(m) Mif. Eq. Pl. 250.
(n) Prac. Reg. 204.
(o) 1 Harr. Ch. Pr. 185.
(p) 9 Dan. 260.
the nature of the conclusions intended to be drawn from them.(r) But this is not to be understood as applying to conclusions of law.

A defendant may, by his answer, set up any number of defences, provided they are not inconsistent with each other.(s) But if the answer either sets up inconsistent defences, or an alternative of inconsistent defences, it is bad.(t) Where a defendant, by his answer, sets up two inconsistent defences, the result will be to deprive him of the benefit of either, and to entitle the complainant to a decree.(u) Sometimes, indeed, the court will, where from redundant expressions or other verbal inaccuracy, a defence has been rendered inconsistent, when it was evidently not intended to be so, either reject the redundant expressions as surplusage or direct them to be struck out.(v) But such indulgence is confined to cases of verbal inaccuracy only which would not have embarrassed the complainant in the conduct of his case.

But although the defendant cannot by his answer, set up in opposition to the complainant’s title two inconsistent defences in the alternative, he will not be precluded from denying the complainant’s general title, and also insisting that in case the complainant establishes his title he is precluded from recovering, by some other circumstance which would equally serve to preclude him or any other person in whom the title might be vested.(w) Nor is there any thing inconsistent in such a proceeding; for by denying the complainant’s title, the defendant merely puts the complainant to prove his own case, to show his prima facie right, which he may have independently of the question whether a defendant may not establish a special case which may be equally valid against another, supposing such other to have the prima facie title, as it would be against the complainant in case he proves his prima facie title.(x)

Although in stating a defendant’s case it is necessary to use such a degree of certainty as will inform the complainant of the nature of the case to be made against him, it is not necessary that the same degree of accuracy should be observed in an answer as is required in a bill.(y)

If the defence to be made to the bill consists of a variety of circumstances, so that it is not proper to be offered by way of plea, or if it is

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(r) 2 Dan. 340. Wightw. 394. (s) 3 Anst. 397, 398. McCle. 317. (t) Ellis v. Saul, 1 Anst. 339. 5
(v) Price, 495. 1 id. 237. 1 Young & Coll. 145.
(u) 4 Gwill. 1329. (w) Carte v. Ball, 3 Atk. 496, 499.
(t) Jesus College v. Gibbs, 1 Young (x) Jesus College v. Gibbs, 1 Young & Coll. 145.
(u) 2 Dan 243. Sed vide 3 Anst. 702.
(y) 2 Dan. 244.
doubtful whether a plea will hold, the defendant may set forth the whole by way of answer, and pray the same benefit of so much as goes in bar as if it had been pleaded to the bill. Thus, it has been held that a defendant insisting upon the benefit of the statute of limitations by way of answer, may, at the hearing, have the like benefit of the statute as if he had pleaded it. So also if a defendant can offer a matter of plea which would be a complete bar, but has no reason to protect himself from any discovery sought by the bill, and can offer circumstances which he conceives to be favorable to his case and which he could not offer together with a plea, he may set forth the whole by way of plea, or of answer to support a plea—as the expending a considerable sum of money in improvements with the knowledge of the complainant—it may be more prudent to set forth the whole by way of answer than to rely on the single defence by way of plea; unless it is material to prevent disclosure of any circumstances attending his title. But it is only at the hearing of the cause that any such benefit can be insisted upon; when the defendant will be entitled to the same advantage of this mode of defence that he would have had if he had adopted the more concise mode of defence by demurring or pleading; and his right to costs in case of his success will not be affected by the course of proceeding which he has adopted, although it has occasioned more expense to the complainant than he would have incurred by simply demurring or pleading to the bill.

Schedules.] Where the bill requires the defendant to set forth a general account or to answer as to moneys received, or documents in his possession, it is the general practice to set forth the account or list of the sums or documents in one or more schedules annexed to the answer, which the defendant prays may be taken as part of his answer. It may also be resorted to by the defendant for the purpose of showing the nature of his own case, or of strengthening it, even though there is nothing in the bill itself, or in the interrogatories, which may render a schedule necessary. But a defendant should be careful not to frame his schedule in a manner which may be burthensome and oppressive to the complainant; otherwise it will be deemed impertinent. Thus, where a bill was filed for an account, containing the following interrogatory, "whether any, and what sum of money was due from the house of..."
A. to the house of B., and how the defendant made out the same? and the defendant, by his answer, set forth a long schedule, containing an account of all dealings and transactions between the two houses, Lord Eldon held the answer clearly impertinent, and that the defendant ought merely to have answered that such a sum was due, and that it was due upon the balance of an account. (e) So where a defendant, in his schedule, set out at length a bill of costs in relation to another bill delivered for the same business, it was held impertinent, although the bill called upon the defendant to set forth how he computed and made out his demand, and all the particulars relating thereto, with interrogatories pointed to the particular items and to a minute comparison of the two bills of costs. (f) In like manner it seems to be held that in the case of an executor called upon to account for his disbursements it is not necessary to set out every particular item. (g)

**Form of answer.** No particular form of words is necessary in an answer. If it be not evasive, and if the substance is preserved, it is sufficient. (h) It is headed by a title as follows: “The answer of C. D., the defendant, to the bill of complaint of A. B., complainant.” If two or more defendants join in the same answer, it is entitled, “The joint and several answer of C. D. and E. F., defendants,” &c.; unless it be the answer of a man and his wife, in which case it is called the joint answer.

Where any defect occurs in the title of an answer, so that it does not appear distinctly whose answer it is, or to what bill it is an answer, it will be a ground for taking it off the file for irregularity. (i)

An answer commences by reserving to the defendant all manner of advantage which he might take by exception to the bill, for the purpose of avoiding the conclusion that the defendant, submitting to answer the bill, must thereby be taken to admit every thing which he does not controvert in express terms. The answers to the several matters contained in the bill, together with such additional matter as may be necessary for the defendant to show to the court, either to qualify or add to the case made by the bill, or to state a new case on his own behalf, next follow. (k) And it may be here remarked, that whatever a complainant is bound to state in his bill, the defendant may be required to admit or deny by his answer to the same. (l) And a defendant may

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(c) French v. Jacko, 1 Mer. 357, (n.) (i) Pieters v. Thompson, Coop. 249.
(g) Norway v. Rowe, 1 Mer. 355. (k) Mitf. Eq. Pl. 254.
set up, in his answer, matter which has occurred between the filing of
the bill and the putting in of such answer.(m)

This part of the answer is succeeded by a general denial of that com-
bination which is usually charged in the bill. And the answer con-
cludes by a general traverse or denial of all the matters alleged in the
bill.(n)

An infant being entitled to every exception to a bill, in a suit against
him, without expressly saving it, the general saving at the commence-
ment, the denial of combination, and the concluding traverse or denial
are omitted in an answer by him.(o)

Engrossing.] The answer having been drawn up by the defendant’s
solicitor or counsel, is read to, or by, the defendant or person who is to
swear to it, and if found to be correct in point of fact, it is engrossed or
copied fairly; for the purpose of being signed, sworn to, filed and
served. The draft is preserved in the office of the solicitor for the de-
fendant.

Answers and copies thereof are required, by a rule of the court, to be
fairly and legibly written; and if not so written, the register, assistant
register and clerks are prohibited from filing such as may be offered to
them for that purpose.(p)

Numbering and marking folios.] The rule last referred to also re-
quires that the solicitor drawing the answer shall number and mark each
folio (i.e. 100 words) in the margin thereof; and all copies, either for
the parties or the court, must be numbered or marked in the margin, so
as to conform to the draft and to each other. As we have before remark-
ed, in reference to bills of complaint, it is not necessary to number the
pages, in addition to numbering the folios, of an answer. As the word
“folio” was formerly used to denote a page, it may still be conveniently
used for that purpose.

Signing.] The answer must be actually signed by the defendant put-
ting it in, although an answer on oath is waived; unless an order has
been obtained allowing it to be taken without signature.(q)

The court has sometimes, under special circumstances, directed the
clerk to receive an answer, though it has not been signed by the defen-
dant; as where the defendant went abroad forgetting or not having had
time to put in his answer.(r) So where a defendant had gone or was

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(m) Lyon v. Brooks, 2 Edw. 110.
(n) Mitf. 254.
(o) Id. 314.
(p) Rule 95.
(q) Denison v. Bassford, 7 Paige, 370.
(r) Aik. 339.
   —— v. Lake, 6 Ves. 171.
   Gwillim, id. 285.
   Damond v. Magge, 2
resident abroad, and had given a general power of attorney to defend suits, &c. So where the signature is waived by the complainant, the answer may be filed without it. And the filing of a replication is evidence of such waiver. But even where the signature is waived, a special order of the court allowing it to be dispensed with, is necessary. To obtain such an order, where the defendant is abroad, the court requires his written consent, or the evidence of a power from the defendant to his attorney, or solicitor, to put in an answer for him.

The engrossment is to be signed, and not the draft; the object in requiring the signature being to identify the instrument, to which, when sworn to, the defendant has given the sanction of his oath, in order to render a conviction for perjury more easy.

In a case where an answer was put in without the defendant's signature, it was ordered to be taken off the file for irregularity; and as there was no suggestion that there was any defence to the suit, the answer having evidently been put in for mere delay, it was made a part of the order that the complainant's bill be taken as confessed for want of an answer.

**Signature of counsel.** An answer must be signed by counsel; unless taken by commissioners upon a commission issued out of the court, in which case the signature of counsel is not required, the commissioners being responsible for the propriety of its contents, as it is supposed to be taken by them from the mouth of the defendant. The signature of counsel is usually attached to the engrossed copy which is filed. The consequence of not procuring the signature of counsel will be, that the answer will be taken off the file on application by the complainant. But the court will not allow such a course to be adopted where the interest of the plaintiff may be prejudiced by the proceeding.

**Swearing to.** It is a general rule, that answers must be put in upon oath. But by consent of parties, and an order of court first obtained, an answer may be taken without oath. If the parties agree, however, that the answer be put in in this manner, it is a matter of course for

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the court so to order. (f) The order for this purpose should be applied for by the defendant, on filing the written consent of the complainant’s solicitor. (g) If applied for on the part of the defendant, it cannot be obtained without such consent. (h) But when it is applied for by the complainant, the defendant’s consent is not required; (i) unless the defendant is abroad, in which case the court requires the consent of counsel, and to be satisfied that the person instructing the counsel to consent is properly authorized by the party. (k)

Waiver of oath.] The filing of a replication by the complainant will be considered as evidence of a waiver of the oath of the defendant. (l)

The statute also authorizes an express waiver of the oath, by the complainant in his bill, in case he is unwilling to permit the defendant to be a witness in his own favor, by the forms of pleading. Thus it is provided, that when a bill is filed for any purpose other than discovery, the complainant may waive the necessity of the defendant’s answer being on oath; and in such a case the answer may be put in without oath, and will have no other or greater force as evidence than the bill. (m) If the complainant waives an answer on oath, under this section of the statute, he must waive it as to the whole bill. And after the defendant has answered the original bill on oath, the complainant cannot, by an amendment, waive the necessity of an answer on oath. (n) If the complainant waives the necessity of an answer on the oath of the defendant, it must be distinctly stated in the bill. (o) If an oath is waived, the answer may be excepted to for scandal or impertinence, but not for insufficiency. (p) But all material allegations in the bill which are not answered and admitted, may be proved by the complainant in the same manner as if they were distinctly put in issue by the answer; and if no replication is filed, the matters of defence set up in the answer will, on the hearing, be considered as admitted by the complainant, although the answer is not on oath. (q)

Where the defendants are not jointly interested in the claim made against them by the bill the complainant may waive an answer on oath as to some of such defendants only. (r)

If a preliminary injunction or ne exeat is prayed for in the bill, the

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(f) Id. ibh.
(g) Id. ibh.
(i) Codair v. Hersey, 18 Ves. 468.
(j) Bayley v. De Walkiers, 10 Ves. 441. 18 id. 465.
(k) 3 Paige, 308.
(l) 2 R. S. 175, § 49, (orig. § 44.)
(m) Burra v. Looker, 4 Paige, 327.
(n) Rule 40.
(o) Ibid. 2 Fow. Ex. Pr. 11.
(p) Id. 535.
(q) Bulkley v. Van Wyck, 5 Paige, 535.
(r) 2 Paige, 308.
defendant may put in his answer on oath for the purpose of moving to
dissolve the injunction or discharge the noe sect, although an answer on
oath is waived by the complainant in his bill. But the answer in such
a case will have no other or greater force, as evidence, than the bill.\(^{(x)}\)
And notwithstanding such waiver of an oath, the answer must be sworn
to if the defendant wishes to dissolve the injunction on the ground that
the equity of the bill is fully denied.\(^{(t)}\)

And it may be here observed, that if the complainant waives an an-
swer on oath, he cannot apply to have the answer taken off the file, on
the ground that the defendant knows it to be untrue. His proper
course, in such a case, is, at the hearing, to ask to have the defendant
charged personally with the costs to which he has improperly subjected
the complainant by such false pleading.\(^{(u)}\)

*Form of oath.*] The 18th rule of the court specifies the form of the
oath to be administered to the defendant on swearing to the answer.\(^{(v)}\)

The oath, when administered to a person professing the christian re-
ligion, is upon the Holy Evanglist; the witness laying his hand upon
and kissing the gospels; except in cases where a different form of oath,
or an affirmation, is authorized to be used by the statute.\(^{(x)}\) But it is
to be observed, that persons who do not believe the christian oath must,
from necessity, be put to swear according to their own notion of an
oath.\(^{(y)}\) Therefore, a Jew may be sworn upon the Pentateuch, with
his hat on;\(^{(z)}\) and a heathen may be sworn in a manner most binding
on his conscience. In a case where the defendant to a cross bill was
resident in the East Indies, and professed the Gentoo religion, the court
directed a commission to the East Indies, and empowered the commis-
sioners to administer the oath in a manner which should seem to them
the most solemn; and if they administered any other oath than the
christian, to certify to the court what was done by them.\(^{(a)}\)

*Jurat.*] As in the case of a bill, the substance of the oath adminis-
tered to the defendant on swearing to his answer, must be stated in the
jurat, or certificate of the officer;\(^{(b)}\) which jurat is attached to the foot

\(^{(x)}\) Rule 36.
\(^{(t)}\) Dougrey v. Topping, 4 Paige, 94.
\(^{(u)}\) Denison v. Baseford, 7 Paige, 370.
\(^{(v)}\) See also ante, 44.
\(^{(x)}\) 2 R. S. 407, \(2\) 103, 4, 5. (orig. \(2\) 83, 84, 85.)
\(^{(y)}\) Omychund v. Barker, 1 Atk. 21, 46.
\(^{(z)}\) Hinde, 928. But see Fryatt v.

Lindo, 3 Edw. Ch. R. 941, note a, from
which it appears that the Jews consider
any form of oath directed by the laws of
the country in which they reside, bind-
ing on them as much as if taken under
the ancient law.

\(^{(a)}\) Rankissseasee v. Barker, 1 Atk. 19.

\(^{(b)}\) Rule 18. Hinde's Ch. 927.
of the answer, immediately after the signatures of the party and of his
solicitor and counsel; and it is customary to write it upon the left side
of the paper.

If there are many defendants who are sworn at the same time, one
jurat will be sufficient. But if the defendants are sworn at different
times, there must be separate jurors for each defendant or each set of
defendants swearing.(c)

It has been decided that the jurat to an answer may be in the past
tense, stating that at the time specified, the defendant appeared before
the officer and swore that the matters stated in the answer were true.
And that the jurat will also be in compliance with the 18th rule, al-
though it states that the defendant swore the facts stated in the answer
were true; instead of swearing as to the truth of the matters stated
therein.(d)

In a case recently before the vice chancellor of the first circuit the
bill prayed that the defendants, being Jews, might swear to their answer
according to their creed, and it set forth the oath and ceremony by
which it was to be done. The jurat to their answer was in the ordina-
ry form; by which the commissioner certified that the defendants had
been "duly sworn." A motion to strike the answer off the file was re-
 fused by his honor, there being no proof to show that the defendants
were not sworn according to their creed, and the officer having certified
that they were duly sworn.(e)

Before whom answer may be sworn to. An answer may be sworn to
before any officer authorized to take affidavits to be read in the court of
chancery, or before a commissioner specially authorized by the court to
take such answer.(f) The officers authorized by law to take affidavits
are the following: Judges of courts of record, circuit judges, supreme
court commissioners, clerks of courts of record, masters and examiners
in chancery, and the register and assistant register of that court,(g)
commissioners to take affidavits to be read in the court of chancery,(h)
and justices of the peace.(i)

If the defendant resides out of this state, the answer may be sworn to
and authenticated in the manner prescribed by law for taking affidavits,
out of this state, to be used in judicial proceedings here.(k) The stat-

(c) 2 Dan. 278. Hinde, 297. 1 Smith, 246. (g) 2 R. S. 384, §§ 50, 51, (orig. §§ 49, 60.)
(d) Whelpley v. Van Epps, 9 Paige, 332. (h) 1 id. 95. § 1, sub. 3.
(e) Fryatt v. Linde, 3 Edw. 239. (i) Laws of 1840, p. 137.
(f) Rule 41. (k) Rule 41.

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ute upon which this rule is founded provides that, in order to entitle the affidavit of any person residing in another state of the union or in any foreign country, to be read or received in judicial proceedings here, it must be authenticated as follows: It must be certified by some judge of a court having a seal, to have been subscribed and taken before him, specifying the time and place where taken. And the genuineness of the signature of such judge, the existence of the court, and the fact that such judge is a member thereof, must be certified by the clerk of the court, under the seal thereof.\(^{(l)}\)

By the second section of the act of 1840, page 235, commissioners appointed by the governor of this state, under that act, are authorized to administer an oath or affirmation, with the same effect as if taken by an officer authorized to administer oaths, resident in this state; provided that wilful false swearing in taking any such oath or affirmation, would, by the laws of the state wherein the same shall be made, be deemed perjury.

**Endorsing.** The answer having been sworn to, should next be endorsed. This is done by writing upon the back, the title of the cause, specifying before whom the cause is pending, and the following underneath—“Copy answer of def’t C. D.;” or, “of C. D. one of the defendants—E. F. Deft’s Sol’r.” Upon the copy to be served, add “For G. H. Esq. Compt’s Sol’r.”

**Filing.** If the bill is filed before the chancellor, the answer, if put in while the cause remains before him, must be filed with the register or assistant register. If put in after the cause is referred to a vice chancellor for his decision, the answer may be filed in the office of the clerk residing in the circuit of such vice chancellor.\(^{(m)}\)

An answer is not strictly considered such until filed; and it ought not to be filed until the costs of a contempt for not answering are paid. It is said to be frequently the practice, however, to file the answer before the costs of the contempt have been paid; and in such case the complainant should be careful not to take an o’fice copy of the answer, or do any other act which may be construed into an acceptance of the answer; for if he does, he will waive the contempt.\(^{(n)}\)

**Serving.** The answer having been filed, a fair copy must be served upon the complainant’s solicitor endorsed as above mentioned.

**Time for answering.** The defendant’s answer must be put in with-
in forty days after service of a copy of the bill and notice of the order to answer. (o) But if the defendant is unable to prepare his answer within that time, the time will be extended by the court on a special application for that purpose, on reasonable grounds being shown. (p) In order to obtain such an extension of the time, a motion must be made upon an affidavit showing the necessity for further time. And further time to answer, not exceeding sixty days, in case of a resident defendant, and not exceeding six months, in case of a non-resident of the state, may also be granted by a vice chancellor or injunction master, on application and sufficient cause shown to him by affidavit, on such terms and conditions as he may direct. But no order extending the time to answer can be granted by an injunction master, or by a vice chancellor out of court after the time for answering has expired, or where time has before been granted by order of the court, or by a vice chancellor or master, or by the agreement of the complainant. (q) This rule does not authorize a vice chancellor or injunction master to grant a chamber order given the defendant time to demur. And if a defendant puts in a demurrer after an order for further time to answer, it is irregular. (r) A chamber order, made by a vice chancellor, giving further time to answer, but not entered in the minutes of the court, is a mere nullity when not authorized by the above rule. (s) The defendant is not entitled to an ex parte order for further time to answer, beyond the time prescribed in the order of the court, upon overruling a plea or demurrer. (t) Therefore, where a demurrer has been overruled on argument and the defendant ordered to put in his answer in twenty days and pay the costs, or that the bill be taken as confessed, an ex parte order extending the time to answer is irregular. (u)

An order for further time is usually applied for ex parte. But where the application is made after the time has expired, or after a former order for time, notice of it should be given. (v)

By the Irish practice, a notice of an application for time to answer, and an affidavit filed in support of it, prevent all further proceedings by the complainant until the motion is disposed of by the court. (w)

A defendant who wishes further time to put in his answer, must make
his application before an attachment has been issued against him, for want of an answer; otherwise he will be in contempt and will not be allowed to make it.\(x\)

Having thus gone through with an answer in its most usual shape, and considered its nature and uses, its form, the engrossing of it, the numbering and marking of the folios, signing, swearing to, endorsing, filing and serving, and the time within which it must be put in; we now propose to direct the reader's attention to the practice in relation to answers in certain special cases, and upon some particular points not before adverted to.

*Answer by attorney.*\(^{(y)}\) An answer by an attorney in fact will in some cases be allowed to be put in; as where the defendant has gone, or is resident, abroad, and has given a general power of attorney to defend suits, &c. But this cannot be done under a general power of attorney to act relative to the management of an estate, even in a suit which relates to the estate. By the English practice the answer in such cases is put in without any signature, and the power of attorney is recited in the order; but by the practice in this state the answer is signed by the attorney, and a copy of the power is annexed thereto.\(^{(b)}\)

*Answer of an infant.*\(^{(c)}\) Where an infant is defendant, a guardian *ad litem* must be appointed for him, by whom an answer for the infant must be put in. The manner of procuring the appointment of the guardian *ad litem* has been already pointed out, ante p. 83.

In most cases the guardian puts in a mere general answer, submitting the rights of the infant to the court. But he is bound to ascertain what are the legal and equitable rights of his ward; and if a special answer is necessary or advisable for the purpose of bringing such rights before the court, it is his duty to put in such an answer. If the infant is a mere nominal party, or has no defence against the complainant's claim, and no equitable rights as against his co-defendants, which render a special answer necessary, the general answer will be sufficient.\(^{(d)}\)

It is the duty of the court to see that the rights of an infant are not prejudiced or abandoned by the answer of his guardian.\(^{(d)}\)

The answer, in cases where an oath is necessary, is to be sworn to by

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\(^{(x)}\) Taylor v. Fisher, 6 Sim. 566. Rep. 240. This was a suit in which a discovery was not desired.


\(^{(a)}\) Rogers v. Cruigar, 7 John. 558. (d) Barrett v. Oliver, 7 Gill & John. 191.

\(^{(b)}\) Dumond v. Magee, 2 John. Ch.
the guardian, and is termed his answer, and not that of the infant.\(^{(e)}\) For which reason the infant is not bound by such answer, and it cannot be read against him; as the infant may know nothing of the contents of the answer put in for him, or may be of such tender years as not to be able to judge of it.\(^{(f)}\) 'Therefore it would be useless and occasion unnecessary expense to call upon an infant to put in a full answer to the complainant's bill. It is accordingly held, that exceptions will not lie to the answer of an infant, for insufficiency.\(^{(l)}\) But after he becomes of age he may, by supplemental bill, be compelled to answer, and make a discovery.\(^{(m)}\)

If the guardian is a co-defendant, he need only sign a joint answer once; as the caption expresses it to be the answer of the guardian in both capacities.\(^{(n)}\)

The general saving at the beginning, together with the denial of combination, at the conclusion, common to all other answers, are omitted in an answer put in for an infant by his guardian; for he is entitled to the benefit of every exception which can be taken to a bill, without expressly making it; and he is considered incapable of the combination charged. The general traverse is also left out of an infant defendant's answer, because it cannot be excepted to for insufficiency.\(^{(o)}\)

Although an infant cannot be called upon to put in a full answer to the complainant's bill, yet he may state in his answer any thing which he means to prove, in the way of defence.\(^{(p)}\)

Where a general answer has been put in for an infant defendant by his guardian \textit{ad litem}, the infant, upon his becoming of age, and before decree, is entitled, as a matter of right, to an order allowing him to put in a new answer, upon his showing, to the satisfaction of the court, that a new or further answer is necessary to protect his rights.\(^{(q)}\) But he is entitled to the benefit of this privilege only for the protection of his own rights, and not as a means of injuring the case of his adversary without benefitting his own.\(^{(qq)}\)

\(^{(f)}\) Id. ib. Stephenson v. Stephenson, 6 Paige, 353.
\(^{(m)}\) Marquis of Waterford v. Knight, 9 Bligh, 307.
\(^{(n)}\) Anon. 2 Jac. & W. 553. 9 Ves. & B. 553.
\(^{(o)}\) Min. 254.
\(^{(p)}\) Per Lord Ch. Baron Richards in Att'y Gen. v. Lambirth, 5 Price, 398.
\(^{(qq)}\) Malone v. O'Connor, 2 Dra. & Waish, 491.
An infant wishing to make a new defence must apply to the court as early as possible after attaining the age of twenty-one; for if he is guilty of any laches, his application will be refused.\((r)\) Nor will it be granted on his coming of age, without an affidavit that he can now make a better defence than that previously put in.\((s)\)

An infant may also apply to put in a better answer at any time during the suit, and before coming of age, provided there is a foundation for it upon the merits.\((t)\) And he may, by petition merely, stay proceedings in the cause until he is prepared with his answer.\((u)\)

The answer of an infant by his guardian \textit{ad litem} is considered a pleading merely, and not an examination for the purpose of discovery. It is not evidence in his favor, therefore, although it is responsive to the bill and sworn to by the guardian \textit{ad litem}.\((v)\) Nor, as has been already stated, can it be read against him.\((w)\) And a complainant cannot, by any form of pleading, compel an infant to become a witness against himself.\((ww)\)

The other formalities in taking the answer of an infant are the same, \textit{mutatis mutandis}, with those observed in putting in the answer of a party under no incapacity.\((x)\)

\textit{Answer of a married woman.} It is a general rule that in a suit against husband and wife, the husband must procure the joint answer of himself and wife to be put in, or the bill may be taken as confessed against both.\((xx)\) And if either party wishes to answer separately, an order should be first obtained allowing it.\((y)\) But where the wife lives separate from her husband, and is not under his control, the court will upon motion, accompanied by an affidavit verifying the circumstances, give the husband leave to put in a separate answer.\((x)\) Upon the same principle, process of contempt will be stayed against the husband, for want of his wife’s answer, on his making an affidavit that she has left him and that he has no power over her.\((a)\) In a case where the husband, who had put in a separate answer, moved that he might be at

\((r)\) Mason v. Dabow et al. 2 Hayw. 178.
\((s)\) Bennett v. Leigh, 1 Dick. 89.
\((t)\) Cecil v. Lord Salisbury, 2 Vern. 224.
\((u)\) Bennett v. Lee, 2 Atk. 487, 529.
\((v)\) Savage v. Carroll, 1 Ball & E. 549. 1 Fowl. Exch. Pr. 470.
\((w)\) Shield’s heirs v. Bryant, 2 Marsh. Rep. 344.
\((aa)\) Stephenson v. Stephenson, supra.
\((bb)\) Bulkeley v. Van Wyck, supra.
\((cc)\) Hinde, 242.
\((xx)\) Bilton v. Bennett and wife, 4 Sim. 17. See Learritt v. Cruger and wife, 1 Paige. 421.
\((yy)\) Id ib.
\((zz)\) Chambers v. Bull, 1 Ant. 269.
\((aa)\) Garey v. Whittingham, 1 Sim. & Stu. 103.
\((aaa)\) Leithly v. Taylor, 1 Dick. 373.
\((aaaa)\) Lloyd v. Basnet, id. 143.
liberty to answer separately from his wife, and that he might not be liable to process on account of his wife not putting in an answer, on an affidavit that his wife lived separate and apart from him, and that he had no control or influence over her, the court held that, as he had already put in a separate answer, there was no necessity for that part of the motion which related to the answer, but made the order as to the latter part.\(\beta\)

Under ordinary circumstances, however, a husband cannot answer separately from his wife without the sanction of an order for that purpose; and if he does so, his answer by the English practice, will be treated as a nullity and the bill may be taken as confessed.\(\epsilon\) By our practice, putting in such an answer is only considered an irregularity; and the court, on motion, in such a case, will order the answer to be taken from the files.\(\epsilon\epsilon\) But as long as it remains upon the file, it cannot be treated as a nullity, by the opposite party.

If a wife appears and afterwards absconds, process will be stayed against the husband and liberty given to sue out a sequestration against the wife.\(\delta\)

And if a married woman obstinately refuses to join in a defence with her husband, the husband may in like manner be allowed to defend himself, and the complainant must proceed separately against the wife.\(\epsilon\)

As the husband may in certain cases be allowed to answer separately from his wife, so the wife may, upon her own application to the court, and for good cause shown, obtain an order to put in her answer independently of her husband. Therefore, if she cannot, in conscience, consent to such an answer as is drawn up by her husband, she is not obliged to submit to it, but upon application to the court she may be considered as a separate person, and will be allowed to answer separately from her husband. And if a husband insists that his wife shall put in an answer contrary to what she believes to be the fact, and by menaces prevails upon her to do so, this is an abuse of the process of the court, and he may be punished for the contempt.\(\phi\)

The cases in which a woman usually obtains an order to answer separately from her husband, are those in which she claims an adverse interest—where husband and wife are made defendants in right of the wife—where she lives separate from him, or disapproves of the defence he intends to make—or where the husband is out of the jurisdiction.\(\gamma\) So

\(\beta\) Berry v. Cane, 3 Mad. 479.  
\(\epsilon\) Ex parte Halsom, 2 Atk. 50.  
\(\epsilon\epsilon\) Anon 9 Eq. Ca. Abr. 66. 1 Dan. 210. 1 Smith, 253. Where the husband is out of the jurisdiction, the complainant may sometimes compel the wife to answer separately. 1 Smith, 254, (n. 1).
where she denies the marriage with her alleged husband, she will be allowed to put in a separate answer, but without prejudice to any question as to the validity of the marriage. (h)

As a general rule, if a *feme covert* wishes to answer separately, she must apply to the court, upon motion or petition, for an order permitting it; and if her separate answer is put in without such an order, it may be taken off the file. (i)

But if her separate answer be put in without such an order, and the same be a fair and honest answer and deliberately put in, with the consent of the husband, and the complainant accepts of it and replies to it, the court will not, on the motion of the wife, or her executors, set it aside. (k) So if a husband files a bill against his wife, he admits her to be a *feme sole*, and she must put in her answer as such; and no order is necessary to warrant her in so doing. (l) And if she does not put in her answer, in such a case, the husband may obtain an order to compel him to do so. (m)

A married woman obtaining an order to answer separately, becomes a substantial party to the suit, entitled to the usual time to put in her answer from the date of the order, and is not bound by any order obtained by her husband on behalf of himself and her. (n) Upon obtaining an order to answer separately, she renders herself liable to process of contempt in case she does not put in her answer pursuant to the order. (o)

The application for an order that the wife answer separately, may be made either by the wife herself, or by the complainant, or the husband. (p) The application by whomsoever made, should be upon notice. (q)

Where husband and wife are defendants, it is necessary that the wife as well as the husband should put in a full answer. But she will not be compelled to answer to any thing which may expose her to a forfeiture. (r) Nor is she obliged to discover whether she has a separate estate; unless the bill is so framed as to warrant the court in making a

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(h) Wybourn v. Blount, 1 Dick. 155.  
(l) Ex parte Strangeways, 9 Atk. 478.  
(m) Ainslie v. Medlicott, 13 Ves. 266.  
(n) Jackson v. Haworth, 1 Sim. & Wms. 233.  
(p) Dick. 155. 1 Ves. sen. 383. 1 Smith, 254, n. (1).  
(r) Wrottesley v. Bendish, 3 Peer Stu. 163.
decree against such separate estate. (s) Neither will she be compelled
to make a discovery which may expose her husband to a charge of felo-
ny; and if called upon by the bill to do so, she may demur. (t)

The answer of the wife cannot be used as evidence against her hus-
band. Therefore where a bill was filed before the statute of frauds
against husband and wife, to discover a trust in a matter in which she
was concerned as executrix, and they disagreed in their defence and
put in separate answers, the husband denying and the wife admitting the
trust; at the hearing, the complainant having proved the trust by one
witness only, insisted on the wife's confession in her answer; but it was
held that her answer could not bind her husband, and the bill was dis-
missed. (u) In Rutter v. Baldwin, (v) the court agreed clearly that a
wife can never be permitted to answer or to give evidence in any way
to charge her husband; and that where a man marries a widow, execu-
trix &c., her evidence shall not be allowed to charge her second hus-
band. (w) But in that case the wife having held herself out as a fema
sole, and treated with the complainant and other parties to the cause
who were ignorant of her marriage in that character; and it having
been proven that on some occasions the husband had given in to the
concealment of the marriage, the court allowed the answer of the wife
to be read as evidence against him.

But the separate answer of a married woman may be read against
herself, notwithstanding her coverture. (x)

And where husband and wife are defendants in a suit relating to the
personal property of the wife, and they put in a joint answer, it may be
read against them for the purpose of fixing them with the admissions
contained in it; but where the subject matter relates to the inheritance
of the wife, it cannot; (y) such joint answer being considered the an-
swer of the husband alone. (yy) And where the husband does not an-
swer, the answer of the wife, in a case relating to her inheritance, is no
answer; and if the husband will not appear, no decree can be had
against her for her inheritance. (x)

If the wife is absent from the state, the husband may, on application
to the court, have an order for time to issue a commission to obtain her

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(s) Francis v. Wizzell, 1 Mad. 258.
(t) Cartwright v. Green, 8 Ves. 405.
(u) Anon. 2 Ch. Ca. 39. 5 Ves. 399.
(w) 15 id. 150.
(x) 1 Eq. Ca. Abr. 297.
(y) Evans v. Cogan, 9 Peer Wms. 449.
(z) Ward v. Meath, 2 Ch. Ca. 173. 1
(z) 2 Dick. 475. Le Neve v. Nave, 3 Atk. 648.
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oath to the answer; and if she refuses to answer, the bill may be taken as confessed against her.\(^{(a)}\)

Where the complainant seeks relief out of the separate estate of the wife, however, the subpoena must be served upon her personally, and she may put in a separate answer; the husband in such a case being considered only a nominal party. And if the wife is absent, a publication of the order to appear, under the statute, must be resorted to against her.\(^{(b)}\)

A joint answer of husband and wife must be sworn to by both, unless the complainant consents to receive such answer upon the oath of the husband only.\(^{(c)}\)

Answer of an idiot or lunatic.\(^{(d)}\) The answer of an idiot or lunatic is similar to that of an infant, and should be sworn to by his committee, in the same manner as the answer of an infant is verified by his guardian ad litem.

Whenever a suit is brought against an idiot or lunatic respecting his estate, his committee, if he has one, is a necessary party to the suit.\(^{(d)}\) And by the English practice the committee applies by motion or petition, to be appointed guardian of the idiot or lunatic, to answer and defend the suit; which is generally ordered of course.\(^{(e)}\) If it happens, however, that the idiot or lunatic has no committee, or the committee, has an interest opposite to that of the idiot or lunatic, an order may be obtained for appointing another person as guardian, to defend the suit for him.\(^{(f)}\) And where the defendant is represented to be in a state of incapacity, the court will not permit his answer to be received without oath and signature; though he is a mere trustee and without interest; but will appoint a guardian by whom he may answer.\(^{(g)}\)

Answer of a foreigner.\(^{(h)}\) In the case of a foreigner not sufficiently versed in the English language to answer in that tongue, an order of course must be obtained, upon motion or petition, for an interpreter; and the answer being engrossed in the foreign language, a translation thereof must be made by the interpreter, and annexed. The foreigner must be sworn to his answer, in order to which, the interpreter attending is previously sworn to interpret truly, and conveys to the defendant the language of the oath. At the same time he swears to the translation as true and just to the best of his ability; and the jurat is adapted thereto.\(^{(h)}\)

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\(^{(a)}\) Leavitt v. Cruger, 1 Paige, 491.
\(^{(b)}\) Ferguson v. Smith, 2 John. Ch. 139. 1 Paige, 492. 1 Hoff. Ch. Pr. 232.
\(^{(c)}\) New York Chemical Company v. Flowers et ux., 6 Paige, 654.
\(^{(d)}\) Mitf. Eq. Pl. 4.
\(^{(f)}\) Mitf. 89.
\(^{(g)}\) Wilson v. Grace, 14 Ves. 173.
\(^{(h)}\) Hinde's Ch. 228.
PROCEEDINGS TO A DEGREE.

Where the answer is taken abroad, in a foreign language, the court will order it to be interpreted by a sworn interpreter and the translation to be filed with the original. \((i)\) And it has been decided in Ireland that the answer of a foreigner who does not understand English must be sworn in the language he speaks, and be filed with an English translation; and if he files an answer in English only it will be taken off the file. \((k)\)

**Answer of a deaf and dumb person.** The same course of proceeding seems proper where the defendant is deaf and dumb. \((f)\) In a case, however, which occurred in 1745, a different course appears to have been adopted. The defendant being deaf and incapable of giving instructions for his answer, the court ordered a commission to issue for taking the answer in the old way, with the bill annexed, for the commissioners themselves to endeavor to take the answer. \((m)\)

**Answer of a blind person.** Where a defendant is blind, some other person must swear that he has truly, distinctly, and audibly read over the contents of the answer to the defendant. The defendant must also swear to the answer. \((n)\)

**Answer of an illiterate person.** Where an answer is put in by an illiterate person, who can neither read nor write, by the practice of the court of Exchequer in England the solicitor for the defendant must make an affidavit that he has read over the answer to the defendant, and that the defendant understood it. And this should be stated in the jurat. And in a case where, instead of the above form, the jurat stated (the answer having been taken by commission,) that the answer had been read over to the defendant by one of the commissioners, and that the defendant declared that he perfectly understood it, the answer was considered irregular, and was, upon motion, taken off the file. \((o)\) So, where an answer by an illiterate person was not accompanied by any affidavit of his solicitor as to its having been read over to him, &c. and the jurat did not express that he had affixed his mark in the presence of the commissioners, it was ordered to be taken off the file for irregularity. \((p)\) In the court of chancery, however, an affidavit by the solicitor is not required; but in the jurat returned in that court, it is expressly stated that the party made his mark in the presence of the commissioners. The form of the jurat in such cases is as follows: This answer was


\((f)\) Hayes v. Lequin, 1 Hogan, 274. 376.


\((m)\) Gregory v. Weaver, ibid. \((n)\) 2 Dan. 380.

\((o)\) Attorney Gen. v. Malin, 1 Young, 376.

\((p)\) Pilkington v. Himsworth, 1 Young & Col. 619.
taken, and the above named defendant C. D. has duly sworn to the same upon the Holy Evangelists, at, &c. this ... day of ... [the same having been first read over and explained to the said C. D. who appeared perfectly to understand the same, and make his mark thereto in our presence,] &c. (q)

**Answer of a Corporation.** The answer of a corporation is usually put in under the corporate seal, and without oath. (r) But where it is the object of the corporation to obtain a dissolution of an injunction, it is necessary to have the answer verified by the oath of some of the corporators or officers of the corporation who are acquainted with the facts; as the injunction cannot be dissolved upon an answer without oath, denying the equity of the bill. (s)

The answer of a corporation should be signed by the president. It is usual for the secretary or cashier to sign it also.

Individual members of a corporation may be called upon to answer to a bill of discovery under oath; but in that case the individuals must be named as defendants in the bill. (t) But where a bill was filed against a corporation generally, who put in an answer under their corporate seal, the court refused, on motion, to order certain officers of the corporation to make oath to the answer so filed. (u) And whenever a discovery from the officers would be prejudicial to the corporation and not be necessary to the complainant's case, the officers are not bound to make the discovery. (v)

Upon the answer of the officers or agents of a corporation joined as defendants with the corporation for purposes of discovery, no decree for relief can be founded, either as against them or the corporation. After putting in their answer they may be examined as witnesses by the complainant. (w)

But where the officer of the corporation from whom the discovery is sought is a mere witness, and the facts he is required to discover are merely such as might be proved by him on his examination, he ought not to be made a party. Thus, where an officer of the Bank of England was made a party for the purpose of obtaining from him a discovery as to the times when the stock in question in the cause had been transfer-

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(q) 1 Young & Col. 615, note. 117. 3 Peer Wms. 310. 1 Bro. C. Rep. 469.
(r) Vermilyea v. Fulton Bank, 1 Paige, 37. 1 Smith's Ch. Pr. 188.
(s) Id. ib.
(u) Id. ib.
(v) 2 Bac. Abr. Corp. 13, 9.
(w) Vermilyea v. Fulton Bank, 1 Paige, 37.
red, and he demurred to the bill, the court allowed the demurrer, on the
ground that the officer was in that case merely a witness.(x)

A contrary doctrine, however, seems to prevail in Massachusetts. In
Wright v. Dame,(xx) it was decided that a member of a corporation, though
not an officer or agent thereof, might be made a party to a bill against
the corporation and individuals for discovery and relief; and that he is
bound to answer, on oath, so much of the bill as seeks for a discovery
of matters affecting the corporation. And it is not necessary the bill
should aver that the corporation thus made a defendant has any informa-
tion which is not possessed by other members. Nor need the bill assign
any special reason for requiring such defendant to make the discovery
prayed for.(y)

Where officers of a corporation are made defendants together with
the corporation, the court will not compel them to put in a joint an-
swer with the latter. The corporation has a right to put in a separate
answer, to deny facts which the officers may suppose to exist, or to make
admissions and offers.(yy)

Although it is not an unusual practice to make the clerk or other
principal officer of a corporation a party to a suit against such corpo-
ration, for the purpose of eliciting from him a discovery of entries or or-
ders in the books of the corporation, yet where such is not the case, it
is still the duty of the corporation, when informed of the nature and ex-
tent of the claims made upon them, to cause diligent examination to be
made before they put in their answer, of all deeds, papers, and mun-
iments in their possession or power; and to give, in their answer, all
the information derived from such examination. And it was said by
Sir J. Leach, master of the rolls, that if a corporation pursue an oppo-
site course, and in their answer allege their ignorance upon the subject,
and the information acquired is afterwards obtained from the schedules
to their answer, the court will infer a disposition on the part of the cor-
poration to obstruct and defeat the course of justice; and on that ground
will charge them with the costs of the suit.(z)

If the majority of the members of a corporation are ready to put in
their answer, and the head or other person who has charge of the com-
mon seal refuses to affix it, application must be made to the supreme

(z) How v. Best, 5 Mad. 19.
(xx) 1 Metcalf, 237.
(y) Id. ib.
(yy) Vermilyea v. Fulton Bank su-
pra.
(z) Attorney Gen. v. East Restford, 2
My. & K. 35.
court for a mandate to compel him; and in the meantime the court
of chancery will stay the process against the corporation. (a)

Where a suit is instituted against a corporation sole, he must appear
and defend, and be proceeded against, in the same manner as if he were
a private individual. (b)

Answer of an Attorney General.] The answer of an attorney gen-
eral is put in without oath, but should be signed by him. (c)

It is entirely in his discretion whether he will put in a full answer or
not. (d) The usual course, however, is for him to put in a general an-
swer, stating that he is a stranger to the matters contained in the bill,
and leaves the complainant to make out his case as he may be able, and
submit the interests of the state to the protection of the court. (e) But
he will be permitted to withdraw this answer and put in another insist-
ing upon the particular right of the state. (f) And whenever the inter-
ests of the state or the purposes of public justice require it, a full an-
swer will be put in by him, at first. (g)

The answer of the attorney general cannot be excepted to for insuf-
iciency; (h) even though it be to a cross bill filed by the defendant in
an information for the purpose of obtaining a discovery of matters al-
leged to be material to his defence to the information. (i) But where a
cross bill is filed against an attorney general, praying relief as well as
a discovery, he cannot protect himself from answering by means of a
demurrer. (k)

Joint or separate answer.] Two or more persons may join in the
same answer, and where their interests are the same and they appear by
the same solicitor, they ought to do so, unless some good reason exists
for their answering separately. The 130th rule of this court provides
that where the same solicitor appears for two or more defendants, or
different solicitors who are partners appear for several defendants, and
separate answers are put in, the taxing officer shall consider whether
such separate answers were necessary and proper; and disallow any
part of the costs thereby unnecessarily or improperly incurred.

In England no preliminary inquiry will be permitted as to the expe-
diency of filing separate answers by the same solicitor; not even with a

(a) See Rex v. Wyndham, Cwp. 377.
(c) 1 Dan. 189.
(e) Davison v. Attorney Gen. 5 Price,
398, n.
(g) Crawford v. Att'y Gen., 7 Price, 192.
(h) 1 Fow. Exch. Pr. 451.
(k) 1 Dan. 185.
(i) Davison v. Attorney Gen. 5 Price,
398, n.
(k) 1 Dan. 185.
(l) 1 Dan. 189.
(m) Dean v. Att'y Gen., 1 Young &
N. 1 Newt. Pr. 103.
(n) 1 Newt. Pr. 103.
view to modify the costs which the complainant must pay upon dismissing his bill. It is only at the hearing, when all danger of prejudice to the parties is over, that the court will make any order upon the subject.(l) But the rule of our court of chancery above referred to, will apply to a case of dismissal, as well as to any other, and protect the party from paying such unnecessary costs thereon.

Where two defendants answer jointly, and one speaks positively for himself, the other may, in cases where he is not charged with anything upon his own knowledge, say that he perused the answer and believes it to be true; but it is otherwise where the defendants answer separately.(m)

It is a general rule that where a joint fiduciary character exists, a joint defence should be adopted. But this rule does not apply where the joint parties are liable to account and incur responsibility as in the case of executors and trustees.(n)

Where, in a suit against twelve defendants, an answer was put in and filed, purporting to be the joint and several answer of all, but was in fact not signed or sworn to by one of the defendants; and after a replication was filed, proofs taken, the cause set down for hearing, a motion for re-examination of a witness, a denial of the same, an appeal from such decision, and a motion to file a supplemental answer, a separate answer was filed without the leave of the court, by the defendant who had not joined in the original answer, setting forth substantially the same defences wished to be set forth in the supplemental answer; it was held, that the separate answer was filed irregularly, and it was directed to be taken off the files of the court.(o)

A joint answer of husband and wife must be sworn to by both; unless the complainant consents to receive such answer upon the oath of the husband only.(p)

**Answer to amended bill.** In answering an amended bill the defendant, if he has answered the original bill, should answer only those matters which have been introduced by the amendments.(q) In fact, the answer to an amended bill constitutes, together with the answer to the original bill, but one record, as much as if it had been engrossed on the same paper; (r) in the same manner that an original and an amended

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(l) Vansandau v. Moore, 1 Russ. 441.
(m) 1 Harr. 185.
(n) Reade v. Sparkes, 1 Molloy, 8.
(o) Fulton Bank v. Beach, 2 Paige, 397; S. C. 6 Wend. 30.
(p) New-York Chemical Co. v. Flower et al., 6 Paige, 654.
(q) Hinde's Ch. 39.
bill are considered as the same record. Upon this principle it is that it has been held that it is impertinent to repeat, in the answer to the amended bill, what appears upon the answer to the original bill; unless by the repetition the defence is materially varied.(e) Where the amendments are not noted upon the amended bill, the defendant’s solicitor should either decline receiving it, or should ascertained what the amendments are and answer them only.(f)

It being a rule that facts occurring since the filing of the bill must be introduced by a supplemental bill, and not by way of amendment,(u) it has been held that when a complainant amends his bill by the insertion of matters which have occurred since the filing of the original bill, the defendant, instead of pleading or demurring to the amended bill on that ground, may, by answer to the amended bill, claim the same benefit that he would have been entitled to if he had pleaded or demurred.(v)

In a case where exceptions to an answer had been allowed, and the complainant had obtained an order to amend, and for the defendant to answer the exceptions and amendments at the same time, and the defendant put in an answer to the amended bill only; whereupon the complainant issued an attachment; it was held that it was irregular, and that the complainant ought to have moved to take the second answer off the file.(w)

It is frequently the practice, in putting in an answer to an amended bill, to entitle it “An answer to the original and amended bill.” It is not necessary, however to do so; as “An answer to the amended bill” only, will be sufficient.(x)

Commission to take answer.] If the defendant resides at some place out of this state, the 41st rule points out a method in which his answer can be sworn to and authenticated before some officer residing at that place. It may also be sworn to before a commissioner appointed by the governor of this state under the act of 1840, p. 235.(y) These provisions will, in most cases, supersede the necessity of issuing a commission. But it may sometimes be necessary or convenient to issue a commission, instead of taking the other course.

To obtain a commission, the defendant should apply to the court, upon notice to the complainant, and upon an affidavit stating that the de-

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(s) Smith v. Searie, 14 Ves. 415.  
(t) 3 Paige. 159.  
(u) Stafford v. Howlett, 1 Paige, 300.  
(v) 2 Ark. 136.  
(w) Wray v. Hutchinson, 2 My. & Keen, 235.  
(x) De Tustet v. Lopez, 1 Sim. 11.  
(y) Smith v. Bryon, 3 Mad. 429.  
(z) See ante, p. 145, 149.
fendant has appeared, and that he resides abroad, stating the particular place. This affidavit may be made by the defendant's solicitor, or by a general attorney. (x) In the order granting the commission, the court will extend the time for answering, if necessary.

The notice of motion should name the commissioners proposed by the defendant. Upon the hearing of the motion, the complainant, if he wishes to join in the commission, may name commissioners on his part.

One commissioner on each side is sufficient; but, for greater caution, it is customary to name two or more. (a)

The order having been obtained, the commission is issued, under the seal of the court, directed to the persons appointed by the court as commissioners, and is transmitted to them by the defendant's solicitor. Or if the defendant is resident in a foreign country; it may be sent to some professional person there, to take care that it be properly executed. And though the foreign country be at war with this country, it must be there executed. In this respect, a commission to take an answer differs from a commission to examine witnesses; which it seems may be executed at the nearest neutral port. (b)

If the complainant has joined in the commission, six days notice of the time and place of executing it must be given to his commissioner. (c) If the complainant has not named commissioners, no notice need be given, and the commission may be executed by the commissioners named in the commission, ex parte. (d)

If the defendant gives notice of executing the commission, but neither countermands it in due season, nor executes it at the time, the court, on motion, will order costs to be taxed for the adverse party’s attendance. (e)

On the day appointed, the commissioners are to meet; and if only one attends on each side, it will be sufficient. But in case none of the complainant’s commissioners attend, the defendant must have two commissioners present, because no fewer than two can take his answer and return the commission. (f)

Where there is a joint commission, and the commissioners of one party only, attend, they may, after waiting until six o'clock in the evening, proceed to take the answer; but not before. (g)

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(c) 1 Hoff. Pr. 937.  
(e) Id. ib.  
(b) --- v. Romney, Abr. 62.  
(c) Pound v. Wildgoose, 9 Price, 102.  
(d) Hinde's Ch. 934.  
(f) Hinde, 934.  
(g) Prac. Reg. 116.
When the commissioners are ready to proceed, the defendant's solicitor or agent having prepared the answer and engrossed it, produces it, together with the defendant, (who attends for the purpose of swearing to it,) to the commissioners; whereupon one of the commissioners, having opened the commission, interrogates the defendant in the following manner: "Have you heard this your answer read? and do you exhibit it as your answer to the bill of complaint of A. B.?" To which the defendant answering in the affirmative, the commissioner proceeds to administer to him the oath of affirmation, as in other cases. (a) In a case where the defendant was an idolater, the order and commission directed the commissioners to administer the oath in the most solemn manner, as in their discretion should seem meet; and if any other than the christian oath was administered, to certify what they did. (i)

It is said that commissioners may refuse to execute the commission, unless they are allowed to read the answer. (k) And where a defendant, having taken out a commission to take his answer only, tenders a demurrer to the commissioners, and refuses to answer upon oath, they must certify such his refusal, and the reason thereof, together with the demurrer, and leave the same to the consideration of the court. (l)

The defendant having been sworn, must sign his answer in the presence of the commissioners; and the answer thus taken, together with the schedules, (if there are any,) are to be annexed to the commission. And the commissioners must then write the caption, at the foot of the answer, thus:—"This answer was taken, and the above named defendant C. D. was duly sworn to the truth thereof on the Holy Evangelists, at the house of . . . . , in . . . . , on the . . . . day of . . . . , before us, by virtue of the commission hereto annexed." This caption must be varied according to the nature of the case. Thus, in the case of a Quaker, or Moravian, it must be expressed to have been taken upon his "solemn affirmation;" and if it be the answer of a corporation aggregate, it must be "under the common seal of the said corporation, as by the said seal affixed appears," &c. (m) The caption should state correctly whether it be an answer, or an answer coupled with a plea or demurrer, &c. The commissioners also should be particular, when the answer is by two or more defendants, to state that they were all sworn; because where the caption of the joint and several answer of two defendants expressed only that it was sworn,
without stating that the defendants were both sworn, the answer was suppressed.(n)

The answer and schedules, with the caption, being thus annexed to the commission, the return must be endorsed upon the commission, thus: "The execution of this commission appears in a certain schedule (or schedules) hereto annexed." And the return thus endorsed must be signed by two commissioners.(o) The commission must then be tied up and sealed, and directed to the register or clerk; and if sent by a messenger, delivered to him by the commissioners. The messenger, on his arrival, delivers it to the register or clerk; who swears him to the fact that he received the commission from the hands of one or more of the commissioners, and that it has not been opened nor altered since he so received it.(p)

In the case of Brown v. Southworth,(q) the chancellor laid it down as the settled practice of the court, that a commission for the examination of witnesses may be returned by the commissioners, by mail, unless there is a special order to the contrary. And that each of the commissioners, after the sealing of the commission and the depositions taken by them, should sign his name upon the outside of the package, in his own proper hand writing. In analogy with this practice relative to witnesses, probably a similar course would be sanctioned with respect to commissions to take answers of defendants. At all events, the court would doubtless authorize it, whenever specially applied to for such an order. Indeed it seems to have been directed in one case.(r)

When the commission is returned by a messenger, it is to be left by him with the register.

If one of the commissioners is the bearer of the commission, the above formalities with regard to swearing the messenger are dispensed with. The commissioner delivers it, sealed, into the hands of the register or clerk, who accepts it without oath, and endorses it thus; [Date,] "Received by the hands of G. H., one of the commissioners."(s)

It is provided by statute that when a commission shall be issued to take a defendant's answer, no copy or abstract of the bill shall be annexed thereto.(t)

**Amendment of answer; and of supplemental answers.** It is only un-

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(o) Id. 16.
(p) Id. 237.
(q) 9 Paige, 351.
(s) Hinde's Ch. 237.
(t) 2 R. S. 179, § 78, (orig. § 72.)
der very special circumstances that a defendant can be allowed to make any alteration in his answer, after it has been put in. (u) But the court will sometimes permit it to be done, upon special application. It is, however, a matter in the discretion of the court; which discretion is exercised with great caution. It may be done, in a small matter, at any time before issue joined, on motion. But in a material point, the motion must be made upon an affidavit of the facts which make it necessary, and after notice to the complainant's solicitor. (v) An amendment may be granted for the purpose of correcting a mistake or error in a matter of fact, or in the statement of a fact; (w) or in making an admission of assets; (x) or a mistake in the title of the answer. (y) So it will be allowed where new matter has come to the defendant's knowledge since the answer was put in, (z) or in cases of surprise, as where an addition has been made to the draft of the answer after the defendant has perused it. (a)

But an amendment of the answer will not be permitted for the purpose of enabling the defendant to set up the defence of usury, unless he pays, or offer to pay the money actually lent, with legal interest. Nor will an amendment be granted to enable a party to set up a defence of usury, or the statute of limitations, if he has not availed himself of the opportunity to interpose such defence in the first instance. Yet it seems that where such defences are defectively set forth, an amendment will be allowed, in order to give the party the benefit of the defence which he intended to present. But he will not be permitted to put in a new or additional plea or answer. (b)

And the court has never permitted amendments to be made where the application has been made merely on the ground that the defendant, at the time he put in his answer, was acting under a mistake in point of law; and not on the ground of a fact having been incorrectly stated. Thus, where a defendant, who was an executor, had admitted himself accountable for the surplus, and it was afterwards found that the circumstances of the case were such that he would have been entitled to it

(b) Ligon v. Smith, 4 Hen. & Munf. 477.
(d) Dagley v. Crump, 1 Dick. 35.
(y) Amb. 69. 1 Mad. 269. 1 Ves. & B. 186.
(f) Beach v. Fulton Bank, 3 Wend. 573.
himself, permission to amend was refused.  

(c) So where a defendant had, by his answer, admitted the receipt of a sum of money from his father by way of advancement, and refused to bring it into hotchpot, he was not permitted to amend his answer as to the admission; although he swore that he made it under a mistake as to the law of the case.  

d) The court will also refuse to permit an amendment of an answer after an indictment for perjury preferred or threatened; even though it is satisfied that the defendant did not intend to perjure himself, and had no interest in so doing.  

(e) Where an amendment to an answer is allowed, the amendments must be served upon the complainant. Thus, where the jurat to an answer was defective and the defendant had leave to amend by adding a proper jurat to the answer on file, it was held that the amendment was not complete until a copy of the amended jurat was served on the complainant's solicitor.  

(f) The practice of allowing the answer to be amended, however, has been almost entirely superseded, in modern times, by permitting the defendant to file a supplemental answer, whenever necessary to correct any error. This practice has been adopted in all cases in which it is wished to correct a mistake in an answer as to a matter of fact.  

(g) Nor is it confined to matters of mistake only, but has been extended to other analogous cases; as where a defendant, at the time of putting in his original answer, was ignorant of a particular circumstance, he has been permitted to introduce that circumstance by supplemental answer.  

(h) And where a defendant had wished to state a fact in his original answer, but had been induced to leave it out, by the mistaken advice of his solicitor, he was allowed to state it by supplemental answer.  

(i) So where a defendant had been induced, by the misrepresentation of the complainant that certain securities mentioned in the bill had been fairly obtained, to put in an answer admitting the securities, &c. the defendant was permitted to file a supplemental answer.  

(k) But although the court will, in cases of a clear mistake, or other cases of that description, permit a defendant to correct his answer by filing a

(c) Rawlin v. Powell, 1 Peter Wms. 300.  
(e) Verney v. Macnamara, 1 Bro. C. C. 419.  
(f) Taylor v. Bogert, 5 Paigé, 33.  
(h) Jackson v. Parish, 1 Sim. 505.  
(i) Nail v. Puner, 4 Sim. 474.  
(j) Curling v. Marquis of Townshend, 19 Ves. 698.
supplemental answer, it always does so with great difficulty where an addition is to be put upon the record prejudicial to the complainant; though it will be inclined to yield to the application if the object is to remove out of the complainant's way the effect of a denial, or to give him the benefit of a material admission.\(^{(l)}\)

But where the application is made on the ground of mistake, it will be granted only where there is a mistake, properly speaking, as to a matter of fact.\(^{(m)}\) And it may be here remarked, that where a defendant, in putting in his original answer, has mistaken facts, he cannot contravene his own admission in any other way than by moving to correct his answer either by amendment or supplemental answer. He cannot do so by filing a cross bill.\(^{(n)}\)

The court, with a view of guarding the rights of the complainant, requires to be clearly satisfied that justice requires the filing of a supplemental answer. In making the application, therefore, the defendant must state specifically what he wishes to put upon record, in order that the court may judge how far his application is reasonable.\(^{(o)}\) And a supplemental answer will not be allowed to be filed unless on new matter, nor unless a sufficient reason appears for not having inserted it in the original answer.\(^{(p)}\)

Where it was evident, however, that an omission in the answer must have arisen from a mere slip, the court allowed the defendant to file a supplemental answer for the purpose of supplying the omission, without any affidavit in explanation.\(^{(q)}\) Where, after answer filed, the defendant obtained an exemption of his person from imprisonment, under the act, it was held that he might file a supplemental answer to present that fact.\(^{(r)}\)

So where, in a suit for a divorce, the complainant commits adultery after the answer of the defendant is put in, she will be permitted, if she applies immediately after the discovery of the fact, to set up that defence in a supplemental answer, or by a cross bill in the nature of a plea *puis darrein continuance*.\(^{(s)}\)

It is material to observe, that if a defendant is allowed to correct a mistake by a supplemental answer, he is held strictly to that mistake; and if he goes beyond that and makes any other alteration in the case than what arises from the correction of such mistake, his supplemental answer will be taken off the file.\(^{(t)}\)

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\(^{(l)}\) Bowen v. Cross, 4 John. Ch. 375.  
\(^{(n)}\) Berkley v. Ryder, 2 Ves. sen. 532.  
\(^{(o)}\) Curling v. Marquis of Townshend, 19 Ves. 628.  
\(^{(p)}\) Tennant v. Wilsome, 2 Anst. 362.  
\(^{(q)}\) Scott v. Carter, 1 Young & Jer. 452.  
\(^{(r)}\) Anon., Hopk. 27.  
\(^{(s)}\) Smith v. Smith, 4 Paige, 438.  
\(^{(t)}\) Strange v. Collins, 2 Ves. & B. 167.
The defendant will not be allowed to file a supplemental answer contradicting the statements in the first answer.\(^{(u)}\) Therefore, where an original bill has been filed and answered, and afterwards a petition is filed to amend the prayer of the bill, and the prayer is amended, and new matter introduced; and the defendant, without leave, files another answer, (in which, without replying to the new matter,) he essentially alters and new models the matter of his original answer, the court may order the new answer to be taken off the files.\(^{(v)}\)

There appears to be no particular limit to the time within which an application for leave to file a supplemental answer will be granted; provided the cause is in such a state that the complainant may be placed in the same situation that he would have been in had the original answer been correct. Accordingly, in several instances such applications have been granted after replication filed.\(^{(w)}\) But where the complainant cannot be placed in the same situation that he would have been in had the defence been stated on the record at the proper time, the court will not permit a supplemental answer to be filed.\(^{(x)}\) Therefore, where an application for that purpose was made after the cause had been set down for hearing, the court denied it, with costs.\(^{(y)}\)

But although the rule of practice now is, that in cases of mistake in the statements or admissions in an answer, or in analogous cases, the defendant will not be permitted to amend his answer, but must apply for leave to file a supplemental answer for the purpose of correcting the mistake, the old course of taking the answer off the file and amending it is still pursued in cases of error or mistake in matters of form.\(^{(z)}\) Thus, where the title of an answer was defective, a motion by the defendant to take it off the file and amend and re-swear it, was granted.\(^{(a)}\) And so where in the title of an answer the name of the complainant was mistaken, a similar order was made.\(^{(b)}\) The addition of the name of a party omitted in the title, has also been permitted.\(^{(c)}\)

So, also, the defendant has been permitted to add the schedules referred to in his answer, where they have been accidentally omitted.\(^{(d)}\) And in several cases in the court of exchequer, where verbal inaccuracies have crept into answers, they have been ordered, at the hearing, to

\(^{(u)}\) Greenwood v. Atkinson, 4 Sim. 61.
\(^{(v)}\) Macdougal v. Punier, 4 Russ. 486.
\(^{(w)}\) Thomas v. Visitors of Frederick School, 7 Gill & John. 389.
\(^{(x)}\) 2 Dan. 342. 19 Ves. 699. 1 Sim. 555.
\(^{(y)}\) 2 Dan. 343.
\(^{(z)}\) White v. Godbold, 1 Mad. 399.
\(^{(b)}\) 1 Fow. Ex. Fr. 389.
\(^{(c)}\) Id. ib.
be struck out.\(e\) In general, however, the court will not permit such amendments as those above mentioned, without making it part of the order that the answer shall be re-sworn.\(f\)

The court has also permitted an answer to be amended, by adding the name of the counsel who signed the same to the record.\(g\)

The application either for leave to amend the answer, or to file a supplemental answer, when granted, is generally upon the terms of paying costs to the complainant for opposing the application, and furnishing the complainant’s solicitor with a copy of the amended or supplemental answer gratis; giving him the usual time to except thereto.

**Of taking answers off the file.** In case any irregularity has occurred, either in the frame or form of an answer, or in the taking or filing of it, the complainant may take advantage of such irregularity by moving to take the answer off the file.\(h\) Thus, where a defect occurs in the title, so that it does not distinctly appear whose answer it is, or to what bill it is an answer;\(i\) or where the complainant is misnamed in the title,\(k\) the answer may, on motion by the complainant, be ordered to be taken off the file for irregularity. But, in such cases, the motion should not be to take the “answer of C. D.” &c. of the file; but it should be called, in the notice, “a certain paper writing purporting to be the answer,” &c.\(l\) The answer, in case of a defect in the title, may also be taken off on the application of the defendant. But as such an answer is a nullity, a motion for that purpose is unnecessary. The defendant may leave the answer upon the file, and put in another.\(m\)

So where an answer has been prepared for five defendants, it cannot be received as the answer of two only,\(n\) nor can it be received as the answer of six,\(o\) and where such an answer has been filed, it will, upon application of the complainant, be ordered to be taken off the file.\(p\) It seems, however, that after such an answer has been filed, the defendant may apply, by motion, to have it taken off the file and amended by striking out the names improperly introduced.\(q\)

If the signature of counsel is not affixed to the answer, the answer

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\(e\) Ellis v. Saul, 1 Ans. 332. Vide Jesus College v. Gibbs, 1 Young & Col. 162. 1 Younge, 389.


\(g\) Harrison v. Delmont, 1 Price, 106. 2 Young & Col. 3.

\(h\) 2 Dan. Ch. Pr. 343.

\(i\) Pietera v. Thompson, Coop. 949.

\(j\) Griffiths v. Wood, 11 Ves. 82.

\(k\) Id. ib.

\(l\) Id. ib.

\(m\) Id. ib.

\(n\) Harris v. James, 3 Bro. C. C. 399.

\(o\) Cope v. Parry, 1 Mad. 83.

\(p\) Cooke v. Westall, 1 Mad. 365.

\(q\) Sed vide 2 Ves. & B. 310.

\(r\) Id. ib.
will also be taken off the file on the application of the complainant.\(r\) So it will if it is not signed by the defendant; and this too although an answer on oath was waived by the bill.\(s\) So where the defendant files a new or supplemental answer to an amended bill without leave, the court may order it to be taken off the file.\(t\) So where the answer is filed without oath.\(u\) Or where the answer of a foreigner who does not understand English, is not put in in the language he speaks, together with an English translation, but in English only.\(v\) Or where a separate answer is put in without leave, by one of several defendants, after the others have answered and a replication has been filed, proofs taken, and the cause set down for hearing.\(w\) So where an answer is very evasive, the court may order it to be taken off the file.\(x\) But where the defendant merely stated "that he had no knowledge of any of the matters in the bill mentioned," the court of exchequer refused to order the answer to be taken off the file, on the alleged ground that it was illusory; but left the complainant to except.\(y\) And an answer, however evasive, will not be ordered to be taken off the file after the complainant has excepted to it.\(x\)

If a married woman puts in an answer separately from her husband, without a previous order of the court authorizing it, her answer may be taken off the file.\(a\) The same rule prevails where the husband answers separately from his wife without leave.\(b\) And in a case where the joint answer of husband and wife was sworn to by the husband only, it was ordered to be taken from the file.\(c\) So an answer taken under a commission will be taken off the file if the jurat does not state where it was sworn to.\(d\)

An answer may also be ordered to be taken off the file for the purpose of being produced before the grand jury on an indictment for perjury preferred by the complainant.\(e\) But this will not be permitted if it

\(r\) Wall v. Stubbs, 2 Ves. & B. 258.
\(s\) Denison v. Bassford, 7 Paige, 370.
\(t\) Thomas v. Visitors of Frederick School, 7 Gill & John. 380.
\(u\) Trumbull v. Gibbons, Halst. Dig. 172. Neubert v. Dellam, 7 Gill & John. 494. In Rogers v. Cruger, (7 John. 556, 581,) the answer of a guardian ad litem of an infant defendant was ordered to be taken from the file because it was put in without oath.
\(v\) Hayes v. Lequin, 1 Hogan, 274.
\(w\) Fulton Bank v. Beach, 2 Paige, 307. 8 Wend. 36, 8 C.
\(x\) Phillips v. Overton, 4 Hayw. 992.
\(y\) Olding v. Glass, 1 Young & Jer. 340.
\(a\) Glassington v. Thwaites, 2 Russ. 458.
\(c\) Leavitt v. Cruger, 1 Paige, 491.
\(d\) New-York Chemical Co. v. Flow- ers and wife, 6 Paige, 654.
\(e\) Henry v. Costello, 1 Hogan, 130.
appear that the alleged perjury is in a part wholly immaterial to the merits of the cause.\(^{(f)}\)

It is to be observed that if the complainant intends to apply to the court for an order to take an answer off the file for an irregularity, he should do so before he accepts the answer; otherwise the right to make the application will be considered waived; except in the case of an irregularity in the jurat or of an omission of the oath of the defendant; in which cases there can be no waiver of the irregularity.\(^{(g)}\) It being a universal principle, in all courts, that jurats and affidavits, when contrary to practice, are open to objection in any stage of a cause.\(^{(h)}\)

Exceptions to answers will be considered in a future chapter.\(^{(i)}\)

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**SECTION VI.**

**DISCLAIMER.**

A disclaimer is where a defendant, upon oath, denies that he has, or claims any right to the subject matter in demand by the complainant's bill; and renounces all title thereto.

Where a person who has no interest in the subject matter of a suit, and against whom no relief is prayed, is made a party, the proper course for him to adopt, if he wishes to avoid the discovery, is to demur; unless the bill states that he has or claims an interest. In which case, as a demurrer, which admits the allegations in the bill to be true, will of course not hold, he can only, (except in cases of partial discovery, to which he may object by answer,) avoid putting in a full answer by plea or disclaimer.\(^{(k)}\)

Although, strictly speaking, a disclaimer is distinct from an answer, yet it cannot often be filed alone, but is usually put in under the title of an answer. For, although the defendant may not at the time he disclaims, possess any interest in the matter, yet he might have had an interest which he has parted with. And this circumstance, it seems,

\(^{(f)}\) McGowan v. Hall, 1 Hayes, 17.
\(^{(g)}\) 2 Dan. 344, 280.
\(^{(h)}\) Id. 280. Pilkington v. Himsworth, 1 Young & Col. 612. But in the case of Nesbitt v. Dellam (7 Gill & John. 494,) where the oath of the defendant to the answer was omitted, but the complainant proceeded with the cause without making that objection, it was held that he could not avail himself of it in the appellate court.
\(^{(i)}\) Book I. Ch. VII, Sec. 1.
would entitle the complainant to an answer as to the certainty of the fact; in order that, if such is the case, he may be enabled to make the proper person a party instead of the defendant. (l)

A defendant cannot shelter himself from answering by alleging that he has no interest in the matter of the suit, in cases where, though he may have no interest, others may have an interest against him. Thus it has been held that a party to an account cannot, by disclaiming an interest in the account, protect himself from setting out the accounts. (m)

So a defendant who has improperly interfered with a party's right so as to make a suit necessary, may be compelled to answer the whole bill with a view to charge him with costs, notwithstanding a disclaimer. (n)

So if a fraud be charged against the defendant, he must answer as to the fraud. and cannot put in a disclaimer only. (o) And a disclaimer by one of several defendants cannot be permitted to prejudice the complainant's right as against the others. (p)

A disclaimer, though in substance distinct from an answer, is in point of form an answer, and is put in and filed in the same way; and the same formal words which precede and conclude the one are pursued as to the form of the others. (q) The form of a disclaimer is simply that the defendant disclaims all right and title to the matter in demand.

A disclaimer is put in upon oath. It must also be signed by the defendant; and in no case can such signature be waived with propriety, since it is a rule that no record will be received without signature which tends to prejudice the rights of the defendant. (r)

Should there appear any inconsistency between the answer and disclaimer, the matter will be taken more strongly against the defendant upon the disclaimer than upon answer; since it is only by the latter that the defendant's title can be ascertained. (s) But the defendant may answer as to one part of a bill and disclaim as to the other part.

A defendant is not absolutely estopped by his disclaimer from afterwards insisting upon a claim. (t) Thus, if a party has disclaimed in ignorance of his rights, and afterwards discovers the same, he may apply to the court to get rid of the effect of the disclaimer, upon a distinct application supported by affidavit, establishing a special case. (u) But he

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(m) Glassington v. Thwaites, 9 Russ. 454.
(n) Hutchinson v. Reed, 1 Hoff. Ch. Rep. 315.
(o) Bulkeley v. Dunbar, 1 Anst. 37.
(q) 1 Fow. Ex. Pr. 351. Hinde, 209.
(r) 1 Smith, 198.
(s) Mitf. 254.
(t) Branch v. Spurser, Harr. 235.
(u) Sidden v. Lediard, 4 Russ. & My, 110.
must make out a very strong case, upon affidavit, to get rid of such a disavowal of title. (v)

If the defendant puts in a disclaimer where he ought to answer, or accompanies his disclaimer by an answer which is considered insufficient, the complainant may except to it in the same manner as to an answer. (w) It seems, also, that if a defendant, under pretence of putting in a disclaimer and answer, puts in a mere disclaimer without any answer, such a proceeding will be considered evasive, and the pretended disclaimer and answer will be taken off the file. But if the complainant, instead of applying to the court in the first instance, excepts to the disclaimer, he will be precluded from afterwards moving to take it off the file. (x)

A defendant who disclaims may be examined as a witness by a co-defendant; (y) but the complainant cannot read his evidence in support of his own right, to the prejudice of another defendant. (z)

Where a disclaimer to the whole bill has been filed, the complainant should not reply to it. His proper course is, either to dismiss his bill as against the party disclaiming, with costs, or to amend it. He may also set the cause down upon the disclaimer; in which case if he can satisfy the court that he had probable cause or reason to file his bill against such defendant, he may have a decree against such defendant, and all claiming under him, without costs on either side. (a) But if it should appear in such a case that the defendant was made a party without probable cause or reason, the complainant will be ordered to pay him his costs. (b)

If the complainant replies to a general disclaimer, and serves the defendant with a subpoena to rejoin, the defendant will be entitled to have his costs taxed against the complainant, for vexation. But it is otherwise where the disclaimer is to part, and there is an answer or plea to another part of the same bill. In such cases the complainant may file a replication to the plea or answer. (c)

It seems, however, that the defendant is not bound to wait for his costs till the hearing of the cause. If he think that he has been made a defendant vexatiously, he may apply for his costs by motion, on notice to the complainant, as soon as the complainant's time for amending his bill has expired. (d) But if the complainant can succeed in satisfying

(v) Seton v. Slade, 7 Ves. 267.
(w) Glassington v. Thwaites, 2 Russ. 488. 1 Anst. 37.
(z) Id. ib.
(y) Seton v. Slade, 7 Ves. 267.
(c) Hill v. Adams, 2 Atk. 39.
(a) Prac. Reg. 175.
(b) Hinde's Pr. 209.
(c) Williams v. Longfellow, 3 Atk. 582.
(d) Hinde's Pr. 209.
the court that he had just ground for making the defendant a party, probably the latter would take nothing by his motion, in such a case.(e)

SECTION VII.

JOINDER OF SEVERAL DEFENCES.

Having in the preceding sections of this chapter, given an outline of the various methods of defence which may be resorted to by defendants in this court, it remains to show in what cases, and in what manner, those defences may be joined or combined.

The rule is general, as we have already observed, that all or any of the customary modes of defence may be joined; provided each relates to a separate and distinct part of the bill. Thus, a defendant may demur to one part of the bill, plead to another, and disclaim as to another.(f) He may also put in separate demurrers to separate and distinct parts of the bill, for separate and distinct causes. For the same grounds of demurrer, frequently, will not apply to different parts of a bill, though the whole may be liable to demurrer; and in that case the demurrer may be overruled, upon argument, and another allowed.(g) The defendant may also plead different matters to separate parts of the same bill.(h)

The rules of pleading upon this subject of the joinder of defences are thus concisely stated by Lord Redesdale in his Treatise on Equity Pleading; "All these defences must clearly refer to separate and distinct parts of the bill. For a defendant cannot plead to that part to which he has already demurred; neither can he answer to any part to which he has either demurred or pleaded; the demurrer demanding the judgment of the court whether he shall make any answer, and the plea whether he shall make any other answer than what is contained in the plea. Nor can the defendant, by answer, claim what, by disclaimer, he has declared he had no right to. A plea or answer will therefore overrule a demurrer, and an answer a plea. And if a disclaimer and answer are inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer."(i)

(e) See 2 Dan. 236.  (a) 2 Dan. 106, 349.
(f) 1 Mitf. Eq. Pl. 258.  (i) 1 Mitf. Eq. Pl. 258.
(g) Id. 174. North v. Earl of Stratford, 3 Peer Wins. 148.  (i) 1 Atk. 544.
To which it may be added that where a defendant adopts different modes of defence, it is necessary, not only that each defence should, in words, be applicable to the distinct part of the bill to which it professes to apply, but that it should be so in substance. And if a defence, though in words applicable to part of a bill only, should on the face of it be applicable to the whole bill, it will not be good, and cannot stand in conjunction with another distinct defence, which is applicable and applied to another distinct part of the bill.\(^{(k)}\)

When a demurrer is put into part only of the bill, and is accompanied by an answer or other defence to the remainder, it should be entitled "The demurrer of C. D., defendant, to part of the bill of complaint of A. B.; and the answer, &c. of the said C. D. to the remainder of the said bill of complaint."\(^{(l)}\) The same rule is applicable to cases where the defence is partly by plea and partly by answer, except in those cases where the answer is in support of the plea. In such cases the plea and answer form but one defence, and the title is properly a "plea and answer," or, "the joint plea and answer," or, "the joint and several plea and answer," according to the circumstances.\(^{(m)}\)

After a general order for further time to answer, the defendant cannot put in a demurrer, except on special leave by the court. Where he wishes for further time to demur, he must obtain a special order from the court for time to answer, plead, or demur.\(^{(n)}\) This will enable him to put in a demurrer coupled with a plea and answer, or either of these defences.

A demurrer may also be taken under a commission to take a plea, answer, and demurrer; but not under a commission to take an answer only.\(^{(o)}\)

Where a demurrer in connection with a plea or answer, or either of them, has been put in, the first step to be taken is to dispose of the demurrer and also of the plea, if there is one, (unless it is intended to admit that it is a valid defence if true;) and for this purpose the demurrer and plea must be noticed for argument in the usual way.\(^{(p)}\) If there should be any impertinence in the plea or answer, however, it should be expunged before setting down such plea or answer; as the setting down a plea for argument is a waiver of the impertinence.\(^{(q)}\)

\(^{(k)}\) Crouch v. Hickin, 1 Keen, 385.
\(^{(l)}\) Tomlinson v. Swinnerton, 1 Keen, 9, 13.
\(^{(m)}\) 2 Dan. 205, 350.
\(^{(n)}\) Burrell v. Rainetaux, 2 Paige, 331.
\(^{(o)}\) Tomlinson v. Swinnerton, 1 Keen, 9, 13.
\(^{(p)}\) 2 Dan. 351.
\(^{(q)}\) 1 Dixon v. Olmius, 1 Cox, 412.
complainant must be careful not to amend his bill, or to except to the answer for insufficiency before the demurrer and plea have been disposed of: otherwise the validity of such plea or demurrer will be admitted.(r)

If upon the argument the demurrer and plea, or either of them, are overruled, the complainant may file exceptions for insufficiency, extending not only to the answer, but to the parts of the bill which were intended to be covered by the plea and demurrer. But if the demurrer and plea, or either of them, are allowed, the exceptions must not extend to the parts of the bill covered by them.(s) Where a partial demurrer has been allowed, the proper course is to amend the bill, either by striking out the part demurred to, or by making such alteration in the bill as will obviate the ground of demurrer. Thus, after a partial demurrer has been allowed, *ore tenus*, for want of parties, the bill may be amended by adding the necessary parties, or stating them to be out of the jurisdiction of the court. And it seems that such an amendment will not preclude the complainant from excepting to the answer as to those parts of the bill which are not covered by the demurrer.(t)

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CHAP. VII.

PROCEEDINGS ON THE PART OF THE COMPLAINANT PREVIOUS TO REPLYING.

Sect. 1. EXCEPTING TO ANSWER.
2. AMENDING BILL OF COMPLAINT.
3. DISMISSING BILL BY COMPLAINANT.
4. MOTION FOR PRODUCTION AND INSPECTION OF DEEDS, &C.
5. MOTION FOR THE PAYMENT OF MONEY INTO COURT.

SECTION I.

EXCEPTING TO ANSWER.

Exceptions to an answer are of two kinds—for insufficiency, and for scandal and impertinence. The former lie where the answer does not sufficiently respond to the allegations and charges in the bill; and the latter where the answer contains scandalous or impertinent matter.

Exceptions are allegations in writing stating the particular points or matters with respect to which the complainant considers the answer insufficient, as a response to the bill, or scandalous or impertinent. And the object of exceptions is to direct the attention of the court to the points excepted to, and to take its opinion thereon, before further proceedings are had; to the end that, if the answer is insufficient, a better answer may be compelled, or if scandalous or impertinent, that the scandalous or impertinent matter may be expunged.

1. Exceptions for Insufficiency.

In what cases they lie.] Exceptions for insufficiency can only be sustained where some material allegation, charge, or interrogatory in the bill is not fully answered.(a) They will not lie to the answers of cor-

(a) Stafford v. Brown, 4 Paige, 88.
portions; (b) nor to an answer to which the oath of the defendant is waived; (c) because such answers are not evidence. Nor will exceptions lie to the answer of an infant, because he is not bound by it, but may put in a new answer when he becomes of age. (d) It would therefore be useless, and occasion unnecessary expense, to call upon an infant to put in a full answer to the complainant’s bill.

Neither can the answer of the attorney general be excepted to for insufficiency. (e) But the answers of lunatics or idiots, put in by their committees or guardians, may be excepted to. (f)

Exceptions founded on verbal criticism, slight defects, and the omission of immaterial matter, will be disallowed and treated as vexations. (g)

Where the matter of the bill is fully answered, and the defendant sets up new matter which is irrelevant, and forms no sufficient grounds of defence, the complainant may except to the answer for impertinence, but not for insufficiency. (h)

Where a bill requires the defendant to view exhibits before putting in his answer, and he neglects to do so, the correct practice is to except to his answer on that ground. (i)

If a plea is ordered to stand for an answer, it is to be deemed a sufficient answer, as far as it covers the bill; but the complainant may still except to the residue of the plea as an answer. (k) And if a plea is ordered to stand for an answer, with liberty to except, the complainant may of course file exceptions to the answer, or to that part of it to which he is, by the order, permitted to except. (l) But the complainant cannot except to the plea as an answer unless liberty to except be expressly given. (m)

If a plea, or a demurrer to the whole bill not accompanied by an answer is overruled, the defendant must answer without the complainant’s being driven to except; but where a partial plea or demurrer is overruled, the complainant must except; as, since there is already an answer on the file, the defendant is not bound to answer further till exceptions have been taken. (n)
A complainant ma y also, where a partial demurrer is allowed, except to the answer to that part of the bill which is not covered by the demurrer. He must not, however, except to that part which is covered by the demurrer.(o) And where a plea is accompanied by an answer as to part of the bill, the complainant may, upon the allowance of the plea, except to the answer, as he must if a partial plea is overruled.(p)

But when the answer is accompanied by a plea, the complainant cannot except to the answer until the plea is argued and an order obtained that it shall stand for an answer with liberty to except.(q) If he does so, the exceptions will have the effect of allowing the plea, in the same manner as a replication would do.(r) And the effect of taking exceptions pending a demurrer to discovery, is to admit the demurrer.(s) But if the plea or demurrer is only to the relief prayed by the bill, and not to any part of the discovery, the complainant may take exceptions to the answer before the plea or demurrer is argued.(t)

The rule that the complainant must except to the answer as insufficient, applies even where the plea or demurrer is accompanied by an answer only as to a single fact—such as a mere denial of combination.(u)

It is a general rule that if matters of avoidance are set up in an answer obscurely or imperfectly, the complainant cannot procure a more complete statement by exceptions, but must first amend his bill.(v)

Exceptions to answers to amended bills. Exceptions will lie to answers to amended bills, as well as to those put in to original bills; but where a complainant takes no exception to the answer to the original bill, he cannot take an exception to the answer to the amended bill, upon a principle which would have applied equally to the answer to the original bill.(r)

And upon a reference on such new exceptions alone, the master cannot inquire whether the old exceptions were fully answered, or whether any part of the original bill to which the old exceptions did not relate was answered by the first answer of the defendant.(s) If the new ex-

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(o) Taylor v. Bailey, 6 Law J. (N. S.) 222.
(p) Cotes v. Turner, Bumb. 122.
(q) Danel v. Reyney, 1 Vern. 344.
(s) Ovey v. Leighton, 2 Sim. & Stu. Paige, 570.
(t) 1 Smith, 280. Mitf. Pl. 317.
(u) Id. ib. Cotes v. Turner, Bumb. 122.
(v) Spencer v. Van Duzen, 1 Paige, 556.
Proceedings to a Decree.

exceptions clearly relate to the original bill, and not to the amendments thereto, the defendant may move to take them from the files for irregularity; or if he has doubts on the subject, he may urge the objection before the master on the reference. (x) Where the reference on such exceptions has been proceeded in, if they do not relate to the amendments, the exceptions will be permitted to remain on the files; but the master's report allowing the new exceptions will be overruled. (u)

But circumstances may occur which may render an occasional departure from the above rule necessary. Thus, where, after a defendant had answered, the complainant amended his bill, by stating an entirely new case, it was held that exceptions would lie, although some of the interrogatories embraced in them were contained in the original bill. (v) So if the defendant, in answering amendments, alleges facts similar to those contained in his first answer, and not called for by the amendments, but alleges them without the circumstances given in the first answer, and interrogated to by the bill, an exception will lie. (w)

Leave to file such an exception must be applied for; however; as it cannot be done without it. (x)

Exceptions founded upon the new matters of the amendment may be taken within the same time as exceptions to a first answer, and may be filed of course, whether exceptions have been taken to the first answer, or not. They should be entitled "Exceptions taken by the complainant to the answer of the defendant, C. D., to the complainant's amended bill of complaint," or "to the answer, &c. to the amendments to the original bill of complaint of the complainant." (y)

Exceptions having been allowed to the answer, and the bill having been amended, and the usual order having been obtained that the defendant should answer the amendment and exceptions at the same time, the defendant put in a second answer. The complainant then took exceptions to the second answer, and entitled them "Exceptions to the further answer to the original bill and to the answer to the amended bill." The exceptions were held to be irregularly entitled, and were ordered to be taken off the file; because new exceptions cannot be taken to the further answer to the original bill; but if that answer be considered in-

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(i) 2 Paige, 160.
(u) Id. ib.
(e) Massaredo v. Maitland, 3 Mad. 66. See also Glassington v. Thwaites, 2 Russ. 458.
(x) Irvine v. Viana, McCle. & Young, 563.
(c) Id. ib.
(g) Bennington Iron Co. v. Campbell, 2 Paige, 161. 1 Hoff. Pr. 359.
sufficient, it must be referred back to the master upon the old exceptions. (a)

Where exceptions to a former answer and to amendments to the bill are answered together, if neither the exceptions nor the amendments are fully answered, the complainant may file new exceptions founded on the new matter introduced into the bill by way of amendment. (a) If the new exceptions are not submitted to by the defendant within the eight days allowed for that purpose, the answers should, by an order, be referred upon the new exceptions and upon such of the old exceptions as are not sufficiently answered. (b) Where the new exceptions are submitted to, the answer must be referred upon the old exceptions which are not sufficiently answered, within ten days after the answer is put in. (c)

If the bill has been amended, so that a further answer put in by the defendant is an answer to the amendments as well as the exceptions, the complainant may file new exceptions at any time within twenty days; but the answer, as to the old exceptions, will be deemed sufficient, unless new exceptions are filed, or it is referred on the old exceptions, within the first ten days. (d)

Waiver of exceptions.] The reason of the rule that a complainant, if he does not except to the answer to the original bill, cannot afterwards except to the answer to an amended bill on the ground that the defendant has not answered matters which were contained in the original bill, is, that by amending his bill, the complainant has admitted the answer to it to be sufficient. (e) Upon the same ground it has been held that a complainant moving as of course to amend his bill, after he has taken exceptions to the answer, will be considered as having waived his exceptions. To avoid this he must move specially for liberty to amend without prejudice to the exceptions. (f) But where the amendment of the bill extends only to the addition of another party, and requires no answer from the other defendants, the principle of waiver will not apply. (g) So where the complainant, after answer to the original bill, changed his name, and then amended his bill by substituting his new name for his old one, and adding another defendant, and afterwards took exceptions to the answer, a motion to take the exceptions off the file

(a) Williams v. Davies, 1 Sim. & Stu. 429.
(b) 9 Paige, 160.
(c) Id. ib.
(d) Id. ib.
(e) Hart v. Small, 4 Paige, 333.
(f) De la Torre v. Bernales, 4 Mad. 396. Irving v. Viana, McCle. & Young, 563.
(g) Taylor v. Wrench, 9 Ves. 315.
was refused.\(^{(k)}\) Nor will an amendment amount to a waiver of exceptions if it is confined to the prayer of the bill—as, for an injunction.\(^{(i)}\) But it will be a waiver of exceptions if the complainant takes the bill as confessed as to those points not responded to.\(^{(k)}\)

**Effect of exceptions.** Where exceptions to an answer are filed, they must be disposed of before any further proceedings can take place in the cause.\(^{(l)}\) Therefore exceptions filed to an answer will prevent the court from ordering it to be taken from the file, notwithstanding it be evasive.\(^{(m)}\)

The effect of filing exceptions, upon an injunction or *ne exeat* will be noticed presently.\(^{(n)}\)

**Form of exceptions.** Exceptions to an answer must be in writing;\(^{(o)}\) and signed by counsel.\(^{(p)}\)

Exceptions must be properly entitled; otherwise they will be suppressed, or taken off the file for irregularity. Thus, where exceptions having been allowed to an answer, the complainant obtained the usual order that he might be at liberty to amend his bill, and that the defendant might answer the amendments and exceptions at the same time, and amended his bill; whereupon the defendant put in a second answer, to which the complainant took exceptions, and entitled them "Exceptions to the further answer to the original bill," the exceptions were ordered to be taken off the file; because new exceptions cannot be taken to a further answer to an original bill.\(^{(q)}\)

The exceptions should point out, specifically, the parts of the bill, or the interrogatories which are unanswered, by separate exceptions applicable to each part.\(^{(r)}\) And it is the rule in England, that where a complainant complains that a particular interrogatory in his bill has not been answered, he must state the interrogatory, in the terms of it, and not throw upon the court the trouble of determining whether the expressions of the exceptions are to be reconciled with the interrogatory.\(^{(s)}\)

Although it seems to be unnecessary, in this state, to specify the precise words of the allegation, charge, or interrogatory in the bill which

\(^{((a)}\) Miller v. Wheatley, 1 Sim. 996.  
\(^{(b)}\) Jacob v. Hall, 19 Ves. 458.  
\(^{(c)}\) Griffith v. Depew, 3 A. K. Marsh.  
\(^{(d)}\) Clark v. Tinsley's adm'r, 4 Rand. 230.  
\(^{(e)}\) Glassington v. Thwaites, 2 Russ. 458.  
\(^{(f)}\) Post, p. 183.  
\(^{(g)}\) Beames' Ord. 78, 181.  
\(^{(h)}\) Yates v. Hardy, Jacob, 232.  
\(^{(i)}\) Candler v. Partington, 6 Mad. 192.  
\(^{(j)}\) Williams v. Davies, 1 Sim. & Sut. 496.  
\(^{(k)}\) 3 Dan. Pr. 306.  
is not fully answered, yet the substance, at least, must be stated; so that by referring to the bill alone, in connection with the exception, the court may see that the particular matters, as to which a further answer is sought, are stated in the bill, or that an answer is called for by the interrogatories.(ss)

But even in England, the rule that exceptions to an answer for insufficiency must set forth the interrogatory in its very terms, does not apply to trifling verbal alterations.(t)

Where an exception did not follow the words of the interrogatory, but the defendant had submitted to answer, and put in a further answer, which was referred upon the same exceptions, it was held that he came too late with his objection to the form of the exceptions.(tt)

And so where a complainant, in his exceptions, went beyond the allegations in the bill, and, upon a reference, the master reported the answer insufficient; whereupon the defendant submitted to the report, and put in a further answer, upon exceptions to the second report, the defendant was held to have precluded himself from objecting to the form of the exceptions, by putting in a further answer. It was considered that he ought to have excepted to the first report.(uu)

Exceptions for insufficiency may be allowed in part, and overruled as to part;(v) though it is otherwise as respects exceptions for impertinence.(w)

If defendants answer separately, exceptions must be taken to each answer;(x) and if a joint answer is put in, and one of the defendant dies, exceptions may be taken to the answer as to the survivor only.(y)

It is a general rule that, after exceptions have been filed, no new exception can regularly be added.(z) But upon special cause shown to the court, leave will be given to amend or add to exceptions—as where there is a clear mistake; there being two causes, and the exceptions being taken from one bill instead of the other.(a) So where, by mistake, the exceptions have been drawn from the draft of a bill instead of the engrossment, which differed from the draft materially.(b) And in

(ss) Stafford v. Brown, 4 Paige, 89, 90.
(uu) Crisp v. Nevil, 1 Ch. Ca. 60.
(v) East India Co. v. Campbell, 1 Ves. 247.
(w) 1 Russ. & My. 30.
(x) Sydolph v. Monkston, 2 Dick. 699.
(y) Lord Herbet v. Pusey, 1 Dick. 255.
(z) Partridge v. Haycraft, 11 Ves. 575.
(b) Bancroft v. Wentworth, 10 Ves. 285, n.
Northcote v. Northcote. (c) liberty was given to amend exceptions after they had been argued. But it does not appear upon what ground such liberty was given.

Within what time to be filed.] Where the answer is to the whole bill, the complainant must expect to it within twenty days after it is put in. If the answer is to part of the bill only, exceptions must be filed within twenty days after the plea or demurrer to the residue of the bill has been allowed or overruled. At the end of which time, if no exceptions are taken, and no order for further time has been granted, the answer will be deemed sufficient. (d)

Where there is a plea or demurrer to a part of the bill, and an answer to the residue, the complainant may except to such answer before the argument of the plea or demurrer. But the effect of such exceptions is to admit the validity of the plea or demurrer. (e) If the plea or demurrer, however, is only to the relief, and not to any part of the discovery, the complainant may take exceptions to the answer before the plea or demurrer is argued. (f)

The complainant, if he wishes to except, must be careful to do so before filing his replication; for by replying, he admits the answer to be sufficient. (g) But it is said by Mr. Daniell, that, in some cases, the court will permit a replication to be withdrawn and exceptions to be taken. (h) By this it must be doubtless understood, upon good cause shown.

One advantage which the complainant will gain by excepting to the answer is, that the exceptions will prevent the defendant from moving to dissolve an injunction or discharge a ne exeat on bill and answer.

But the filing of exceptions is no objection to a motion to dissolve the injunction, unless they affect the answer in points relating to the grounds of the injunction. (i) Nor, if they are frivolous. And the court will look into them to see if are so. (ii)

And in order to have the filing of exceptions operate in any case, so as to prevent a dissolution of the injunction, on bill and answer, the complainant must file and serve them within ten days after the answer is put in. (k) If exceptions are filed within the ten days, it will not be in or-

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der for the defendant to move for a dissolution of the injunction, or for a discharge of the *ne exeat*, on bill and answer, until the time for procuring the master's report on the exceptions (twenty days) has expired, unless a report against the validity of the exceptions is sooner obtained.(l)

The defendant, upon receiving exceptions, may give a written consent that they be referred forthwith; and unless the complainant procures the master's report within ten days thereafter, in favor of the exceptions, they will not prevent the dissolution of the injunction, or discharge of the *ne exeat*. And the same practice is to be observed in referring a second or third answer on the old exceptions.(m)

The provisions of the 39th rule are not applicable to the case of an answer to which the oath has been waived, and which therefore is not liable to exceptions for insufficiency.(n) If the whole equity of the bill is denied, exceptions for impertinence will not prevent a dissolution of the injunction.(o)

The defendant may give notice of an application to dissolve an injunction, immediately upon the service of his answer, without waiting the ten days allowed the complainant to except; but if exceptions are duly served within the time prescribed by the rule, it will be an answer to the application. But the defendant is not at liberty to give notice of such an application for a time which is within the ten days allowed by the 38th rule for excepting to the answer.(p)

Where a complainant, after the defendant has submitted to answer some of the exceptions, amends his bill by inserting matter which also requires to be answered, he has 20 days, under the 50th rule, to file new exceptions to a further answer for insufficiency as respects the amendment.(q)

If an answer is insufficient, the complainant must raise all his objections to it in the first instance; and he will not be permitted to take any exceptions to the second answer which were not taken as to the first.(r)

*Obtaining further time to except.* Further time to file exceptions, not exceeding twenty days, may be obtained on application, and sufficient cause shown by affidavit, to a vice chancellor or injunction master, and on such terms and conditions as he may direct. But no such order

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(m) Rule 38.

(n) Livingston v. Livingston, 4 Paige, 111.

(o) Id. lb.

(p) Satterlee v. Bargy, 3 Paige, 142.

(q) Van Wagenen v. Murray, 1 Edw. 319.

(r) Eager v. Wiseall, 3 Paige, 369.
for time can be granted by an injunction master or by a vice chancellor out of court, after the time for excepting has expired, or where time has been before granted by order of the court, or by a vice chancellor or master, or by agreement.\(s\)

A chamber order under the above rule, extending the time to file exceptions, will not prevent an application to dissolve the injunction, if exceptions are not filed within the ten days.\(t\) An extension of the time required by the 38th rule, within which exceptions must be filed to prevent an application for the dissolution of an injunction, can only be obtained upon a special application to the court and on due notice to the defendant.\(u\)

**Filing and service of exceptions.** The exceptions having been properly drawn up, and signed by counsel in the manner already directed, are in the next place to be endorsed, filed in the proper office, and a copy served upon the defendant or his solicitor, within the time limited by the rule.

**Submission to.** If the exceptions are for insufficiency, the defendant may, within eight days after the service thereof, give a written notice of his submission, to answer any or all of such exceptions; and he will be liable for the costs of those he submits to.\(v\) If he submits to all the exceptions, or to part, and the rest are abandoned, or are disallowed on reference, the complainant may enter an order of course, that the defendant put in a further answer within twenty days after notice of the order, and pay the costs, or that an attachment issue, or that the bill be taken as confessed, at the election of the complainant.\(w\)

Where two or more defendants put in a joint and several answer, which is referred for insufficiency, and one or more of them submit to the exceptions, the others may have them argued.\(x\)

Where exceptions to the answer of one of the defendants are submitted to, if the exceptions go to the merits, an injunction will not be dissolved.\(y\) If exceptions have not been submitted to, nor allowed by the master, the court on a motion to dissolve the injunction, will look into them to see they are not frivolous. If frivolous, they will furnish no objection to such motion to dissolve.\(z\)
Where, upon a defendant submitting to answer exceptions, the complainant obtains an order that he may be at liberty to amend his bill, and that the defendant may answer the amendments and exceptions at the same time, the defendant will be entitled to the time usually allowed to answer amended bills, to put in his answer to the exceptions and amendments.(a)

Reference of.] If the exceptions are not submitted to, within the eight days allowed for that purpose, the complainant may, at any time within ten days thereafter, have an order of course to refer the exceptions to an exception master, or to such vice chancellor as may be agreed upon by the parties, with his assent. If the exceptions are not thus referred, they will be considered as abandoned, and the answer, as to them, will be deemed sufficient.(b)

It has been decided that the complainant must not only enter an order to refer the exceptions within the ten days specified in the above rule, but he must also serve a copy of notice of such order, or take out and serve a summons from the master within the ten days, or the exceptions will be considered as abandoned.(c) And the practice is the same in England, under a rule of court similar to our 51st.(d)

In this court exceptions are always referred to a master,(e) or to a vice chancellor acting as master ;(f) though it is otherwise on the equity side of the court of exchequer, where it is the practice for the court itself to determine upon exceptions, in the first instance, upon argument.(g)

A reference of exceptions must be executed by such vice chancellor as may be agreed upon by the parties, with his assent, or by an exception master who may be thus agreed upon, or by the exception master who is nearest or most convenient to the residence of either of the solicitors, and who is legally competent to execute the reference. But where the solicitors of both parties reside more than thirty miles from any exception master who is competent to act, the reference may be executed by any other master nearest or most convenient to the residence of either of such solicitors, or by the nearest exception master.(h)

The bill and answer, together with a copy of the order of reference, being left with the master, he issues a warrant underwritten, "to proceed on the exceptions to the defendant's answer." This is the first warrant both here and in England.(i)

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(a) Hinde 262.
(b) Rule 51.
(c) Peale v. Bloomer, 8 Paige, 78.
(d) Taylor v. Harrison, 1 My. & Craig, 274.
(e) Byington v. Wood, 1 Paige, 146.
(f) See Rule 51.
(g) 2 Fow. Ex. Pr. 1, 2.
(h) Rule 99.
(i) 1 Hoff. Mast. 254. 1 Tur. Pr. 477.
Proceedings to a Decree.

In proceeding upon exceptions, before the master, the course is for the complainant's solicitor or counsel to state the subject, shape, and prayer of the bill, and to read the first exception. The defendant's solicitor then reads from the answer such parts as he insists is an answer thereto; and each counsel argues on the point. The master will then allow or disallow it, or suspend his opinion; and thus all the exceptions are gone through with.\(^k\)

If the defendant's solicitor or counsel does not attend, the master may proceed upon the matter of the reference \(ex\ partes\).\(^l\) Before he does so, however, the person who served the warrant must make an affidavit of its service upon the defendant.\(^m\) It is decided in Byington \(v\) Wood,\(^n\) that if either party neglects to appear before the master and argue the exceptions, he will not afterwards be permitted to bring them before the court by exceptions to the master's report. And it was stated by the chancellor, in the same case, to be the duty of the master, although he proceeds, \(ex\ partes\), to examine the exceptions with as much care as if they were litigated before him.

In England, warrants to proceed on the exceptions are successively taken out, until the master has made up his opinion. It is in this mode that further argument may be had upon them, and that the parties know the decision of the master.\(^o\) With us the master adjourns the further hearing, when necessary.\(^p\) If he does not decide at once, and apprise the parties of his decision, he should fix a day for them to attend, when he will be prepared, and then deliver his report to the prevailing party; which is the complainant if a single exception is allowed.\(^q\)

No objections are taken to the draft of the master's report on exceptions, and no copies of the draft will be allowed on taxation, except the engrossed copy which is prepared by the master to file.\(^r\)

In cases where a defendant has not answered, and insists upon some particular right or principle upon which he declines answering, masters generally report according to the exceptions; because they will not take upon themselves to judge how far the defendant ought or ought not to answer, but leave it to be determined by the court upon exceptions to their report.\(^s\)

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\(^{1}\) 1 Turr. Ch. Pr. 477.
\(^{2}\) 3 Dan. Pr. 315.
\(^{3}\) Hinde, 303.
\(^{4}\) 1 Paige, 146.
\(^{5}\) 1 Turr. 469, 477.
\(^{6}\) Hoff. Mast. 254.

\(^{7}\) 1 Harr. Pr. 230. 1 Turr. 462.
\(^{8}\) Price \(v\) Shaw, 9 Dick. 732. Richards \(v\) Barlow, 1 Paige, 237. Id. 146. Hopk. 9.
\(^{9}\) For. Rom. 106.
It is said to have been formerly the practice, in some of the masters' offices, for the master to report the answer insufficient generally, upon the complainant establishing one exception, without entering into the others.\(^{(1)}\) But in \textit{Rowe v. Gudgeon},\(^{(u)}\) Lord Eldon expressed his disapprobation of this practice, and held that on the argument of the exceptions, the master's judgment ought to be given upon each. And in another case,\(^{(v)}\) Sir Thomas Plumer, V. C., said that his opinion was that the suitor has a right to the master's judgment upon each of the exceptions.

When the bill has been amended and the defendant puts in a further answer, whereupon the complainant files new exceptions as to the amendments, the complainant must go before the master upon the old exceptions, as they apply to the original bill, and upon the new exceptions as to the new matters introduced by the amendments,\(^{(w)}\) And in such a case he may have the master's judgment upon the answer to the amendments with reference to such parts of the original bill as applies to them. If the original words apply to the amendments, the master, in considering whether the answer is sufficient as to the amendments, must take into his consideration everything in the amended bill that gives a construction to the amendments.\(^{(x)}\)

Where, however, the reference is upon new exceptions founded on new matter introduced into the bill by way of attachment alone, the master cannot inquire whether the old exceptions were fully answered; or whether any part of the original bill to which the old exceptions did not relate, was answered by the first answer of the defendant.\(^{(y)}\) If the new exceptions clearly relate to the original bill, and not to the amendments thereto, the defendant may urge the objection before the master, on the reference.\(^{(z)}\)

Where exceptions are taken in the court of exchequer to the answer to the original bill, and exceptions are also taken to the answer to the amended bill, a separate order for the argument of each set of exceptions must be entered. And it is irregular to set them down for argument under one order.\(^{(a)}\)

In deciding on the sufficiency or insufficiency of an answer, it is the duty of the master to take into consideration the relevancy or materiality

\(^{(1)}\) For. Rom. 104. \(^{(u)}\) 2 Paige, 160. \(^{(w)}\) 1 Ves. & B. 331. \(^{(z)}\) Id. ib. \(^{(a)}\) Eastwood v. Dabree, 1 Young & Ser. 508. \\
\(^{(v)}\) Agar v. Gurney, 2 Mad. 389. \(^{(y)}\) Bennington Iron Co. v. Campbell, 11 Ves. 570. \(^{(x)}\) Id. ib. Per Lord Eldon.
of the statement or question referred to in the exception. (b) And the true way of ascertaining this materiality, is to inquire whether a further answer, stating or admitting the fact in the manner which would be most favorable to the complainant, would be of any benefit to him; (c) or would assist his equity, or advance his claim to the relief sought by the bill. (d) The complainant is entitled to an answer to every fact charged in the bill, the admission or proof of which is material to the relief sought, or to substantiate his proceedings and make them regular. (e)

Master's report.] The master having heard the arguments, and looked into the bill, answer, and exceptions, certifies his opinion as to the sufficiency or insufficiency of the answer, in a report to the court. And if he finds the answer insufficient, he must, in case it is a first or second answer, besides reporting upon the exceptions, fix the time to be allowed the defendant for putting in a further answer and paying the costs. And he must specify the same in his report. (f)

But the neglect of the master to fix the time, in his report, within which the defendant shall answer the exceptions, will not render the report irregular as against the defendant; as the only effect of such a neglect of the master is to compel the complainant to make a special application to the court to obtain a further answer, if the defendant does not answer voluntarily. (g)

The complainant must procure and file the master's report within twenty days from the date of the order or reference, or the exceptions will be considered as abandoned; unless the master shall, within the twenty days, certify that the complainant has not been guilty of any unreasonable delay, and that a further time, to be specified in the certificate, is necessary. In such case the report must be obtained within that further time, or the exceptions will be considered as abandoned, and the answer will be deemed sufficient. (h)

The master is entitled, under this rule, to grant only one certificate extending the time for obtaining his report. (i) But where the time for making the report has passed, and it appears by affidavit that the omission to procure the master's certificate that further time was necessary to enable him to make his report, arose from inadvertence, the court ex-

(b) Rule, 106.
(c) Davis v. Mapes, 2 Paige, 106.
(d) Bally v. Kenrick, 13 Prize, 991.
(e) Davis v. Mapes, supra.
(f) Rule 55.
(g) Corning v. Cooper, 7 Paige, 587.
(h) Rule 54.
tended the time for another fortnight, on the complainant paying the the costs of the application.\(^{(k)}\) In an injunction case, however, the court will not enlarge the time for obtaining the master's report, except under special circumstances—such as the illness of the master, &c.\(^{(l)}\)

The master's report must be delivered to the complainant, who must forthwith file it in the register's, assistant register's or clerk's office, as the case may require. And if the complainant does not except to it within eight days thereafter, it will become absolute as against him.\(^{(m)}\)

And if none of the exceptions are submitted to, or allowed by the master, the answer will be deemed sufficient after the expiration of that time.\(^{(n)}\)

No order to confirm the report is necessary.

Notice of its being filed must be given to the defendant; who may file exceptions to it within eight days after such notice; and if he does not except within that time, the report becomes absolute against him also.\(^{(o)}\)

No proceedings can be taken upon the master's report until it is filed. Therefore, where a complainant, after the master had made his report on exceptions, but before it was filed, obtained an order for an injunction, the injunction was held to be irregular.\(^{(p)}\) And so if the complainant, before the master's report allowing the exceptions has been filed, obtains an order for leave to amend, and that the defendant may answer the amendments and exceptions at the same time, the order will be discharged.\(^{(q)}\)

**Exceptions to master's report.** Either party may except to the master's report. Exceptions by the complainant must be put in within eight days after the report is filed, and exceptions by the defendant within eight days after he receives notice that it is filed.\(^{(r)}\)

Where a party has neglected to file exceptions to the report within the time prescribed by the rule of court, he will not afterwards be permitted to file them, unless he shows, by affidavit, that he was prevented from filing them by accident, mistake, or surprise.\(^{(s)}\)

If the master has reported the answer insufficient, the defendant should except to the report before he puts in a further answer; for it has been held that where a first answer is, upon exceptions, reported insufficient,
the defendant, if he submits to put in a further answer without excepting to the report, admits that he ought to answer all the matter excepted to; and that he must therefore answer fully to all the points comprised in the exceptions, and cannot afterwards, by excepting to the report made upon a reference of his second answer, raise the question whether he ought to be compelled to answer the exceptions or not. And upon this ground, where exceptions were taken which extended to matters not charged in the bill, and upon reference the master reported the answer insufficient; whereupon the defendants, instead of excepting to the master's report, put in a further answer which fully answered the charges in the bill, but did not extend to those parts of the exceptions which were not founded on the bill; and the master, upon a second reference, reported the answer to be still insufficient, the court, upon exceptions to the master's report, ruled that, inasmuch as the defendants did not except to the first report, but had since answered, they had admitted that they ought to answer all the matter of the exceptions.\(^{(t)}\)

Where the master has reported the answer to be sufficient, the exceptions to the report ought to be filed before the time fixed by the rules of the court for the complainant to file his replication has arrived. Otherwise the defendant may move to dismiss the bill for want of prosecution. In injunction cases, also, the complainant, if he wishes to revive an injunction which has been dissolved, upon the master's report of the sufficiency of the answer, should lose no time in filing his exceptions to the report; otherwise he may lose the benefit he would derive from his injunction.\(^{(u)}\) So, when a complainant wishes to amend his bill, he must if he intends to except to the report, do so, and get his exceptions disposed of before he obtains the order to amend; as an order to amend will be considered as a waiver of exceptions for insufficiency.\(^{(v)}\)

**Form of exceptions to report.** Exceptions to a master's report on exceptions either for scandal and impertinence or for insufficiency, must be drawn or perused, and settled and signed by counsel.

Exceptions to reports of masters are in the nature of special demurrers, and the party objecting must point out the error; otherwise the part not excepted to will be taken as admitted.\(^{(w)}\)

Where several exceptions to an answer are allowed by the master, and the defendant takes one general exception to the report, that excep-

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\(^{(t)}\) Crispe v. Nevil, 1 Ch. Ca. 60.
\(^{(u)}\) 2 Dan. Ch. Pr. 330.
\(^{(v)}\) De la Torro v. Benezales, 4 Mad. 396.
\(^{(w)}\) Wilkes v. Rogers, 6 John. 566.
tion will be overruled if any of the exceptions to the answer are well taken. (x)

When the master has reported an answer not scandalous or impertinent, the complainant, in his exceptions to the report, must show in what line or page, and how far, the answer is scandalous or impertinent. (y) And so where an answer is reported sufficient, it is said that the complainant in his exceptions to the report should show wherein it is insufficient. (z)

No exceptions can be taken to a master’s report, which are not founded upon objections distinctly taken before the master. (a)

Filing exceptions to report.] The exceptions being drawn, engrossed, and signed by counsel, must be filed in the proper office. In England a deposit is necessary to be made, on filing exceptions, as a stake or recompense to the other party; if, upon argument, the exceptions should be disallowed. But this is not necessary here. (b)

Hearing of exceptions to report.] The argument of exceptions to a master’s report is to be heard as a special motion; (c) of which the usual notice must be given to the opposite party. They may be heard either on a regular motion day, or any day in term.

Either party may notice the same for hearing. The party Excepting to the report must furnish the necessary papers for the court; and if he neglects to do so, the report will be confirmed. (d) Those necessary papers are the bill, answer, exceptions to answer, master's report, and exceptions to report.

If both parties have excepted, each must furnish copies of his own exceptions, and the party obtaining the reference must furnish such other papers as may be necessary. (e)

If either party neglects to appear before the master, on a reference of exceptions to the answer, and argue them, he will not be permitted to bring them before the court by exceptions to the master’s report. (f) But on sufficient cause shown, and payment of costs, it seems leave may be given to refer back to the master the exceptions to the answer; in order that the party may have an opportunity to be heard thereon. (g)

Upon the hearing of exceptions to the report, the party excepting

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(a) Candler v. Pettit, 1 Paige, 497.
(b) Craven v. Wright, 2 Pear. Wma. 181. But see 2 Atk. 182, contra.
(c) Id. ib.
(d) Byington v. Wood, 1 Paige, 145.
(e) Id. ib.
(f) Stafford v. Rogers, Hopk. 98.
(g) Rule 82.
(h) Idem.
(i) Idem.
must confine himself to the exceptions, and will not be allowed to go into a new case. The court acting merely in revision of the report, cannot entertain an objection raised on an extrinsic ground.\(k\) And the 106th rule also provides that on exceptions to the master's report, the parties shall be confined to the objections taken before the master.

The manner in which exceptions to the report are argued is as follows; The junior counsel for the exceptions (if there are more than one counsel,) opens the exceptions to the court, and the leading counsel on the same side argues them. The counsel against the exceptions then state their case to sustain the report; and the matter having been thoroughly discussed, the court gives judgment for or against the report by allowing or disallowing the exceptions.\(i\)

**Costs on exceptions to report.** The costs of the hearing on exceptions to a master's report upon exceptions are in the discretion of the court. But neither party can have costs as against the other, unless he succeeds as to the major part of the exceptions to the report. And where the party succeeding as to the major part does not succeed as to all the exceptions, his costs to be allowed against the adverse party cannot be taxed at more than ten dollars.\(k\)

Upon the argument of exceptions to a report on exceptions to an answer, the solicitor is only entitled to the usual fee which is allowed for attendance upon a special motion.\(l\) Each party is entitled to the costs of the hearing, as to the exceptions decided in his favor; which costs are to be set off against each other. Where the costs on each side would be nearly equal, the usual practice is to give costs to neither party.\(ll\)

When the court, upon exceptions, overrules the master's report, the party succeeding shall not have the costs, but they must abide the event of the suit.\(m\)

**Proceedings for a better answer.** If all the exceptions to the answer are submitted to by the defendant, or a part are submitted to and the rest abandoned, or on a reference to a master are disallowed, the complainant may have an order of course that the defendant put in a further answer within twenty days after notice of the order, and pay the costs of the exceptions, or that an attachment issue, or that the bill be taken as confessed, at the election of the complainant.\(n\)

\(a\) Kilbee v. Sneyd, 2 Moll. 239. \(b\) Id. ib.

\(i\) Hinde, 276. \(ib\) Anon., 3 Atk. 235.

\(k\) Rule 62. \(ll\) Rule 58.

\(l\) Richards v. Barlow, 1 Paige, 333. \(m\) Rule 59.
Where the master overrules a part of the exceptions, and the complainant excepts to the report, he cannot enter a common order that the defendant answer the exceptions submitted to by him, or which have been allowed by the master, until his exceptions to the report are finally disposed of by an order of the court thereon. (o)

With respect to the time when the order for a further answer may be entered, under the 58th rule, it has been decided by the chancellor that it cannot be entered until the master’s report has become absolute against the defendant; i.e. until the expiration of eight days after the filing of the report; during which time the defendant has a right to except to it. (p)

The 59th rule provides that if, on a reference of exceptions, or the reference of a second answer upon the old exceptions, the answer is found insufficient, and the master’s report has become absolute against the defendant, (by the expiration of eight days from the time it was filed,) the complainant may have a similar order of course to put in a further answer and pay the costs, within the time specified in the master’s report.

In the cases specified in the 58th and 59th rules, the defendant is entitled to a copy of the taxed bill of costs at least ten days before the time for putting in the further answer expires, or he may put in such answer without paying the costs. But the complainant may afterwards proceed by attachment to compel payment thereof. (q)

If the defendant does not put in a further answer, and pay the costs within the time prescribed, or within such further time as may be allowed him, the complainant, on filing an affidavit showing such default, may have an order of course to take the bill as confessed, or for an attachment, according to the original order. (r)

If an order for an attachment is entered, the proceedings thereon will be similar to those employed to compel an original answer, or the appearance of the party; which have been already stated. (s)

The endorsement of the attachment, the recitals, &c., should state the writ to be issued for not putting in a further answer.

If the complainant has amended his bill, so as to require an answer to the amendments, as well as to the exceptions, the defendant has the same

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(q) Rule 60.
(r) Rule 61.
(s) Ante, p. 55, 87.
time to answer the amendments and exceptions together, that he originally had to answer the bill. (t)

If, after an answer has been reported insufficient, and the time for putting in a further answer has been fixed by the master, the defendant finds himself unable to put in his answer within that time, he may get the time extended, on application to the court. Such application, however, should be made before the time fixed in the report has expired; otherwise the defendant will be in contempt under the operation of the 61st rule, and cannot be heard to make such application.

A defendant may, if he chooses, file a further answer before the master has signed the report as to the insufficiency of the first answer. (u) And in an injunction cause, a defendant to whose answer exceptions have been allowed, is entitled to file a further answer after notice to his solicitor that the complainant has presented a petition for an order to be at liberty to amend, and that the defendant may answer amendments and exceptions together; provided the further answer be filed before the order is actually served. (v)

The subpoena for a better answer and for costs is abolished by the 58th rule.

**Form of further answer.** The form of a second answer is nearly the same as that of an original answer. The title of it must correspond with the order under which it is put in; and if there are no amendments, it should be entitled "The further answer of the defendant C. D. to the original bill of complaint of the complainant." If there are amendments, it should be "The further answer of the defendant C. D. to the original bill of complaint; and the answer of the same defendant to the amended bill of the complainant." (w)

If, after exceptions to the original bill are allowed, the complainant amends his bill and the defendant puts in a further answer to the original bill and an answer to the amended bill, and the answer is referred back upon the old exceptions as to the original bill, and upon new exceptions as to the amendments, and is again reported insufficient, whereupon the bill is again amended, the answer should be entitled "a further answer to the original and first amended bill, and an answer to the secondly amended bill," &c. (x)

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(t) Rule 60.  
(u) Wynn v. Jackson, 2 Sim. & Stu. 


(v) Leyburn v. Green, 2 Russ. 577.  

(w) 2 Paige, 160. 1 Ves. & B. 186.
But it is not necessary, in answering a bill which has been amended before answer, to call it an answer to, the original and amended bill. The most correct way is to call it "an answer to the amended bill" only, as the original bill has become nugatory by the amendment, and the defendant is not bound to notice it.\(y\)

A further answer is in every respect similar to, and is considered as part of, the answer to the original bill. Therefore, if a defendant, in a further answer, repeats any thing contained in a former answer, the repetition, unless it varies the defence in point of substance, or is otherwise necessary or expedient, will be considered as impertinent; and if, upon reference to a master, such parts of the answer are reported to be impertinent, they will be struck out as such, with costs, which are in strictness to be paid by the counsel who signed the answer.\(z\) But if, after an answer has been put in, the complainant amends his bill, stating an entire new case, the defendant must answer that case, even though in so doing he answers some of the interrogatories which were in the original bill.\(a\)

When a defendant has insisted, in his first answer, upon some general ground of exemption from answering to particular interrogatories, and the master has reported against him, but the defendant has omitted to except to the report, he may still insist upon the same ground of defence by his further answer.\(b\) Though it seems that he cannot do so when his reason for not answering has been founded on an objection to the interrogatories themselves.\(c\)

Where the further answer is an answer to amendments as well as to exceptions, the exceptions should be answered first, and afterwards the amendments.\(d\)

New exceptions cannot be taken to a further answer to the original bill; but if the answer be considered insufficient, it must be referred back to the master upon the old exceptions.\(e\) And where a complainant refers a second or third answer upon the old exceptions, the particular exceptions to which he requires a further answer must be stated in the order of reference. And such a second or third answer must be referred within ten days after it is filed, or it will be deemed sufficient.\(f\)

\(\(y\) Smith v. Bryon, 3 Mad. 428.\)
\(\(z\) Mitf. 256, 7. Doe v. Green, 3 Paige. 347.\)
\(\(a\) Mazzaredo v. Maitland, 3 Mad. 66. 428.\)
\(\(b\) Finch v. Finch, 2 Ves. 491.\)
\(\(c\) Crispe v. Neville, 1, Ch. Ca. 60.\)
\(\(d\) 2 Eq. Drafts. 3.\)
\(\(e\) Williams v. Davies, 1 Sim. & Stu. 426.\)
\(\(f\) Rule 59.\)
Where the complainant amends his bill, and the defendant answers the amendments and exceptions together, if the complainant wishes to refer the further answer on the old exceptions, as well as to file new exceptions to the answer to the amendments, he must file his new exceptions within the ten days allowed by the above rule for referring the further answer on the old exceptions; and then, after waiting the usual time for the defendant to submit to the new exceptions, he must refer the answer upon the old exceptions which are not answered, and upon such of the new exceptions as are not submitted to. (g) Where the further answer is an answer to exceptions only, if the complainant wishes to except for impertinence, he must file such exceptions within the ten days allowed by the 52d rule for referring the answer on the old exceptions. (h) But if the further answer is intended as an answer to amendments, as well as to the former exceptions, a neglect to file new exceptions within the first ten days does not deprive the complainant of the benefit of such new exceptions; provided they are filed and served within the twenty days allowed by the 50th rule for excepting—the further answer, so far as it purports to be an answer to the amendments, not being complete until the expiration of that time. The order of reference in such a case, however, must be a reference of the new exceptions only, or of such of them as have not been submitted to by the defendant. In other words, the further answer is complete as to the matters of the original bill and the old exceptions, unless some proceedings are had thereon within the first ten days after it is put in. But as to the new matters introduced into the bill by amendment, it is not complete until after the expiration of twenty days. (i)

Although, as has just been stated, a further answer can only be referred to the master upon the old exceptions, yet if the bill has been amended, the complainant may deliver new exceptions applying to any part of the amendments which he does not think sufficiently answered. But such new exceptions must not extend to any matter which was contained in the original bill. (k)

If the master finds a second answer insufficient, he must fix the time for putting in a further answer, and specify the same in his report. (l)

Further answers must be prepared, signed, and filed in the same manner as original answers.

(g) Hart v. Small, 4 Paige, 333.  
(h) Id. ib.  
(i) Id. ib. 1 Edw. Ch. Rep. 319.  
(k) Rule 55.
Third answer insufficient.] If the complainant considers the third answer insufficient, it may be referred to the master, as we have already seen, upon the old exceptions. The order of reference, however, must specify the particular exceptions to which a further answer is required.(m)

Such answer must be referred within ten days after it is put in.(n)

A second or third answer must be referred to the same master as the first, if he is in office and competent to act.(o)

The proceedings before the master, upon reference of the second or third answer for insufficiency, are precisely the same as upon the first. The master, however, in deciding upon the exceptions, is not to look at the second or third answer only, but he must look at it in connection with the preceding answer.(p)

If the master, upon looking into the further answer, shall still be of opinion that no sufficient answer is given to the matter originally excepted to, he must report accordingly. But upon a reference of a third answer, the master is not to fix a time in his report for the defendant to put in a further answer.

The court will not stay the proceedings before the master, upon a reference as to the sufficiency of the third answer, for the purpose of enabling the defendant to put in a further answer.(q)

When the third answer is reported insufficient on the original exceptions, and the report has become absolute, (by the expiration of eight days from the time of filing it, without its having been excepted to,(r) the complainant, on filing an affidavit of the facts, may have an order of course for an attachment against the defendant.(s)

The attachment issued under this rule should be endorsed, "attachment upon a third answer reported insufficient;" and the proceedings upon it will be similar to those upon an attachment for want of a first answer.(t)

If the defendant is arrested upon the attachment, he is to be examined on interrogatories to the points reported insufficient, and must stand committed until he shall have answered them to the satisfaction of the master, and paid the costs.(u)

The sheriff must keep the defendant in his actual custody, and bring

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(m) Rule 52.
(n) Idem.
(o) Leggett v. Dubois, 3 Paige, 477.
(q) Russell v. Night, 6 Sim. 430.
(r) See Rule 56.
(s) Rule 64.
(t) See ante, p. 87, 88.
(u) Rule 64.
him personally before the court, and must keep and detain him in his custody until the court shall have made some order in the premises. (v) But the inability of the defendant, from sickness or otherwise, to attend, will be a sufficient excuse for not bringing him before the court. (w) The officer will not be required to confine the defendant in prison, or otherwise to restrain him of personal liberty, except so far as shall be necessary to secure his personal attendance. (x)

In the case of Farquharson v. Balfour. (y) the defendant being a gentleman advanced in years, was, by order of the court, allowed to remain at an hotel in the neighborhood of Lincoln’s Inn, in the custody of the tipstaff, till his examination should be completed.

It is to be observed, that the execution of the order for an attachment will not be suspended by exceptions to the master’s report. Thus, where the defendant excepted to the report, before he could be taken into custody under the order, and thereupon applied to the court to hear the exceptions instanter, and that in the meantime the process of contempt should be discontinued, the court refused the application, unless the defendant would render himself amenable to the process. But upon the defendant rendering himself amenable by appearing upon the floor of the court, the exceptions to the master’s report were allowed to be called on for argument. (z)

Examining defendant upon interrogatories. If a complainant, having obtained the order that the defendant should be examined on interrogatories before the master, means to exhibit interrogatories, he must, if the defendant is in custody, do so immediately. (a)

The statute requires that when a defendant arrested upon an attachment has been brought into court, or appeared therein, the court shall cause interrogatories to be filed, specifying the facts and circumstances alleged against the defendant, and requiring his answer thereto; to which he shall put in written answers, on oath, within such reasonable time as the court shall allow. (b)

In the case of The People ex rel. Lovett v. Rogers. (c) upon the defendant’s being brought before the chancellor upon an attachment, an order was entered directing the relator to file interrogatories specifying the facts and circumstances alleged against the defendant, and to serve a

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(r) 2 R. S. 537, § 12.  
(v) Id. 540, § 37.  
(x) Id. ib.  
(y) Tur. & Russ. 184.  
(z) Id. ib.  
(a) Id. ib.  
(b) 2 R. S. 537, § 19.  
(c) 2 Paige, 103.
copy upon him; and that the defendant put in written answers thereto, upon oath, within twenty-four hours.

The order for the examination of the defendant upon interrogatories, should contain a provision that the sheriff be at liberty to carry him before the master at such time and from time to time, as the master shall appoint, to be examined.\(d\)

As respects the form of the interrogatories, it has been held that they must be confined to the points to which the exceptions went. But they may require a more minute and particular discovery as to those points than was called for by the original bill.\(e\)

By the English practice, interrogatories are referred to a master to be settled.\(f\) But such is not the practice here. If the defendant considers either of the interrogatories improper, he can take the objection before the master by refusing to answer it; and the master's decision upon that point may be reviewed by the court, upon exceptions by either party, to his report.

Upon the examination before the master on interrogatories, the defendant has a right to have the assistance of counsel.\(g\)

In the case of Farquharson v. Balfour, before referred to, the mode of conducting the examination adopted by the master, and which was subsequently approved of by the court, was as follows: A written answer to the interrogatories was prepared and carried in by the defendant to the master, who compared the answer with the interrogatories, and then determined whether or not it was satisfactory. In the points in which the master considered the answer to be unsatisfactory, the defect was supplied by the personal examination of the defendant until the master was of opinion that the answer was sufficient.\(h\)

By the 105th rule, the master is authorized to examine the defendant either upon written interrogatories or \textit{viva voce}, or in both modes, as the nature of the case may appear to him to require; the examination being at the time taken down by the master, or by his clerk in his presence, and preserved, in order that it may be used by the court if necessary.

In deciding on the sufficiency or insufficiency of the examination of the defendant, the master must take into consideration the relevancy or materiality of the statement or question referred to in the exception.\(i\)

\(d\) 1 Hoff. Pr. 254.  
\(e\) Tur. & Russ. 103.  
\(f\) Id. ib.  
\(g\) Tur. & Russ. 184.  
\(h\) See also Rule 105, which allows the master to examine defendant orally, as well as upon written interrogatories.  
\(i\) Rule 106.
Master's report upon defendant's examination. The defendant having passed his examination to the satisfaction of the master, the master reports the same to the court. Whereupon the defendant may move for his discharge from the attachment. But he is not entitled to his discharge upon a report of the sufficiency of his examination, until the complainant has had an opportunity of perusing such examination. (k) The complainant has also a right, before the defendant is discharged, to see all the documents mentioned in the schedules, or referred to in the examination, if they are so mentioned or referred to, that, in the case of an answer, they would have made part of the answer. (l)

The certificate, or report, of the master as to the insufficiency of the defendant's examination does not require an order of confirmation. In this respect it is like the report of the master as to the sufficiency of an answer. The practice in relation to exceptions to an answer for insufficiency must be adopted and pursued in these cases, so far as the same is applicable. On filing the master's certificate, and notice thereof, if the defendant does not except to the same within eight days, the certificate will become absolute. (m) In case the master certifies that the examination is insufficient, the complainant may add new interrogatories to be approved of by the master if he shall deem such further interrogatories necessary; and the order will then be that he put in his further examination to the exceptions and the new interrogatories together, within such time as the master may direct. But if the examination is certified by the master to be sufficient, the complainant will not be permitted to call for a re-examination of the defendant to the same point, on new interrogatories, without special permission of the court, on cause shown, and upon notice of the application to the adverse party. (n)

Taking bill as confessed on third answer reported insufficient] If the defendant, after his third answer has been reported insufficient, cannot be arrested on the attachment issued against him, and does not surrender himself thereon within twenty days after notice to him or his solicitor of the issuing thereof, or within such further time as may be allowed him by the court, the complainant, on filing an affidavit of the facts, may have an order of course to take the bill as confessed. (o) And in case the defendant, on being arrested upon such attachment, neglects or refuses to answer the interrogatories to the satisfaction of the master, the complainant may have such an order. And in either case the de-
fendant may be further punished for the contempt, in the discretion of the court. (p)

2. Exceptions for Scandal and Impertinence.

The nature of scandal and impertinence, and the rules for distinguishing them, have been already stated in the chapter relative to bills of complaint, and in the first section of the 6th chapter. (q) Scandal and impertinence in answers is of the same nature, and subject to the same rules, and a similar method of practice, as when it is found in bills of complaint. In addition, however, to what has been already said respecting it, it may be further remarked in this place, that facts set forth in the answer which are not material to the decision, are impertinent; and if reproachful, are scandalous. (r) Chancellor Kent remarks, that the best rule to ascertain whether the matter in an answer be impertinent, is to see whether the subject of the allegation could be put in issue, or be given in evidence between the parties. (s)

If the matter of an answer is relevant, or can have any influence in the decision of the suit, either as to the subject matter of the controversy, the particular relief to be given, or as to the costs, it is not impertinent. (t) Or, in other words, whatever is material is not impertinent, as a general rule. (u) Thus, a statement introduced into an answer to show the temper with which a bill is filed, and the oppressive course pursued by the complainant, is not impertinent; as it may have an effect upon the costs. (v) If the complainant puts impertinent questions, however, in the interrogating part of his bill, he must take the answers to them, though they be impertinent. (w) Therefore, if a bill against executors calls specifically and particularly for accounts in all their various details, a very voluminous schedule containing a copy from the books of account, specifying each item of debt and credit, will not be impertinent; though it seems it would have been, had the bill not called for it. (x) And where a complainant avers the alienism of parties as a ground for their not being entitled under a will, it is not impertinent for a defendant to allege in his answer that the complainant, who also claims rights under the same will, is an alien likewise. (y)

(p) Rule 64.
(s) Id. ib.
(u) Bally v. Williams, McCle. & Young, 334.
(x) Scudder v. Bogert, 1 Edw. 372.
But statements in an answer which are neither called for by the bill, nor material to the defence, with reference to the order or decree which may be made on the bill, are impertinent. (z) So are statements in an answer to a bill of revivor, which merely show irregularity and misconduct in the former proceedings in the suit. (a) And copies of receipts taken by the defendant for monies paid, and charged in account, and making an immense schedule to an answer, are impertinent. (b) So if a defendant to a bill of revivor puts new matter on the record, which might, if stated in the answer to the original bill, have produced a different decree, it will be impertinent and may be expunged. (c) And if the defendant in his answer sets up a distinct matter in avoidance, which is not called for by the bill, the same, if irrelevant or immaterial, may be excepted to for impertinence, or the complainant may have the benefit of the objection upon the hearing. (d)

An answer may be referred for scandal, at the instance of a co-defendant; but not for impertinence. (e)

By the English practice, a reference of the answer for impertinence is good cause to be shown against a motion to dissolve an injunction. (f) But by the practice here, where the whole equity of the bill is denied, it is no answer to an application to dissolve an injunction, that the defendant has also incorporated into his answer other matters which are scandalous, or otherwise irrelevant. (g)

Exceptions to an answer for scandal or impertinence must be filed within twenty days after service of the answer. (h) They are to be taken in the same manner as exceptions for insufficiency, and may be submitted to in like manner, and within the same time. And if not submitted to, they must be referred in the same manner, and the master’s report procured within the same time, or they will be considered as abandoned, and the answer will be thenceforth deemed sufficient. (i)

An exception for impertinence must be supported in toto; and if it includes any part of the answer which is relevant and proper, the exception must fail altogether. (k)

Where exceptions for impertinence, if allowed, would mutilate the
answer unnecessarily, by breaking up sentences and clauses which ought to stand or fall together, such exceptions should be disallowed. (l)

If the whole of a sentence or clause in an answer is impertinent, and depends upon the same principle, the complainant cannot except to a part of the sentence only, where the allowance of such exception will wholly change the meaning of what remains, or make it unintelligible. (m)

Exceptions should point out the exceptionable matter with sufficient certainty to enable the officers of the court to strike out such exceptionable matter, if the exceptions are allowed. (n)

The complainant is not precluded from excepting to the further answer of a defendant, for impertinence, although it purports to be an answer to the old exceptions for insufficiency only; but in that case his exceptions for impertinence must be filed within the ten days allowed for referring the further answer upon the old exceptions. (o)

If exceptions are taken for both insufficiency and impertinence, they must be taken and referred at the same time. (p) Therefore, where the complainant, after he had referred the further answer of the defendant for insufficiency, on the old exceptions, and after he had taken out and served a warrant to proceed on such reference, put in new exceptions to the further answer, for impertinence, and obtained another order of reference of those exceptions, it was held that the exceptions for impertinence were irregular; and they were ordered to be taken off the files of the court. (q)

If on a reference of exceptions to an answer for scandal or impertinence, the master reports that the answer is scandalous or impertinent, the complainant, on filing proof that the report has become absolute against the defendant, may have an order of course that the proper officers of the court expunge the scandalous or impertinent matter, and that the defendant pay the costs within twenty days after service of a copy of such order and of the taxed bill, or that an attachment issue. (r)

When the defendant submits to the exceptions, the same order may be entered on filing the notice of the submission. (s)

If the master disallows an exception for scandal or impertinence, his report is final, and cannot be excepted to in that respect. But the complainant may, upon the hearing of the cause, or upon the taxation

(l) Franklin v. Keeler, 4 Paige, 389.  (m) Id. ib.
(s) Idem.
of the general costs in the suit, insist that the matter excepted to was in fact impertinent. (1)

Costs on exceptions to answer.] It is provided by the 63d rule, that on exceptions either for insufficiency or for scandal and impertinence, the complainant shall be entitled to the costs of the exceptions which are submitted to, and those which are finally allowed after a reference to a master; but that neither party shall be entitled to costs upon the reference of exceptions, unless he finally succeeds as to all the exceptions which are referred. The costs on exceptions are not to be taxed until all the exceptions are submitted to, abandoned, allowed, or finally disposed of; and then the whole costs to which the exceptant is entitled, are to be included in one bill, and the adverse party may offset any costs to which he is entitled.

Copies of pleadings for the master are not allowed on a reference of exceptions, unless in cases of difficulty where copies are required by him, and are actually made for that purpose. (u)

Only one solicitor and counsel fee can be charged on a reference; and only one fee can be allowed to the master; except by the special order of the court. (v)

It has before been stated that the defendant is liable to pay the costs of the exceptions which he submits to answer. (w)

If an answer contains scandalous or impertinent matter, the counsel whose name is subscribed to it is personally liable to the complainant for the costs on the exceptions for impertinence. (x)

When impertinent matter in an answer which should have been embraced in one exception, is made the foundation of several exceptions to detached parts thereof, the court may refuse to give the costs of the reference to the complainant, although the major part of his exceptions to the answer are finally allowed. (y)

Costs of exceptions to answer.] If the defendant submits to the exceptions, the complainant has his costs; and if they are referred, he has the costs of the exceptions allowed, and the defendant his costs of the exceptions disallowed; and the balance struck is to be paid. (z)

To entitle the exceptant to the costs of the reference, he must finally succeed in obtaining the allowance of a major part, in number, of the

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(1) Rule 57.
(u) Richards v. Barlow, 1 Paige, 323.
(v) Id. ib.
(w) See Rule 50.
(x) Doe v. Green, 2 Paige, 347.
(y) Franklin v. Keeler, 4 Paige, 382.
exceptions referred. And each exception constituting a part of such majority must be wholly sustained.\(^{(a)}\)

Where part of the exceptions to an answer are allowed, and the rest disallowed, the costs to which the respective parties are entitled may be offset, or a proportionate share of the costs only may be allowed to the party who succeeds as to a majority of the exceptions.\(^{(b)}\)

SECTION II.

AMENDING BILL OF COMPLAINT.

Although, as a general rule, the bill may be amended at any time before decree, yet as it is most usually amended between the times of putting in the answer and of filing the replication, the present seems the most fitting place for treating of amendments. And in doing so, convenience will be promoted by considering the whole subject of amending bills, at whatever stage of the cause the amendment may be made.

In what cases the bill may be amended.\(^{(a)}\) If a bill does not contain such material facts, or make all such persons parties, as are necessary to enable the court to do complete justice, the complainant may alter it, by inserting additional matter subsisting at the time of filing the bill, of which he was not then apprised, or which he thought not necessary to be stated. And he may add such persons as shall be deemed necessary parties. Or in case the bill is found to contain matter not relevant, or no longer necessary to complainant's case, or the names of parties who may be dispensed with, the bill may be amended by striking out such matter or parties. The original bill thus added to, or altered, is termed an amended bill.

From what has just been stated, it will be seen that amendments to a bill are of two sorts—those which relate to parties, and those which affect the substance of the case. And amendments relating to parties are either by the addition or omission of them. There is also another class of amendments relating to parties; to wit, the changing of their situation by striking out the name of a co-complainant and making him a defendant.

Amendments being regarded with reference only to the furtherance of

\(^{(a)}\) Buluid v. Miller, 4 Paige, 473. \(^{(b)}\) Norton v. Woods, 5 Paige, 260.
justice, they are, as a general rule, in the discretion of the court, especially in matters of mere form. (c) They are, therefore, always allowed with great liberality, until the proofs are closed; except where the bill is sworn to; (d) in which case they are allowed with great caution. (e)

Facts which have occurred since the filing of the original bill ought not to be introduced by amendment; because, as the amendments are held to constitute part of the same record as the original bill, (f) which can only relate to facts which had occurred previous to the time when it was preferred, the introduction of matters of a posterior date would render the record incongruous. Matter, therefore, which has occurred since the original bill was filed, should be brought before the court by supplemental bill, and not by amendment. (g)

Nor can a bill be amended by inserting therein facts known to the complainant at the time of filing the bill; unless some excuse is given for the omission. (h) And amendments can only be granted when the bill is defective in parties, or in the prayer for relief, or in the omission or mistake of a fact or circumstance connected with the substance, but not forming the substance itself nor repugnant thereto. (c)

In some cases, however, the court will suffer matters which have occurred since the filing of the original bill to be introduced by amendment. Thus where the complainant has an inchoate right at the time of preparing his original bill, and which merely requires some formal act to render his title perfect; and such formal act is not completed until afterwards, the introduction of that fact by amendment will be permitted. The case of an executor filing a bill before probate, and afterwards obtaining probate, is an instance of this kind. (d) Where, also, the defendant in his answer states facts which have taken place since the bill was filed, the court will permit such facts to be incorporated into the bill by amendment. (e) But an amendment of the bill is not necessary to enable the complainant to avail himself of such facts at the hearing; as the replication puts all the facts stated in the answer com-

pletely in issue between the parties; and the complainant may, after such replication, examine witnesses as to such facts, as well as the defendant.\(^{\text{f}}\) Yet where it is important to the complainant that a fact disclosed in the answer should be further inquired into, or avoided by some further statement, the practice of introducing such facts from the answer of the defendant, into the bill, is often resorted to. Thus, where a complainant not being satisfied with the answer, amended his bill, stating by way of pretense a quotation from the answer, and negativing it, and insisted that the facts would appear differently if the defendant would look into his accounts, it was held that the matter so introduced was not impertinent.\(^{\text{g}}\)

So where a complainant filed a bill stating an agreement, and the defendant, by his answer, admitted that there was an agreement, but different from that stated by the complainant, it was held that the complainant might amend his bill by abandoning his first agreement and praying for a decree according to that admitted by the defendant.\(^{\text{h}}\) But the court will not permit a complainant to amend his bill so that he may continue to insist upon the agreement originally stated, and if he fails in that, to get the benefit of the one admitted by the defendant.\(^{\text{i}}\)

The question whether the court will or will not permit a bill filed for the mere purpose of discovery, to be converted into one for relief, by an amendment adding a prayer for relief, does not seem to be settled.\(^{\text{k}}\) But as a cross bill is entitled to be treated with greater indulgence than an original bill, in a case where the defendant filed a cross bill for the purpose of getting a discovery, only, from the complainant in the original suit, but did not get any answer to it before the hearing of the original cause; in consequence of which the discovery became useless; whereupon the defendant amended his cross bill by praying relief, it was held that, under the circumstances, he was at liberty to do so.\(^{\text{l}}\)

A bill for relief cannot be converted into a bill for a discovery by striking out the prayer.\(^{\text{m}}\)

If is said, by Lord Chancellor Hart, that great latitude is allowed to a complainant in making amendments; and that wherever it can be done, an amendment is to be preferred to a supplemental bill.\(^{\text{n}}\)

\(^{\text{f}}\) Atwood v. ———, 1 Russ. 355.
\(^{\text{g}}\) See 1 Dan. 514.
\(^{\text{h}}\) Seely v. Boehm, 2 Mad. 176.
\(^{\text{i}}\) Lindsay v. Lynch, 2 Sch. & Lef. 2.
\(^{\text{j}}\) Harris v. Knickerbacker, 5 Wend. 638.
\(^{\text{k}}\) 1 Paige, 209, S. C.
\(^{\text{l}}\) Hammond v. Hammond, 2 Moll
\(^{\text{m}}\) 1 Dan. 514. 2 Sch. & Lef. 1. 7 312.

\(^{\text{n}}\) Ves. 292.
Yet, if a complainant takes advantage of an order to amend, so as entirely to change his case, and to make the bill a perfectly new one, he will be ordered, upon motion, to place the defendant in the same position, with regard to costs, that he would have been in had the complainant, instead of amending, dismissed his original bill, with costs, and filed a new one. Thus, where a complainant, by his original bill, sought to set aside a deed, and after the answer was filed, he amended the bill by making quite a different case, and sought to establish the deed, the court ordered him to pay the costs of the original bill, and of certain accounts set forth in the answer, in compliance with the prayer of that bill, and the costs of the motion. (a)

Upon the same principle, where a complainant takes advantage of an order to amend to strike out a portion of his bill, though he does not alter the nature of it, yet if expenses have been occasioned to the defendant by the part which has been struck out, which, in consequence of its having been so struck out, could not be awarded to him at the hearing, the court will, upon motion, order such costs to be taxed and paid to the defendant. (b)

In respect to amendments as to parties, the courts are more liberal than as to other amendments. A court of equity will not dismiss a bill absolutely, for want of proper parties, if the complainant shows enough to give color to his claim for relief against the parties not before the court. (a)

As respects the time within which an amendment may be made, it is settled that it must be done at the earliest opportunity, and that any unreasonable or improper delay will deprive the party of the favor of the court. (b) Thus the court will not give to a complainant leave to amend his bill, if he has not taken any step in the prosecution of the suit for an undue length of time, (as for instance, for two years after answers put in,) and be unable to explain this delay. (c)

When amendment may be made of course, and when only on special motion.] It is a general principle that no alteration can be made in any pleading or other matter after it has been filed, and by that means become a record of the court, without the sanction of a previous order.

The 43d rule of court, however, allows the complainant, in cases where the bill has not been sworn to, to amend it at any time before

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(a) Mavor v. Dry, 2 Sim. & Stu. 113. (a) Al'en v. Smith, 1 Leigh, 331.
See also Smith v. Smith, Coop. 141. (b) Rogers v. Rogers, 1 Paige, 434.
(c) Balleck v. Perkins, id. 110. 81.
plea, answer, or demurrer put in, of course, and without costs. He may also amend of course, after answer, at any time before replying, until the time for replying expires, and without costs, if a new or further answer is not thereby rendered necessary. He may also amend sworn bills, except injunction bills, of course, if the amendments are merely in addition to, and not inconsistent with, the original bill.

But amendments of injunction bills, except creditors' bills, cannot be made without a special order of the court and upon notice.

Creditors' bills may be amended of course, in the same manner as bills not sworn to, if the amendments are merely in addition to, and not inconsistent with, what is contained in the original bill. But all such amendments must be sworn to.\(^{(q)}\)

Amendments of course may be made without entering any order.\(^{(r)}\)

On a demurrer for want of parties, or for any other defect which does not go to the whole bill, the complainant may amend of course, on payment of costs, at any time before the demurrer is noticed for argument, or within ten days after receiving a copy of the demurrer. On a demurrer for causes other than the above, the right to amend, and the terms of the amendment, are in the discretion of the court.\(^{(s)}\)

Amendment of sworn bills. Amendments to pleadings which are sworn to are allowed with great caution, as a general rule.\(^{(t)}\) Yet we have seen that a sworn bill (if it is not an injunction bill,) may be amended of course, and without costs, if the amendments are merely in addition to, and not inconsistent with, what is contained in the original bill; such amendments being verified by oath, in the same manner as the bill is required to be verified.\(^{(u)}\)

Amendment of injunction bills.] By the practice in England, if a complainant who has obtained an injunction for want of an answer, amends his bill before an opportunity has been afforded of discussing the propriety of the injunction upon the merits of the case, he will lose the benefit of the injunction. In other words, an injunction drops of course upon the complainant's amending his bill; unless leave is granted to amend without prejudice to the injunction;\(^{(v)}\) which will not be given except upon special application specifying the amendment.\(^{(w)}\)

In this state no amendment of an injunction bill, unless it be a credi-

\(^{(q)}\) Rule 190.

\(^{(r)}\) Rule 43.

\(^{(s)}\) Rule 44.

\(^{(t)}\) Verplanck v. The Mercantile Ins. Co. 1 Edw. 45.

\(^{(u)}\) Rules 43 and 190.


\(^{(w)}\) Vesey v. Wilks, 3 Mad. 475.
tor's bill, can be allowed without a special order of the court and upon
due notice to the adverse party, if he has appeared in the suit.(x) And
such a bill will not be amended unless the proposed amendments are
distinctly stated and sworn to; and the application to amend must be
made as soon as the necessity of an amendment is discovered.(y)

In the case of Renwick v. Wilson,(x) Chancellor Kent allowed an in-
junction bill to be amended as of course, after the answer had been ex-
cepted to as insufficient, by inserting additional statements and charges,
without prejudice to the injunction, and without costs, but refused to al-
low amendments, by striking out or altering any part of the bill, with-
out due notice of the motion, accompanied by an affidavit stating the
precise amendment asked for.

Amendments after demurrer.] Where a demurrer for want of par-
ties is allowed, the cause is not considered so much out of court but that
the complainant may afterwards have leave to amend, by bringing the
necessary parties before the court.(a) The 44th rule provides, that if
the defendant demurs to the bill for want of parties, or for any other
defect which does not go to the equity of the whole bill, the complain-
ant may amend of course on payment of costs, at any time before the de-
murrer is noticed for argument, or within ten days after receiving a
Copy of the demurrer. If the demurrer is for other causes than the
above, the right to amend, and the terms of the amendment, are in the
discretion of the court.(b)

Where a mere formal objection to the bill is made by demurrer ore
tenus, the complainant will be permitted to amend without costs.(c)
Though he seeks, under such circumstances, to amend more extensiv-
ely than by merely adding parties, he must pay the defendant the costs
of the demurrer.(d)

Upon the allowance of a demurrer on the ground of a formal defect
in the bill, the complainant will be allowed to amend, if his counsel has
acted under a mistake as to the practice. Thus, where by mistake, the
allegations in a creditor's bill, made necessary by the 189th rule, were
omitted, a demurrer was sustained, but leave to amend was given.(e)

(a) Rule 43. See also West v. Coke, 1 Mor. 191.
(b) 8 John. Ch. Rep. 81.
(g) Bessenlen v. Decreta, 2 Ch. Ca. 197. 6 Ves. 773. Marshall v. Love-
liss, Camb. & Norw. 239, 301. Beazley v. Love-
liss, id. 530.
(c) Garlick v. Strong, 3 Paige, 440. 4 Sim. 565.
(d) Newton v. Lord Egmont, 4 Sim. 585.
(e) McElwain v. Willis, 3 Paige, 505.
Where a demurrer is about being argued, and the complainant would amend in a material matter, the court will only grant the permission upon special grounds.\(^{(f)}\)

If a demurrer to the bill is overruled, the complainant may, within ten days thereafter, amend his bill of course, without costs.\(^{(g)}\)

**Amendments after plea.** Upon the argument of a plea for want of parties, the court, instead of allowing it absolutely, usually gives the complainant leave to amend his bill on payment of costs—a liberty where he may also obtain after allowance of the plea, according to the common course of the court, for the suit is not determined by the allowance of the plea.\(^{(h)}\)

If a plea is allowed to part of the bill, the complainant cannot amend his bill without a special order on notice, and stating the proposed amendment. Leave to amend in such a case, will not be given to enable the complainant to state facts as to the part covered by the plea, tending to disprove it. The complainant must take issue upon it. Nor, after allowance, will he be permitted to amend, by stating facts which, admitting the truth of the plea, seeks to avoid or restrict its effects.\(^{(i)}\)

If a plea is, upon argument, overruled, the complainant may, within ten days thereafter, amend his bill of course and without costs.\(^{(k)}\)

If the complainant has relied to the plea, he cannot withdraw the replication and amend the bill except upon notice and special grounds.\(^{(l)}\)

**Amendment after exceptions to answer.** Where the answer is excepted to as insufficient, and the defendant submits to answer further, the complainant may amend his bill of course, and without costs, at any time within ten days after the defendant submits to answer. So, where, upon a reference on exceptions, the answer is found insufficient, the complainant may amend within ten days after confirmation of the master's report; and in either case, the defendant must answer the amendments and exceptions together.\(^{(m)}\)

The complainant cannot amend under this rule, however, by leaving out the name of the defendant whose answer is insufficient.\(^{(n)}\) But he may amend by adding new parties and new charges, on payment of costs, if a new or further answer be required.\(^{(o)}\)

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\(^{(f)}\) Holmes v. Waring, 8 Price, 604.

\(^{(g)}\) Rule 46.

\(^{(h)}\) Mitt. Eq. Pl. 297.

\(^{(i)}\) Taylor v. Shaw, 2 Sim. & Sta. 19.

\(^{(k)}\) Rule 45.

\(^{(l)}\) Carleton v. L'Estrange, 1 Tur. & Russ. 22.

\(^{(m)}\) Rule 45.

\(^{(n)}\) Chase v. Dunham, 1 Paige, 572.

If an order to amend is entered, the defendant cannot put in a second answer without waiting for the amendments. *(p)*

**Amendments after replication.** If the complainant has occasion to amend his bill after replication, *merely by adding parties*, he may, by the English practice, obtain leave to do so, as a matter of course; and upon this principle, liberty was given to a complainant to amend after replication, by charging that one of the defendants already before the court was the administrator of an individual whose personal representative would have been a necessary party to the suit; on the ground that such an amendment amounted to no more that the addition of a party. *(q)* Orders of this nature may be obtained without withdrawing the replication. *(r)* But such an order cannot be entered of course after proceedings subsequent to filing the replication have been had—such as rules to produce witnesses given, or an undertaking to speed the cause. *(s)*

By our practice, an amendment after replication is not a matter of course. An application to the court, upon notice to the opposite party, for leave to withdraw the replication and amend the bill, is necessary. *(t)* And the court will not grant such leave unless the complainant shows the materiality of the amendments, and thereon why the matter proposed to be introduced as an amendment was not before stated in the bill. *(u)*

In the case of *Small v. Atwood*, *(v)* a replication was allowed to be withdrawn and bill amended by striking out the name of a complainant and making him a defendant, and by stating such facts and circumstances relating to certain transactions between that complainant and the defendant as were material to show that the other complainants were not and ought not to be bound by the acts or misrepresentations of that complainant respecting the property in the pleadings mentioned, or the purchase thereof, and as were material to show that such acts and misrepresentations of the said complainant were evidence against the defendant. The complainants who made the application giving security for costs, and undertaking to amend within a given time, paying the costs of the application, the usual costs of the amendments, and withdrawing the replication.

*(p) Coulston v. Richardson, Bunb. 186.*
*(q) Brattle v. Waterman, 4 Sim. 125.*
*(r) Brattle v. Waterman, 4 Sim. 195.*
*(s) Lord Kilcoursey v. Ley, 4 Mad. 212.*
*(v) 2 Young & Jer. 519.*
In the court of exchequer, a motion to withdraw a replication and amend the bill was granted on payment of costs, and upon an undertaking to amend in a week, although it did not appear that the matter sought to be introduced had come to the party's knowledge subsequently to the filing of the replication.\(w\) But it has been decided in this state that where the complainant files a replication to the answer, after he is apprised of the necessity of an amendment of his bill, he precludes himself from making such amendment.\(x\) In a case where a special application to the court for leave to make the amendment is necessary, the complainant should obtain an order to extend the time for filing the replication until after the decision of the court upon the application to amend.\(y\)

Where it is intended to amend a bill after a replication filed, by the addition of new facts or charges, the proper course is to apply for leave to withdraw the replication, and amend.\(z\) It is ordered by the fifteenth of Lord Lyndhurst's Orders that after replication has been filed, the complainant shall not be permitted to withdraw it and amend his bill, without a special order of the court for that purpose made upon a motion of which notice has been given; the court being satisfied by affidavit that the matter of the proposed amendments is material, and could not, with reasonable diligence, have been sooner introduced into the bill.

It has been decided, however, that this order does not apply to amendments by adding parties, after replication.\(a\)

After a witness has been examined, the bill cannot be altered or amended, unless under very special circumstances, or in consequence of some subsequent event; except merely for the purpose of adding parties.\(b\) And where a complainant, by a false suggestion that the cause was at issue only, had obtained an order for liberty to amend his bill by the addition of a prayer which had been accidentally omitted, the order was discharged upon a motion made by the defendant at the opening of the cause, when it came on for hearing.\(c\)

But it seems that the court will, even after publication has been passed, and the cause set down, suffer the bill to be amended by adding parties.\(d\) But not if the complainant has been guilty of laches.\(e\)

\(w\) Callanan v. Salwey, McCle. 598.
\(x\) Vermillyea v. Odell, 4 Paige, 121.
\(y\) Id. ib.
\(z\) Carleton v. L'Estrange, 1 Tur. & Russ. 23.
\(a\) Brattle v. Waterman, 4, Sim. 125.
\(c\) Harding v. Cox, 3 Atk. 583.
\(d\) Hinde, 35.
\(e\) Milward v. Oldfield, 4 Price, 395.
to be observed, however, that if the parties be added after publication has passed, the cause, as to such parties, must be heard upon bill and answer only.\(^{(f)}\) If, therefore, a complainant, after publication passed, is advised that it will be necessary to bring other parties before the court, and in order to do that, must put new matter in issue, he must not proceed by amendment, but by supplement bill.\(^{(g)}\)

Amendment at the hearing.] If the defendant does not take the objection of the want of proper parties until the hearing, the complainant will be allowed a reasonable time to bring the proper parties before the court, either by an amendment of the original bill or by a supplemental bill; unless it should appear that the necessary parties were omitted in the bill by the fraudulent or wilful omission, or the bad faith of the complainant.\(^{(h)}\) So if a formal charge of fraud is necessary in a bill, but has been omitted, the court will give leave to amend, at the hearing.\(^{(i)}\)

Upon the hearing of a petition of appeal presented by the defendants, leave was given to the complainants to amend their bill, by making it either a bill and information, or an information.\(^{(k)}\)

When it appears, upon the hearing, that the complainant is entitled to relief, although it be different from that which he has specifically prayed, the court will sometimes allow the cause to stand over, with liberty to the complainant to amend his bill.\(^{(l)}\) And where it appeared, at the hearing, that the complainant was not entitled to the specific relief prayed for, and that in order to enable the court to grant the relief upon the case made by his bill, which might properly be given, viz. a foreclosure of the mortgage, it would be necessary to bring an additional party before the court; an order was made that the complainant should be at liberty to amend his bill by adding parties, and praying such relief as he might be advised.\(^{(m)}\)

But the instances in which this will be done are confined to those cases where it appears by the bill that the complainant is entitled to relief, though different from that specifically prayed. Where the object

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\(^{(f)}\) Hinde, 25.
\(^{(g)}\) Goodwin v. Goodwin, 3 Atk. 370.
\(^{(i)}\) Wamburzze v. Kennedy, 4 Desau. 460.
\(^{(j)}\) Mary Magdalen Coll. v. Sibthorpe, 1 Russ. 154.
\(^{(k)}\) Beaumont v. Boulbee, 5 Ves. 495.
\(^{(l)}\) Cook v. Martyn, 2 Atk. 3.
\(^{(m)}\) Palk v. Lord Clinton, 12 Ves. 63.
of the proposed amendment is to make a new case, it will not be permitted.\(^{(n)}\)

After answer put in, it is not a matter of course to grant an amendment adding parties as co-complainants; the granting or refusal of such an order being in the discretion of the court.\(^{(o)}\) And such an amendment will not be allowed without the consent of the person proposed to be added as a co-complainant.\(^{(p)}\)

Accordingly, it has been recently decided that an order made at the hearing for leave to amend, by adding parties, did not authorize the introduction of new co-complainants.\(^{(q)}\) But the court will sometimes allow a bill which has originally been filed by one individual of a numerous class, in his own right, to stand over at the hearing, in order to be amended by the introduction of the words, "on behalf of himself," \&c.\(^{(r)}\)

And in the case of Milligan v. Mitchell,\(^{(s)}\) an order was made at the hearing, that the complainants should be at liberty to amend their bill by adding parties as they should be advised, or by showing why they were unable to bring the proper parties before the court.

So, also, where a matter has not been put in issue with sufficient precision, the court has, upon hearing the case, given the complainant liberty to amend the bill for the purpose of making the necessary alteration.\(^{(t)}\) And where a complainant had amended his bill, and by accident had omitted to insert in the amended bill the prayer for relief, although it was in the original bill, the court has put off the cause in order that the complainant might have an opportunity to re-amend his bill by inserting it.\(^{(u)}\)

Wherever improper submissions have been made in a bill on behalf of infants, the court will, at the hearing, order that the bill shall be amended by striking out the submission.\(^{(v)}\) Upon the same principle, where an infant heir at law had been made a co-complainant, the court ordered the cause to stand over, with liberty to the complainant to amend his bill by making the infant a defendant.\(^{(w)}\) And where a mat-

\(^{(a)}\) Deniston v. Little, 2 Sch. \& Lef. 11, n.
\(^{(b)}\) The Governors of Lacton School v. Smith, 1 McCl. 17. 4 Price, 395.
\(^{(c)}\) Id. ib.
\(^{(d)}\) Milligan v. Mitchell, 1 My. \& Craig, 444, 511. 3 id. 79. 1 My. \& Keen, 446.
\(^{(e)}\) Lloyd v. Loaring, 6 Ves. 773.
\(^{(g)}\) Cited 1 Dan. Pr. 388. 1 My. \& Craig, 433, S. C.
\(^{(h)}\) Mitf. Pl. 306. 2 Bro. P. C. 194.
\(^{(i)}\) Harding v. Cox, 3 Atk. 583.
\(^{(j)}\) Serle v. St. Eloy, 2 Peer Wms. 366.
\(^{(k)}\) Plunket v. Joice, 2 Sch. \& Lef. 159.
ter has not been properly put in issue by the bill, to the prejudice of an infant complainant, the court has generally ordered the bill to be amended.(x)

Where a mere formal objection to the bill was made by demurrer, *ore tenus*, the complainant was permitted to amend.(m) So also upon the allowance of a demurrer for want of equity, on the ground of a formal defect in the bill.(n) And this is now a matter of course.(o) But where a bill is dismissed, on demurrer, for want of equity, on the merits of the case as stated, leave to amend the bill will not be granted.(p)

**Amendment after decree.**] In the case of *Habergham v. Vincent*,(y) Lord Thurlow intimated an opinion that after a decree had been made, passed and entered, without bringing before the court a personal representative who had become so after the bill was filed, he might be added by amendment, and that a motion for that purpose would be regular; provided it was merely for the purpose of making him a witness to what was done in the master's office; but if there was any thing in the decree affecting him in the way of order to pay, such an order would be out of the power of the court.

In a case in Ireland,(z) the prayer of a bill was amended after a decree, by adapting the prayer to the facts stated; but the defendant being allowed to put in a new answer to the amendment, the cause which had been set down for re-hearing, was heard as on the original hearing.

It is well settled, however, as we have already seen, that the bill cannot be amended at any time after publication passed and the cause set down for hearing, in any other respect than by making parties.(a) But an amendment merely changing the character in which the complainant sues, is not considered in conflict with this rule. Therefore, after a decree has been entered, leave has been given to the complainant to take out administration, and to state it by way of amendment; the decree being suspended in the meantime.(b)

**Amendment upon appeal.**] Leave to amend the bill will be granted upon appeal, by the appellate court, if it is there found necessary.(c)

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(z) Mitf. 397. • 2 Peer Wms. 401, 403. 2 Atk. 599.
(m) Garlick v. Strong, 3 Paige, 440.
(n) McElwain v. Willis, id. 505.
(o) Cunningham v. Pell, 6 Paige, 655.
(y) 1 Ves. jun. 68.
(z) Blake v. Foster, 2 Moll. 402. See Vol. I.
(a) Goodwin v. Goodwin, 3 Atk. 370.
In the case of *Mary Magdalen College* v. *Sibthorpe* (d) upon the hearing of a petition of appeal presented by the defendants, leave was given to the complainants to amend their bill, by making it either a bill and information, or an information.

**Second amendment.** By the 13th of Lord Lyndhurst's amended orders (e) the complainant is entitled to only one order for leave to amend after an answer has been filed; unless the court is satisfied, by affidavit, that the draft of the intended amendments has been settled, approved, and signed by counsel, and that such amendments are not intended to be made for the purpose of delay or vexation, but because they are material to the case of the complainant. But that order does not extend to amendments which are made only for the purpose of rectifying some clerical error, or error in names, dates, or sums. In which cases, the order to amend may be obtained upon motion or petition without notice.

In this state there is no rule of court upon the subject; but probably a similar practice must prevail.

In the case of *Kirby v. Thompson* (f) a second amendment of a bill was refused after an answer by one defendant, and a plea by another, which was allowed, and the bill dismissed as to him, and a motion for a re-hearing granted, and after eighteen months had elapsed since the first amendment—there being no evidence of any new information since acquired—and the second amendment being substantially the same as the first, though more directly charging the defendants with fraud.

In a case where a complainant had amended his bill, and by accident had omitted to insert, in the amended bill, the prayer for relief, although it was in the original bill, the court ordered the cause to stand over, to give the complainant an opportunity to re-amend his bill by inserting it (g)

As an insufficient answer is not considered as an answer, an order to amend, obtained after exceptions for insufficiency allowed or submitted to, will not be considered as the one order to amend, which, by the terms of the 13th order above referred to, the complainant is entitled to have after answer. (h) And for the same reason it has been held that the amendment of a bill, by adding parties after a demurrer allowed, will not preclude a complainant from amending, as of course, after the answer has come in. (i)

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(d) 1 Russ. 154.
(e) 1 Russ. & My. 769.
(f) 6 John. Ch. 70.
(g) Harding v. Cox, 3 Atk. 583.
(h) Bird v. Hustler, 1 Russ. & My. 393.
(i) Pesbeller v. Hammett, 3 Sim. 399.
In what time amendment is to be made. This branch of the subject has been already anticipated. It will therefore be sufficient to refer the reader to the previous pages of the present section, and to the 43d, 44th and 45th rules of the court.

The time to amend the bill may be extended, if necessary, by the court, on special cause shown.(c)

Amendments, how made.] When an order to amend has been obtained, the first thing to be done is to serve it upon the defendant, in the usual way.(l) And where the order is granted upon payment of costs, those costs must be paid or tendered before any further proceedings are had; otherwise, such further proceedings will be nugatory.(m)

Amendments of course may be made without entering any rule or order for that purpose. But the registers and clerks are not to permit any amendments to be made unless they appear to be duly authorized.(n)

Upon an amendment of course, the complainant's solicitor must either file a new engrossment of the bill, or furnish the register or clerk with an engrossed copy of the amendments containing proper references to the folios and lines in the original bill on file, where such amendments are to be inserted or made.(o)

Creditors' bills may be amended of course in the same manner as bills not sworn to, if the amendments are merely in addition to, and not inconsistent with, what is contained in the original bill. But all such amendments must be verified by oath, in the same manner as the bill is required to be verified.(p)

With the exception of creditors' bills, no injunction bills can be amended without a special order of the court and upon due notice to the defendant, if he has appeared.(q) Nor can any amendments be allowed which are inconsistent with the original sworn bill.(r)

The complainant cannot amend under the 45th rule, by leaving out the name of the defendant whose answer is insufficient.(s)

Where the amendment is not of course, the record must be amended by interlining; provided it can be done so as to make the record fair and legible. Or, if the amendment be by omitting original matter, it

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1. Rule 128.
2. Rule 190.
3. Rule 190.
4. Rule 43.
5. Rule 43.
6. Rule 43.
7. Rule 43 and 45.
8. Rule 45.
is done by drawing a pen through the same. (t) With respect to the quantity of matter which may be introduced into a record without requiring a new engrossment, that appears to be limited by the English practice, to two chancery folios, or 180 words, in each place. (w) If the amendment exceeds that quantity of words in any one place, or the bill has been so often amended that the amendment inserted, though under two folios, cannot be interlined upon the record, or are so considerable as to blot and deface it, a new engrossment must be made and annexed to the original record. (v) 

It was held in the case of Pierce v. West's executor, decided in one of the circuit courts of the United States, (w) that the amendment should state only so much of the original bill as may be necessary to introduce and to make intelligible the new matter, which should alone constitute the chief matter of the amended bill.

After a defendant has put in his answer on oath, the complainant cannot amend his bill and include in such amendments a waiver of the answer of the defendant on oath, so as to deprive him of the benefit of his answer to the amendments, so far as it may be responsive to the bill. (x)

A complainant cannot, by amendment, introduce matter which would constitute a new bill. (y) Therefore, after a decision upon a plea to the jurisdiction, that a bill between members of a manufacturing corporation cannot be sustained, the court will not grant the complainant leave to amend by averring that the corporation had been dissolved. (z)

In the case of Hunt v. Holland, (a) it was decided in this state, that if a bill which has been sworn to, is amended under the 190th rule, and a new engrossment of the bill and amendments is filed, the defendant is entitled to a copy of the bill as originally filed, as well as of the amended bill; unless the amendments are particularly designated in the copy of the latter which is served. In that case, Chancellor Walworth observes: "There is no pretence here that any part of the original bill has been left out, or that the additional matters are inconsistent with the original bill. It was probably necessary, in this case, to re-engross the original matter with the amendments, as the latter were numerous and long. And from an examination of the whole, it is evident the amendments could not have been verified by oath, in such a manner as to make the

(u) 1 Turn. & V. 169.
(v) Id. ib. Hinde, 32.
(z) Pratt v. Bacon, 10 Pick. 129.
(a) 3 Paige, 78.
them intelligible, without incorporating them in this manner with the original matter, or preceding them with recitals, which would have made them longer than the whole amended bill now is, including the original matter. If it was necessary to attach the amended bill to the original bill on file, it was the business of the clerk to do it. But in point of fact, it is seldom done, as all the papers in the cause are usually placed together in the same bundle, and without sealing the original bill and the amendments together where there has been a re-engrossment of the whole bill. As no copy of the original bill had been served, and no answer put in, or appearance entered, at the time of the amendment, in this case, there could have been no particular use or benefit to the defendants, or to any one, in having the amendments marked, as such, in the re-engrossment, or in the copy of the amended bill which was served. But as this was an injunction bill, the defendant might probably have compelled a delivery of a copy of the bill with the jurat annexed thereto, as originally filed, in order to move to dissolve the injunction, in addition to the copy of the bill as amended.\(^b\)

An original bill cannot be amended by incorporating therein matters which have arisen subsequent to the commencement of the suit.\(^b\) Nor by inserting facts known to the complainant at the time of filing the bill; unless some excuse is given for the omission.\(^c\)

The *signature of counsel* is necessary to an amended bill, as well as to an original bill.\(^d\) Where, however, the same counsel who signed the original bill amends his former draft, which has his signature, it is not necessary that he should sign the draft again; as the signature will be applied as well to the amendments as to the former draft. Nor is it necessary that there should be a second signature to the record. But if the amendments are made by another counsel, then it is necessary that there should be a second signature either to the draft or to the engrossment.\(^e\)

The want of the signature of counsel to an amended bill is a good cause of demurrer.\(^f\) The defendant may also move to have it taken off the file, for that defect.\(^g\)

In a case where amendments were introduced into a bill irregularly, and the defendant, instead of coming to the court by motion to complain of the irregularity, put in his answer, in which he insisted upon the ob-

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\(^{b}\) Stafford v. Howlett, 1 Paige, 200.  
\(^{c}\) Webster v. Threlfall, 1 Sim. & Stu. 135.  
\(^{d}\) Whitmarsh v. Campbell, 2 Paige, 67.  
\(^{e}\) Kirkley v. Burton, supra.  
\(^{f}\) Kirkley v. Burton, supra.  
\(^{g}\) Pitt v. Macklew, 1 Sim. & Stu. 136, n.
jection and reserved to himself the same benefit of it as if he had pleaded it in bar; to which answer the complainant replied and set the cause down for hearing; the court, after ordering the amended bill to be taken off the file, and all the proceedings upon it to be set aside as irregular, held that although the defendants might certainly have prevented considerable delay and expense by bringing the objection immediately before the court, the costs ought to be borne by the complainants.\(^{(a)}\)

The proper course, however, to be pursued, in general, by the defendants, where a bill has been irregularly amended, is to apply to the court by motion either to have the amended bill taken off the file, or to have the amendments expunged. The former motion is applicable to cases where there has been a new engrossment, and the latter is adopted where the amendments have been merely made by interlineation of the old record.\(^{(i)}\)

Service of amendments.\(^{(j)}\) By the 43d rule of the court, no amendment is to be considered as made until it is served upon the defendant, if he has appeared in the cause.

According to the practice in England, the amended bill having been filed, (the order to amend having been previously served,) the complainant’s clerk in court should in cases where the order has been made upon the complainant’s undertaking to amend the defendant’s office copy, call upon the defendant to produce his office copy in order that it may be amended; and the defendant being thus apprised that the order to amend has been acted on, must leave his copy with the complainant’s clerk in court for that purpose.\(^{(k)}\)

But by our practice, the amendments should be served by delivering a copy of them, specifying the interlineations or passages stricken out, by the page and line, and any additions annexed to the bill, by the designating letter, and the page and lines where they are to be inserted.\(^{(l)}\)

Terms of amendment.\(^{(l)}\) The terms upon which the bill will be allowed to be amended under different circumstances, and in the various stages of a cause, are specified in the 43d, 44th and 45th rules of the court.

It has been decided that where a mere formal objection to the bill is made by demurrer \textit{ore tenus}, the complainant will be permitted to amend without costs.\(^{(m)}\)

\(^{(a)}\) Milligan \textit{v.} Mitchell, 1 Mylee & Craig, 433.

\(^{(i)}\) 1 Dan. 551.

\(^{(j)}\) Woodhouse \textit{v.} Meredith, 1 Jan. & W. 204.

\(^{(k)}\) 1 Hoff. Pr. 399.

\(^{(l)}\) Garlock \textit{v.} Strong, 3 Paige, 440.
Where the complainant amends his bill by striking out the names of some of the defendants, the order will only be granted on the terms of paying their costs; as by striking them out as defendants, the complainant deprives them of the opportunity of applying for their costs at the hearing.\(^{(n)}\)

\textit{Time to answer after amendment.}—Whenever the complainant is permitted to amend his bill, if the answer has not been put in, or a further answer is necessary, the defendant has the same time to answer after such amendment as he originally had.\(^{(o)}\)

\textit{Effect of amending bill.}—In general, an amendment before answer puts an end to all process of contempt which may have been issued for want of an answer; and the court will not allow an amendment to be made without prejudice to the process, even though the complainant undertakes not to require any further answer to the amendments.\(^{(p)}\)

It seems, however, that if a specific amendment were to be proposed, and it should appear evident that the case, so far as relates to the original defendants, would not be varied by it, an order to make such amendments would be granted without prejudice to the process. But this must be shown distinctly; otherwise the court will not interfere.\(^{(q)}\)

Upon a motion to amend without prejudice to process entered against some defendants for want of appearance, the master of the rolls in Ireland said he could not allow a bill to be amended without prejudice to process, unless every party who had appeared in the cause had notice of the application.\(^{(r)}\)

On a petition to amend after answer, and exceptions submitted to by adding new charges and new parties, the order provided that such amendments should not prejudice the injunction issued, nor invalidate the order for taking the bill \textit{pro confesso} against two of the defendants.\(^{(s)}\)

Another effect of amending a bill is, that if there are exceptions to the answer then pending, the amendment will be considered as having waived them.\(^{(t)}\) Where, therefore, a complainant, after taking exceptions to the answer, is desirous of amending his bill, he should make a special motion to that effect, and obtain an order that the amendment be without prejudice to the exceptions previously taken; unless indeed

\(^{(a)}\) Wilkinson v. Belcher, 2 Bro. 272. \(^{(e)}\) Rule 45.
\(^{(c)}\) Symonds v. Duchess of Cumberland, 3 Cox, 411. \(^{(f)}\) De la Torre v. Bernales, 4 Mad. 396.
\(^{(g)}\) Id. ib. \(^{(p)}\) Raymond v. O'Dell, 1 Hogan, 230. \(^{(q)}\) Beekman v. Waters, 3 John. Ch. 410.
the amendment consists in merely adding a defendant, and requires no further answer; which Lord Eldon considered an excepted case.\(^u\)

So the complainant cannot, in general, after he has amended his bill, take exceptions to the answer to the original bill, without the special order of the court.\(^v\)

Although the rule is inflexible that if a complainant who has obtained an injunction for want of an answer, amends his bill, he will lose the benefit of his injunction, unless the order by which the amendment is sanctioned expressly declares that it is to be without prejudice to the injunction, or has been obtained upon the allowance of exceptions;\(^w\) yet the rule is only to be understood as applying to cases where the injunction is a mere injunction to stay proceedings at law, and has been obtained in consequence of the defendant's default in not appearing or answering. Where an injunction has originally been granted upon an affidavit of merits, an order to amend without prejudice to the injunction may be obtained as matter of course, unless the bill has been already amended; in which case the court will not make an order to sanction a re-amendment unless notice is given, and the proposed amendments stated, and unless the court is satisfied, upon affidavits, that the amendments relate to facts of which the complainant had no knowledge to enable him to bring them sooner before the court.\(^x\)

What effect the amendment of the bill would have upon a *ne exeat regno*, does not appear to have been decided. In *Grant v. Grant*, \(^y\) however, Sir John Leach, upon a special motion being made before him for leave to amend a bill without prejudice to the *ne exeat*, refused to entertain the motion, although it was supported by an affidavit in which the amendments were stated, and notice had been served upon the bail as well as upon the defendant. His honor observing that he had an unqualified aversion to the writ of *ne exeat*, but should abstain from expressing any opinion that might prejudice the question; and that the complainant's counsel, if they were satisfied with the analogy which had been pointed out to the practice at law, might take an order to amend without the special reservation, or might abandon their motion, but that in either case they must pay the costs.

Any amendment of a bill, however trivial and unimportant, author-

\(^u\) De la Torre v. Bernales, 4 Mad. 396.  
\(^v\) Pratt v. Archer, 1 Sim. & Stu. 433.  
\(^w\) Jacob v. Hall, 12 Ves. 458.  
\(^x\) Sharp v. Ashton, 3 Ves. & B. 144.  
\(^y\) 2 Sim. 14  
\(^z\) Bliss v. Boscauen, 2 Ves. & B. 101, 102.
izes a defendant, though not required to answer, to put in an answer making an entire new defence, and contradicting his former answer. This was held in *Bolton v. Bolton*, (z) in which case the court, upon this ground, refused, with costs, a motion to take an answer to an amended bill off the file, which contradicted the original answer, and introduced no less than four new issues or defences.

And a defendant may not only answer an amended bill, but he may defend himself from the effect of the amendments by demurrer or plea; as where a complainant amends his bill and states a matter which has arisen subsequent to the filing of the bill, and properly the subject of a supplemental bill or bill of revivor. (a) And it has been held that a defendant may demur to an amended bill, even though he has previously put in a demurrer to the original bill. (b)

SECTION III.

DISMISSING BILL BY COMPLAINANT.

If the complainant, after the putting in of the defendant's answer, conceives that he shall not be able effectually to prosecute his suit, he may apply to the court for leave to dismiss his bill; either as against all the defendants, or against such of them as he thinks he can dispense with, with costs. This is a motion of course. (c)

The rule is well settled, by the English decisions, that the court will not, after appearance, make an order to dismiss a bill, on the complainant's application, without costs, except upon the defendant's consent actually given in court; (d) even though the ground of the application be that, upon the hearing of the cause, the court would have ordered it to be so dismissed, and the defendant, although served with notice, does not appear to oppose the motion. (e) But a complainant, where he has been admitted to sue in *forma pauperis*, may move to dismiss his bill without costs, except in cases where his admission in *forma pauperis* has taken place subsequently to the filing of the bill. (f) So where a

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(c) Cited 1 Dan. Pr. 519. (d) Id. ib. Anon. id. 140. See al-
(e) Mnf. 307, 390. 1 Atk. 39.
(b) Bancroft v. Wardour, 2 Bro. C. C. so Lewis v. Germond, 1 Paige, 300.
66. 2 Dick. 57. S. C. (e) Anon. 1 Ves. jun. 140. Fidelle
(c) Dixon v. Parks, 1 Ves. jun., 409. v. Evans, 1 Cox, 27. 1 Bro. C. C. 297.
defendant, by his own act, has rendered it impossible for the complainant to attain the object of his suit—e. g., by surrendering a lease, to obtain an assignment of which is the object of the suit, and the defendant afterwards absconds, the court will permit the bill to be dismissed without costs. (g) But not where the object of the suit is defeated by the complainant's own act or procurement. (h)

Where also an executor or administrator has commenced a wrong suit, by mistake, or has ascertained that it would be useless to proceed, in consequence of facts subsequently discovered, he will be permitted to discontinue without the payment of costs. (i)

In this state it is provided by statute, that upon the complainant in a court of equity dismissing his own bill or petition, or upon the same being dismissed for want of prosecution, the complainant shall pay to the defendant his costs to be taxed; except in those cases where, according to the practice of the court, costs would not be awarded against such complainant upon a decree rendered, on hearing of the cause. (k)

It has been decided that this provision only extends to those cases where prima facie the complainant would not be chargeable with costs on a decree dismissing the bill at the hearing; as in the case of suits by executors in right of their testators. (l) If the complainant would, prima facie, be chargeable with costs if the suit was decided against him at the hearing, the court will not examine the whole merits of the cause merely to ascertain whether there are any equitable circumstances which might excuse him from the payment of costs. (m)

If a solicitor files a bill in the name of a person, as complainant, without having a proper authority from him for so doing, the course for the party to pursue, if he wishes to get rid of the suit, is to move that the bill may be dismissed with costs, to be paid by the solicitor filing the bill. This motion may be made by the complainant in person, or he may, by warrant under his hand and seal, disclaim the bill as being brought without his order or privity, and empower some counsel to make the motion. (n)

If a bill be exhibited in the name of a married woman, against her husband, it may, upon affidavit that she knew nothing of it, or had not consented to it, be dismissed. (o)

(g) Knox v. Brown, 9 Bro. C. C. 186. (k) 2 R. S. 613, § 1.
(h) Hammeraley v. Barker, 2 Paige, 372. (l) Id. ib.
(i) Arnoux v. Steinbrener, 1 Paige, 82. (m) Id. ib.
(n) Prac. Reg. 172. (o) Id. 90.
A motion to dismiss a bill as having been filed without the privy or consent of the complainant, must be accompanied by an affidavit of the complainant himself that the bill had been filed without any authority from him. And to avoid the effect of such an application, the solicitor against whom it is made, must show distinctly, upon affidavit, that he had a special authority from the party to institute the suit; and it will not be sufficient to assert, generally, that authority had been given.(p)

If the name of a person is made use of in a bill as co-complainant with others, without his consent, he may move that his name be struck out, and that the solicitor who filed the bill may be ordered to pay the costs.(q) Such motion should be made at the earliest possible opportunity after the fact has come to the complainant's knowledge; for if there has been acquiescence or laches on the part of the complainant making the application, it will not be granted.(r)

And it seems that even when the suit is not disavowed, one co-complainant may dismiss a bill with costs, as far as concerns himself; and it is said that he may do so on motion of course.(s) But in a more modern case,(t) it is stated that counsel appeared, and that the court refused to make an order for such dismissal, unless upon terms framed so as to protect the other complainants in the suit from injury. The mere circumstance, however, that the rights of the complainant applying to be dismissed are concurrent, with those of the complainants who remain, will not be a sufficient reason for refusing the motion; since any defect which his withdrawal may make in the record, may be supplied by making him a defendant, by amendment.(u)

In the case of Langdale v. Langdale,(v) it was held that one of several complainants may have the bill dismissed as to himself, upon consent of the defendant, and without notice to, or consent of his co-complainants.

It is a rule that one complainant cannot be examined as a witness for another. In order to procure his testimony, the proper course is to move for an order that his name be struck out of the bill. But as the defendant has a right to the responsibility of each of the complainants for costs, security for the costs up to the time of the application must be given.(w)

(q) Wilson v. Wilson, 1 Jac. & W. 457.
(r) Dans v. Dutens, 9 Cox, 335. 1 Ves. jun. 196, S. C.
(t) Holkirk v. Holkirk, 4 Mad. 51.
(u) 2 Dn. 355.
(v) 13 Ves. 167.
(w) Loyd v. Makean, 6 Ves. 145.
A complainant may move to dismiss his own bill with costs, as a matter of course, at any time before the decree.\(x\) After a decree, however, the court will not suffer a complainant to dismiss his own bill unless upon consent\(y\)—for all parties are interested in a decree, and any party may take such steps to have the effect of it, as he may be advised.\(x\)

And it seems that, after a decree upon a creditor’s bill, the bill cannot be dismissed even by consent of all who have come in. There must be a re-hearing or appeal.\(a\) Though before a decree upon a creditor’s bill is had, such a bill may be dismissed by consent, and the money in court paid to the complainants.\(b\)

In cases other than creditor’s bills however, if, upon the hearing of the cause, the court has merely directed inquiries, by a reference or issue, to satisfy the conscience of the court preparatory to its giving judgment, the complainant may, before the trial of the issue, or proceeding upon the reference, obtain an order to dismiss the bill with costs.\(c\) But if the issue has been tried and determined in favor of the defendant, the complainant cannot move to dismiss, because the defendant may have it set down on the equity reserved in order to obtain a formal dismissal of the bill, so as to enrol it as a final judgment, and thereby make it pleadsable.\(d\)

With regard to the effect of a dismissal of the bill by the complainant, it may be stated, as a general rule, that a voluntary dismissal of a bill by the complainant, or a voluntary dismissal upon any interlocutory proceeding, will not prevent a new bill from being filed. It is not pleadsable unless it is a dismissal by the court upon the hearing.\(e\) But a dismissal of an original bill on motion of the complainant is a good bar to a bill of revivor and supplement, or either, founded upon it.\(f\)

\(\text{(z) Carrington v. Holly, 1 Dick. 281.}\) \(\text{(y) Guilbert v. Hawles, 1 Ch. Ca. 40.}\) \(\text{(z) 1 Dick. 281.}\) \(\text{(y) Anon. 11 Ves. 169.}\) \(\text{(c) Carrington v. Holly, ubi supra.}\) \(\text{(d) Id. ib.}\) \(\text{(a) Lashley v. Hogg, 11 Ves. 603.}\) \(\text{(e) Brandlyn v. Ord, 1 Atk. 571.}\) \(\text{(b) Wood v. Westall, 1 Young, 305.}\) \(\text{(f) Bowden v. Beauchamp, 2 Atk.}\) See also White v. Lord Westmeath, 82. Beat. 174.
SECTION IV.

MOTION FOR PRODUCTION AND INSPECTION OF PAPERS, &C.

*General principles respecting.*] Previous to the final hearing of a cause, the court only orders the production of books and papers upon two principles—security pending the litigation, and discovery or inspection for the purposes of the suit in this court. (g) And it will not make an order which will amount to an anticipation of the final decree, by giving the complainant any other advantages from the production than those above mentioned. (h)

Where the answer admits that the defendant is in possession of deeds or documents, the court will, upon motion or petition founded upon the admission in the answer, and upon evidence that the complainant has a direct and immediate interest in such deeds or documents, grant an order for their production. (i) This is a special motion, and notice must be given of it.

A motion for production cannot be founded upon an affidavit that a deed is in the defendant's possession. An admission in the answer is necessary, and in order to obtain such an admission, leave to amend the bill will be given when requisite, although the cause is at issue. (k)

If the answer offers to produce the deed or documents for the inspection of the complainant, an order for their production, and giving leave to the complainant to inspect them, will be made on reading the admission and upon notice. (l)

A voluntary offer of this nature by the defendant is considered as dispensing with some of those safeguards which the practice affords him. But an offer to produce a deed as the court shall direct, or if the court shall require it, is not a voluntary but a qualified offer which ought not to fix the defendant. It is merely a submission to the discretion of the court, and only binds the party to produce the paper if the court shall think it necessary. And upon such a qualified offer the court will enter fully into the merits of the question as to the right of the complain-

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(g) Watts v. Lawrence, 3 Paige, 159. Wiswall, 2 Paige, 369. 1 Jac. & W. 237.
(4) id. ib. Lingen v. Simpson, 6 Mad. 990.
(l) 2 Fowl. Ex. Pr. 54.
ant to the inspection, and be satisfied that the defendant cannot be prejudiced, before it will order such production.\(m\)

To entitle the complainant to an order for the production of documents before the hearing, or issue joined, or publication, the documents must be described in the answer or schedule with reasonable certainty so as to be considered incorporated with the answer by the reference to them. And they must be admitted by the answer to be in the defendant’s possession or power. It must further appear that the complainant has an interest in the production of the papers called for.\(n\) A mere general reference to them, in the answer without describing them, is not sufficient.\(o\) As where the defendant “for greater certainty refers to the books of account of the said partnership, in case the same shall be ordered to be inspected by the complainants;” or alleges certain facts as appearing from the said books and accounts; or where he speaks of books, papers, and writings of R. in his possession;\(p\) or where an answer admits that such a deed was executed, and craves leave to refer to it when produced.\(q\) So, merely stating the contents of a deed is not sufficient to entitle the complainant to an order for its production.\(r\)

Nor is a reference to papers, in the answer, sufficient, without an admission also that they are in the custody or power of the defendant.\(s\)

The rule for producing papers rests upon the principle that the papers are, by the reference to them in the answer, incorporated therein and made a part of it.\(t\)

Yet the mere circumstance of a defendant incorporating a deed in his answer, whether by referring to the schedule or otherwise, is not a ground for compelling its production, if in other respects such production would be inequitable. Thus, the court will not upon motion, before the hearing, compel an incumbrancer to produce, at the hearing, deeds which are admitted by his answer, but which are his title deeds; even though the complainant may have an interest in them.\(u\)

But if the defendant in his answer, states the effect of documents admitted to be in his possession, yet for greater certainty craves leave to

\(m\) Atkins v. Wright, 14 Ves. 211.
\(n\) Stanhope v. Roberts, 2 Atk. 213. 4 John. Ch. 385. 6. 1 Fowl. Pr. 46.
\(p\) Watson v. Renwick, supra.
\(q\) Darwin v. Clarke, 8 Ves. 158.
\(r\) Erakine v. Bize, 2 Cox’s Ca. 226.
\(s\) Gibbons v. Ogden, supra.
\(t\) Evans v. Richard, 1 Swanst. 7.
\(u\) Sparke v. Montrio, 1 Young & Col. 103. Sampson v. Swettenham, 5 Mad. 16.
refer to them when produced, the complainant is entitled to move for their production, although the answer positively states that they form part of the defendant's title, and in no way assist or make out the title of the complainant.(v)

What is a sufficient possession by defendant.] As respects the kind of possession of a document which will induce the court to order the defendant to produce it, it has been held that it must be a present possession; and that an admission that at a certain time past it was in the defendant's possession, was not sufficient.(w) But it need not be an actual personal possession. Therefore where books and papers, the joint property of the defendants and of other persons not before the court, were admitted by the answer to be in the custody of a third party as the common agent of all, an order was made upon such agent to permit an inspection by the complainant, against the consent of those owners who were not parties; on the principle that the court has a right to give the complainant whatever access the defendant himself would be entitled to.(x) So, if papers belong to a defendant, they are in his possession, custody, or power, although they may be in a foreign country, or are coming over to this country; and the court will order the defendant to produce them within a reasonable time.(y) And where books, papers, or writings are in the custody or hands of the defendant's solicitor, they are considered as being in the defendant's own custody or power, and he will be bound to produce them.(z) But the court will not, in such a case, make an order upon the solicitor; for he may have a lien on the papers, as against his client.(a) And where the defendant is ordered to produce papers which are in the hands of his solicitor, he must pay his bill of costs, if he cannot otherwise procure them.(b)

In the case of Fencott v. Clarke,(c) a voluntary deed belonging to the defendant, which the bill impeached for fraud, and which was in the custody of the defendant's solicitor, who claimed a lien on it, was ordered to be produced for the complainant's inspection, after it had been proved by the defendant, and publication had passed. But the court

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(w) Heeman v. Midland, 4 Mad. 391.
(a) McCann v. Breere, 1 Hogan, 139.
(b) Ex parte Shaw, Jac. 272.
(c) 8 Sim. 8.
will not order a defendant to produce letters which passed between him, and his solicitor, in the relation of solicitor and client, in the progress of the cause, or with reference to it, previously to its being instituted, or which contain legal advice. (d) Nor will it order the production of a correspondence between the solicitor of the defendants and a person not a party to the suit. (e)

Complainant’s interest in documents.] With regard to the nature of the interest of the complainant in a deed or document which will entitle him to an order for its production, it is laid down as a general rule that if the applicant has what is termed a common interest in the instrument, with the other party, he is entitled to the production. (f) And this term embraces the interests of landlord and tenant; (g) principal and agent; (h) copartners; (i) trustees and cestuis que trust; (k) and tenants in common. (l)

The complainant is entitled to the production of a deed which sustains his title; but he has no right to the production of a deed which is not connected with his title, and which gives title to the defendant. (m) A mere interest in such deed, on the part of the complainant is not sufficient. (n)

If, however, the defendant has in his possession a deed relating to the title of both parties, production of it will be ordered. (o) So if the complainant has a direct interest in deeds in the defendant's possession and they do not relate solely to any separate and independent title of the defendant, they will be ordered to be produced. (p)

An heir at law is not entitled to a general inspection of deeds, &c. in the hands of a devisee; because his title does not depend upon documentary evidence. But an heir in tail is entitled to inspect all deeds creating or relating to the entail. (q)

An application on behalf of a party having a vested interest in reversion, remainder, or otherwise, in real property expectant on a life interest in


(e) Curlling v. Perring, 2 My. & Keen, 290.


(g) Smith v. Duke of Northumberland, 1 Cox’s Ca. 362. Inman v. Hodgson, 1 Young & Jer. 28.


(i) Kelly v. Eckford, 5 Paige, 548.

(j) Sparke v. Montrou, 1 Young & Col. 102. (k) 1 Hoff. Pr. 310.

(l) Tyler v. Drayton, 2 Sim. & Stu. 309. 5 Mad. 16.

(m) Sparke v. Montrou, supra.

(n) Bolton v. Corporation of Liverpool, 3 Sim. 489.

(p) Attorney Gen. v. Ellison, 4 Sim. 238.

(q) Lady of Shaftbury v. Arrowsmith, 4 Ves. 66. See 3 Sim. 459.
possession, for the production of the title deeds for the inspection of the remainderman or reversioner, to enable him to mortgage his interest, will not be entertained by the court.\(^r\)

In a suit between partners, upon the application of either party, and in any stage of the suit, the adverse party will be compelled to deposit the partnership books and papers which are in his possession or under his control, in the hands of an officer of the court for the inspection of the party making such application, and that he may take copies if necessary.\(^s\) This is upon the principle that both parties have an equal right to the inspection of such books and papers, and an equal interest in them.

Where, however, a document is not put in issue by the complainant in his bill, which is for an account of partnership dealings, but it is stated in the answer as part of the defendant’s defence, and admitted to be in his possession, and is offered to be brought in, an order for its production will not be granted if no partnership property is shown in it.\(^t\)

It does not establish a sufficient interest in a title deed relating to real estate, to warrant an order for its production, that if its effect be such as is sworn to by the party claiming the estate under it, legatees will lose the benefit of legacies bequeathed to them by that party’s ancestor, from whom he immediately derives title.\(^u\)

Upon a bill of discovery in aid of an action to try whether the complainant’s house was within the limits of a certain parish, and therefore liable to the parochial rates, the court ordered the defendants, the parish officers, to produce for his inspection the rate books, account books, and minute books, orders and other documents which related to the matter in question, and were admitted by their answer to be in their possession.\(^v\) So where a tithe collector’s books are admitted by the answer of: the rector to be in his possession or power, and to relate to the matters in the bill mentioned, they will be ordered to be produced for the usual purposes; although the defendant states that they will not in any manner, assist or make out the complainant’s case.\(^w\)

In the case of Bolton v. Corporation of Liverpool,\(^x\) the complainants filed their bill alleging that the defendants had in their custody

\(^{r}\) Shaw v. Shaw, 12 Price, 163.  
\(^{s}\) Burrell v. Nicholson, 1 My. & Keen, 680.  
\(^{t}\) Kelly v. Eckford, 5 Paige, 549.  
\(^{u}\) Sheha v. Glyn, 2 Moll. 387.  
\(^{v}\) Wilson v. Forster, McCle. & Young, 374.  
\(^{w}\) Newton v. Beresford, 1 Young, 377.  
\(^{x}\) 3 Sim. 467.
cases for the opinion of counsel, by which it would appear that the defendants had no right to levy the dues, and also various charters, deeds, &c. by which the truth of the statements in the bill would appear. The defendants admitted in their answer that they had in their custody several cases, two of which were prepared many years ago and without reference to the existing proceedings, but which contained mistaken representations as to the nature of their title to the dues, and the rest of which were prepared, pending, or in contemplation of the existing proceedings; and that they also had in their custody charters, deeds, and copies of accounts from public offices, which evidenced their title to the dues. A motion by the complainants for the production of all the documents, was granted as to the two old cases only. This decision was upon the ground that the papers not ordered to be produced only evidenced the title of the defendants, and not the title of the complainant.

Other cases in which production will be ordered.] It is the practice of the court to order deeds and other papers contested as false and fraudulent to be brought into court for inspection. And this will be done under special circumstances, although the deed sought to be impeached is in the custody of a purchaser for a valuable consideration. But a deed, though impeached for fraud, will not be ordered to be taken out of the defendant's hands and left in an officer's possession before the hearing, except in a special case; as where there is reason to suppose the deed will not be forthcoming.

Where a solicitor refused to allow a deed in his possession to be proved on behalf of the complainant, because he had a lien on it for costs due from the defendant, he was ordered to produce the deed at his own expense, and to pay all the costs consequent on his refusal.

Under the general charge in a bill, that the defendant has divers papers, writings, &c., in his possession or power, relating to the matters in the bill mentioned, the complainant is entitled to the production of cases submitted for the opinion of counsel, admitted by the answer of the defendant to be in his possession, but not to the opinions given upon those cases. Though a complainant is, generally speaking, entitled

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(10) Braislington v. Brasington, 1 Sim. & Stu. 455.
(11) Kennedy v. Green, 6 Sim. 6.
(12) Preston v. Carr, 1 Young & Jer. 175.
to the production and discovery of all papers relating to the matters in the bill mentioned, in the defendant's possession or power; yet it seems that he is not entitled to the production of letters stated by the answer of the defendant to have been received by him since the filing of the bill, in answer to inquiries made by him in respect to some of the matters in question, with a view to his proofs in the cause, nor to any particulars respecting such letters, which would disclose the names of the witnesses, or the facts likely to be proved by them. (d)

So upon a bill which sought to charge a solicitor with a fraud practiced on the complainants in the course of proceedings on his client's behalf, the court refused to order the production of entries and memorandums contained in the defendant's books, or of written communications made or received by him, relating to those proceedings, and admitted by the answer to be in the defendant's custody. (e)

The court will not, on motion by a defendant, compel a complainant to produce documents in his possession, although the defendant swears that an inspection of them is necessary to enable him to answer the bill. (f) But if the complainant, upon request, refuses to permit the defendant to inspect such documents, he cannot afterwards object that the answer is insufficient in not stating their contents. And where the books or documents of the complainant are material for the defendant's defence of the suit, the defendant must file a cross bill against the complainant for the discovery of them. (g)

Mode of inspecting documents, &c.] Where a party establishes his right to inspect books in the adverse party's possession, it is of course to grant the order for inspection, with liberty to take copies. (h) The defendant may seal up such parts of the books, &c. as he swears do not relate to the claims of the complainant. (i)

It seems to be a rule, that under an order for inspection, the examination may be conducted without the presence of the defendant or his solicitor. The papers must be delivered into the possession of the officer of the court, to be open to the view of the complainant whenever he pleases; and it will not be a compliance with the order, to deposit a box containing the papers, under lock, with a notice to send for the key.

(d) Preston v. Carr, 1 Young & Jer. 175.
(e) Greenough v. Gaskell, 1 My. & Keen 98.
(f) Penfold v. Nunn, 5 Sim. 409.
(g) Kelly v. Eckford, 5 Paige, 548.
(h) Hide v. Holmes, 9 Moll. 372.
(Denning v. Smith, 3 John. Ch. 409. 5 Paige, 548.)
whenever it is wanted. (k) In the master's office, however, when papers are produced, it is the practice to give notice of inspection to the opposite party. (l)

Where books, papers, and writings, mentioned in a schedule to the defendant's answer, are deposited by the defendant with his clerk in court for the inspection and examination of the complainant, under the usual order for that purpose, the defendant is entitled to have them restored to him as soon as such inspection and examination have taken place, and the complainant is entitled to have them retained in the custody of the clerk in court, notwithstanding it may be necessary that they should be produced before the master in taking the accounts directed by the decree, or in the hearing of an appeal from the decree. (m)

SECTION V.

MOTION FOR THE PAYMENT OF MONEY INTO COURT.

In some cases, the court, upon the application of the complainant, will order money in the hands of a defendant to be paid into court by him, to abide the event of the suit. The time at which the application for this purpose is usually made, is after the defendant's answer has been put in. But it may be made at any stage of the cause, provided the court is satisfied that money in which the complainant has an interest is in the defendant's hands, who has no equitable right to it, or that it is in danger of being lost.

Thus, the application for payment of money into court may be made either upon an admission in the defendant's answer, or, under special circumstances, upon affidavit before answer. Therefore, in a case of gross fraud appearing, the court, upon the affidavit of the complainant, and upon consideration of the affidavit of the defendant in answer thereto, ordered money to be paid into court before answer, upon a special application of which notice was given. (n) But the court, will not, in any case, order money to be paid into court before answer, where there is a probability of a balance in favor of the defendant. (o)

(k) Preston v. Carr, 1 McCle. & Y. 457.
(m) Small v. Atwood, 1 Young & Col. 37.
(n) Jervis v. White, 6 Ves. 737.
(o) Id. ib.
In what cases proper.] The cases in which the application for this order is most usually made are, upon admissions—in cases of executors and trustees—and vendors and purchasers.

1. Upon admissions.] Where the defendant’s answer contains a clear admission that there is trust money in his hands, the court will always, on an interlocutory application, order it to be paid into court. (p)

Formerly, in order to move for payment of money into court, upon an admission in the defendant’s answer, it was thought necessary, where the defendant was an executor, to show that he had abused his trust, or that the fund was in danger from his insolvent circumstances. (q) But by the present practice, money may be ordered to be paid into court, on motion, upon the ground of admission alone. (r) These admissions may be made by the answer, or by schedules, or books containing an account of receipts and payments, and referred to, so as to be part of the answer; but not upon the affidavit of an accountant that from the schedules to the answer, and from the books of account not made part of the answer, such a balance was due. The reference to books must be sufficient to make them parts of the answer or examination. (s) The motion, however, may be founded upon the schedules to an examination added up under oath, where the defendant has omitted to add them up. (t)

The admission may also appear from the examination of the defendant before the master. (u) And if after the defendant’s examination on interrogatories, and motion for the payment of money into court founded thereon, the complainant is permitted to file further interrogatories, under which he extracts an admission of a further sum in the defendant’s hands, it will also be ordered to be paid into court. (v)

Where the defendant, who is sued as an executor, admits that he has money of the testator in his hands, he cannot protect himself from payment of the amount into court, by alleging that he has lent it upon a promissory note bearing interest. (w) For it is a well settled rule that, however wide the power given to executors, by the will, to lend the assets, they cannot lend upon personal security; and if so lent, the court will, upon motion, before hearing, make them bring in the money. (x)

So if an executor admits a large balance of the personal estate to be

(q) Strange v. Harris, 3 Bro. C. C. 365.
(r) Mills v. Hemson, 8 Ves. 67.
(s) Id. ib.
(t) Id. ib.
(u) Id. ib.
(w) Vigors v. Binfeld, 3 Mad. 89.
(x) Morissey v. Foley, 2 Molloy, 348.
in his hands, he will be ordered to pay the whole into court, although he states an action at law is depending against him for a debt, to a considerable amount, due from the testator; but with liberty, in case the complainant in the action at law should recover, to apply to the court to have a sufficient sum paid out again. And if the complainant in the action at law recovers, the court will order the amount to be paid out to him and not to the executor.\(^{(y)}\) So, if an executor admit a balance due from him to the testator, upon an unsettled account, he will be ordered to pay the amount into court, notwithstanding there are debts of the testator still outstanding, if the testator has been dead three years before, within which time all the debts ought to have been paid.\(^{(z)}\)

In general, a partner in trade admitting the receipt of money, but insisting there is a balance in his favor, will not be ordered to pay the sum in his hands into court; but if he has received it contrary to good faith, and which he ought not to have received, he will be ordered to bring it into court.\(^{(a)}\)

But although a defendant makes an admission which would entitle the complainant to a decree, the complainant cannot for that reason, move for payment of money into court.\(^{(b)}\)

\(^{2}\). \textit{In cases of executors and trustees.} An executor admitting himself to be a debtor to the testator at the time of his death, will be ordered to pay the debt into court.\(^{(c)}\) So, also, where in a suit by legatees against an executor, he admits a balance due them, on his examination, the court will order him to pay it into court, before report.\(^{(d)}\) So where the master reports a balance in the hands of an executor, and the party interested calls for the investment of it pending an appeal by the executor, the court will compel the executor to bring in the sum reported.\(^{(e)}\) And money admitted by an executor to be in the hands of his partner, is considered in his own hands, for the purpose of being ordered to be paid into court.\(^{(f)}\)

As a general rule, upon a bill filed against an executor or administrator for a distribution of the estate of the decedent, if it appears that there is a clear balance in his hands uninvested, beyond all just claims made by him upon the fund, such balance will be directed to be brought into court and invested pending the suit.\(^{(g)}\) But the mere fact that an executor is an octogenarian, if he is in possession of his faculties in

\(^{(y)}\) Yare v. Harrison, 2 Cox, 377.  
\(^{(z)}\) Mortlock v. Leathes, 2 Mer. 491.  
\(^{(a)}\) Foster v. Donald, 1 Jac. & W. 253.  
\(^{(b)}\) Peachham v. Daw, 3 Mad. 98.  
\(^{(c)}\) Rothwell v. Rothwell, 2 Sim. &;  
\(^{(d)}\) Curgyvao v. Pateras, 3 Anst. 751.  
\(^{(e)}\) Carmichael v. Wilson, 3 Moll. 92.  
\(^{(f)}\) Johnson v. Ason, 1 Sim. & Sta. 75.  
\(^{(g)}\) Hosack v. Rogers, 6 Paige, 415.  
Stu. 819.
other respects, is not a sufficient reason for taking the property out of his hands.\(^{(A)}\)

Where the application is against an executor or trustee, the admission is all that is required. It need not appear that the fund was in danger or insecure.\(^{(i)}\)

Where, by a marriage settlement, moneys were directed to be laid out on government or real securities, and the trustees had lent the money to the husband, on bond, they were ordered, on motion, to pay the money into court.\(^{(k)}\)

Though executors have a power of laying out money on good and sufficient security for an infant, yet, after a decree for an account, and notice to them by the prochein amy not to lend the money on mortgage, they will be ordered to pay it into court, but not to the extent of replacing the amount by so much stock as the same would have produced at the time of the investment;\(^{(l)}\) for after a decree an executor cannot deal with the assets, for the purpose of investment, without leave of the court.\(^{(m)}\)

3. In cases of vendor and purchaser.\(^{(n)}\) The court will also, upon motion, order the purchaser of an estate, being in possession under the agreement, to pay the purchase money into court, where he has approved of the title;\(^{(n)}\) or even in a case where it appears upon the face of the abstract that the title is bad, but the purchaser has sold the estate to another person;\(^{(o)}\) or where a time is fixed for the payment of the purchase money by instalments, and the property is a coal mine, and the defendant is deriving a benefit from working it;\(^{(p)}\) or where the purchaser exercises acts of ownership on the estate, as by cutting down timber and underwood;\(^{(q)}\) or where the purchaser has taken possession without the consent or privity of the vendor.\(^{(r)}\) But if the vendor permits the purchaser to take possession before the completion of the title, without any stipulation as to the purchase money, he cannot, on motion, have the purchase money paid into court.\(^{(s)}\) Yet the court will not permit a purchaser in possession with the assent of the vendor, or under an agreement, to commit acts of ownership tending to alter the nature

\(^{(i)}\) Strange v. Harris, 3 Bro. C. R. 365.\(^{(p)}\) Buck v. Lodge, 18 Ves. 450.
\(^{(k)}\) Blake v. Blake, 9 Sch. & Lef. 26.\(^{(q)}\) Burroughs v. Oakley, 1 Mer. 59, 378.\(^{(m)}\) Collis v. Collis, 2 Sim. 365.\(^{(r)}\) Dixon v. Asley, 1 Mer. 132, 378.
\(^{(l)}\) Widdowson v. Duck, 3 Mer. 494.\(^{(s)}\) 2 id. 499.\(^{(n)}\) McKim v. Thompson, 1 Bland, 161.
\(^{(n)}\) Walters v. Upton, Coop. 95, n. Boothby v. Walker, 1 Mad. 107.
\(^{(o)}\) Clark v. Elliott, 1 Mad. 606.
of the property which constitutes the security of the vendor.\(t\) And affidavits have been allowed to be read, under those circumstances, to show that acts of this nature have been committed, even though the bill should contain no allegation to that effect.\(u\) Such affidavits may be read upon motion made after answer is put in. And slighter acts of ownership are sufficient to call for this interference of the court, where the acts were committed after the discovery by the purchaser of the objections to the vendor's title, than where the objections have arisen subsequently, and there is no evidence of acts committed since the discovery made.\(v\)

But if the possession of the purchaser is not under the contract of purchase, but prior to, and independent of it, the purchaser will not be compelled to pay his purchase money into court, particularly if there has been laches in the vendor in making out his title.\(w\)

4. In other cases, and generally.] The general rule, as to the payment of money into court, is that the complainant must be solely entitled, or have such an interest jointly with others as to entitle him, on behalf of himself and of those others, to have the fund secured.\(x\)

If it appears upon a master's report that the defendant is indebted, the balance thus ascertained will be directed to be paid into court, before the hearing.\(y\) But if the report is excepted to, the court will not, pending the exceptions, order the money to be paid in. Yet where it is evident that the exception is taken merely for delay, the complainant may apply for the immediate hearing of the exception.\(z\)

The application for the payment of money into court, upon a master's report of the amount due, should not be made until such report has been confirmed by the court, or the exceptions thereto have been disposed of.

Money may be ordered to be paid into court after the usual decree for an account, and before the hearing on further directions.\(a\)

It is competent for the court, on the hearing of exceptions, at the same time it allows an exception taken by the defendant and directs the master to review his report, generally, to order the defendant to pay a

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\(t\) Bradshaw v. Bradshaw, 2 Mer. 499.  
\(u\) Cutler v. Simons, 2 Meriv. 103.  
\(v\) Wickham v. Evered, 4 Mad. 53.  
\(w\) Dixon v. Astley, 1 Mer. 133, 135.  
\(x\) 19 Ves. 564, S. C.

\(a\) Freebody v. Perry, Coop. 9.  
\(b\) Fox v. Birch, 1 Mer. 105.  
\(c\) Freeman v. Fairlie, 3 Mer. 29.  
\(d\) Gordon v. Robby, 3 Ves. 572.  
\(e\) Creak v. Capel, 6 Mad. 114.  
\(f\) Wood v. Downes, 1 Ves. & B. 49.
sum of money into court, if it is satisfied that ultimately that sum will be found due from the defendant.  

Upon moving, on the answer of the defendant, for the payment of money into court, the complainant may show that upon the case stated in the answer he has an interest in the sum in question, or that a larger sum is due than is admitted, though the defendant, in his answer, expressly denies that the complainant has any such interest, or that such sum is due.  

Where an executor admitted that he had received certain sums, but said he had paid money on account of the estate, without specifying the amount, he was allowed to verify the amount by affidavit, and was ordered to pay the actual balance only into court.  

Although the court has no authority to make any compulsory order on any person not a party to the suit, yet it will order that a person who had received money on behalf of the complainant, previous to the suit, although not a party, may be at liberty to pay the amount into court.  

The court will, in general, only order the principal sum due from the defendant to be paid in, and not the interest.  

But where a defendant, by his answer, admits that he has received a principal sum, and interest to a greater amount, he will be ordered, on motion, to pay in the interest.  

In what time money to be paid in.] If the court is satisfied that the order applied for ought to be made, the defendant is directed to pay the money into court on a certain day named in the order; the practice of ordering it to be paid “forthwith” being altered.  

Effect of paying money into court.] It is provided by statute that the party bringing money into court, pursuant to an order thereof, shall in all cases be thereby discharged from all further liability, to the extent of the money so paid in.  

Money, how deposited and invested.] All money brought into court and paid to the register or assistant register, for or by any suitor, is to be deposited in such banks as the court shall direct; and accounts thereof are to be kept in such manner and form as the court shall direct. When such money is paid to a clerk of the court it is to be deposited in

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(6) Brown v. De Tastet, 4 Russ. 126.  
(c) Domville v. Solly, 2 Russ. 373.  
(d) Anon. 4 Sim. 359.  
(e) Francis v. Collier, 5 Mad. 75.  
See Johnson v. Chippendale, 2 Sim. 55.  
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(6) Brown v. De Tastet, 4 Russ. 126.  
(f) Wood v. Downes, 1 Ves. & B. 49.  
(g) Fairly v. Freeman, cited 1 Ves. & B. 50.  
(h) Higgins v. ———, 8 Ves. 381.  
(i) 2 R. S. 171, § 94, (orig. § 31).
such bank, and the accounts are to be kept in such manner and form, as
the vice chancellor shall direct.\(^k\)

The chancellor may cause any monies brought into court pursuant to
his order, to be invested in any public stock, or to be placed at interest,
on approved landed security, and from time to time to be transferred or
disposed of as he shall think proper. And the same power may be ex-
ercised by a vice chancellor in respect to monies paid into court pur-
suant to any order of such vice chancellor.\(^l\)

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**CHAP. VIII.**

PROCEEDINGS ON THE PART OF THE DEFENDANT PREVI-
OUS TO REPLICAITION.

Sect. 1. Motion to dismiss Bill.
2. Cross Bill.
3. Putting Complainant to his Election.

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**SECTION I.**

MOTION TO DISMISS BILL.

The 65th rule of the court provides that if the complainant does not
reply to the defendant's answer within ten days after it is deemed to be
sufficient, (see Rule 50 as to the time when it is to be deemed sufficient,) he
shall be precluded from replying, and the cause shall stand for hear-
ing on bill and answer, and either party may notice it for hearing as
soon as it is in readiness for hearing against the other defendants, if any
there are.

Where the complainant amends his bill, after answer, however, he
cannot file a replication to the original answer, until the time for an-
swering the amended bill expires; although he waives a further an-
swer to the amendments.\(^a\)

\(^k\) 2 R. S. 171, §§ 20, 21, (orig. (a) Richardson v. Richardson, 5
Paige, 68.
\(^l\) Id. § 94.
By the 66th rule it is provided, that where the cause stands for hearing on bill and answer against part of the defendants, if the complainant does not use due diligence in proceeding against the other defendants, any of those who have perfected their answer may apply to dismiss the bill for want of prosecution; and on such application further time shall not be allowed to the complainant, of course, without any excuse shown for the delay.

This rule applies only to a case where there is more than one defendant. In case of a sole defendant, the motion is unnecessary; as, under the 65th rule, he can speed the cause by noticing it for hearing himself on bill and answer, after the expiration of ten days from the time when his answer is deemed sufficient; unless a replication is filed within that time.

Accordingly, in the case of Whitney v. The Mayor, &c. of New-York, (b) the court decided that a motion by a defendant to dismiss the bill for want of prosecution, can only be made where there are other defendants against whom the cause is not in readiness for hearing, by the neglect of the complainant to expedite the proceedings against them. And that where the defendant himself is in a situation to notice the cause for hearing, a motion to dismiss for want of prosecution will not be granted. (c)

Where the defendant's answer is accompanied by a plea or demurrer, he cannot obtain an order to dismiss the bill for want of prosecution, until the demurrer or plea have been disposed of. (d)

Neither can the defendant, by the English practice, move to dismiss the bill after the complainant has obtained and served an order to amend. (e) But merely obtaining an order to amend, if it is not drawn up and served before the defendant moves to dismiss, will not prevent the dismissal of the bill. (f) The order to amend will, however, be in time, if it be drawn up and served before the motion to dismiss is actually made; although it be after notice of the motion has been served. (g)

But by our practice, as we have already seen, amendments may be made without a special order of the court, except in cases of injunction bills. And indeed amendments of course may be made without entering any rule or order for that purpose. But no amendment is to be

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(b) 1 Paige, 548.
(c) See also Vermilyea v. Odell, 4 668.
(d) 2 Dan. Pr. 356, 85, 391.
(e) Gully v. Van Bodiscoe, 5 Sim. Paige, 131.
(f) Anon. 7 Ves. 299. Morris v. Owen, 1 Ves. & B. 593.
(g) Peacock v. Sieve, 5 Sim. 563.
considered as made until it is served upon the defendant, if he has appeared.\(^{(k)}\)

If, upon the hearing of a cause, it is ordered to stand over, with liberty to the complainant to amend his bill by adding parties, in pursuance of which the complainant amends, but does not proceed any further, the defendant may move specially to dismiss the bill for want of prosecution, and is not bound to set the cause down again.\(^{(i)}\) And it seems that if the order allowing the cause to stand over directs that it shall stand over for a limited time, within which the complainant is to add the necessary parties, in default of which, the bill is to be dismissed with costs, and the complainant does not add the parties within the limited time, no further application need be made to dismiss the bill; as it is already out of court.\(^{(k)}\)

If notice of motion to dismiss for want of prosecution be given for too early a day, the defect is not cured by the motion being accidentally postponed to a day when it might have been regularly made.\(^{(l)}\)

The defendant cannot move to dismiss the bill for want of prosecution pending an abatement of the suit by the death, marriage, or bankruptcy of a complainant.\(^{(m)}\)

It has been decided in this state, however, that upon the abatement of a suit by the death of one of several complainants, it is at the election of the surviving complainants whether they will revive the suit. And the court will limit a time within which they shall make that election; and if they do not revive within the time limited, the court will order that they be precluded from any further prosecution of the suit.\(^{(n)}\)

In order to prevent a dismissal of the bill upon the application of the defendant, the complainant must show that he is unable to go on, because some of the defendants have not answered, and that he has used due diligence to obtain their answers.

As to what is due diligence, that is a question necessarily depending upon the circumstances of each case. It is necessary, however, for the complainant to show, that where it has been in his power to do so, he has resorted to the usual process of the court to compel an answer. Thus where the complainant's solicitor made an affidavit that he had

\(^{(k)}\) Ante, p. 393. Rule 42.
\(^{(i)}\) Mitchell v. Lowndes, 2 Cox, 15.
\(^{(k)}\) Vide Stevens v. Praed, 2 Cox, 374.
\(^{(l)}\) De Geneve v. Hannam, 1 Russ. & My. 494.
\(^{(n)}\) Pelis v. Coon, Hopk. 450.
frequently called on the clerk in court for the defendants who had not
answered, and threatened an attachment, but had not issued one, the
court was of opinion that an attachment ought to have been issued. (o)

Where a bill has been amended against the other defendants, and they
have been served with a subpoena to answer the amended bill, the cir-
mstance of their time for answering the amended bill not having ex-
pired, will be a sufficient reason for not dismissing the bill. (p) So, if
one of the other defendants has died, without answering the bill, and
the complainant has had no opportunity to revive the suit against his
representatives, either from the circumstance of no representatives hav-
ing been constituted, or from their not having been constituted in suffi-
cient time to enable the complainant to revive against them, the court
will probably allow the complainant sufficient time to enable him to get
the representatives before the court. But in a case of that nature, he
must show that previous to the abatement of the suit, he used due dili-
gence to procure the answer of the original defendant. (q)

Although a bill which has been dismissed for want of prosecution, is
so effectually out of court that no motion or proceeding can be had in
the cause, except for the purpose of carrying the order of dismissal into
effect, it seems that the court will, under certain circumstances, enter-
tain a motion to restore it. (r) It is not, however, the ordinary course
of the court to restore a bill which has once been dismissed. It must
be shown that substantial justice requires that it should be done; and
then, upon the particular circumstances, the court will make the or-
der. (s) And there is no instance to be found in which the court has
restored a bill which has been regularly dismissed, for the mere purpose
of agitating the question of costs. (t)

The method of restoring a cause, after a dismissal for want of prose-
cution, appears to be by obtaining an order to discharge the order dis-
missing the bill; which can be procured only upon the terms of the com-
plainant's paying the costs of obtaining that order and of the application
for the order to discharge it. In Jackson v. Purnell, (u) the or-
der appears to have been made upon the complainant's undertaking to
amend within a week, amending the office copy, and not requiring any

(o) Gully v. Van Bodicoate, 5 Sim. 668.
(q) 2 Dan. 371.
(r) Jackson v. Purnell, 16 Ves. 104.
(s) For. Rom. 112.
(u) Id. ib.
further answer, and to reply forthwith, and speed his cause to a hearing.\(^{1}\)

Where a bill is dismissed for want of prosecution, it operates as a discontinuance of the suit, and does not prevent the bringing of a new bill.\(^{2}\)

In order to procure a dismissal of the bill for want of prosecution, draw up an affidavit stating that the cause is in readiness for hearing on bill and answer as to the defendant applying; the time when his answer was put in, and so much of the complainant's proceedings with respect to the other defendants, as to show that he has not used due diligence in proceeding against them.

Swear to this affidavit, and serve a copy upon the complainant's solicitor, together with a notice of motion to dismiss the bill for want of prosecution to be made on some regular motion day within the time specified in the 89th rule.

A motion to dismiss the bill may be made by a person named as a defendant in the prayer for process, and who has appeared and answered without the service of a subpoena.\(^{3}\)

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**SECTION II.**

**CROSS BILL.**

This is the proper stage of the cause for filing a cross bill, but it will be more convenient to reserve the consideration of the subject until we come to speak of the different kinds of bills. (See post, Book IV, chap. 9.)

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**SECTION III.**

**PUTTING COMPLAINTANT TO HIS ELECTION.**

If a complainant sues a defendant at the same time, and for the same cause, at law and in equity, the defendant may apply to this court for

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\(^{1}\) Vide 3 Vea. & B. 1 n. S. C.  
\(^{2}\) McBroom v. Sommerville, 2  
\(^{3}\) Hume v. Babington, 1 Hogan, 8  
Stew. 819.
an order that the complainant make his election in which court he will proceed.\(^{(y)}\)

This motion must be made after the defendant has put in his answer; and the order is, that the complainant elect within eight days after the service thereof; and that if he elects to proceed at law, the bill be dismissed.\(^{(z)}\)

If the complainant, after an order to elect, elects to proceed in equity, this court will restrain his proceedings at law by injunction.\(^{(a)}\) But if he elects to proceed at law, and fails there, the dismissal of his bill will be no bar to his filing a new bill for the same matter.\(^{(b)}\)

Where a judgment had been given at law, that a power of sale had not been well executed, the defendants at law, under the alleged execution of the power, filed a bill in equity to have the defect in the execution of the power supplied, and the instrument by which it had been executed rectified; and they, at the same time, prosecuted a writ of error on the judgment; the suit in equity having been brought to a hearing, it was held that the complainants in equity were bound to elect either to have the bill dismissed, or to abandon the writ of error.\(^{(c)}\) So where a creditor filed a bill to set aside or obtain relief against a judgment at law, confessed by his debtor, in favor of a third person, on the ground of fraud, and during the pendency of his suit in equity, he proceeded at law, recovered a judgment and issued execution, under which the property of the debtor was advertised for sale, the court ordered the complainant to make his election, either to stay execution during the continuance of the injunction, or consent to have the injunction dissolved. And the complainant refusing to make an election, the injunction was forthwith dissolved.\(^{(d)}\)

But the complainant will not be put to his election where the bill is for discovery only, and no relief prayed; for from the discovery he may be able to proceed at law, when without it he could not.\(^{(e)}\)

If the complainant considers that the bill and action are for different matters, and that he ought not to be compelled to elect, he may oppose the motion on that ground; and the court will examine the pleadings in each suit, and generally decide without further inquiry. But the

\(^{(y)}\) Mist. 949.


\(^{(a)}\) Mist. 949.

\(^{(b)}\) Id. ib. Countess of Plymouth v. Bladon, 9 Vern. 32.

\(^{(c)}\) Cockeral v. Cholmeley, 1 Russ. & My. 418. 6 Bligh, N. S. 190, S. C.


\(^{(e)}\) Forum Romanum, 901.
ordinary practice is to obtain an order of reference to ascertain if the complainant’s proceedings at law and in equity relate to the same matters. (f) This, however, is granted only in cases of difficulty. If it clearly appears that both suits are not for the same matter, the court will determine without the reference. (g)

If a reference is granted, it operates as a stay of proceedings in both suits, in the meantime. (h)

If the master reports that the matters of the two suits are distinct, the order for the complainant to elect will be discharged, with costs. (i)

The right to put the complainant to an election is not confined to suits brought in our own courts; but he may be compelled to elect whether he will proceed in this or in a foreign court. (k)

The complainant is entitled to a complete answer before he can be put to his election; for possibly he cannot decide in which court it would be most advisable he should prosecute his claim, until he has a full and complete answer from the defendant. He therefore cannot be put to his election, after exceptions are filed, until they are answered. And it is irregular to obtain an order to elect, before the common time for filing exceptions has expired. (l)

And inasmuch as a plea avers there is no relief to be given in equity, if the defendant has pleaded, even to a part of the bill, the order to elect will be discharged; as such an order supposes that relief can be obtained in both tribunals. (m)

A special application to the court, on notice to the complainant’s solicitor, is necessary, to obtain an order that the complainant elect. (n) Which application should be founded on an affidavit stating that the two suits are brought for the same purpose, and upon copies of the pleadings in each suit, to show that the matters in both suits are identical.

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(g) Mills v. Fry, 3 id. 9.
(i) Mouselley v. Basset, supra.
(l) Mills v. Fry, supra.
(n) Livingston v. Kane, 3 John. Ch. 224. 4 id. 84. 1 Hoff. Pr. 342.
CHAP. IX.

REPLICATION.

Nature and office.] A replication is the complainant's reply to the defendant's plea or answer. It is a mere averment of the truth and sufficiency of the bill, and a denial of the allegations in the answer. (a) Its office is merely the production of the issue.

If the complainant wishes to prove any fact, on the hearing, not admitted by the answer, he must file a replication. (b) And sometimes, though he should happen to need no witness on his part, yet it may be necessary to reply, for the purpose of putting the defendant to prove the allegations in his answer; as where he confesses the matter alleged by the complainant, but sets forth some further matter in bar of the complainant's equity. (c) For if no replication is filed, the defendant's answer will be taken as true, and no evidence can be given by the complainant to contradict it. (d)

And on a bill for a divorce, or to annul a marriage contract for any other cause than physical incapacity, if the material allegations in the bill are denied by the answer, the complainant must file a replication; otherwise the defendant may apply to have the bill dismissed. (e)

A replication may be filed as well to a plea as to an answer; and this, whether the plea be accompanied by an answer or not. It is to be observed, however, that if the complainant replies to a plea before it has been argued, he admits the plea to be valid, if true; and that he cannot afterwards object to it on the ground of its invalidity or irregularity. (f)

Where a defendant puts in a general disclaimer to the whole bill, the complainant ought not to reply to it. It is otherwise, however, where the disclaimer is to part, and there is an answer or plea to another part

(a) Barton, 142.  (c) Rule, 167.
(c) Prac. Reg. 375.  

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of the same bill. In such cases there may be a replication to such plea or answer.\(g\)

Formerly, if the defendant, by his plea or answer, offered new matter by way of defence, the complainant replied specially to the new matter. But latterly the use of a special replication has been discontinued. And if the complainant wants to avoid the effect of matter pleaded in bar, his proper course is to apply to amend the charging part of his bill. This charging part, containing the alleged pretences of a defendant, and the complainant's denial of them, amounts, virtually, to a special replication.\(h\)

Indeed, by the 65th rule, special replications are prohibited from being filed, except by leave of the court, on cause shown; the general replication being sufficient to put the cause at issue.

By the existing practice the complainant is to be relieved according to the form of his bill, whatever new matter may have been introduced by the defendant's plea or answer.\(i\)

Form of.] A replication is entitled in the same manner, *mutatis mutandis*, as an answer; and commences with a general saving of the advantage of exception to the manifold insufficiencies of the answer; which is followed, (when it is a general replication,) by an averment and offer to prove that the matters in the bill are true, certain, and sufficient in law to be answered unto, and that the answer of the defendant is uncertain, untrue, and insufficient to be answered unto. It then concludes with a general traverse of all the matters contained in the answer.

A special replication is nearly in the same form, except that it points out the parts of the answer which it admits to be true, and traverses the rest.\(k\)

The signature of counsel is required to a replication only when it is special; not when it is general.\(l\)

Nor is it necessary that a replication be signed by the complainant; the signature of his solicitor being sufficient.

Within what time to be filed.] The 65th rule requires the replication to be filed within ten days after the answer is deemed to be suffi-

\(g\) Williams v. Longfellow, 3 Atk. 589. Cora. Canc. 309.
\(h\) Storms v. Storms, 1 Edw. 358.
\(i\) Mitf. 399. Dupone v. Massy, Cox's Dig. 146. Mitf. Pl. 322.
\(j\) Hinde's Pr. 285, 6.
\(k\) Id. 297.
cient; (m) and if it is not filed within that time, the cause will stand for hearing on bill and answer.

The replication must be filed within the ten days, although the answer was served on an agent instead of the solicitor in person. (n)

If the complainant amends his bill after answer, he cannot file a replication to the original answer until the time for answering the amended bill expires, although he waives a further answer to the amendments. (o)

Where an answer is allowed to be amended, the complainant has thirty days after service of a copy of the amended answer, to put in his replication. (p)

A replication may be filed immediately after the answer has come in.

If a replication is filed and served after the time limited by the rule, without an order having been obtained extending the time, the defendant’s solicitor, if he wishes to take advantage of that objection, should refuse to receive it, or return it immediately.

Extending time to reply.] By the 125th rule, further time to file a replication, not exceeding twenty days, may be granted on application, and sufficient cause shown, by affidavit, to a vice chancellor or injunction master. But no such order can be granted by an injunction master or by a vice chancellor out of court, after the time for replying has expired, or where the time has before been extended.

The court also, upon special cause shown, may extend the time for filing a replication. (q) But it is not necessary to apply to the court itself, except in cases where the time for replying has expired, or where it has been already once extended.

Whenever the application is made to the court, it must be upon notice to the defendant.

It is not a matter of course for the court to permit the filing of a replication after the time limited by the rule has expired. But the court must be satisfied there is a probability that injustice will be done if the complainant is compelled to bring his cause to hearing on bill and answer. Upon such an application, if it appears that an answer was put in upon oath, denying any material allegation in the bill, the complainant must show that the bill was sworn to, or he must state in an affidavit, that he believes and expects to be able to prove that the allegations denied or

(m) See Rule 50 as to when an answer is to be deemed sufficient. (n) Kane v. Van Vranken, 5 Paige, 69. (o) Richardson v. Richardson, 5 Paige, 69. (p) Taylor v. Bogert, id. 33. (q) Rule 126.
put in issue by the answer are true. If new matters are set up in a sworn answer, as a defence to the suit, the complainant should state upon oath, that the matters thus set up, or some material parts thereof, are not true, or at least, that he believes them to be untruly stated. (r)

If the complainant wishes to amend his bill, and an application to the court for leave to do so is necessary, he should not file a replication—which is wholly inconsistent with the idea of an amendment of the bill—but should obtain an order to extend the time for filing the replication until after the decision of the court upon the application to amend. (s)

Filing replication nunc pro tunc.] A replication is considered a mere formal instrument, and if the complainant has omitted to file one at the proper time, the court will allow it to be done afterwards nunc pro tunc. And where the omission arose from a mistake or inattention, it has been allowed to be supplied after the cause had been set down for hearing upon bill, answer, and proofs. (t) And this has been permitted even after the cause has come on for hearing, and the reading of the proofs has been commenced. (u) The like permission has also been given after the cause has been set down for hearing on bill and answer, and a reference ordered. (v)

So, where there are several defendants, one of whom only has answered, the court, on special cause shown, will permit a replication to his answer to be filed nunc pro tunc, after the time for replying has expired; although the cause is not at issue as to the other defendants; if the complainant is proceeding with due diligence. (w)

The general rule of the court, however, is, that unless a replication be filed, the complainant, if he brings the cause on to a hearing, must submit to take the answer as wholly true; because the defendant has been deprived of the opportunity of proving the truth of his answer.

Effect of filing.] If the complainant files a replication to the answer after he is apprized of the necessity of an amendment of his bill, he precludes himself from making such amendment. (x)

The filing of a replication after notice given of a motion to dismiss

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(u) Scott v. Clarkson's Ex'rs, 1 Bibb, June 19, 1831. (x) Vermilyea v. Odell, 4 Paige, 191.

the bill for want thereof, is good cause against the motion; but it will only be allowed on payment of costs.(y)

The effect of filing a replication to a plea, as we have already seen,(x) is to admit its validity as a bar, if true.

 Withdrawal:] If the necessity for an amendment arises after the filing of the replication, the complainant should make a special application to the court for leave to withdraw the replication, for the purpose of amending.(a) Upon which application he must satisfy the court, by affidavit, that the matter of the proposed amendment is material, and could not, with reasonable diligence, have been sooner introduced into the bill.(b)

But this practice does not apply to amendments by merely adding parties, after replication.(c)

If the answer of a defendant has been replied to, such defendant cannot be examined by a co-defendant, as a witness, until the replication is withdrawn.(d)

(y) Griawold v. Inman, Hopk. 86. (c) Brattle v. Waterman, 4 Sim. 125.
(a) 1 Dan. 546. 2 id. 389. Coop. 9 Fowl. 100.
(b) Id. ib.
CHAP. X.

TESTIMONY.

Sect. 1. Who may be Witnesses.

I. General Incompetency.

II. Incompetency in the particular suit.

III. Incompetency as to particular branches of evidence.

2. Examination of Witnesses.

1. De bene esse.

2. By an Examiner.

3. By a Vice Chancellor.

4. By Commissioners, upon a Commission.

5. By the Court, at the Hearing.

6. As to the credit of Witnesses.

3. Proofs at the Hearing.

As soon as the cause is at issue by the filing of a replication, both parties may proceed to take testimony for the purpose of establishing their respective cases. If no replication is filed, the answer is taken as true, and, therefore, the defendant needs no proof; and the complainant not having replied, cannot offer any.

We do not intend to go into the subject of evidence, in this treatise, any further than to show who may be witnesses, and the several methods of taking their testimony in this court.

SECTION I.

WHO MAY BE WITNESSES.

It may be laid down as a general rule, that all persons are competent to be witnesses in equity who are capable of being witnesses in trials at law. And it is a general principle, common to both courts, that all per-
sons are competent witnesses who are not expressly excluded by the rules of law. There are three general grounds of disqualification which operate as exceptions to this rule: I. General incompetency; II. Incompetency in the particular suit; and III. Incompetency as to particular evidence.

I. General Incompetency.

The grounds of disqualification under this head are, 1st. Where the witness labors under a defect of religious understanding. This embraces idiots and lunatics, children, &c. 2d. Where the witness refuses to take an oath, or from defect of religious belief does not acknowledge its sanction; 3d. Where his character is infamous, in consequence of a conviction of certain crimes.

These grounds of incompetency we do not propose to enter into, in this place; as the rules of courts of law and of equity respecting them are the same, and those rules are well settled, and familiar to the practitioner.

II. Incompetency in the particular suit.

That branch of incompetency which extends only to the particular suit or issue before the court, includes every class of persons disqualified by interest, whether directly as parties, or indirectly as being pecuniarily interested in some future use which may be made of the decree. Yet not only interested witnesses, but parties themselves may sometimes be examined as witnesses. We are therefore to inquire, 1st. When a party to the suit may be examined as a witness; 2d. What persons other than parties may be so examined.

1. When a party to the suit may be examined as a witness.] At law, whenever a person tendered as a witness, has no interest in the event of the suit, he will be competent, although he is a party to the record.\(^{(a)}\) And the rule in equity is the same; since it only admits the testimony of those parties who are not interested in the event of the suit; or at least of that part of it to which the evidence they are called upon to give, applies.\(^{(b)}\)

When a complainant may be a witness. A complainant is considered, in every case, an incompetent witness for his co-complainant, both at law and in equity, by reason of his liability to the costs of the suit, and

\(^{(a)}\) 1 Phil. Ev. 51. \(^{(b)}\) 2 Dan. 448. McLaren v. Hopkins, 1 Paige, 18.
therefore cannot be examined; except where he is merely a trustee, and has no beneficial interest in the property, or by consent. Upon the same principle a prochein amy suing for an infant, is considered as so far interested in the event of the suit, that neither he or his wife can be a witness for the complainant. If their examination is necessary for the purpose of justice, his name must be struck out of the bill, and that of another person substituted; which, upon application to the court, will be permitted, on security being given for the costs already incurred.

The rule which prohibits a complainant from being examined as a witness on behalf of his co-complainant, operates as long as the complainant's name continues on the record. Therefore, it was held, that a complainant who had become a bankrupt, could not be a witness on behalf of his assignees who had filed a supplemental bill; although he had obtained his certificate, and had released; because he was still liable to the costs of the original bill.

If, therefore, a complainant is desirous of having the evidence of his co-complainant at the hearing of the cause, he must (unless the defendant will consent to his being examined,) move for leave to strike out his name as co-complainant, and to make him a defendant, by amendment. This will be permitted, even without the consent of the defendant, upon security being given for the costs already incurred.

A complainant, however, cannot obtain leave to examine either a co-complainant or a prochein amy as a witness, merely on giving security for costs, without either changing the character in which he appears upon the record, or striking him out altogether.

But it seems that a guardian ad litem is a competent witness; he being at most liable only for costs, and that not of course, but in the discretion of the court, according to the circumstances.

Although a complainant in a cause cannot be a witness for his co-complainant, yet he may, with his own consent, be examined by a defendant as to points in which he is not interested. The consent of


(d) Feraday v. Wightwick, 4 Russ. 114.

(e) Head v. Head, 3 Atk. 511. Mitf. 27. 13 Vea. 493.


(g) Hewstason v. Tookey, 2 Dick. 799.

(h) Mottex v. Mackreth, 1 Vea. jun. 142. 2 Cox, 393. Lloyd v. Makeam, 6 Vea. 145.

(i) Benson v. Chester, Jac. 577.


(l) Armiter v. Swanton, 1 Amb. 393. 1 P. Wms. 595.
the complainant, however, to be examined, is absolutely necessary.\(m\) Yet this rule does not extend to a prochein amy; who may be examined by a defendant without his consent.\(n\)

And the rule that a complainant cannot be examined by a defendant without his consent, was, under special circumstances, departed from in *Hougham v. Sandys*,\(o\) where the court gave permission to the defendants to examine one of the complainants as a witness, upon the certificate of the master that the examination would be necessary for the better prosecuting the inquiries. The complainants in that case, however, were mere trustees of a sum of money, and had filed the bill to ascertain the rights of the defendants in the same. And there being no doubt about the liability of the complainants to pay the money, which was admitted, and the costs of the suit being payable out of the fund, the reasons which ordinarily prevent the examination of a complainant as a witness did not exist in that case.

*When a defendant may be a witness*. Where a party wishes to examine a defendant as a witness against a co-defendant, or against the complainant, he may, at any time within twenty days after he has received or served a notice of the rule to produce witnesses, on filing an affidavit that such defendant is a material witness, and is not interested in the matter to which he is to be examined, have an order of course for the examination of such defendant, as a witness, as to any matter in which he is not interested; subject to all just exceptions.\(p\) And such defendant may thereupon be examined to such matters, in the same manner as other witnesses. But the adverse party may, at the hearing, object to the competency of his testimony.\(q\) And if he is interested in the matters to which he is examined, the objection may be taken at the hearing, although it has not before been made.\(r\)

1. *On the part of the complainant*. A complainant cannot examine a sole defendant as a witness against himself.\(s\)

If a defendant is examined as a witness, by the complainant, no decree can be taken against him personally, except upon matters wholly distinct from those to which he has been examined.\(t\) But this rule does not apply to the case of a mere formal defendant, as an executor or

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\(m\) Hewatson v. Tookey, 2 Dick. 799.
\(n\) Bird v. Owen, Mos. 312.
\(o\) 2 Sim. & Sta. 291.
\(p\) Rule 72.
\(q\) lb. id.
\(r\) Mohawk Bank v. Atwater, 2 Paige, 54.

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trustee, against whom no personal decree is sought, and who has no personal interest in the question as to which he is examined as a witness against his co-defendants, who, by his answer, admits his own liability, or who suffers the bill to be taken as confessed against him.\(u\)

It should be observed, however, there is a material difference between a mere trustee and an executor or administrator. A mere trustee may be a good witness for his cestui que trust, but an executor or administrator cannot be a witness to increase the assets, although he has no personal interest in them; because he is answerable for a devastavit, and liable to be sued by the creditors and to answer the costs.\(v\) This, however, is not the case with an administrator durante minore estate, after his administration is determined; for as he is not liable to be called to an account by any person but the executor, he may be examined as a witness, on behalf of the executor, against a third person.\(w\)

A defendant also, as to whom a decree cannot be opened, is a competent witness for a co-defendant who applies for leave to file a bill of review.\(x\)

If the complainant examines a defendant who is primarily liable for the debt or demand, as a witness against a co-defendant, he cannot have a decree against either; unless the defendant thus examined had admitted his own liability, by his answer, or by suffering the bill to be taken as confessed.\(y\) In other words, if a complainant, by examining a defendant, precludes himself from obtaining a decree against him, he also precludes himself from obtaining relief against the others, if, in order to such relief, a decree against the defendant examined is necessary. Thus it has been held, that where a complainant, by examining as a witness, a defendant who was primarily liable, had precluded himself from obtaining relief against such defendant, he could not have relief against another defendant who was only secondarily liable, i.e. liable in case a decree had been made against the first.\(z\) And the rule is the same where the defendant examined, is one of several parties all equally liable to account and contribution.\(a\)

The reason of this rule is that a complainant shall not compel a defendant to assist, and in the same cause act adversely against him.\(b\)

\(u\) Id. ib. Man v. Ward, 2 Atk. 288.
\(v\) Id. ib. Croft v. Pyke, 3 P. Wms. 181. Maban v. Meatal, 3 Atk. 95. Id. 663.
\(w\) Fotherby v. Pate, 3 Atk. 603.
\(x\) Hodges v. Mullikin, 1 Bland, 507.
\(y\) Bradley v. Root, 5 Paige, 633.
\(a\) Hulton v. Sandys, 1 Young, 609. Meadbury v. Iddiss, 9 Mod. 438.
\(b\) Nightingale v. Dodd, Amb. 584.
It is not for the sake of the defendant himself, however, that the rule has been adopted; as he has protection from giving evidence against himself by demurring to the interrogatory. It is for the sake of the other parties that it has been established, and the objection can only come from the other defendants.(c)

The rule does not apply to cases where the party who has been examined has no beneficial interest in resisting the decree, although he may have the legal estate in him, as a trustee, &c.; or where he submits to a decree.(d) Thus where a deed of trust is impeached as fraudulent, the trustee may be a witness, if he has no interest in the support of the deed, and no participation in the alleged fraud.(e)

The rule of exclusion is confined to those matters in which the defendant is interested either in procuring or in resisting a decree. If he is not interested in the whole of the matters embraced in the suit, he may be examined as to those in which he has no interest, and a decree may be made against him upon the rest.(f)

If the complainant intends to examine a defendant as a witness, he should not reply to his answer. If he does so it will be considered as an intimation that he intends to ask a decree against him; which will prevent his reading the depositions at the hearing.(g)

Yet, if the complainant has replied to the answer of a defendant whom he afterwards thinks it necessary to examine, he may apply to the court to withdraw his replication, or to have it amended by striking out the name of such defendant.(h)

If the defendant has put in an answer denying the complainant's case, the complainant will be precluded from using his evidence at the hearing, whether the answer has been replied to or not. Thus, where a bill was filed against two defendants, charging them with fraud, and one of the defendants denied the fraud, and charged it on the other, the court would not allow the depositions of the defendant who had denied the fraud, to be read against the other, notwithstanding the complainant had not replied to the answer; because, although he had not replied at the time of the examination, he might have done so at any time before pub-

(c) Id. ib.
(d) Carter v. Hawley, cited Amb. 563.
(e) Taylor v. Moore, 9 Rand. 563.
(f) Nightingale v. Dodd, Amb. 83.
(g) Winter v. Kent, 2 Dick. 595.
(h) Hardecastle v. Shafto, 2 Fowl. Ex. Pr. 85. See ante, page 293.
lication; so that the defendant, at the time of his examination, might have been under a bias. (i)

If a complainant examines a defendant as a witness, he will be decreed to pay him his costs of the suit. Whether the complainant will be allowed to recover these costs from the other defendants, must depend upon the circumstances of the case. (k)

2. On the part of a co-defendant. Hitherto we have been speaking of an examination of a defendant or of a co-complainant by a complainant.

The rule of the court, authorizing the examination of a defendant by a co-defendant, has also been given. (l)

Previous to the adoption of that rule, however, it was the practice for courts of equity to permit the examination of a defendant by a co-defendant, in all cases where the defendant to be examined was not interested in the result. (m) If a defendant is interested in the result, his depositions cannot be read on behalf of a co-defendant, any more than they can, under similar circumstances, be read for a complainant.

Whenever a decree can be made against a defendant upon the subject as to which he is examined, his evidence in favor of a co-defendant will be inadmissible. (n)

And it is laid down as a general rule that where a defendant may, by any possibility, be liable to costs, this is always a reason for refusing his evidence. (o) Yet it has been held in this state, that a defendant charged as combining with others in a fraud against which relief is sought, but against whom no particular relief is prayed, may, though liable for costs, be a witness for his co-defendants. This decision was upon the ground that he comes within the exception to the general rule excluding a witness on account of interest: viz. that where the interest is contingent or uncertain, the witness is nevertheless competent, and the objection is to be confined to his credibility. (p)

When it is said that the liability of a defendant to have a decree made against him will prevent his being a witness for another defen-

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(i) Meadbury v. Isdall, cited Blunt's Amb. 817, n. 1. 9 Mod. 438, S. C.
(l) Ante, p. 257.
(m) Piddock v. Brown, 3 P. Wms. 388.
(n) Dixon v. Parker, 2 Ves. 219.
dant, the rule must be understood as being subject to the same limitations as have been already mentioned, relative to the examination of a defendant by a complainant, viz: that the decree to which he is liable must be an adverse decree, or it will not exclude his evidence. Therefore where a defendant is a mere formal party, such as a bare trustee having the legal estate, he will be a good witness, as well for a co-defendant as for the complainant. (q) It is otherwise, however, where the defendant is an executor or administrator. (r)

Where the defendant is only partially interested in the matters embraced in the suit, he may be examined as to those in which he has no interest. (s) If this were not so, the complainant, by joining persons as defendants in a suit in which he has cause of action against one as to one subject, and against another as to a different subject, but having no cause against them jointly, might, by this sort of mechanism, unless the court permitted one defendant to examine another, deprive one of the benefit of the other’s testimony. (t)

And the rule excluding the testimony of a defendant in favor of his co-defendant, on the ground of interest, extends only to cases where the defendant examined has been made a party because he has a direct interest. Where he is merely made a party as an attorney or trustee, the objection will not go to his competency, but only to his credibility. (u)

If a witness is disinterested at the time of his examination, his deposition may be read, although he has become interested since his examination. (v) And so where a person has been examined as a witness for the complainant, and is afterwards made a defendant to the suit, his evidence may be read. (w) In like manner where a witness who had been examined de bene esse, afterwards became interested and was made a party, his deposition de bene esse was allowed to be read at the hearing. (x)

If both parties examine a witness without an order, neither can afterwards object to the evidence; as each, by examining him, has allowed him to be a good witness. (y)

(q) Man v. Ward, 2 Atk. 238. 2 Dan. Pr. 450.
(r) Id. ib. Croft v. Pyke, 3 P. Wms. 181. 3 Atk. 95, 503.
(s) Nightingale v. Dodd, Amb. 83. Mos. 298, S. C.
(u) Bridgman v. Green, 2 Ves. 638.
(v) Goss v. Tracey, 1 P. Wms. 288.
(w) Hawes v. Hand, 2 Atk. 615. 2 Ves. 43.
(x) Cope v. Parry, 2 Jac. & W. 538.
(y) Bradely v. Root, 6 Paiga, 639.
(z) Brown v. Greenly, 2 Dick. 504.
When a party is examined as a witness, he is to be cross-examined, and re-examined, in the same manner as ordinary witnesses. And a cross-examination by the party against whom he is produced, will not amount to a waiver of the objection to his competency.

If a party sought to be examined as a witness is interested, his interest may be divested by a release; but the release must be executed previous to his examination. Where a defendant had been examined as a witness for the complainant, and on hearing was found to be interested and his testimony rejected, an application for a re-hearing, with a view to release the witness and re-examine him, was refused.

A certified copy of the order for the examination of a party as a witness, must be taken, for the purpose of being produced before the examiner, as his authority for taking the examination.

2. What persons, other than parties, may be witnesses.] The incompetency of witnesses, from interest in the subject matter of the suit, is not confined to persons who are parties to the record. An individual is equally incompetent to be a witness, if he is interested in the result of the case, whether he be a party or not.

What sort of interest will exclude.] The interest which will exclude a witness from being sworn must be a direct interest in the event of the suit. If the only interest a witness has in the cause in which he is sworn is in the question, the objection goes to his credibility, and not to his competency.

Cases may occur in which a direct interest in the event of the suit may belong to a person who is not a party, and which will disqualify him from giving evidence. Thus a residuary legatee or next of kin are incompetent as witnesses in a suit by or against an executor or administrator, where the effect of his evidence would be to increase the fund. And upon the same principle, a bankrupt, or a person who has taken the benefit of the insolvent debtor's act, or a creditor of a bankrupt or insolvent debtor, is an incompetent witness in a suit for his assignees.

So a remainderman is incompetent to prove payment of a legacy charged on the estate. Neither can a co-partner give evidence for a

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(a) Benson v. Le Roy, 1 Paige, 129.  
(b) Moorehouse v. De Passow, 19 Ves. 435.  
(c) Dunham v. Winsan, 2 Paige, 24.  
(d) Hinde's Pr. 256, 357. Mulvany v. Dillon, 1 Ball & B. 409.  
(e) 2 Dan. 447.  
(g) Id. id.  
(h) 2 Dan. 461. 1 Phil. Er. 46. Austin v. Bradley, 2 Day, 409.  
(i) Aldridge v. Lord Wallscourt, 1 Ball & Blunt, 312.
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defendant who is sued alone for a partnership debt. It is not true, as a uniform rule, that a creditor is a competent witness for administrators. He is only so where the assets are sufficient for the payment of debts. When they are not, whether the administrator be complainant or defendant, if the verdict swells the fund to which he must look for the payment of his debts, his incompetency is manifest. He is only competent when the verdict cannot affect his interest.

So in an action upon an administration bond, against a surety, the administrator is not a competent witness for the defendant; on account of his liability for costs in case of a recovery against the defendant.

And a member of a corporation is not a competent witness to sustain a claim of the corporation; even though he release his interest in the subject matter of the suit; and this is upon the principle that he is a virtual party to the suit, and therefore liable for the costs. But the remote and contingent interest of a corporator in a mere municipal corporation, is not sufficient to exclude him as a witness in behalf of the corporation. And where the corporators are mere trustees, they may be witnesses. That was the case in *Weller v. The Governors of the Foundling Hospital* and Lord Kenyon admitted several of the Governors to prove the badness and insufficiency of the work for which the action had been brought.

And in all cases a mere trustee, without legal interest, may be a witness; if he is not responsible for costs.

**Must be a present interest.** The interest, to disqualify, must be a present interest, and not a mere expectancy or probability. An heir apparent may be a witness concerning the title of land, or charges upon it; for his heirship is only a contingency; but one who has a vested remainder cannot, for he has a present estate in the land. So a co-obligor in a bond for due administration is a good witness to prove a tender by the administratrix; though a bail is incompetent, because he would immediately become answerable if a verdict were given against his principal.

**Ignorance as to interest.** The ignorance of a witness with regard to

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*(4) Evans v. Yeatherd, 2 Bing. 125.*
*(5) Owens v. Collinson, 3 Gill & John.*
*(m) Id. ib.*
*(n) Doe v. Tooth, 3 Young & Jer. 19.*
*(o) Trustees of Waterton v. Cowen, 4 Paige, 513.*
*(p) Peake's Ca. 153.*
*(q) Gres. Eq Ev. 258.*
*(s) Aldridge v. Lord Wallscourt, 1 Ball & Beat. 318. Smith v. Blackham, 1 Salk. 283. Id. Raym. 724.*
his interest does not make his evidence admissible, if he is really interested; a rule of which the prudence is obvious. (u) And where a person not really interested, believes himself to be so, his testimony cannot be admitted. (v)

Honorary obligation. Where, however, the witness merely considered himself under an obligation in honor to pay a sum of money, according to the event, or to contribute to the expenses of the suit, the evidence has generally been received. Indeed that very feeling of honor may be looked upon as a guaranty that he will speak the truth. (w)

Witness testifying against his interest. And a witness who is interested in the event of a suit, may be examined when called by the party to whom his interest is opposed; (x) and is at all times competent to give evidence to his own disadvantage. (y)

Interest equally balanced. So if the witness has an interest inclining him to each of the parties; so as, upon the whole, to make him indifferent, he will be competent to give evidence for either party. (z)

Interest acquired fraudulently. If a witness has acquired an interest in the subject matter, for the mere purpose of depriving a party to the suit of the benefit of his testimony, such interest will not exclude him from giving evidence. (a)

Interest acquired after examination. And the evidence of an interested witness given while he was disinterested, will be received. (b)

Husband or wife of party. It is a general rule that the husband or wife of a party to the suit cannot be admitted to give evidence either for or against the party; they being both considered, in law, as one person. (c) They cannot be witnesses for each other, because their interests are absolutely the same; nor against each other, because this is inconsistent with the relation of marriage. (d) It is looked upon as a matter of public policy; (e) which cannot be waived by the consent of the party interested; (f) a policy which, even after a divorce, protects the

(v) Id. 1b. Richardson's Ex'r v. Hunt, 2 Manf. 148. Stra. 129. 1 H. Black. 307.
(x) Kennedy v. Barrettt, 1 Bibb, 154.
(z) 1 Phil. Ev. 59, 66. Cowen & Hill's Notes, p. 126. 7 T. R. 480, 1.

(c) 1 Phil. Ev. 76. Co. Litt. 6, b. City Bank v. Bange, 3 Paige, 38.
(d) Id. 77.
confidence which subsists during coverture.(g) But it does not extend to persons who have not been legally married.(h) For these reasons a witness was precluded from proving that a woman who was bringing an action as a feme sole was his wife.(i) The rule holds good where the wife is suing as executrix.(k)

And though the interest has ceased, the rule continues. Thus a wife was not allowed, after her husband's bankruptcy, to prove that certain effects had been his property.(l)

Interested witnesses, when admitted. Interested witnesses are sometimes admitted from necessity, where no other evidence is reasonably to be expected; whether because knowledge of the fact is confined to few, or because the interest is extended to many.(m) For the first reason, a porter or servant is allowed to prove a delivery of goods.(n) So, where a son having a general authority to receive money for his father, had received a sum and given it to the defendant, his evidence to that effect was admitted for his father in an action of trover for the money.(o) So in trover against a pawnbroker, the servant embezzling his master's goods and pawning them, will be admitted to prove the fact.(p)

For the second reason, viz: because the interest is extended to many, no person is incompetent to prove a public right, as for example, a right of way—every citizen being interested in it. So, in an action for a tolls claimed in a public road, persons who have refused to pay the demand are from necessity, competent to give evidence, notwithstanding their interest in the result of the cause.(q) Sometimes the interest is made general by the statute which creates it.(r) It is necessary to show, in every case, that, under the circumstances, the necessity actually exists.(s)

Amount of interest. The magnitude of the interest which a witness has, is not a point to be considered. If he has an interest in the event of the suit, however small it may be, the line of exclusion is strict.(t)

In the strong language of Mr. Phillips, "a person who loses or gains the smallest sum by the event of the suit, whatever may be his rank, for-
une, or character, is as incompetent to give evidence as one who may be interested to the amount of thousands."

Objection to competency of witnesses. Objections to the testimony of witnesses for incompetency must be made before the examiner, and no objections to the testimony of a witness not a party to the suit, shall be made at the hearing, unless such objection was made before his testimony was closed. Therefore, where the interest of a witness is of such a nature that it may be released, if the adverse party suffers him to be examined without objection, and waits until the proofs are closed, it will be too late to object to the competency of the witness at the hearing.

But where an objection to the competency of a witness is made as soon as his interest is discovered, if the party calling the witness insists upon proceeding, or the examiner overrules the objection, the adverse party is not, by cross examining the witness, precluded from moving to suppress the deposition, or from objection to the testimony at the hearing.

And where the interest of the witness does not appear upon the pleadings, or upon previous testimony, the objection may be raised whenever the facts on which it is founded are disclosed. The party may also, at the time of the examination, raise the objection that the witness is interested—stating in what that interest consists—and it will then be sufficient if the party making the objection, proves the facts stated as the grounds thereof, at any time before the proofs in the cause are closed.

The principle of the rule requiring the objection to be made in due season is, that the party may have an opportunity to remove the interest of the witness, by release or otherwise.

But where a party is examined as a witness, he is always examined subject to all just exceptions; and if he is interested, the objection may be taken at the hearing, although it has not been previously made.

Competency how restored. The objection on the score of interest may be waived, either expressly or by implication. It is frequently done in open court, at law. And where a party to a deed, though knowing that a person was interested, had nevertheless requested him to attest it,

(u) 1 Phil. Ev. 66. (v) Rule 85. (w) Idem. (x) Id. ib. (y) Town v. Needham, 3 Paige, 545. (z) Id. ib. (a) Id. ib. Gregory v. Dodge, 4 Paige, 557. (b) Id. 241. 9 Paige, 60. (c) Mohawk Bank v. Atwater, 2 id. 55. (d) Norden v. Williamson, 1 Taunt. 378.
he was held to have expressly waived the incompetency of that attesting witness. (e)

The objection on the score of interest is waived by implication when a party adopts the interested person as a witness by examining him. (f)

But a cross examination of the witness by the other party, will not, as we have before stated, be a waiver of the objection to his competency. (g)

A person who is bail for one of the parties, may be relieved from his disability by setting him free from his obligation, which is done by justifying and substituting another bail. (h)

But, by far the most common mode for restoring competency is by a release; that is, if the interest be against the witness, by releasing to him every claim; if in his favor, by inducing him to release all claims which he may have. Therefore, where a person has a legacy given to him by will, if he releases his claim to the legacy, he is a good witness to prove the will. (i) And the rule is the same as to a release by a devise. (k)

It is usual to release specially, the particular interest which causes the disqualification, whether a bona fide satisfaction is actually made at the time or not; but a general release will always answer the purpose. (l)

But the operation of this mode of restoring competency is not universal, and many persons against whom the objection of interest would most strongly and most justly lie, are not permitted to be qualified by a release. Thus, neither a party on the record, nor a person who is virtually, though not nominally a party, can be restored to competency by a release. (m)

An offer of a release to a witness equally restores his competency; because the parties have a right to his testimony, and he cannot be permitted to deprive them of it by refusing to accept a full discharge. (n)

The release must be regularly produced and proved, as any other deed. (o) Payment, or the offer of payment, or the offer of a release, are to be proved, according to the circumstances, in any of the usual ways.

(e) Honeywood v. Peacock, 3 Camp. 196.
(h) Tidd's Pr. 283, 7th ed.
(i) 1 Phil. Er. 133.
(j) Cook v. Grant, 16 Serg. & Rawle, 198.
(k) Gres. Eq. Er. 975. Scott v. Lifford, 1 Camp. 250.
(l) Id. 273.
(m) Fowler v. Welford, 1 Doug. 141.
(n) And see Bent v. Baker, 3 T. R. 27.
(o) Cocking v. Jarrard, 1 Camp. 37.
III. Incompetency as to particular branches of Evidence.

An interested witness is in general incompetent to prove even the most trifling matters—such as the custody of a document.\(^{(p)}\) But the courts frequently allow a witness who is interested in one particular point, to give evidence on all topics which do not bear precisely upon that. For instance, a bankrupt may be made a witness to prove matters which do not impugn the validity of the bankruptcy.\(^{(q)}\)

And this is of the more frequent occurrence in equity, because many issues may be combined in one suit. And there is a tendency in cases where it is not certain which of several courses they may take at the hearing, to allow a witness whose interest may possibly be affected in the event of the cause taking a particular turn, to give his evidence, subject to its being suppressed on the happening of that contingency.\(^{(r)}\)

Attorneys, &c. Attorneys, solicitors, counsel, &c., are not permitted to disclose any information which they have obtained in the character of professional advisers.\(^{(s)}\) They are considered as the same person with their clients, and are entrusted with their secrets.\(^{(t)}\) Nor is it necessary that the witness should still be the attorney or counsel of the party, or that his name should appear on the record of the pending suit.\(^{(u)}\) Neither is the restriction confined to facts, disclosed in relation to suits actually pending, but extends to all cases in which the counsel or attorney is applied to in the line of his profession; whether such facts were communicated with an injunction of secrecy, or for the purpose of asking advice, or otherwise. Thus a counsel or attorney employed to draw a deed is considered as acting in the line of his profession, and bound to conceal the facts disclosed by the person who employs him.\(^{(v)}\)

Conveyancers, interpreters, and clerks. Communications respecting the preparing of deeds are privileged.\(^{(w)}\) The rule includes an interpreter, so far at least as he is merely the organ of the professional adviser;\(^{(x)}\) also the clerk of the counsel or solicitor consulted.\(^{(y)}\)

Confidential communications not of a legal nature. The statute de-
clares that no minister of the gospel, or priest of any denomination, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination.(z) Nor shall any physician or surgeon be allowed to disclose any information acquired by him in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon.(a)

Parents to bastardize issue. There is a rule founded, to use the expressions of Lord Mansfield, "in decency, morality, and policy, that parents shall not be permitted to say, after marriage, that they have had no connection, and therefore that the offspring is spurious; more especially the mother, who is the offending party." "The law of England," he says, in another place, "is clear, that the declarations of a father or mother cannot be admitted to bastardize the issue born after marriage."(b) This must not, however, be understood to mean that they may not give evidence against the validity of their own marriage; though then it is said they come forward under a cloud of suspicions.(c)

SECTION II.

EXAMINATION OF WITNESSES.

In this state, witnesses are examined either by an examiner, by a vice chancellor, by commissioners, under a commission issued for that purpose, or by the court itself, at the hearing of the cause.

Commissions to take testimony may be executed either within this state, or in some foreign state or country.

And exhibits may be proved, *viva voce* at the hearing, in certain cases.

Usually, testimony is not taken in this court until after the cause is at issue; but in certain cases witnesses may be examined *de bene esse*, before the defendant has put in his answer.

The subjects to be noticed in the present section, are, I. Examination of witnesses *de bene esse*; II. By an examiner; III. By a vice

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(a) 2 R. S. 406, § 92, (orig. § 73.)
(b) Id. § 93, (orig. § 73.)
(c) Standen v. Edwards, 1 Ves. 134.
(d) Stevens v. Moss, Cowp. 591.
(e) Bull. N. P. 119.
chancellor; IV. By commissioners, under a commission; V. By the court, at the hearing; VI. As to credit of witnesses.

I. EXAMINATION DE BENE ESSE.

Different methods of examination.] There are two methods of taking the examination of witnesses de bene esse in this court: 1. Under an order of the court, upon a special application therefor; and 2. By summary proceedings under the statute.

1. Under an order of the court. This was the ancient mode of proceeding to take the examination of witnesses de bene esse; and although the revised statutes authorize an examination in a more summary manner, before certain officers out of court, without any application being made to the chancellor or vice chancellor, for leave to do so, the former method does not appear to have been abolished. It will therefore be necessary to consider it.

In what cases resorted to. The examination of a witness de bene esse, takes place where there is danger of losing the testimony of an important witness from death, by reason of old age, (as where the witness is seventy years old and upwards; (d) or dangerous illness; (e) or where he is the only witness to an important fact. (f) In such cases, the court, to prevent the party from being deprived of the benefit of his evidence, will permit his depositions to be taken before the cause is at issue; in order that if the witness die, or be not forthcoming to be examined after issue joined, the dispositions so taken may be used at the hearing. (g)

The examination of a witness de bene esse is incidental to every suit brought in this court. It may even be incidental to a suit to perpetuate testimony, where there is danger that the evidence of the witnesses whose testimony is intended to be perpetuated, will be lost before the suit for perpetuating is ripe for a regular examination. (h)

Wherever the testimony of a witness is required to be used either in support of, or in defence to, an action at law, a bill must first be filed in this court, with the proper affidavit annexed to it, praying specifically that the witness may be examined de bene esse. (i) But an order of this nature, in aid of a proceeding at law, cannot be obtained upon a bill filed for any other purpose. (k)

(d) Rowe v. ———, 13 Ves. 361.
(e) Bellamy v. Jones, 8 Ves. 31.
(f) Shirley v. Earl Ferrers, 3 P. Wms. 77. Pearson v. Ward, 2 Dick. 048. 1 Cox, 493. 6 Mad. 315.
(g) Hinde's Ch. 368.
(h) Frere v. Green, 19 Ves. 319.
(i) Phillips v. Carew, 1 P. Wms. 117.
The court will grant an order for the examination of witnesses de bene esse, not only in the cases above enumerated, but wherever the justice of the case appears to require it. Thus where an application was made to examine the surviving witness to a will, de bene esse, on the ground that the parties concerned all lived in a foreign country, and that the surviving witness was greatly afflicted with the gout, the order was made, although the witness was only stated to be "upwards of sixty years old."(l) So also, where the age of the witness was not stated, but the affidavit upon which the application was made, alleged only that the witness was subject to violent attacks of the gout and from these attacks was under the apprehension of dying, and that he was a material witness; his testimony being required to prove the draft of a bond which he had prepared, but which was lost; the court of exchequer made an order for his examination de bene esse.(m)

In like manner, where a witness is about to go abroad, the court will make an order for his examination de bene esse.(n) But not if it is in the power of the complainant to detain him.(o)

It seems also that in a question of pedigree, where the case depends upon a chain of distinct circumstances in the knowledge of different individuals, the death of one of whom would destroy the whole chain the court will permit the examination of such individuals de bene esse; although none of them come within the description of witnesses whose testimony in danger of being lost either from age or serious illness.(p)

But the rule that the examination of a witness de bene esse will be permitted where the person proposed to be examined is the only witness, will not be extended to cases where there is more than one witness to the same fact; unless upon the ground of the age or infirmity of the witness. Thus where an application was made for leave to examine de bene esse one of two surviving witnesses to a will, who was neither of the age of seventy nor in a state of dangerous illness, on the ground that he was in prison charged with a capital felony, no order was made.(q)

Within what time to be had.] The court will grant an order allowing the complainant to examine a witness de bene esse, before an answer has

(l) Fitzhugh v. Lee, 1 Amb. 65.  
(m) Jeppson v. Greenaway, 2 Fowl. Burnb. 320.  
(n) Ex. Pr. 103.  
(p) Jeffery v. Earl Ferrers, 3 P. Wms. 77.  
(q) Byrne v. Byrne, 2 Moll. 440.  
(o) The East India Company v. Naish, 13 Ves. 56.  
(Anon.) 19 Ves. 321.
been put in; provided the necessity for taking his deposition is satisfactorily shown by affidavit.(r)

It will also be granted before appearance, on the ground of the witness being seventy years of age, or dangerously ill, or the only witness, if the defendant has been served with a subpoena; immediately after the filing of the bill, and without waiting either for the defendant's appearance or for his being in contempt for non-appearance.(s) And it seems clear that the contempt of a defendant in not appearing would, at any time, be a reason for giving permission to a complainant to examine his witnesses de bene esse, where a proper ground is laid for it; even where the case does not come within any of the three instances just mentioned.(t) It is also said that a reference of the complainant's bill for impertinence is no reason for refusing the order.(u)

But where the defendant has not appeared, he must have notice of the examination of the witness, in order that he may have an opportunity to cross-examine him.(v)

A defendant cannot have an order to examine a witness de bene esse before he has put in his answer.(w)

Notice of application when necessary.] By the English practice, an order for leave to examine a witness de bene esse, on the ground of the witness being seventy years of age, or dangerously ill, or of his being the only witness to a material fact, may be obtained without notice.(x) And the application may, as we have already stated, be made before answer, or even before appearance; provided the defendant has been served with a subpoena.(y)

Here it seems, in cases above enumerated, wherever there is an appearance, notice of the application must be given; though under special circumstances, it has been dispensed with.(z)

But where the application is not made on the ground of the age or dangerous illness of the witness, or because he is the only witness, the court will not make an order for his examination de bene esse as of

(u) 2 Dan. 545.
(y) Ante, p. 271 et supra.
course. Therefore, if a party wishes to examine a witness de bene esse, upon a ground different from those above mentioned, he must apply to the court for an order to that effect, on notice to the other party. (a)

It seems, however, that where a defendant is in contempt for non-appearance, such an order may be obtained without notice; and this even where the defendants are infants. Thus, in a case where the defendants were infants, and in contempt by the messenger’s return that they had absconded, and were not to be found, the court, upon the usual affidavit, of the materiality of the evidence of the witnesses, &c., and the complainants undertaking to proceed with all due diligence, and with as much expedition as the course and practice of the court, and the contempt of the defendants would admit, to bring the cause to an issue and examine their witnesses in chief, made an order that the complainants should be at liberty to examine them de bene esse. But it was provided by the order that, before the publication of the depositions of such witnesses should be allowed to pass, proper evidence should be produced to satisfy the court that the complainants had complied with the above undertaking. (b)

Affidavit in support of motion. The application for leave to examine a witness de bene esse must, in every instance, whether made upon notice or without, be supported by an affidavit of the facts which form the ground of the application; such as the age of the witness, &c., and that he is a material witness for the party making the application. Where an application is made for an order to examine a witness on the ground that he is the only person who knows the fact, the affidavit should state the particular points to which his evidence is meant to apply. (c) And it should be shown, not only that the witness is a person who knows the fact, but that he is the only person who knows it. And the affidavit should also show the ground which the person making it has for believing that the witness is the only person. (d) Therefore, where an order was applied for to examine several witnesses de bene esse, one upon the usual affidavit that he was above seventy years of age, and the other upon the affidavit of the agent, who stated that he was informed by the witness that he could prove the particular fact, and that he, (the agent,) believed that he was the only person who could do so, the court, although it granted the application as to the witness who was above seventy, denied it as to the other. (e)

(a) Bellamy v. Jones. 8 Ves. 31. (d) Rowe v. ————, 13 Ves. 261.
(c) Pearson v. Ward. 1 Cox. 177. (e) Id. ib. 2 Dan. Pr. 547.
Dick. 648. S. C.
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The affidavit must also state the place of residence and description of the witness sought to be examined. (f)

In *Fort v. Ragusin*,(g) an order was made for the examination of a witness *de bene esse* on his own affidavit that he was a mariner and about to return to the Havana; that the complainant was absent from the state, and that he was advised by the complainant's counsel that his testimony would be material.

**Order for.** The order to examine witnesses *de bene esse* gives the party liberty to examine such and such witnesses, naming them, and will only authorize the examination of the persons named therein. It must be served upon the opposite party, in order to afford him an opportunity to cross examine the witnesses. (h)

**Where applied for by the defendant.** A defendant, although he may equally with the complainant, examine a witness *de bene esse*, cannot obtain an order for that purpose before he has put in his answer. (i) But where a complainant has obtained an order for a commission to examine witnesses *de bene esse*, the defendant, if he has any witnesses to examine *de bene esse*, may, to save the expense of another commission, obtain an order for leave to examine his own witnesses, (naming them,) under the complainant's commission. Without such an order he cannot examine his witnesses under that commission, but must obtain one for himself. (k)

**By whom witnesses are to be examined de bene esse.** Witnesses may be examined *de bene esse*, either by an examiner, or in a proper case for it, by a commissioner, under a commission issued in the same manner as a commission to take the examination of a witness in chief. (l) The cases in which a commission to take testimony will be issued, will be stated in another part of the present chapter.

**Under a commission.** The form of the commission to take the examination of witnesses *de bene esse*, is nearly the same as that of the ordinary commission; the principal variation being that it specifies the particular witnesses to be examined, and does not authorize the examination of witnesses generally. (m)

**Mode of taking the examination of witnesses de bene esse.** Whether witnesses are examined by an examiner or by a commissioner under a

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(g) 2 John. Ch. Rep. 146.

(h) 1 Smith's Ch. Pr. 508. Tomkins v. Harrison, Mad. & Geld. 315.

(i) Lingan v. Henderson, 1 Bland, 238.

(k) Williams v. Williams, 1 Dick. 99.

(l) Hinde's Pr. 313.
commission, their examination is taken in the same manner as the examination of a witness in chief. In either case, all the formalities which are required in the examination of witnesses in chief must be observed, at least as far as the circumstances of the case will admit of their being so. (e)

**Notice of examination.** In all cases, notice of the examination of a witness *de bene esse*, either by an examiner, or upon the execution of a commission for that purpose, must be given to the opposite party, in order that he may have an opportunity for cross examination. (p)

**After examination de bene esse, examination in chief to be had.** The party examining witnesses *de bene esse*, is bound to take the earliest opportunity to examine them afterwards in the ordinary method; and if he is guilty of any laches in so doing, he will lose the benefit of the examination *de bene esse*. (q) If the witness is alive, or in the country, he must be examined in chief. And to entitle the party to read the depositions taken *de bene esse* at the hearing, he must show by affidavit the death of the witness, or his absence, when the proofs in chief were taken. (r) But whenever it can be established to the satisfaction of the court that there is a moral impossibility against the examination of a witness in chief, it will order depositions taken *de bene esse* to be published. (s) So also, the court has permitted depositions of this nature to be read, although there has been no strict proof of the death of the witnesses; because the length of time which has elapsed since the depositions were taken, has afforded a just ground for presuming them to be dead. (t)

And sometimes, where the evidence is required upon a trial at law, the court will order depositions taken *de bene esse* to be published, on the ground that the witness, though alive, will be unable, from age or sickness, or other infirmity to attend at the trial. (u) But the more usual course, in such cases, is to make an order that the officer in whose possession the original deposition is, shall attend with it at the trial, in order that if it should be proved to the satisfaction of the court of law that the witness is unable to attend, then the depositions should be tendered.

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(o) Hinde’s Pr. 313.  
(q) 2 Dan. 549.  
(r) Cana v. Cano, 1 P. Wma. 587.  
(s) Anon. 2 Ves. 496. Marren v. Bound. 1 Vern. 331.  
Rom. 140.
and read; (v) it being the province of the judge who tries the cause at law, and not of this court, to decide on the admissibility of the evidence, upon the facts as they appear before him. (w) Upon this ground, the court has frequently refused to make an order that the depositions taken de bene esse, of a witness who was alive, though sworn by affidavit to be unable to attend at the trial of an issue at law, should be read at the trial. (x)

It should be observed that depositions taken de bene esse can never be used except for the purpose of supplying the want of an examination in chief. Applications to this effect have been made where many circumstances have concurred to induce a belief that the examination de bene esse, and the examinations in chief, were contradictory, but they have been refused. (y)

Such is the English practice. Whether in this state a re-examination of a witness in chief, who has been examined de bene esse will be required in any case, has not been settled by any decision of the court.

2. Summary proceedings under the statute.] It is provided by the revised statutes that any person who is a party to a suit pending in any court of this state, or who expects to be a party in any suit about to be commenced, may cause the testimony of any witness material to him in the prosecution or defence of such suit, to be taken conditionally, and to be perpetuated. (z)

Upon producing to either of the officers therein named proof by affidavit that the applicant is a party to a suit actually pending in some court of record in this state, or that he has good reason to expect to be made a party to such a suit; and that the testimony of any witness within this state is material and necessary to the prosecution or defence of such suit; and if the suit is not actually commenced, that the party expected to be adverse to the applicant resides within this state and is of full age, such officer is authorized to appoint a place and time for the examination of such witness, and to issue a summons to the witness to appear and testify at the time and place appointed. (a)

The subsequent sections of the statute specify the manner in which

(w) Jones v. Jones, 1 Cox, 184.
(x) Hindo's Ch. 390.
(y) Cann v. Cann, 1 P. Wms. 567.
(z) 9 R. S. 398, § 45, (orig. § 33.)
(a) Id. ib. §§ 46, 47, (orig.) §§ 34, 35.)
the testimony of the witness is to be taken, the cases in which his deposition may be given in evidence, the effect thereof, &c. (b)

Under the former act, which was similar in its provisions to the article of the revised statutes above referred to, it has been decided that a witness upon his examination de bene esse is bound to give evidence in the same cases and to the same extent that he would be, were he called as a witness upon the trial of the cause; and that he is not bound to answer a question which would either criminate himself, render him infamous, or subject him to a penalty or forfeiture. (c) The act does not authorize the examination of a witness who could not be compelled to testify upon the trial. (d)

II. BY AN EXAMINER.

Except in cases where they reside more than twenty miles from an examiner, or out of the state; or where, for special reasons, it is expedient to have them examined by a vice chancellor or by the court itself, witnesses are usually examined by examiners; who are officers of the court appointed for that purpose.

Each party has a right to elect his own examiner; and the court will not, on motion of the opposite party, interfere with that right. But a direct examination may be had before one examiner, and a cross-examination before another. (e)

Witnesses cannot be examined by an examiner until the expiration of twenty days after the replication is put in, or twenty days after the cause is in readiness for hearing or to take testimony against all of the defendants. After the twenty days have elapsed, however, if no notice of an application for the examination of witnesses before a vice-chancellor or in open court, or for an issue, has been given; or if the application has been denied; either party may have an order of course to produce witnesses within forty days after notice of the order. (f) Which order operates upon both parties equally.

Notice of this order must be served upon the opposite party; and until such notice is served, the time does not commence running.

If the notice is served upon the agent of the solicitor for the opposite party, each party has double the usual time to produce his witnesses.

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(b) Id. 390, §§ 48 to 53.
(c) Matter of Kip, 1 Paige, 601.
(d) Id. id.
(f) Rules 67, 68.
And if the adverse party wishes to shorten the time, he must obtain an order on his part, and serve notice thereof upon the opposite solicitor, either personally or by leaving the same at his office.\(^{(g)}\)

The order to produce witnesses having been entered, and notice thereof served upon the solicitor for the adverse party, the next step to be taken by the party obtaining the order is to arrange with the examiner a day when he will be able to examine the witnesses, and to give notice of the time and place of examination, to the other party.

**Enlarging time to examine witnesses.** One order to enlarge the time to produce witnesses may be granted, on sufficient cause shown, without notice to the adverse party; but an ex parte order will not be granted after the time to produce witnesses has actually expired; nor will a second order be granted to the same party, except on the usual notice of the application to the adverse party, and upon such terms as the court may prescribe.\(^{(h)}\)

Where one party has obtained an order to extend the time, both parties have a right to take testimony until its expiration. The order operates as an enlargement of the forty days rule. But the opposite party is not precluded from obtaining an ex parte order extending the time still further.\(^{(i)}\)

Where the time to produce witnesses has been extended by agreement of the parties, an ex parte order further to extend the time is regular, if made before the expiration of the time agreed on by the stipulation of the parties. But the party applying for such further extension should state the fact of the previous extension by agreement of the parties.\(^{(k)}\)

**Notice of examination.** It is not necessary to show witnesses prior to their examination; but notice of the examination, and of the names, places of abode, and additions of the witnesses must be given to the adverse party at least ten days before the examination, if his solicitor resides more than fifty miles from the place of examination, and in all other cases at least six days.\(^{(l)}\)

Notice that witnesses will be examined at a particular tavern in a city named in the notice, without mentioning the christian name of the tavern keeper, is good; unless it is shown there were, in the same city, two tavern keepers of the same sur-name.\(^{(m)}\)

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\(^{(g)}\) James v. Berry, 1 Paige, 647.  
\(^{(h)}\) Rule 86.  
\(^{(i)}\) Osgood v. Joslin, 3 Paige, 195.  
\(^{(k)}\) Fitch v. Hazeldine, 9 Paige, 416.  
\(^{(l)}\) Rule 74.  
\(^{(m)}\) Overstreet v. Thompson, 1 Littell, 190.
The examiner does not require proof of the service of the notice, before commencing the examination; but allows the party to proceed, at the peril of having the depositions suppressed, upon the application of the opposite party, if notice has not been given.

An irregularity in the service of notice of examination, will be waived by a neglect to complain of it in season. (a)

Attendance of witnesses how compelled. Whenever there is reason to suppose that a witness will not voluntarily attend to be examined, recourse must be had to the compulsory process of subpœna ad testificandum; which commands the witness to whom it is directed to appear before the examiner to testify on behalf of the party requiring his testimony.

Process of subpœna to compel the attendance of witnesses before an examiner may issue of course. It must specify the time and place of attendance. But no witness can be compelled to appear before an examiner more than forty miles from his place of residence, except by special order of the court. (o)

Any number of names may be inserted in one writ.

The statute makes it the duty of the register, assistant register, and clerks of the court to furnish to solicitors, when required, and on payment of the fees allowed by law, blank process of subpœna for this purpose, duly sealed. (p)

Subpœna duces tecum. In case the witness is required to bring with him any written document or paper in his possession, the writ must be a subpœna duces tecum; which is in the same form as the ordinary subpœna, except that before the words "and hereof fail not at your peril," the words "and that you then and there bring with you and produce" [naming the document or paper required] are inserted.

Under this process, the party may, in court, object to the production of the document; and if the objection be overruled, production is compelled. (g) An attorney, who is a witness to a deed, and in possession of the same, cannot be compelled to attend with it at the hearing, otherwise than by a subpœna duces tecum. (r) A solicitor who has been served with a subpœna duces tecum, for the purpose of having a deed in his possession proved on behalf of the complainant, cannot object to producing the deed, on the ground that he has a lien on it for costs due

(p) 2 R. S. 179, § 75, (orig. § 69)
(g) Field v. Beaumont, 1 Swanst. 299.
(o) Rule 76.
(r) Burk v. Lewis, 6 Mad. 29.
from the defendant. If he does, the court will order him to produce the deed at his own expense, and to pay all the costs consequent on his refusal.\(^{(s)}\)

**Service of subpoena.** The subpoena is served by exhibiting to the witness the original writ under the seal of the court; delivering to him a copy of such writ, or a ticket containing its substance; and paying or tendering to him the fees allowed by law for travelling to, and returning from, the place of examination, and the fees allowed for one day's attendance.\(^{(t)}\) Those fees are, fifty cents per day to each witness, for attending, and four cents for travelling every mile in coming to or returning from the place of attendance, if the witness resides more than three miles from the place of attendance.\(^{(u)}\)

If the witness, whose attendance is required, is a married woman, the subpoena must be served upon her personally, and the fees should be tendered to her personally, and not to her husband.\(^{(v)}\)

The person serving the subpoena should be careful to see that the copy delivered to the witness is a true copy of the original writ; in order that he may make affidavit of the fact, if necessary. And he should tender to the witness, in specie, the fees for attendance and travel to which he is by law entitled.

**Proceedings against witness who fails to attend.** The statute relative to proceedings as for contempts to enforce civil remedies, contains a provision authorizing persons summoned as witnesses who shall refuse or neglect to obey such summons, or to attend, be sworn, or answer, to be proceeded against in the manner therein provided.\(^{(w)}\) And by another article of the statute, a failure of such witness to attend is declared a contempt of court, and subjects him to the payment of the sum of fifty dollars; besides the damages the party subpoenaing him may have sustained.\(^{(x)}\)

The 76th rule also contains a provision that witnesses duly subpoenaed may be punished for contempt, if they fail to attend and submit to an examination.

The particular method of proceeding against witnesses, under these provisions, will be stated hereafter, under the head of "contempts."

**Furnishing names of witnesses.** Before the commencing of the examination of any witnesses, except those examined de bene esse, the

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\(^{(s)}\) Brasserton v. Brasserton, 1 Sim. 455.  
\(^{(t)}\) 9 R. S. 400, § 54.  
\(^{(u)}\) Laws of 1840, p. 391, § 8.  
\(^{(w)}\) 1 Phil. Ev. 782.  
\(^{(x)}\) 2 R. S. 534, § 1.  
\(^{(v)}\) 400, § 55.
parties must furnish to each other, or to the examiner, the names of the several witnesses intended to be examined, with their places of abode, and additions. And no witnesses, whose names are not thus furnished, can be examined by either party without special permission of the court on sufficient cause shown, and after notice to the opposite party. (y) But this rule does not extend to witnesses who are examined merely as to the general character of other witnesses. (s)

If the attention of a party is called to the provisions of the above rule, at the commencement of the examination, and he neglects to furnish a list of his witnesses, he must, in addition to showing a sufficient excuse for his neglect, state what facts he expects to prove by his witnesses. (a)

Proceedings before examiner.] The parties, with their counsel, have a right to be present at the examination of witnesses by an examiner. (b) And such examinations are public.

The witnesses are to be examined, cross-examined, and re-examined orally. (c) It is not the practice in this state to make use of written interrogatories before examiners, as is done in England; although there is nothing in the statute or rules to prohibit it.

We have already stated that where a party to the cause is to be examined as a witness, the order for his examination must be produced to the examiner, before his examination is entered upon. (d)

Oath to witnesses. The first thing to be done by the examiner is to administer the oath to the witnesses. The form of the oath is as follows:—the witness laying his hand upon, and kissing the gospel: “You shall true answer make to all such questions as shall be asked of you upon the examination in this cause pending in the court of chancery of the state of New-York, wherein A. B. is complainant and C. D. is defendant, without favor or affection to either party; and therein you shall speak the truth, the whole truth, and nothing but the truth, so help you God.” Or, if the witness desire it—“You do swear in the presence of the ever-living God, that the answers,” &c. While taking this oath, the witness may or may not hold up his hand, in his discretion. (e)

If the witness is a Quaker, or declares that he has conscientious scruples against taking any oath, or swearing in any form, he will be allowed to give his testimony upon his solemn affirmation, as follows: “You

(z) Idem.
(a) Grant v. Miller, 3 Paige, 199.
(b) 2 R. S. 180, § 89, (orig. § 83.)
(c) Id. ib.
(d) Ante, p. 262.
(e) 2 R. S. 407, § 103, (orig. § 83.)
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solemnly, sincerely, and truly declare and affirm, that you will true answers make," &c. If the witness believes in any other than the christian religion, he is to be sworn according to the peculiar ceremonies of his religion, if there be any such ceremonies, instead of the modes above prescribed.\(f\) In this latter case the examiner must certify, in his jurat, the manner in which the oath has been administered, the religion of the witness, and that the mode pursued is the usual and most solemn form in which oaths are most usually administered to witnesses professing such religion.\(g\)

Method of examining witnesses.] The direct examination of the witness must be completed and signed by him before his cross-examination is commenced. Previous to every adjournment also, the testimony, so far as it has been taken, must be read over to the witness, and be signed by him.\(a\)

The witness may be permitted to explain or correct any mistake made by him, at any time before his examination is finally closed; but no part of his testimony previously reduced to writing can be erased or altered.\(t\)

The examination of each witness must proceed from day to day, until it is completed.\(k\)

Counsel have no right to advise a witness that he is not bound to answer a particular question. It is the duty of the examiner to inform a witness of his legal rights.\(l\)

The questions may be put to the witness, either by the solicitor or by the examiner; and the examiner takes down the answers in writing; concluding the answer to each question before another one is put.

Use of notes by witness. A witness may be permitted to use short notes to refresh his memory, but not the substance of his depositions; nor may he transcribe such notes verbatim.\(m\) The rule is that he may refresh his memory by notes, as to dates and names, because there is nothing to guide the memory as to them; but he cannot be allowed to give his whole evidence from writing.\(n\)

Demurrer by witness. If improper questions are put to a witness, he may, by a demurrer, object to answering them. This species of demurrer signifies merely the witness' tender of reasons why he should not answer the question; and is not, like a demurrer in pleading, con-

\(\begin{align*}
\(f\) & 2 R. S. 407, §§ 104, 105, (orig. \\
(84, 85) & \) Omychund v. Barker, 1 Atk. 21. \\
(6) & Rule 84. \\
(e) & Idem. \\
(4) & Idem. \\
(1) & Taylor v. Wood, 2 Edw. 94. \\
(m) & Curs. Canc. 260. \\
(n) & Anon., Amb. 258. See also Shaw v. Lindsay, 16 Ves. 350.
\end{align*}\)
fined to the facts appearing upon the record, but states the facts upon which the witness relies as the ground of his objection.\(^{(o)}\)

The grounds upon which a witness may protect himself from answering interrogatories or questions, are principally, 1. That his answers may subject him to pains or penalties, or to a forfeiture, or something in the nature of a forfeiture; 2. That the disclosure required may subject him to a decree against himself; or 3. That he cannot answer without a breach of professional confidence.\(^{(p)}\)

Another ground of demurrer has been attempted to be set up, viz. that the question is immaterial to the case, or irrelevant; but it has been held that this ground of objection will not prevail; because it does not concern a witness to examine what is the point in issue.\(^{(q)}\)

Where a witness is served with a subpoena \textit{duces tecum} to produce a deed or other document, it is not necessary that there should be a written interrogatory as to the fact of his having it in his possession; and if, upon being asked, \textit{viva voce}, to produce it, he objects to doing so, either upon the ground of his having an interest in the deed or otherwise, he may refuse to do so without a formal demurrer. The proper course to be adopted by the party, in such a case is, to move that the witness attend and produce the deed and pay the costs occasioned by his refusal; upon the hearing of which motion the court will decide whether the reasons alleged by the witness are satisfactory or not.\(^{(r)}\)

A witness is not excused from answering a question, on the ground that the conduct inquired into on his part would subject him to a penalty, if the time limited for proceeding for the penalty is past.\(^{(s)}\)

The second ground of objection above stated—that the answer may lead to a decree against the witness, is available only in those cases in which the witness is a party to the suit, or has otherwise a direct interest in the subject matter.\(^{(t)}\)

Where the witness demurs to the question—on the ground that he cannot answer without a breach of professional confidence—he must name the party to whom he was attorney or solicitor.\(^{(u)}\) He must also swear that the facts from the discovery of which he desires to be protected, came to him in his capacity of solicitor or attorney to a particular person; for a solicitor or attorney, like any other witness, is bound to discover all se-

\(^{(o)}\) Parkhurst v. Lowten, 2 Swanst. 203.
\(^{(p)}\) 2 Dan. 555. Davis v. Reid, 5 Sim. 443.
\(^{(q)}\) Ashton v. Ashton, 1 Vern. 165. But see 9 Price, 496.
\(^{(r)}\) Bradshaw v. Bradshaw, 1 Russ. & My. 359. 2 Swanst. 213.
\(^{(s)}\) Roberts v. Ellatt, 1 Moo. & Malk. 199.
\(^{(t)}\) 2 Dan. 556.
\(^{(u)}\) Parkhurst v. Lowten, 2 Swanst. 194, 201.
secrets of his client which he did not come to the knowledge of in his relation of solicitor or attorney to his client. (v) It must also appear that the knowledge came to him in the character of a professional adviser, and in such character only. Therefore, where a demurrer stated that the witness was the attorney or agent for a person, it was held not sufficiently precise; for an agent may only be a steward or servant. (w)

But it is not necessary that the facts should have been communicated to the witness in relation to a suit pending, or even in contemplation of a suit. If the witness was consulted professionally, or the facts were communicated to him for the purpose of obtaining his advice or assistance, professionally, the communication is privileged. (x)

There is no regular form of demurrer by a witness to a question or interrogatory. It is sufficient if he states his reasons why he should not answer. (y) He must submit to the judgment of the examiner or commissioner, whether he has not stated a sufficient reason for protecting himself from answering. If the examiner or commissioner is of opinion that he ought to answer, and he will not, he should take down in writing the witness' reasons for declining to answer; (yy) and if the reasons are founded on facts which do not appear upon the pleadings, the facts upon which they are founded must also be stated upon the oath of the witness. (z)

Thus, where a witness demurred to an interrogatory because she claimed an interest in the land, it was disallowed on the ground that she did not answer to the interest, nor state what interest she claimed. (a)

It seems, however, that if the facts upon which the witness relies as the ground of his exemption, appear upon the record, there will be no necessity for re-stating them in the demurrer; as where the witness is party to the suit, and the interest he has in the matter appears upon the pleadings. (b)

In taking down a demurrer, the examiner ought to take the witness' statement upon oath. Where this is not done, the demurrer must be supported by affidavit; as it is necessary the court should, in some way

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(w) Vaillant v. Dode, 2 Atk. 201.
(x) Morris v. Williams, 9 Molloy, 342.
(y) Nightingale v. Dodd, Mos. 298.
(a) Jefferson v. Dawson, 2 Ch. Ca. 208.
(b) Mos. 299. 9 Swanst. 197.
or other, have the sanction of an oath to the facts on which the objection is founded. (c)

A demurrer to two interrogatories may be allowed as to one and overruled as to the other. (d)

A witness who demurs to a question is not the proper person to bring it before the court. If the party putting the question does not ask for an attachment, nor in any way bring the point before the court, no one else can. The question will be considered as waived, or the demurrer well taken, unless he who puts the question persists in it, and takes measures to have the demurrer disposed of. (e)

Interpreter. If a witness whom it is proposed to examine does not understand English, an order should be obtained to appoint an interpreter. This order may be obtained on an ex parte application to the court, upon an affidavit showing the necessity for it.

The person appointed must be sworn to interpret truly; and the deposition is to be taken down by the examiner, from the interpretation, in English. (f)

The oath to be administered to the interpreter, is as follows: "You do solemnly swear that you will truly and faithfully interpret the oath to be administered and the questions to be put to E. F., a witness now to be examined, out of the English language into the French language, and that you will truly and faithfully interpret the answers of the said E. F. thereto, out of the French into the English language."

Signature to depositions. The signature of the witness to his deposition is absolutely necessary; and if he should die after his examination is completed but before it is signed, the deposition cannot be read. (g)

The testimony of the witness is complete, so far as the party calling him is concerned, when the direct examination is finished and signed by the witness. But the party calling him is bound to keep the witness before the examiner a sufficient length of time afterwards to enable the adverse party to complete the cross-examination; or the deposition may be suppressed. (h)

Practice where witness is in prison. If the witness to be examined is confined in prison, so that he cannot be examined elsewhere, the examiner will proceed to the prison, and take his examination there, in

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(c) 2 Swans. 203. Bowman v. Rodwell, 1 Mad. 266. Morgan v. Shaw, 4 103. See also Lord Belmore v. Ander-
well, 1 Mad. 54. 2 Cox, 288; 4 Bro. C. C. 90, S. C. (g) Copeland v. Stanton, 1 P. Wms.
(d) Davis v. Reid, 5 Sim. 443. 414. (d) Trustees of Watertown v. Cowen,
the usual manner. (i) And if no examiner will consent to go to the prison to take his examination, a commission may be procured for the purpose.

Where witness is sick. In like manner, if a witness is incapable, by reason of sickness, of attending at the examiner’s office to be examined, the examiner may go to the place of the witness’ residence and administer the oath, and take the deposition of the witness. (k)

But in either case, notice should be given to the other party of the time and place of examination, in the usual manner.

Cross examination. The cross-examination of a witness should always commence as soon as the direct examination is finished; (l) and without suffering him to go abroad. (m)

It must be completed and signed before the witness is re-examined by the party calling him. (n)

The party producing a witness must bring him before the examiner for cross examination, if it is not completed at one meeting; or the deposition in chief may be suppressed. (o) But if the witness refuses to be cross-examined, it is no reason for such suppression; as the adverse party should enforce his right of cross-examination, by proceeding against him as for a contempt. (p)

A complainant cannot read the cross-examination of one of the defendant’s witnesses if the defendant declines to read the examination in chief. (q)

If the witness dies before his cross-examination, his deposition may, in some cases, still be read; (r) the court, however, bearing in mind the fact that the cross-examination has not taken effect; especially if it should appear that the party had lost any material fact which was within the knowledge of the witness, and which could not have been proved by other means. (s)

Where a party is examined as a witness against another party, he may be cross-examined like any other witness, by the party against whom he is called, and his evidence cannot be used in his own favor. (t)

The chancellor has decided that the fees of the examiner upon the cross-examination of a witness are chargeable to the solicitor of the party.

(ii) Id. ib. See 4 Mad. 413.
(i) Beattagh v. Beattagh, 1 Hogan, 98.
(m) Gilb. For. Rom. 128.
(n) Rule 84.
(o) Whittuck v. Lysaght, 1 Sim. & Stu. 446. 5 Paige, 510.
(p) Smith v. Biggs, 5 Sim. 391.
(q) Arundel v. Arundel, 1 Rep. in Ch. 90.
(r) O’Callaghan v. Murphy, 2 Sch. & Lef. 158.
(t) Benson v. Le Roy, 1 Paige, 122.
for whose benefit or at whose request such cross-examination is had, and not to the solicitor of the party calling the witness. (u)

As respects the effect of a cross-examination, it has been already stated that the cross-examination of a witness will not prejudice the right of the party to move to suppress his deposition on the ground of incompetency. (v)

Re-examination. After the examination of a witness is finally closed, he cannot be again examined to the same facts, without the consent of the adverse party, or by order of the court, on sufficient cause shown. But he may be re-examined as to any new matter arising out of the testimony of other witnesses. (w)

On an application for liberty to re-examine a witness to correct a mistake involving the direct contradiction of a material fact, the court made the order, with a direction that the examiner should certify specially as to the circumstances. (x)

A party will not be allowed to re-examine a witness whose memory has been refreshed since his examination closed, except as to documentary evidence. (y)

After a hearing and final decree in a cause, a witness cannot be re-examined to explain or correct his testimony taken on his examination in chief and read at the hearing; unless under very special circumstances. (z)

Such a re-examination rests in discretion; and though granted, under peculiar circumstances, is contrary to the ordinary practice of the court. (a)

How long examination may continue. In the case of Green et al. v. Wheeler et al., (b) Chancellor Walworth decided, that where an examination of witnesses is commenced before the time for taking testimony expires, it may be continued by the examiner, if necessary, after the expiration of such time; until an order to close the proofs is actually entered.

Objections to competency of witnesses. We have before stated that if a party wishes to exclude the testimony of a witness on the ground that he is incompetent, he must raise the objection before the examiner; otherwise he cannot insist upon it at the hearing. (c)

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(a) Trustees of Watertown v. Cowen, 5 Paige, 510.
(b) See ante, p. 287.
(c) Rule 84.
(d) Byrne v. Frear, 1 Moll. 396.
(e) Noel v. Fitzgerald, 1 Hogan, 135.
(f) See ante, p. 266.
(h) Decided, Aug. 16th, 1842.
Upon the objection being made, the examiner is bound to decide upon it. If he decides against the objection, he must note the objection, together with his decision, and proceed to take down the testimony. But if he decides that the objection is well taken, he should not take down the testimony, unless it is insisted on by the party against whom the decision is made, or by his solicitor or counsel.\((d)\)

If the taking down of the testimony is insisted on, the objection and decision and the fact that it was so insisted on, and the person by whom, are to be noted, and the testimony taken down. And in that case, or in case the examiner has erroneously admitted testimony, the party making the objection may apply to have the deposition suppressed, or the objectionable testimony expunged, with costs.\((e)\)

And where the deposition is suppressed, or where the testimony taken down in opposition to the decision of the examiner is expunged, no costs will be allowed, on taxation, for such depositions or testimony; unless the court shall so direct, or the party shall satisfy the taxing officer that the decision of the examiner was wrong.\((f)\)

The chancellor has decided that the right which is given to a party by the 85th rule, to proceed with the examination, notwithstanding the decision of the examiner that the witness is incompetent, or that the interrogatory is irrelevant and improper, cannot properly be exercised, except in cases where the solicitor or counsel of such party has reason to doubt the correctness of the decision. And that if the solicitor or counsel who is conducting the examination insists upon proceeding in a case where there is no reasonable ground for doubt as to the correctness of the decision, he will be personally charged with the costs of the application to the court to suppress the deposition, or to expunge the objectionable testimony.\((g)\)

And it was decided, in the same case, that the examiner has no right to reserve the question, upon an objection to the competency of a witness, or the propriety of an interrogatory, where he has no rational doubt as to the validity of the objection. It is his duty in such cases to decide the question, and leave the solicitor or counsel conducting the examination to proceed with the illegal testimony, at the peril of being personally charged with costs.

Where facts are distinctly put in issue by the pleadings, the examiner cannot reject evidence which is material to prove such facts, on the

\((d)\) Rule 85.
\((e)\) Idem.
\((f)\) Idem.
\((g)\) Scott v. Young, 4 Paige, 542.
ground that the matters put in issue by the pleadings are immaterial. (A)

Filing depositions.] The examiner, within ten days after the order to close the proofs is entered, on being applied to by either party for that purpose, must cause the depositions and exhibits taken or produced before him, to be returned and filed with the register, assistant register or clerk. And unless this is done, the examiner is not entitled to receive pay for taking the depositions or marking the exhibits. (I)

Copies of depositions or exhibits will not be allowed to be read on the hearing, unless the original have been returned and filed in the proper office. (k)

III. BY A VICE CHANCELLOR.

In what cases allowed.] Whenever it shall appear to a vice chancellor that it is expedient that the witnesses in any cause authorized to be heard by him should be examined in his presence, he shall order such examination to be had accordingly, either at a stated or special term. (l)

And whenever it shall appear to the chancellor that it is expedient that the witnesses in any cause not authorized to be heard by a vice chancellor should be examined by a vice chancellor, the chancellor shall order such examination to be had before any vice chancellor to be designated by him. (m)

Whenever an order for such examination of witnesses has been made, no witnesses can be examined by either party, before an examiner or upon a commission, without the special direction of the chancellor or vice chancellor making such original order. (n)

At what time to be applied for.] The chancellor has followed up these statutory provisions, by the 67th rule of the court. That rule provides that where a cause is at issue upon a replication to the plea or answer of all or any of the defendants, and is in readiness for hearing or to take testimony against all of the defendants, if the complainant, or any of the defendants as to whose plea or answer a replication has been filed, desires an examination of the witnesses in the presence of the vice chancellor, he may, within twenty days after the replication is put in, or after the cause is in readiness for hearing or to take testimony, apply to the court for that purpose.

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(A) Putnam v. Ritchie, 6 Paige, 391. (l) 2 R. S. 180, § 90, (orig. § 83.)
(I) Rule 87. (m) Id. § 91, (orig. § 85.)
(k) Idem. (n) Id. § 92, (orig. § 86.)
Notice of such application should be given for the first regular motion day, either in term or vacation, after such notice, can be given.(o)

Special cause to be shown.] But such order will not be granted without sufficient cause shown, whether the application is opposed or not.(p)

Notice of motion for.] Notice of the application must be given to the several parties who have a right to take testimony in the cause. And to enable a defendant to give such notice to his co-defendants, where they appear by a different solicitor, the complainant's solicitor, as soon as the cause is in readiness to take testimony, must give notice thereof to each defendant to whose plea or answer he has filed a replication; stating in such notice the names of the other defendants who have a right to take testimony, and the solicitors by whom they appear. And the defendant is allowed twenty days thereafter to give notice of his application.(q)

The chancellor has decided that, under this clause of the 67th rule, it is not necessary to give notice of the names of solicitors of defendants against whom the bill has been taken as confessed, and who are therefore not entitled to take testimony in the cause.(r)

Hearing of application.] Upon the hearing of the application, the party applying must furnish the court with a brief abstract of the matters of fact in issue, not exceeding five folios; and either party may read or refer to the pleadings of any of the parties who are entitled to take testimony in the cause.(s)

Time and place of examining witnesses.] If the application for an order to examine witnesses in the presence of the vice chancellor is granted, and the time and place for taking the testimony is not designated in the order, the party obtaining the order must, within ten days thereafter, apply to the vice chancellor to assign a time and place for that purpose.(t)

Notice of examination.] The party obtaining the order must give to the adverse party at least fifteen days notice of the time and place thus assigned for the examination. If he neglects to apply and give notice within the time prescribed, the adverse party may consider the order as abandoned, and may obtain a rule of course to produce witnesses in the usual form. Or he may himself apply to the vice chancellor and give notice of the time and place assigned by him.(u)

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(o) Rule 67.  (z) Rule 67.
(p) Idem.  (t) Rule 77.
(q) Idem.  (u) Idem.
Furnishing names of witnesses.] The names of the witnesses to be examined must be furnished before the commencement of the examination, in the same manner as upon an examination before an examiner.(v)

Postponing examination.] If any material witness cannot be procured at the time and place appointed or assigned, the vice chancellor may postpone the taking of the testimony till some future day, on payment of costs, or otherwise in his discretion, and upon such terms and conditions as he may think proper.(w)

Mode of examining witnesses.] The testimony is to be taken down in the mode usually adopted in trials at nisi prius, and the vice chancellor may decide all questions as to the competency of witnesses and the relevancy of testimony, or may in his discretion, reserve any such question until the hearing.(x) Or the testimony may, in the discretion of the vice chancellor, be taken down by the clerk at the time of the examination, and be signed by the witnesses, in the mode in which testimony is taken before an examiner.(y)

Examining a defendant.] An order for the examination of a defendant as a witness against the complainant, or a co-defendant, subject to all just exceptions, may be made by the vice chancellor on the usual affidavit. But such order cannot be granted after the examination of other witnesses has commenced, unless a sufficient excuse is shown for the delay. Such notice of the application must be given to the adverse party as the vice chancellor may deem reasonable.(z)

Motion to dismiss bill.] After the testimony on the part of the complainant is closed, and before the defendant proceeds to examine any witnesses on his part, he may move the vice chancellor to dismiss the bill for want of proof. If the vice chancellor is satisfied that the evidence on the part of the complainant, in connection with the admissions in the answer, is insufficient to sustain the suit, he may, in his discretion, decree a dismissal of the bill, or may reserve the question till the hearing.(a)

Examination how to proceed.] The parties must proceed de die in diem, with the examination of the witnesses, unless the vice chancellor shall adjourn for his own convenience to a more distant day.(b)

Documentary evidence.] All documentary evidence not set forth or

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(v) See ante, p. 290. (w) Rule 77. (x) Rule 78. (z) Rule 78. (y) Rule 89. (a) Rule 79. (b) Rule 80.
distinctly referred to in the pleadings, which either party wishes to use on the hearing, must be produced before the examination is closed, and be marked as exhibits, unless notice of the intention to use the same on the hearing is given to the adverse party before the examination commences.\(^{(c)}\)

**Testimony to be drawn up.** Within four days after the examination is closed, or within such further time as may be allowed by the vice chancellor for that purpose, the solicitor for the party who obtained the order must draw up a statement of the testimony, or of so much thereof as is material to be engrossed and filed. And a copy thereof must be served on the solicitor for the adverse party, with a notice to appear before the vice chancellor to have the testimony settled. This notice must be the same as upon a special motion.\(^{(d)}\)

**Testimony to be settled by vice chancellor.** The adverse party may propose amendments in writing to this statement of the testimony; and the vice chancellor may correct any errors or omissions therein, whether amendments are proposed or not.\(^{(e)}\)

**Statement to be filed.** The statement of the testimony, after having been settled by the vice chancellor, must be correctly engrossed by the clerk of the court, certified by him, and filed in his office.\(^{(f)}\)

The practice of examining witnesses before a vice chancellor is seldom, if ever, resorted to. In fact, no instance of the kind has come to my knowledge since the provisions in relation thereto in the revised statutes were enacted. And I am informed by a gentleman engaged in very extensive practice,\(^{(g)}\) that he has not known of any such cases.

**IV. BY COMMISSIONERS, UPON A COMMISSION.**

By the revised statutes the chancellor is authorized to direct a commission to be issued to any person or persons to take testimony in any cause depending in this court. The vice chancellors are also authorized to direct such commissions to be issued in those causes which they are respectively authorized to hear.\(^{(h)}\)

A commission may also be issued by the register, assistant register, or either of the clerks, under such regulations as the chancellor may from time to time prescribe.\(^{(i)}\)

\(^{(c)}\) Rule 80.
\(^{(d)}\) Rule 81.
\(^{(e)}\) Idem.
\(^{(f)}\) Idem.
\(^{(g)}\) Julius Rhoades, Esq. of Albany.
\(^{(h)}\) 2 R. S. 180, § 84, (orig. § 78.)
\(^{(i)}\) Id. § 85, (orig. § 79.)
This court, however, independent of any statutory regulations, always possessed the power to issue a commission for the examination of witnesses, either in or out of the state, and to direct the manner in which the same should be returned.

The above provisions of the statute are only in affirmation of the power which this court previously possessed and exercised. And the manner of executing the commission and returning the same depend upon the rules and practice of the court, and not upon any statutory provisions; except so far as is specified in 2d Revised Statutes, p. 109, § 89.\(^{(k)}\)

There are two kinds of commissions to examine witnesses: 1. To examine witnesses within the state; and 2. To examine witnesses residing out of the state—called a foreign commission.

1. Commission to examine Witnesses within the State.

The 69th rule provides, that if a party wishes to examine witnesses residing more than twenty miles from an examiner, and no order has been made to examine the witnesses in the presence of a vice chancellor, or to take the testimony in open court at the hearing, or for an issue, he may at any time within twenty days after he has received or served a notice of the rule to produce witnesses, apply for a commission.

_Petition for._ Such commission may be issued upon the petition of the party wishing to examine such witnesses.\(^{(l)}\)

The petition is to be presented to the register, assistant register, or either of the clerks, and must state the names and residence of the witnesses, and of the persons proposed as commissioners; and pray that a commission may be issued to take the examination of such witnesses.\(^{(m)}\)

But the chancellor still has the power to grant a commission, if he thinks proper to do so; notwithstanding the authority given to the register, &c. by the statute, to issue it. Thus, where a special application was made to the court for a commission, within the twenty days allowed by the 69th rule to apply to the register, upon a notice of the application, to the adverse party, the court granted the commission; but refused costs of the special application to the party applying.\(^{(n)}\)

\(^{(k)}\) Brown v. Southworth, 9 Paige, 351.
\(^{(l)}\) 2 R. S. 180, § 86, (orig. § 80.)
\(^{(m)}\) Id. § 87. Rule 69.
\(^{(n)}\) Clark v. Bundy, 9 Paige, 439.
Notice.} The like notice of this application must be given to the opposite party, as is required in cases of special motions. (o)

Order for commission.] If the adverse party does not appear and join in the commission, or object to the persons named as commissioners, a commission will be issued, agreeably to the prayer of the petition. (p)

As to the effect of an order for a commission, it has been decided by the vice chancellor of the first circuit, that such an order will not stay the closing of the proofs until the commission is executed and returned, without a special order of the court. (q)

Joining in commission.] If the adverse party wishes to join in the commission, he must, at the time of presenting the petition, furnish the names and residence of the witnesses on his part, and they will be inserted in the commission. If he is not satisfied with the commissioners named in the petition, he may name commissioners on his part. And the register, assistant register or clerk to whom the petition is presented, after hearing the allegations of the parties, must designate a suitable person or persons to execute the commission, and issue the same accordingly. (r)

Application to court for commission.] The 71st rule provides, that if it shall be necessary to have a commission in any case not specified in the 69th and 70th rules, or after the expiration of the time therein limited for applying to the register, &c. the party may present a petition to the court for that purpose, setting out the facts which entitle him to a special commission. The usual notice of this application must be given to the adverse party.

Carriage of commission.] The party suing out a commission is entitled to the carriage of it. But if he loses it, or commits any gross abuse in the execution of it, so that it is necessary to have the commission renewed, the carriage of the new commission is generally entrusted to the adverse party. (s) Or, if the adverse party has not joined in it, his remedy for a delay is to enter an order to close the proofs as soon as he is entitled to it, and thus drive the party to a special motion for time. And if he has joined, the court will sometimes indulge him with an order for a duplicate commission, where it appears doubtful whether the other party will execute his commission or not; especially in in-
junction cases where the object is delay. Such duplicate commission, the party obtaining it may carry and execute himself. (i)

**Manner of executing commission.** Any of the commissioners named in the commission may execute it, in case the others neglect or refuse to join in the execution thereof, or are from any cause prevented. (u) It is not necessary for the commissioners to take an oath. (v)

The attendance of witnesses before the commissioners for the purpose of being examined, may be compelled by process of subpoena in the same manner as before an examiner. (w)

And the like notice of the time and place of examining them must be given to the adverse party as is required for the examination of witnesses before an examiner. (x) This notice is not to be given by the commissioners, but by the party.

If a witness served with a subpoena *duces tecum* refuses to produce the document mentioned in the subpoena, upon being required to do so by the commissioners, an application may be made to the court by motion; when, if the witness shows no sufficient ground for withholding the production, an order will be made that he attend again before the commissioners and produce it, and pay the party the costs occasioned by his previous refusal. (y)

The witnesses are also to be sworn in the same manner as witnesses under examination by an examiner; (z) the commissioners being authorized to administer oaths or affirmations to them. (a)

The parties and their counsel have a right to be present at the examination, and the witnesses may be examined, cross-examined, and re-examined orally. (b) There is nothing in this section of the statute, or in the rules, prohibiting their examination upon written interrogatories annexed to the commission. The party obtaining the commission may doubtless, therefore, resort to interrogatories if he thinks proper; but the adverse party will not be thereby deprived of his right under the statute, of cross-examining the witnesses orally, nor the party obtaining the commission, of the right of re-examining them orally.

The particular method of taking the testimony, and of objecting to witnesses, is the same as that in use before examiners, and is regulated by the 84th and 85th rules. (c)

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(c) Id. ib. 2 How. Exch. Pr. 579. (v) Bradahaw v. Bradahaw, 1 Russ. & My. 358.
(u) Rule 76.
(e) 1 Hoff. Pr. 473.
(s) See ante, p. 378. Rule 76.
(x) See ante, p. 378. Rule 72.
(y) See ante, p. 281.
(z) 2 R. S. 180 § 89, (orig. § 89.)
(a) Id. ib. § 89, (orig. § 83.)
(b) Id. ib. § 89.
(c) See ante, p. 281 et seq.
The commissioners must subscribe their names to each sheet of deposition taken by them. (d)

Return to commission. Neither the statute nor rules specify any particular time within which commissions are to be returned. The time may be fixed by the order granting the commission, according to the circumstances of each case, or by the court, upon a special application under the 71st rule.

After the examination of the witnesses is completed the depositions are to be annexed to the commission; upon the back of which the return is endorsed in the following form: "The execution of this commission appears in a certain schedule (or schedules) herunto annexed." This return is made by two or more (generally all) of the acting commissioners, who must subscribe their names thereto. (e)

Commissioners making a false return, e.g. by certifying that a witness was examined, upon oath, who was never examined, are, by the English practice, finable. (f)

If any of the commissioners obstruct the others in their examination, or examine irregularly, such misbehavior, or whatever else it may be necessary to communicate to the court, may be certified by the commissioners in the return of the commission. This may be done without affidavit, because, being officers of the court, they are allowed to certify. But it seems that a party wishing to avail himself of such certificate, must make an application supported by affidavit of the fact; otherwise the court will not take notice of the commissioners' certificate alone; because they are appointed for another purpose, and are not to certify but of necessity. (g)

So if a witness, upon being produced before the commissioners, demurs or objects to being examined, they must return the objection, with the commission. (h)

The commissioners enclose the depositions and the commission, with the return endorsed thereon, in an envelope, seal the envelope, and sign their names upon the outside of the package, in their own proper handwriting, and direct it to the register, assistant register, or clerk. (i)

In a recent case before the chancellor, (k) he stated it to be the settled practice of the court, that a commission may be returned by the commissioners by mail in all cases; unless there is a special order to the com-

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(d) Hinde, 345. 2 R. S. 394, § 24, sath. 4, (orig. § 16.)
(e) 1 Smith, 350.
(g) Id. ib.
(h) 2 Dan. 519, 560.
(i) Brown v. Southworth, 9 Paige, 351.
(k) Idem.
trary. And he observed that the return of a commission by mail was as safe as the return of it by a special messenger; and that the sanctioning of this practice would save the delay and expense of special applications to the court for directions in that class of cases where the commission is issued upon a petition to the register or clerk, without a previous order of the court.

If the commission is returned by mail, the commissioners must deposit the packet, directed as above mentioned, in the nearest post office, and endorse thereupon: "Deposited in the post office at ..., this ..., day of ..., by A. B. and C. D., commissioners."

If the commission is directed to be returned by a messenger, the commissioners, unless the order names some particular person, must deliver it to such person as the party suing out the commission shall designate; who will bring it to the office of the register, &c.

The messenger, on delivering the commission to the register, &c., must make oath, before him, "that he received the commission from the hands of the commissioner or commissioners, and that it has not been opened or altered since he received it."(t)

Where a commission for the examination of witnesses in Lisbon, was executed, and forwarded with the depositions to England, but the ship in which they were sent was lost on the passage, the court ordered the commissioners, or any two of them, to transmit the drafts of the depositions, and to certify the circumstances of the return of the commission; but would not make any order for the reading of the drafts of the depositions, &c., at the hearing of the cause, until after the commissioners had made their return and certificate.(m)

In another case,(n) where the messenger accidentally lost the commission upon the road, and it was picked up by travellers, it was allowed to be read, upon their affidavit that they had not opened or altered it.

So where depositions of witnesses examined in India were, by mistake, transmitted from thence to the complainant's solicitor by post, and the packet was delivered to the master unopened, they were received, on the facts being verified by affidavit.(o)

Opening of packet.] When the commission is returned, it is opened

(t) Hinde's Pr. 359.
(m) Burn v. Burn, 2 Cox, 496. 1
(n) Smalea v. Chayer, Dick. 99.
(o) Kansaedy v. Kennedy, 1 Hagg., Dick. 359. 311.

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by the chancellor or the register, &c., and objections of every kind to
the evidence are taken and considered at the hearing of the cause. (p)

Examining parties on a commission.] Parties in the cause may be
examined upon a commission, whenever they are competent witnesses,
as well as before an examiner. (q) But whenever a party is to be ex-
amined, the order for his examination must be produced to the com-
missioners before his deposition is taken; as without an order of the court,
they would not be authorized to examine a party. (r)

Commission to examine de bene esse.] A commission may also
be issued to examine witnesses de bene esse, when necessary; to be ex-
ecuted either in this state or in a foreign country. (s)

2. Commissioners to examine Witnesses out of the State.

In what cases issued.] It sometimes occurs that witnesses whose test-
imony is important to the parties in the cause, or some of them, reside
abroad, or in some place out of the jurisdiction of the court. In such
cases a commission to examine witnesses abroad must be obtained.

Commissions of this description may be issued to take the depositions
of witnesses in any country. Where the country in which the witnesses
reside is at war with this, the usual practice appears to be to direct it
to the nearest neutral port; (t) but in Cahill v. Shepherd, (u) the court
made an order for a commission to examine witnesses in Seville, in
Spain; although there was then a war between England and Spain.

How obtained.] A foreign commission may be applied for by petition
to the register, assistant register, or clerk, in the same manner as a com-
mission to examine witnesses within the state. (v)

But in some cases the party will be obliged to make a special appli-
cation to the court. For instance, in a petition and commission under
the 69th rule, the names of the witnesses must be stated; and there are
sometimes various provisions necessary in a foreign commission, which
the register is authorized to insert in the order. Sometimes also the
party allows the time for applying for the register, &c., to pass by with-
out having presented a petition to him. For these reasons it is quite
common to apply to the court itself for an order.

This practice is authorized by the 71st rule; which provides, that if

(p) Strike v. McDonald, 9 Harris &
Gill, 192.
(q) Plainville v. Brown, 4 Hen. &
Munf. 292.
(r) Hinde, 257.
(s) See 9 Dan. 548. Hinde, 315.
(t) ___ v. Romney, 1 Amb. 63.
(u) 19 Ves. 335.
(v) See ante, p. 293, 294.
it shall be necessary to have a commission to examine witnesses in any case not provided for in the 69th and 70th rules, or after the expiration of the time therein limited for making an application to the register, assistant register, or clerk, the party may present a petition to the court for that purpose, setting out the facts which entitle him to a special commission. The usual notice of this application must be given to the adverse party.

Duplicate commission.] Where the adverse party will join in the commission, the court will sometimes give him liberty to take out a duplicate and transmit it to his own commissioner. But if the opposite party has thus an opportunity of joining, and fails to do so, he will not be permitted to sue out a new commission to the same place himself, except on special grounds.

Number of commissioners.] Four is the usual number of commissioners; but where the commission is to be executed in a foreign country, particularly if very distant, it is the custom to increase the number—sometimes as many as eight have been appointed.

Form of commission.] The commission differs but little, in form, from a commission to be executed within this state; unless it be a commission to examine foreigners in their own language; in which case it directs that they shall "be examined on their respective corporal oaths, to be first taken before the commissioners or any two or more of them, solemnly."

It also differs in another respect from a commission to be executed within this state. As the court has no power to compel foreign commissioners to execute the commission, it simply authorizes them to examine the witnesses; but when directed to commissioners within the state, it authorizes and requires them to do so.

Interrogatories.] Witnesses examined out of the state, if the parties do not consent to an oral examination, are to be examined on written, direct, and cross, interrogatories, to be allowed by a vice chancellor, or master and annexed to the commission.

If the opposite party does not join in the commission, the party obtaining the order should serve him with the interrogatories, and a notice that the officer will be applied to at such a time and place, to settle

(x) Campbell v. Sougall, 19 Ves. 554. Parker, 1 Atk. 19. 2 Dan. 535.
(y) 1 Newl. 410. (b) Rule 79.
(z) Anon., Atk. 633. 2 Fow. Pr. 74.
and allow the interrogatories, direct and cross. This notice should be similar to that required to be given of special motions (c)

Where there was a joinder in a commission, the following course was taken in a case referred to by Mr. Hoffman (d) before the vice chancellor of the first circuit. The commission was issued on the application of the defendant. An order was obtained, en notice, that the complainant furnish to the defendant's solicitor, and the defendant furnish to the complainant's solicitor, the direct interrogatories proposed by them respectively, to be exhibited within six days of the order; and that each party respectively furnish the other with his cross interrogatories within ten days from the date of such order; and that the whole would be settled by the vice chancellor at his chambers on such a day, twelve days from the order.

The interrogatories should be signed by counsel. (e)

The officer should endorse his allowance at the foot of the interrogatories, direct and cross. (f)

Carriage of commission.] As in the case of a commission to be executed within this state, the party obtaining a foreign commission has the right to transmit or carry it. (g)

Notice to other commissioners.] The commissioner or commissioners to whom the commission is delivered, must keep it unopened until the day of attendance, and must give notice of the time and place of executing it to all the other commissioners whose names are upon the direction. This should be in writing; and the party obtaining the commission should see to the service. (h) By the English practice, this is a notice of eight days. (i)

Notice to adverse party of executing commission.] No notice of the time and place of executing a commission out of the state is necessary to be given to the opposite party. (k)

One commissioner sufficient.] Any of the commissioners may execute the commission, in case the others neglect or refuse to join in the execution, or are prevented from attending. (l)

Oath of commissioners.] There is nothing in our statute or rules making it necessary for the commissioners to take an oath before proceeding to execute the commission; though it is the English practice for them to do so.

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(c) 1 Hoff. Pr. 477. See Rule 69.
(d) Brush v. Van denberghe, 1 Hoff. Pr. 477.
(e) 2 Fow. Ex. Pr. 159.
(f) 1 Hoff. Pr. 478.
(g) See ante, p. 284.
(h) Hinde, 334.
(i) Id. 362.
(k) Rule 72.
(l) Rule 70.
PROCEEDINGS TO A DEGREE.

Attendance of witnesses.] No compulsory process can be issued to compel the attendance of witnesses to be examined who are resident out of the jurisdiction of the court. Therefore no subpoena can be issued for that purpose. If the witnesses will not attend voluntarily, they cannot be examined; unless there is some statute of the state, in which the witness resides, compelling him to appear and testify upon a foreign commission. There is such a provision in our revised statutes respecting commissions from other states. (m)

Oaths to witnesses.] The commissioners are authorized to administer oaths or affirmations to such witnesses as attend before them. (n) This is to be done in the manner already directed; (o) except that as the witness is examined upon interrogatories, the word "interrogatories" must be substituted, in the oath, for "questions."

It seems that it is not necessary for the commissioners to certify, in their return, the form of the oath administered. (p)

If an interpreter is employed, the same oath should be administered to him as upon an examination before an examiner. (q)

Method of examination.] If the commissioners on both sides attend the execution of the commission, and one side examines and the other side neither examines nor puts in interrogatories, he will not be allowed afterwards to examine, except upon special order made, on good cause shown. (r) So where a defendant has joined in a commission, and his commissioners do not attend, or if upon due notice being given, one party proceeds and examines his witnesses, the other party, if he does not examine, will not be permitted to have a new commission; unless upon affidavit made of some reasonable cause of non-attendance. (s)

A commissioner may be examined as a witness under the commission; but the other commissioners have no power to enforce his attendance for that purpose. (t) Under special circumstances, the court will permit a commissioner to be examined; even after the commission has been opened and the examination of a witness proceeded with. (u)

The witnesses are to be examined upon the interrogatories, as already stated, and their testimony to be reduced to writing by the commissioners.

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(m) 2 R. S. 397, art. 4.
(n) Id. 180, § 89, (orig. § 82.)
(o) See ante, p. 381.
(p) Keene v. Meade, 3 Petera, 9. 1 Hoff. Pr. 480.
(q) See ante, p. 385.
(s) Hinde, 355.
(t) 9 Roll. Rep. 90.
(u) Grubb v. Grubb, 1 Young & Jer. 36.
The title of the depositions is written before commencing the examination, as follows: "Depositions of witnesses produced, sworn, and examined on the .... day of ...., in the year ...., at ...., under and by virtue of a commission issued out of the court of chancery of the state of New-York, in a certain cause therein depending and at issue between A. B. complainant, and C. D defendant."

The deposition then goes on as follows: "E. F., of the city of ...., in the state of ...., laborer, aged .... years, being duly and publicly sworn (or affirmed) and examined, on the part and behalf of the complainant, deposeseth and saith as follows:

1st. To the first interrogatory this deponent saith as follows." Then must follow the substance of the deposition.

The cross-examination is introduced in a similar way.

"To the first cross-interrogatory this deponent saith as follows:

If a witness cannot depose to any matter contained in an interrogatory, the deposition must be taken down in these words—"To such an interrogatory this deponent cannot depose." (v)

A witness may, upon his examination, demur to the interrogatory, in the same manner as upon an examination before an examiner. (w)

The witness must first be examined upon the interrogatories of the party who produces him, and then, forthwith, without suffering him to go abroad, upon the cross-interrogatories on the other side. (x)

The party suing out the commission has the right to examine the first witness. (y)

If a witness does not understand the English language, the course of proceeding is the same as that to be pursued where such a witness is examined before an examiner. (z)

Commissioners are not bound to examine each witness upon all the interrogatories, but they may examine them to those interrogatories or parts of interrogatories to which they are called upon to examine them. (a) They are not to judge what interrogatories are pertinent and what are not; but are to examine upon the interrogatories as they find them. (b) They are not bound, however, to divest themselves entirely of all discretion as to what is or is not legal evidence; and they are not obliged to take all that is offered to them whether it has the character

(v) 2 Dan. 512.  
(w) See ante. p. 282.  
(x) Hinde's Pr. 346. Gilb. For. 511.  
(y) 1 Newl. 297.  
(z) See ante. 285.  
(b) Baker v. Cole, 2 Swanst. 207, (n).
of evidence or not: yet they must be careful that, in rejecting any thing, they do not reject too much. (c)

The commissioners should also be careful not to take down from a witness matters reflecting upon the character of any of the parties; unless the interrogatory leads to it. Therefore, where a witness, examined under the last general interrogatory, had testified to several things reflecting upon an individual, which the commissioner took down, the court discharged an order by which the witness was directed to pay the costs; because it was the commissioner's fault to take down any matter that was scandalous and impertinent. (d)

When the direct examination of the witness is completed, it must be signed by him and certified by the commissioners, as follows:

"E. F.

Examination taken, reduced to writing, and sworn to this ... day of ....,
Before us,

J. K.
L. M.
Commissioners."

This should be done before his cross-examination is commenced. (e)

And where his cross-examination is completed, it should be signed and certified in the same way, before the witness is re-examined by the party calling him. (f)

Previous to every adjournment also, the testimony, so far as it has been taken, must be read over to the witness and be signed by him. (g)

The witness may be permitted to explain or correct any mistake at any time before his examination is finally closed; but no part of his testimony previously reduced to writing can be erased or altered. (h)

Method of examining witness who does not speak English.  Under a commission to examine witnesses who cannot speak English, the usual and proper course is to take down the depositions from the interpreter in English. (i) This, however, does not appear to be absolutely necessary; since, in some cases, examinations taken down in a foreign language, have been recognized by the court. If the depositions are taken down in the language of the witness, they must afterwards be translated

(c) Whitecock v. Baker, supra.
(d) Anon., 2 P. Wms. 406.
(e) Rule 84.
(f) Idem.
(g) Idem.
(h) Idem.
out of that language into the English, by a person appointed by the court for such purpose, who must be sworn to the truth of his translation; (k) and must attend at the office for the purpose of making it; for the court will not make an order for the record of the depositions to be delivered out, in order that they may be translated. (l)

The translation, after the correctness of it has been sworn to, is annexed to the record, and an office copy made of it, which will be permitted to be read at the hearing; an order for that purpose having been previously obtained; which is usually applied for at the same time that the application is made for the appointment of a person to translate the depositions. (m)

Exhibits, how endorsed.] Where a book, deed, paper, or other exhibit is proved, the following endorsement (without which it cannot be read at the hearing,) is written upon the exhibit produced and signed by the commissioners:

[Title of the cause.]

"At the execution of a commission for the examination of witnesses in this cause, this paper writing was produced and shown to J. S., a witness sworn and examined, and by him deposed unto at the time of his examination on the complainant's behalf, this ... day of ..., before us,

J. K.  { Commissioners."

L. M.

Return to commission.] The commission and depositions are to be returned in the same manner as in the case of a commission executed within this state. (n)

There is no certain time within which it is to be returnable. But a reasonable time is allowed according to circumstances. (o)

Where the commission is ordered to be returned without delay, this ex vi termini imports no definite period wherein the party is restricted to return it. (p) But this latitude of returning the commission must not be converted to oppressive purposes. And if the commission be not executed and returned within a reasonable time—due allowance being made for the distance and other concurrent circumstances of

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(k) 1 Newl. 279. 2 Dan. Pr. 538.  
(l) Faquier v. Tynte, 7 Ves. 399.  
(m) 1 Newl. 279.  
(n) See ante, p. 296.  
(o) Wake v. Franklin, 1 Sim. & Stu. 95.  
(p) Wake v. Franklin, 1 Sim & Stu. 97.
time and place—the court upon application, will interfere, if it appears that unnecessary or wilful delay has occurred. And probably in a gross case it will so far interfere as to make an order upon the party to expeditiously and return the commission by a limited time; and in default, order the proofs to be closed, and let the cause proceed to a hearing.(g)

The above is the English practice, and is founded upon the supposition that the court has fixed some period for the return of the commission. By the practice here, if the court has fixed the time for the return of the commission, and it is not returned within that time, the opposite party can close the proofs. If the commission is issued without an extension of the time to take proofs, the party can close the proofs, as if no commission had issued.

Letters rogatory.] Where the government of a foreign country in which the witnesses proposed to be examined reside, refuses to allow the commissioners to administer oaths to such witnesses, or to allow this commission to be executed, unless it is done by some magistrate or judicial officer there, according to the laws of that country, letters rogatory must be issued.(r)

These are directed to any judge or tribunal having jurisdiction of civil causes in the foreign country, recite the pendency of the suit in this court, and that there are material witnesses residing at that place, without whose testimony justice cannot be done between the parties; and then request the said judge or tribunal to cause the witnesses to come before them, and answer to the interrogatories annexed to the letters rogatory, to cause their depositions to be committed to writing and returned with the letters rogatory.

This practice is derived from the civil law, by which these letters are sometimes called letters requisitory.(s)

A special application must be made to the court, to obtain an order for letters rogatory. And Mr. Hoffman supposes the court would allow them to issue, even without a commission having been previously sent; on satisfactory proof that the authorities would not permit its execution.(t)

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(g) Hinde, 307. (r) Commissioners are forbidden to administer oaths in the Island of St. Croix, (6 Wend. 476;) in the Havana, (t) Hoff. Ch. Pr. 489.

(s) Peters' C. C. Rep. 336., and in Sweden, (3 Ves. sen. 236.)

V. BY THE COURT, AT THE HEARING.

The 67th rule of the court provides, that where a cause is at issue upon a replication to the plea or answer, and is in readiness for hearing, or to take testimony therein against all the defendants, if the complainant, or any of the defendants as to whose plea or answer a replication has been filed, wishes to have the testimony taken in open court, at the hearing of the cause, he may apply for an order to that effect.

Within twenty days after the replication is put in, or within twenty days after the cause is in readiness for hearing, or to take testimony against all the defendants, he may give notice of an application to the court, for such an order for the first regular motion day, either in term or vacation.

But such an order will not be granted, without sufficient cause shown, whether the application be opposed or not. Neither will such order be granted until the cause is in readiness for hearing, or to take testimony, against all of the defendants.

Notice of the application must be given to such of the parties as have a right to take testimony in the cause. And to enable a defendant to give such notice to his co-defendants, where they appear by a different solicitor, the complainant's solicitor, as soon as the cause is in readiness to take testimony, must give notice thereof to each defendant to whose plea or answer he has filed a replication; stating the names of the other defendants who have a right to take testimony, and the names of their solicitors. And the defendant is to have twenty days thereafter to give notice of his application.

As we have before stated, notice need not be given of the names of solicitors of defendants against whom the bill has been taken as confessed.

Upon the hearing of this application, the party making it must furnish the court with a brief abstract of the matters of fact in issue, not exceeding five folios. And either party may read or refer to the pleadings of any of the parties who are entitled to take testimony in the cause. (v)

To obtain this order, draw up an affidavit stating the nature and situation of the cause and the facts or "special cause" making it necessary or expedient to have the witnesses examined in open court at the hearing; instead of being examined in the usual manner; and serve a

(v) Ante, p. 390. (c) Rule 67.
copy, with the notice of motion, within the time specified in the 89th rule for special motions.

VI. AS TO THE CREDIT OF WITNESSES.

In what cases proper.] Formerly, when witnesses were examined in secret, if either of the parties wished, after publication had passed, to impeach or discredit a witness examined by his adversary, he was obliged to exhibit articles for that purpose. And he could not do so, as a matter of course, but must have the sanction of an order of the court, to be applied for on notice to the adverse party.

But now, since examinations of witnesses are to take place in public, upon notice to the opposite party, and after furnishing him with a list of the names of the witnesses to be examined, Articles are unnecessary; the more especially, as the adverse party has a right to be present at the examination, and cross-examine the witnesses.

Witnesses may be impeached, however, by examining other witnesses as to their credit, in the same manner as the witnesses sought to be impeached were themselves examined; except that the names of witnesses examined as to the credit of other witnesses need not be furnished to the opposite party previous to the examination.

Witnesses may be examined to discredit other witnesses, by proving that previously to their examination they had made declarations contrary to their depositions.

At what time to be had.] Examinations as to credit must be made during the running of the rule to produce witnesses; unless some special circumstances prevent it; as for example, where the witness to be discredited was examined under a commission which was not returned until after the time for producing witnesses expired. In such a case the court would open the order to close the proofs and give the party time to examine as to the witness' credit.

Method of examining.] The rule of evidence as to impeaching the credit of witnesses is the same in equity as at law. The inquiry must be general, as to the general character of the witness for veracity.

A party, in examining as to the credit of a witness, can only put general questions, as, "whether you would believe the witness upon his oath." It is not competent, even at law, to ask the ground of that
opinion, but only the general question is permitted. (b) The regular mode of examining into general character is to require of the witnesses whether they have the means of knowing the former witness' general character, and whether upon such knowledge they would believe him upon his oath. (c)

A commission may be resorted to for the purpose of discrediting witnesses not residing abroad, when necessary, as well as in ordinary cases. Where a commission is required, it will, in general, be directed to the same commissioners as were named in the former commission. (d) But a commission will not be directed for the purpose of examining witnesses abroad; unless in case of great emergency, and where it is sworn that no person here can prove anything as to the witness' credit. (e)

If a party, who has obtained a commission to examine a witness as to credit, delays the execution of it till after decree, he will be made to pay the costs. (f)

The method of proceeding upon an examination as to the credit of witnesses, whether before the examiner, or under a commission, is precisely similar to that employed in other cases.

SECTION III.

PROOFS AT THE HEARING.

In what cases received] An examination viva voce at the hearing is admitted where written documents, essential to the justice of the cause, have been neglected to be proved previously; or where the complainant, finding sufficient matter confessed in the defendant's answer to ground a decree upon, proceeds to a hearing of the cause upon bill and answer only. (g) The defendant's answer in such case being taken as true, no examination of witnesses is requisite. Therefore the proof of the documents referred to in the pleadings, when such proof is necessary, must be by witnesses, viva voce, at the hearing. (h) So if a replication is

(b) Carlos v. Brook, 10 Ves. 89.
(c) Phil. & Amos' Ev. 925.
(d) Wood v. Hammerton, 9 Ves. 145.
(e) Callaghan v. Rochfort, 3 Atk. 643.
(f) White v. Fussell, 1 Ves. & B. 151.
(g) Hinde's Pr. 369. 9 John. Ch. 482.
(h) Id. ib. See also Fielder v. Cage, Prac. Reg. 219.
filed; but all the testimony which the complainant requires is matter of record; he may prove the record at the hearing. (i)

**What may be proved.** Proof at the hearing is confined to the verification of exhibits; (k) and it will scarcely ever be received where any thing except hand-writing is to be established. (l)

Ancient records and writings may be proved at the hearing; (m) and office copies of records. (n) So, deeds, bonds, or other instruments which require proof of their due execution by a subscribing witness or witnesses; or promissory notes, bills of exchange, letters or receipts of which proof must be made of the hand-writing of the persons writing or subscribing the same, are all considered as exhibits which may be proved **viva voce**, at the hearing. (o)

It is to be observed that, with the exception of documents coming out of the hands of a public officer having the care of such documents, (which are proved by the mere examination of the officer to that fact,) no exhibit can be proved, **viva voce**, at the hearing, that requires more than the proof of the execution or of hand-writing, to substantiate it. (p) If it be any thing that admits of cross-examination, or that requires any evidence besides that of hand-writing, it cannot be received. (q) Therefore a will cannot be so proved; because the sanity of the testator, and other requisites under the statute, must be proved. (r)

This rule is so strictly adhered to that in many cases where an instrument which, **prima facie**, appears to be an exhibit, requires more formal proof, it cannot be received as one. Thus, in the case of **Earl Pomfret v. Lord Windsor**, (e) the court refused to admit certain receipts to be proved **viva voce**, although ordinarily they might be taken as exhibits; because, in order to make them evidence of the fact they were intended to substantiate, a further fact must have been proved which the other side would have had a right to controvert and cross-examine upon. So where a deed was offered in evidence, the subscribing witnesses to which were dead, and witnesses were produced at the hearing to prove the hand-writing of such witnesses, they were not allowed to be examined, because something more, viz. the death of the witnesses, was necessary.

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(i) Mills v. Pittman, 1 Paig. 490.
(l) Graves v. Budget, 1 Atk. 444. Bubb, 199.
(k) Eade v. Lingood, 1 Atk. 203.
(n) 2 Dan. 449.
(o) Id. ib.
(p) Lake v. Skinner, 1 Jac. & Walk. 9, 15.
(q) Id. ib. Emerson v. Berkley, 4 Hen. & Mansf. 441.
(r) Eade v. Lingood, 1 Atk. 203.
(s) 9 Ves. 473.
(t) Harris v. Ingledew, 3 P. Wms. 93 Niblett v. Daniel, Bubb. 310.
to be proved.\(t\) It has been also held that where a power is required to be exercised by a deed executed in the presence of, and attested by, witnesses, the deed by which the power is exercised cannot be proved, \textit{viva voce}, at the hearing of the cause.\(u\) So where a book in which the collector of a former rector had kept accounts of the receipt of tithes, was offered to be proved \textit{viva voce}, it was rejected, because, besides proving the hand-writing, it would be necessary to prove that it came out of the proper custody, and that the writer was the collector of the tithes.\(v\)

If a document is impeached by the answer of a defendant, it cannot be proved \textit{viva voce} on the part of the complainant against such defendant. Thus where the answer of one of the defendants in a cause insisted that a covenant was fraudulently inserted in a deed, \&c., the court refused to admit such deed to be proved, \textit{viva voce}, against that defendant; although it was held that it might have been so proved against the other defendant who had not impeached its authenticity.\(w\) So where a bill was filed for the payment of an annuity, the circumstances under which the annuity deed was executed, being disputed by the parties, the complainant was not allowed to prove the deed, \textit{viva voce}, as an exhibit; but leave was given to file interrogatories for that purpose.\(x\)

It is only, however, where the \textit{execution} or the \textit{authenticity} of a deed is impeached that it cannot be proved \textit{viva voce}. If the \textit{validity} of it only is disputed, it may be so proved.\(y\)

\textit{Order for.} No deed or other writing can be proved at the hearing, except on an order previously obtained, after due notice to the adverse party.\(z\)

The notice of motion for such an order must describe the deed with reasonable particularity.\(a\)

A copy of the order must be served upon the opposite party.

\textit{What documents may be read without being proved.} Documentary evidence, set out or distinctly referred to in the pleadings, and which is of itself evidence, without further proof—such as exemplifications of records, deeds duly acknowledged, \&c.—may be read at the hearing, without notice to the adverse party, or any order previously obtained for

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\(t\) Boxtan v. Drewit, Prec. in Ch. 64.
\(u\) Brace v. Blick, 7 Sim. 619.
\(v\) Lake v. Skinner, 1 Jac. \& W. 9.
\(w\) Barfield v. Kelly, 4 Russ. 355.
\(x\) Mabur v. Hobbs, 1 Younge \& Coll. 589.
\(y\) Attorney Gen. v. Pearson, 7 Sim. 309.
\(a\) 1 Hoff. Ch. Pr. 490.
that purpose; although not made an exhibit before the examiner. (b) And the 17th rule contains a provision that where any deed or other instrument in writing, which is duly acknowledged or proved in such a manner as to authorize it to be read in evidence, is stated in the bill, or where any judgment or other matter of record is set out or distinctly stated in the bill, such deed or instrument, or an authenticated copy of the record, may be read upon the hearing of the cause on bill and answer; unless the defendant has, in his answer, denied the due execution of such deed, &c. or the existence of such record.

The chancellor has decided that to authorize a complainant to read deeds or other instruments in writing under this rule, he must not only set out the deed, &c. in his bill, but that he must also state therein that such deed or instrument has been duly acknowledged or proved, in such a manner as to entitle it to be read in evidence without further proof. (c) It was also held in the same case that where the complainant, supposing that a deed set out in his bill had been admitted by the answer of the defendant, has omitted to file a replication and prove the execution of the deed, if he discovers his mistake for the first time at the hearing of the cause on bill and answer, he should apply to the court to postpone the further hearing of the cause to a future day, to enable him to make a special application for leave to file a replication and prove the execution of the deed.

In the case of De Peyster v. Golden, (cc) the cause was set down for hearing on bill and answer, and it was asked that certain receipts might be proved at the hearing; but leave was refused.

Examination of witness.] When the cause is called on and the exhibit required to be proved, the original order and the exhibit described therein, together with the witness to prove the same, are to be produced to the register or clerk; who will administer the usual oath. And by the English practice, the examination of the witness, as to the execution, &c. is also performed by the register. (d)

On a re-hearing or appeal.] A motion for leave to prove exhibits, viva voce, on a re-hearing before the lord chancellor, has also been granted, in a case where the exhibits were not proved on the hearing at the rolls; saving just exceptions. (e) And a similar order will be granted in the ordinary case of appeal; upon a special application and payment of costs. (f)

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(b) Pardoe v. De Cala, 7 Paige, 133.
(c) Lauting v. Hall, 9 Paige, 383.
(cc) 1 Edw. 63.
(d) Hinde, 371
(e) Walker v. Symonds, 1 Meriv. 37, n.
(f) Higgins v. Mills, 5 Russ. 287.
Subpœna to testify viva voce.] The attendance of an unwilling witness to prove an exhibit at the hearing, may be enforced by process of subpœna; which is to be issued in the same manner as subpœnas ad testificandum in other cases, and in a similar form.

A subpœna of this nature requires the same personal service as a subpœna to testify in other cases, and the same tender of fees as upon an examination before an examiner.\(^{(g)}\)

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CHAP. XI.

HEARING.

Sect. 1. Preliminary Proceedings

2. Hearing of the Cause.

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SECTION I.

PRELIMINARY PROCEEDINGS.

Notice of hearing.] After the proofs are closed, either party may notice the cause for hearing at the next or any subsequent term, and have it entered on the calendar of causes for the term.\(^{(a)}\)

If the complainant does not reply to the defendant's answer within ten days after it is deemed to be sufficient, the cause will stand for hearing on bill and answer; and either party may notice it for hearing as soon as it is in readiness for hearing against the other defendants, if there are any.\(^{(b)}\)

It is not necessary to obtain an order, to set the cause down for hearing.\(^{(c)}\)

Notices of hearing must be served upon the opposite party, where his

\(^{(a)}\) See ante, p. 289. 9 Dan. Ch. Pr.: \(^{(b)}\) Rule 65.

\(^{(a)}\) Rule 88. 445. \(^{(b)}\) Rule 98. \(^{(c)}\) Rule 98.
solicitor resides over one hundred miles from the place where the court is held, at least eight days before the commencement of the term; if he resides over fifty and not exceeding one hundred miles from such place, six days; and in all other cases at least four days previous to the term.(d)

Causes must be noticed for hearing for the first day of term, or for as early a day in term as practicable. But if a cause is not in readiness for hearing in time to notice it for the first day in term, it may be placed at the foot of the calendar; and if the bill has been taken as confessed, may be heard out of its regular order.(e)

*Note of issue.*] The solicitor noticing the cause for hearing, must furnish the register, assistant register, or clerk, who is to make up the calendar, with a note of issue specifying the class to which the cause belongs, and the time from which it is entitled to priority. This must be furnished at least four days before the commencement of the term.(f)

Notice to the register to set down the cause, is not necessary or taxable; the note of issue being all that is necessary.(g)

*Case and abbreviation of pleadings.*] When a cause is heard or submitted, if the parties do not agree upon a case to be signed by them, containing, with all requisite brevity, a statement of the pleadings and proofs, the complainant must furnish the court with a case. This should state the times of filing the bill and other pleadings, the names of the original parties, the change of parties, if any has taken place, and a very brief history of the proceedings in the cause. And it should contain an abbreviation of the pleadings, not exceeding one sixth of the number of folios contained in such pleadings.(h)

*Method of making up the calendar.*] In making up the calendar, the causes to be heard are arranged in the following classes. 1st. Causes to be heard on bills taken as confessed, which are entered according to priority from the date of the order to take the bill as confessed. 2d. Pleas and demurrers; which have priority from the time of filing the same. 3d. Causes to be heard on bill and answer; which take priority from the time when the answer was put in. 4th. Causes to be heard on pleadings or on pleadings and proofs; which have priority from the time the replication was filed.

Causes to be heard on exceptions, or upon the equity reserved in a decreetal order, must be placed in the class to which they belonged.
before the decretal order or reference, and according to their priority at that time. And causes for re-hearing are to be arranged in the same manner.

Appeals from orders, decrees, or sentences of the vice chancellors or surrogates, when necessary to be placed on the calendar, have priority in the several classes and over other causes in the same class, except such as are specially directed to be heard before the chancellor, from the time when the matter arose before the vice chancellor, or surrogate.\(^{(i)}\)

Appeal causes are to be placed or the chancellor's calendar, as of the same date at which they were entitled to be placed on the calendar of the court below.\(^{(k)}\) An appeal from the decision of the surrogate upon a summary application, is not to be placed on the calendar, but is heard as a special motion.\(^{(l)}\)

The court, in hearing calendar causes, however, may, in its discretion, give a preference to any particular cause or description of causes.

And mortgage causes of the 4th class are entitled to a preference over any other causes of the same class; unless the defendant, previous to the hearing, files an affidavit of merits, and that his answer has not been put in for delay. The filing of this affidavit should be noted on the calendar.\(^{(m)}\)

*Papers necessary to be furnished.*] Where the cause is heard or submitted on *plea or demurrer* or on *bill and answer*, except in mortgage and partition causes, where the complainant's rights are not contested, the court must be furnished with copies of the pleadings and an abbreviation thereof not exceeding one sixth of the number of folios contained in the originals.\(^{(n)}\)

If the cause is heard on *bill, answer and replication*, or on *pleadings and proofs*, in addition to the case required by the 90th rule, the court is to be furnished with copies of the pleadings, and of the dispositions, if any, and with short abstracts of the exhibits.

On an *appeal* or *re-hearing*, a copy of the decree or order appealed from or re-heard, must be furnished, and copies of the pleadings, abstracts, cases, depositions, &c., on which the same was founded, a copy of the notice of appeal filed with the clerk, and of the vice chancellor's opinion if one was delivered, and a copy of the minutes of the clerk showing what papers were read or used, or offered or rejected upon the hearing in the court below.\(^{(o)}\)

\(^{(i)}\) Rule 91.
\(^{(k)}\) Belknap v. Tremble, 2 Paige, 277.
\(^{(l)}\) Wood v. Wood, M. S. Nov. 30th, 1853.
\(^{(m)}\) Rule 91.
\(^{(n)}\) Rule 93.
\(^{(o)}\) Rule 93.
And the court has decided that, upon the hearing of an appeal from the sentence or decree of a surrogate, the papers to be furnished for the use of the chancellor are, the copy of the surrogate's return, including a transcript of the appeal as entered in the court below, and copies of the petition of appeal and of the answer thereto, filed in the appellate court, and a copy of the points upon the appeal.\(^{(p)}\)

It is the duty of the clerk of the vice chancellor to enter in the minutes of the court, a statement of the pleadings, depositions, affidavits, &c., read or agreed to be considered as read, upon the hearing of the cause before the vice chancellor, or which were offered and rejected. And where any mistake has occurred, by the neglect of the clerk to enter a paper as read which was in fact read or agreed to be considered as read in the court below, the minutes may be corrected on application to the vice chancellor. But papers which were not in fact used or agreed to be considered as read there, nor offered and rejected, cannot be used on the hearing of the appeal.\(^{(q)}\)

Upon exceptions to a master's report, copies of the order of reference, report and exceptions, and of such parts of the evidence, before the master, and of the pleadings, as are material, must be furnished.

Where the cause is heard upon the pleadings and the verdict of a jury, a copy of the order and master's report directing and settling the issue, and a copy of the clerk's minutes of the trial and verdict, are to be furnished in addition to the case and proceedings.

The necessary papers must be handed to the court when the hearing of the cause commences.\(^{(r)}\)

By whom papers are to be furnished.] If the cause is heard or submitted on plea or demurrer, or on an appeal, or on exceptions to a master's report, or on a rehearing, the papers must be furnished by the party pleading, demurring, appealing, or excepting, or who obtained the rehearing, except on appeals from the vice chancellors, where the respondent or party principally interested in, or entitled to the benefit of the order or decree, has given notice of his election to furnish the necessary papers; in which case, the latter is to furnish them.

In all other cases the papers must be furnished by the complainant; except that on an original hearing upon pleadings and proofs, each party must furnish copies of the testimony and abstracts of the exhibits, on his part only.

And each party must deliver to the court and to the adverse party, a copy of the points on which he relies; and he may also deliver to the

\(^{(p)}\) Halsey v. Van Amringe, 6 Paige, 183. 19.
\(^{(q)}\) Studwell v. Palmer, 5 Paige, 168.
\(^{(r)}\) Rule 93.
court and to the adverse party, a draft of the minutes of the decree to
which he thinks himself entitled.\(s\)

\textit{Notice of motion to suppress depositions.]} Where a party, upon the
examination of witnesses before an examiner or a commissioner, has ob-
jected to the competency of any witness, or to the relevancy or propri-
ety of any question, he may, at the hearing, apply to have the deposi-
tion suppressed, or the objectionable testimony expunged. But he must
give due notice of such application, to the opposite party.\(t\)

\textbf{SECTION II.}

\textbf{HEARING OF THE CAUSE.}

\textit{Before whom hearing to be had.]} Whenever a cause which might be
heard by a vice chancellor, shall be ready to be set down for hear-
ing, either party may apply to the chancellor for leave to set down
the same for hearing before the chancellor; and he may direct the
same to be set down accordingly; whenever, from the difficulty of
the case, or for any other reason, he shall think proper.\(u\)

Applications of this nature are very rare. The chancellor is so over-
whelmed with business that the case must be very difficult or the rea-
son very substantial to induce him to grant such an application. The
current usually sets the other way.

It has been decided that where a cause pending before a vice chancel-
lor is in readiness for hearing, but cannot be heard because such vice
chancellor, before his appointment, had been counsel in the cause, the
chancellor, upon application to him, may direct the cause to be heard
before any other vice chancellor, at a stated term of his court. And in
such case the decree must be entered with the clerk of the circuit where
the suit was pending; the name of the vice chancellor before whom the
cause was heard being inserted in the caption of the decree, instead of
the name of the vice chancellor of that circuit.\(v\)

\textit{Motion to suppress depositions.]} In case notice has been given of a
motion to suppress depositions at the hearing, it is usual to bring it on
before entering upon the hearing of the cause. The court may either
decide the question at once, as to the admissibility of the depositions, or

\(s\) Rule 75. \hspace{1cm} \(u\) 2 R. S. 178, § 69, (orig. § 63.)
\(t\) Rule 85. \hspace{1cm} \(v\) Whitney v. Post, 8 Paige, 36.
may allow them to be read *de bene esse*, reserving the question until the
final deposition of the cause.

*Submissions.*] If the parties do not wish to argue the cause orally,
they may submit the same to the court upon written arguments. All
submissions must be in writing, signed by the parties or their counsel or
solicitors, and must be delivered to the register, assistant register, or
clerk, where the court is held, with the necessary copies and papers.\(^{(w)}\)
As to what papers are necessary, see ante, p. 314.

On special motions and petitions as well as in calender causes, the reg-
ister &c., must mark the papers and note them in his minutes, as on a
hearing; and he is not to enter the submission until all the necessary
copies and papers are furnished.\(^{(x)}\)

*Course of proceeding.*] Where the cause is heard upon *pleadings
and proofs*, the complainant opens. The order of proceeding is as fol-
low: The complainant's bill is first opened, or the substance of it
briefly stated, and the defendant's answer also by the junior counsel, (if
there is more than one counsel;) after which the same counsel states
the case and the matters in issue, and the points of equity arising there-
from; and then such depositions and parts of the defendant's answer as
are considered essential, are read by the complainant's counsel. After
the complainant's evidence has been read, the opening counsel for the
complainant makes his observations and arguments. Then the defend-
ant's counsel go through the same process for him. The leading coun-
sel for the complainant is then heard in reply, and concludes the argu-
ment.

Where a replication to the answer has been filed, and the cause is
heard upon pleadings and proofs, the allegations set up in the answer,
and which are not responsive to the bill, must be proved, or the defend-
ant cannot avail himself of them at the hearing.\(^{(y)}\)

Where there are two defendants, who set up adverse claims, the course
of practice is for the complainant to open; for the defendant who sets
up a claim against the other then to go on, and for the other defendant
to answer; and there is no reply between the defendants;\(^{(x)}\) unless
specially directed by the court.

Upon *plea or demurrer*, the defendant holds the affirmative, and opens
the argument; and upon *appeal*, the opening argument of the appellant's
counsel is first heard. Where the cause is heard upon *exceptions to a

\(^{(w)}\) Rule 97.
\(^{(y)}\) Simpson v. Hart, 14 John. 63.
\(^{(x)}\) Rule 97.
\(^{(z)}\) Walton v. Van Mater, Halet. Dig. 175.
master’s report, the party excepting opens the argument. But where both parties except, the complainant’s counsel is first heard upon his exceptions, and then the defendant’s counsel answers him, and opens the argument upon his own exceptions.

Where the cause is heard on bill and answer, the course of proceedings is much the same as on a hearing upon pleadings and proofs. But the answer is to be wholly read, or considered as read, and every matter set up in it, whether responsive to the bill or of pure avoidance, must be taken as true. And this rule prevails even where the defendant only avers that he believes and hopes to be able to prove such facts.(a)

No other evidence is permitted to be read, except it be matters of record to which the answer refers, and which are provable by the record itself; or documents which may be proved, viva voce, at the hearing.(b) We have already examined the subject of proofs at the hearing, however, in the 3d section of the last preceding chapter; to which the reader is referred.(c)

If the complainant goes to hearing on bill and answer, and the court shall not see cause to make a decree thereupon, for want of sufficient matter confessed by the answer, the bill will be dismissed with costs.

In general, where a cause has been brought on for hearing upon bill and answer, and the complainant fails in making out his case for want of a full admission of it by the answer, the court will permit him to reply on payment of costs. Thus, where a bill was brought against three several executors of three joint factors, one of whom swore “he believed and hoped to prove” that the complainant’s demand was paid; whereupon the complainant replied as to the other two, and brought the cause on upon bill and answer as to the third, it was insisted that the complainant could have no decree for thus bringing on his cause, for though the defendant had not directly sworn by his answer that the money was paid, yet as he had sworn he believed and hoped to be able to prove it paid, and the complainant, by not replying, had precluded him from the benefit of his proof, what the defendant stated upon his belief must be taken to be true, and the complainant was ordered to pay the costs, and left at liberty to reply to the answer of the other defendants.(d)

It may also be observed here that where, after a cause has come on to

(b) 2 Dan. 697.
(c) Ante, p. 308.
(d) Barker v. Wyld, 1 Vern. 140.
be heard, it has been discovered that, through inadvertence although witnesses have been examined, no replication has been filed, the court has permitted one to be filed, *nunc pro tunc.* (e) The general rule of the court, however, is as already stated, that unless a replication be filed, the complainant, if he brings the cause on to a hearing, must submit to take the answer as wholly true; because the defendant has been prevented from proving the truth thereof. (f)

*Private hearing.* Causes are not always heard in public. Wherever there are valid objections to a public hearing, the cause may be heard privately. Thus, in the Matter of Lord Portsmouth, (g) Lord Eldon, before going into his private room for the purpose of proceeding with the further hearing of the petition and affidavits privately, according to appointment, desired that it might be understood that it was the uniform practice in chancery, as long as the court had existed, in the case of family disputes, on the application of the counsel on both sides, to hear the same in the chancellor's private room; and that what was so done, was not the act of the judge but of the parties themselves, in such family cases.

But in the more recent case of *Ogle v. Brandling,* (h) it was held that the consent of both parties was not necessary to a private hearing. That case related to the custody of a young lady who was a ward of the court. And it was stated that some of the disclosures made in the affidavits, were of so distressing a kind as to render it a proper case to be heard in private. The opposite party would not consent to this. The lord chancellor said he would direct the case to be heard in private, notwithstanding that one of the parties withheld his consent; that he would act on that as on similar occasions, upon the responsibility of the counsel, who gave him the assurance that a private hearing was proper.

*Hearing cause out of its order.* Although it is a general rule that causes come on to be heard according as they stand upon the calendar, yet they are sometimes heard out of their ordinary course. In some cases a cause noticed for hearing will be advanced, on an application to the court, on sufficient cause being shown. (i)

*Hearing two causes together.* In cross suits, and also in other suits, where there are two causes between the same parties, involving the same point in dispute, and where it is material that both causes should be heard together, if both are set down for hearing, but stand at a dis-
tance from each other, the court will permit the cause which stands last, to be advanced, or that which stands first to be adjourned, so that both may come on at the same time; and likewise, if it be necessary, the depositions taken in one cause to be read in the other—an order for that purpose having been previously obtained.\(k\)

**Depositions and bill in cross suit.** The court will also order depositions in a cross suit to be read, on the account directed in the original suit, though the cross bill is dismissed.\(l\) And a cross bill for discovery, taken *pro confesso*, will be ordered, on motion, to be read on the hearing of the original cause.\(m\)

**Objecting to jurisdiction.** If a defendant puts in his answer, and goes to hearing without objecting to the jurisdiction of the court, on the ground that the complainant has a perfect remedy at law, it is too late to make the objection at the hearing.\(n\)

**Objection for want of parties.** The proper time for taking an objection for want of parties, is upon opening the pleadings, and before the merits are discussed;\(o\) but it frequently happens that after a cause has been gone into, and thoroughly heard, the court has felt itself compelled to let it stand over for the purpose of amendment.\(p\)

The objection for want of parties ought to proceed from the defendant; for it has been decided that the complainant, bringing his cause to a hearing without proper parties, cannot put it off without the consent of the defendant.\(q\) Cases of exception may occur; where, for instance, the complainant was not aware of the existence of persons whose claims could touch the interests of those who were upon the record; but that ought to be clearly established. And the complainant ought to apply as soon as he has obtained that knowledge.\(r\)

An objection at the hearing, for want of a particular party, may be obviated by the complainant's waiving the relief he is entitled to against such party.\(s\) And where the evident consequence of the establishment of the rights asserted by the bill, might be the giving to the complainant a claim against other persons who are not parties to the suit, the complainant, by waiving that claim, may avoid the necessity of

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\(a\) *Nevil v. Johnson*, 2 Vern. 447. \(b\) *Jones v. Jones*, 3 Atk. 111. \(c\) *Dar-\n\(d\) *Wixford v. Beazley*, 3 Atk. 501, 503. \(e\) *went v. Walton*, 2 Atk. 510. \(f\) Id. ib. \(g\) *Innes v. Jackson*, 16 Vern. 356. \(h\) Id. ib. \(i\) *Pawlet v. The Bishop of Lincoln*, 2 Atk. 296.
making those persons parties. This, however, cannot be done to the prejudice of others. (t)

In some cases the defect of parties has been cured at the hearing, by the undertaking of the complainant to give full effect to the utmost rights which the absent party could have claimed; those rights being such as could not affect the interest of the defendants. (u)

As a decree, made in the absence of proper parties, may be reversed, and at all events will not bind those who are absent or those claiming under them, (v) great care should be taken on the part of the complainant to have the necessary parties before the court, and that previously to his bringing the cause on for hearing; because he cannot then apply for leave to add parties without the consent of the defendant. (w)

Not only may the defendant raise the objection at the hearing, for want of parties, but the court itself may raise the objection when determining the cause.

Ordering cause to stand over, to add parties.] It appears formerly to have been considered that where a bill wanted proper parties, it was in the power of the court either to dismiss it without prejudice to the complainant’s right to file a new bill, or to give leave to amend; (x) but it seems that a decree of the Master of the Rolls dismissing a bill for want of parties, was afterwards reversed for that reason; and that a decree of the same nature in the court of Exchequer was likewise reversed in the House of Lords, and that since that time causes have never been dismissed for want of parties, but are only ordered to stand over on paying the costs; in order to give the complainant an opportunity to make the proper parties. (y)

But if the objection for want of parties is distinctly taken by the defendant by plea, demurrer, or answer, and the complainant, notwithstanding, goes to hearing without amending his bill by bringing in the necessary parties, the court, in its discretion, may refuse to permit the cause to stand over, and may dismiss the bill with costs. (z)

And where the objection for want of parties is not taken in the answer, or demurrer or plea, costs will in no case be allowed. (a)
An order allowing the cause to stand over is a relaxation on the part of the court, and is always considered as made by consent. Therefore, it cannot be appealed from.\(^{(b)}\)

If a cause comes on again after it has been put off by the court for want of formal parties, an objection for want of other parties, which might have been made in the first instance, comes too late.\(^{(c)}\)

Where a cause is directed to stand over for the purpose of adding parties, and the complainant neglects to proceed under the order, the defendant may move to dismiss the bill for want of prosecution.\(^{(d)}\)

**Ordering cause to stand over to supply proofs.** Leave will also be given by the court, at the hearing, for the cause to stand over for the purpose of supplying defects in the testimony, under special circumstances. Thus, a cause has been allowed to stand over to enable a party to procure an instrument to be stamped, without which it could not be received in evidence.\(^{(e)}\) So, where in a suit by the complainant as administrator, the letters of administration were produced, but the death of the intestate was not proved, the testimony was held insufficient, but liberty was given to file interrogatories to establish the death of the intestate.\(^{(f)}\) And an order for this purpose has been granted on a bill to appoint a trustee to carry a will into execution, where the proof of one of the witnesses to the will being abroad was defective;\(^{(g)}\) to prove an instrument mentioned in the pleadings and not sufficiently established;\(^{(h)}\) where the execution of a will was proved, but the witnesses had not been examined as to the sanity of the testator;\(^{(i)}\) in a case where additional proof was necessary because an infant heir against whom the suit had been revived was held not bound by the admission of his ancestor;\(^{(j)}\) and where the loss of a deed was not sufficiently proved to let in secondary evidence; but this was under special circumstances, and the order was granted with reluctance.\(^{(k)}\)

And where a written agreement set out in the bill was admitted by the answer of one defendant, but was not admitted by the other defendants, who claimed through him, and the complainant’s counsel, under a misapprehension of the law, closed the proofs and brought the cause

\(^{(b)}\) Beresford v. Adair, 2 Cox’s Ca. 156.
\(^{(c)}\) Jones v. Jones, 3 Atk. 217.
\(^{(d)}\) Mitchell v. Lowndes, 2 Cox’s Ca. 15.
\(^{(e)}\) Huddleston v. Briscoe, 11 Vea. 595.
\(^{(f)}\) Moons v. De Bernales, 1 Russ. 301.
\(^{(g)}\) Wood v. Stane, 8 Price, 613.
\(^{(h)}\) Orr v. Johnson, Seaton’s Decrees, 363.
\(^{(i)}\) Abrahams v. Winship, 1 Russ. 526.
\(^{(j)}\) Cartwright v. Cartwright, Dick. 545.
\(^{(k)}\) Cox v. Allingham, Jacob, 337.
to a hearing without making formal proof of the written agreement; and the objection being taken at the hearing that the agreement should have been proved as against those defendants who had not admitted its execution, it was held that the court might suspend the argument and give the complainant an opportunity to prove the agreement in the usual way before an examiner. (m)

Default at the hearing.] If the cause is noticed for hearing on the part of the defendant, and the complainant fails to appear, to argue on his part, or does not furnish the necessary papers, the bill may be dismissed with costs.

If noticed on the part of the complainant, and the defendant does not appear at the hearing and furnish the necessary papers on his part, the complainant may have such decree as he is entitled to by the case made by his bill.

If, upon an appeal, the appellant does not appear and furnish the necessary papers when it is his duty to furnish them, the adverse party, if he has noticed the cause for hearing, may have the decree or order appealed from affirmed, with costs, by default. And if the respondent does not appear, the appellant may be heard ex parte.

Where the respondent has elected to furnish the papers for the court upon the hearing of an appeal, if he does not appear and furnish the necessary papers, his default may be entered. And the adverse party may then furnish the papers and be heard ex parte; either at the same term or the next term of the court, or on any motion day previous to the next term. (n)

Dismissing bill at the hearing.] If the bill is dismissed at the hearing, upon a mere defect of form in the pleadings, and not upon the merits of the case, it should be dismissed without prejudice to the complainant's right to institute a new suit, if he thinks proper to do so (o) Unless the dismissal is accompanied with such a direction, it may be pleaded in bar to a new suit. (p) A direction of this kind will also be inserted where a bill is dismissed in consequence of facts not having been properly put in issue; (q) or where the agreement for the specific performance of which the bill was filed turns out, upon the evidence, to be different from that actually proved; (r) or where it appears clear that the complainant in a bill for specific performance, is entitled to com-

(m) Desplaces v. Goris, 5 Paige, 252; and see Hall v. Latting, 9 Paige, 383.
(n) Rule 96.
(o) Crosier v. Acet, 7 Paige, 137.
(p) Mist. Pl. 194.
(q) McNeil v. Cahill, 2 Bligh, 263.
(r) Woollam v. Hearn, 7 Ves. 299.
Lyndsay v. Lynch, 9 Sch. & Lef. 1.
penetration, although he is precluded, by the form of his bill, from insisting upon it.(s)

Whether a bill for a specific performance be dismissed without prejudice to the complainant's right to bring an action at law, or not, he is still considered by the court of equity, as at liberty to bring his action at law, upon the contract; unless the court thinks proper specifically to restrain him, by injunction, from so doing.(t)

The court will, sometimes, not only acknowledge the complainant's right to bring an action upon an agreement, although it dismisses his bill, but it will, in express terms, give him leave to bring his action upon the agreement.(u)

In general, when a bill is ordered to be dismissed upon a contingent event, the rule is that such orders are not conclusive unless the words "without further order" are added; and that where such words are omitted, the defendant must apply for and obtain an absolute order of dismissal.(v) In this respect, however, the rule acted upon, where an order is made for a cause to stand over for a limited time, with liberty to the complainant to add parties, and in default thereof that the bill should stand dismissed with costs, &c. is different; for it seems that in such cases the bill is actually out of court, without further order; because the defendant has it not in his power to set it down again in a fit state to be heard; insomuch as he is not the person to add the parties.(w)

Retaining bill, with liberty to bring an action.] The court will, in some cases, notwithstanding it decrees a dismissal of the bill, reserve to the complainant the right to bring an action at law. And it not unfrequently happens that the court, instead of making a decree for an immediate dismissal of the bill, will direct it to be retained for twelve months, with liberty to the complainant, in the meantime, to proceed at law, as he shall be advised. In which case it forms a part of the decree, that if the complainant shall not proceed at law, and go to trial within the time limited, his bill is from thenceforth to stand dismissed with costs, &c., but that in case the complainant shall proceed at law and go to trial within the time specified, the court reserves the consid-

(s) Stevens v. Guppy, 3 Russ. 171.  (e) Cator v. Dewar, Seaton on Decrees, 357.  
(t) Morlock v. Buller, 10 Ves. 292.  (w) Id. ib.  2 Dan. 340.  
(u) McNamara v. Arthur, 2 Ball & B. 349.  (w) Id. 941.  
(v) Edwards v. Hockin, Seaton on Decrees, 389.
eration of the costs of the suit, and of all further directions, until the
master shall have made his report.\textsuperscript{\textit{x}}

The cases in which the court retains the bill, with liberty to the
complainant to proceed at law, are those in which it is necessary to es-

tablish his right at law, in order to found the equitable relief;\textsuperscript{\textit{y}} and
the practice cannot be made use of to enable the complainant to try
whether he has any claim at law; and if he fails there, to come into
this court and try to raise an equity.\textsuperscript{\textit{z}} And although in one case\textsuperscript{\textit{a}}
Lord Thurlow appears to have expressed an opinion that the court, by
retaining the bill for a year, has admitted the complainant’s right to
equitable relief, yet the better opinion seems to be that such is not the
necessary consequence, and that the court may ultimately determine
against the complainant, although the bill has been retained.\textsuperscript{\textit{b}}

In decrees of this description, latterly, further directions are only re-
served in the event of the trial taking place.\textsuperscript{\textit{c}} In cases, however,
where default is made in bringing the action, the bill will not be out of
court unless the decree expressly directs that upon default the bill is
to stand dismissed “without further order.”\textsuperscript{\textit{d}}

\textsuperscript{\textit{x}} Seaton on Decrees, 356. 2 Dan. 639.
\textsuperscript{\textit{y}} Walton v. Law, 6 Ves. 150.
\textsuperscript{\textit{z}} Id. ib.
\textsuperscript{\textit{b}} 2 Dan. 640. Seaton on Decrees, 357.
\textsuperscript{\textit{c}} Id. ib. Seaton on Decrees, 357.
\textsuperscript{\textit{d}} Harwood v. Oglander, 6 Ves. 295.
\textsuperscript{\textit{e}} Stevens v. Praed, 2 Cox, 376.
\textsuperscript{\textit{f}} Seaton on Decrees, 357.
CHAP. XII.

DEGREE.

2. Form of.
4. Docketing and Discharging.
5. Rectifying Decree.
   I. Before Enrolment.
      On Petition or Motion.
      Rehearing.
      By Supplemental Bill in the Nature of a Bill of Review.
   II. After Enrolment.
      By Petition.
      By Bill of Review.
6. Decrees Pro Confesso.
7. Decrees by Default.
8. Decrees by Consent.

SECTION I.

NATURE, USES, AND KINDS OF DECREES.

A decree is a sentence or order of the court, corresponding to the judgment of a court of law, pronounced after the hearing or submission of the cause; by which the rights of the parties to the suit are determined and settled according to equity and good conscience.

Decrees are of two kinds—interlocutory and final.

1st. Interlocutory Decrees.

An interlocutory decree is properly a decree pronounced for the purpose of ascertaining matter of law or fact preparatory to a fi-
nal decree. (a) Therefore, when it happens that some material circumstance or fact necessary to be made known to the court is either not stated in the pleadings, or is so imperfectly ascertained by them that the court is unable to determine finally between the parties; and therefore, a reference to, or an inquiry before, a master, or a trial of the facts before a jury upon a feigned issue, becomes necessary, the decree entered for that purpose is an interlocutory decree. The court, in the meantime, suspends its final decree until, by the master's report, or the verdict of the jury, it is enabled to decide finally. (b)

It very seldom happens that a first decree can be final, or conclude the cause. Thus, if any matter of fact is strongly controverted, the court is so sensible of the deficiency of trial by written evidence, that it will not bind the parties thereby, but will direct a feigned issue. (c) Where, also, the object of the suit is a commission for the partition of lands, or to settle their boundaries, the first decree is generally interlocutory; the further directions being reserved till after the commission has been returned.

But the most usual ground for not making a perfect decree, in the first instance, is the necessity which frequently exists for a reference to a master of the court to make inquiries, or to take accounts, or sell estates and adjust other matters which are necessary to be disposed of, before a final decision can be made upon the subject matter of the suit. (d)

There are some cases in which it is a rule of the court not to make any decree whatever until certain preliminary inquiries have been made by a master. This rule is invariably acted upon in suits for the specific performance of contracts. And the court will not permit the question whether a good title can be made or not, to be argued before it in the first instance; even though the objections to the title are stated, and the questions arising upon them are properly raised by the pleadings. (e) But the purchaser may deprive himself of this right, by his manner of pleading, (f) or by acts in pais—such as taking possession of the estate, or exercising acts of ownership over it. (g) But such acts will not preclude the purchaser from his right to investigate the title unless the court is satisfied, from them, that he intended to waive, and has actually waived it. (h)

(a) Sexton on Decrees, 2. 1 Newl. Ch. Pr. 392.
(b) 1 Harr. Ch. Pr. 420.
(c) Id. ib. Hinde, 429.
(d) 2 Dan. 632.
(e) Id. ib. Jenkins v. Hiles, 6 Vesey, 646.

(f) Jenkins v. Hiles, supra.
(g) Fleetwood v. Green, 15 Ves. 594.
(h) Burroughs v. Oakley, 3 Swanst. 159.
The interlocutory decree for a reference as to the title of a vendor, directs an inquiry whether he can make a good title at the time of the reference, not whether he could make a good title at the time of entering into the contract.\(i\) And, under such a reference, it has been held that if the vendor can show a good title at any time before the master's report, it will entitle him to a decree;\(k\) and even after the report, if the vendor can satisfy the court that he can make a good title by clearing up the objections reported by the master, the court will make a decree in his favor.\(l\)

The decree for a reference of title, on a bill for a specific performance, should contain a declaration that the contract ought to be specifically performed.\(m\) The court will also, in many cases, make an interlocutory decree for a reference to a master to inquire what persons are interested in the subject matter of the suit. Thus, in all cases relating to the distribution of the estate of an intestate, the court will, before making any decree affecting the estate, or even ordering an account of it to be taken, direct a master to inquire and report who were the next of kin of the intestate at the time of his decease, and whether any of them are living or dead, and if dead, who are their personal representatives.\(n\)

An inquiry of this nature is always directed, in cases where any part of the property in question devolves upon the next of kin; whether it be upon a total, or upon a partial or constructive intestacy. And, latterly, it has been the practice, in all cases where the next of kin are concerned, to confine the decree, in the first instance, to an inquiry as to the next of kin, and to reserve all further directions.\(o\)

The same course is generally pursued in other cases, where there is a fund distributable among persons constituting a particular class consisting of numerous individuals; as in the case of a bequest to the cousins of a testator, &c. In such cases, as well as in that of intestacy, the court will, before it directs any steps, to be taken, either towards a distribution, or for ascertaining the amount of the fund, satisfy itself, by a previous reference to the master, that all the individuals constituting the class amongst whom the fund is distributable, are parties to the proceeding.\(p\)

It will also adopt the same course of proceeding where the property

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\(i\) Langford v. Pitt, 2 P. Wms. 630.  
\(k\) Mortlock v. Buller, 10 Ves. 202.  
\(l\) Hepburn v. Dunlap, 1 Wheat. 179.  
\(m\) Paton v. Rogers, Mad. & Geld.  
\(n\) Molq v. Smith, Jacob, 495.  
\(o\) 2 Dan. 636.  
\(p\) Id. ib.  
\(q\) Id. ib.  
\(r\) Seaton on Decrees, 73.
is distributable between one of two or more classes of individuals. And where the complainant has filed his bill in the character of an individual belonging to a particular class, the court has directed a preliminary inquiry whether he is or is not within that class. Thus, where the complainants filed their bill in the character of next of kin, an inquiry was directed as to whether they did or did not come within that description. (q) And even where the complainant claimed as heir at law of a person deceased, through a great number of descendents, and in support of his claim had examined witnesses to prove that he filled that character, the Master of the Rolls, before he would hear the cause, directed the master to inquire who was the heir at law of the deceased. (r)

A decree empowering an executor to sell the lands of his testator, for the payment of debts, and to report his proceedings in execution thereof to the court, is not final, but an interlocutory decree. (s) So a decree declaring the rights of the parties merely, and directing an account in conformity therewith, but reserving the consequential directions, and the question of costs, until the coming in of the report, is an interlocutory decree. (t) So if a decree for the foreclosure of a mortgage merely decides or declares the rights of the complainant by virtue of his bond and mortgage, and refers it to a master to compute and ascertain the amount due to him; reserving all questions and directions until the coming in and confirmation of the master's report, it is an interlocutory decree merely; as the complainant cannot obtain the benefit of his suit until he brings the cause on to be heard again upon the equity reserved, and for further directions as to a sale of the mortgaged premises and the payment of his debt and costs out of the proceeds of such sale. (u)

In the case of Travis v. Waters, (v) a similar principle was laid down by the court for the correction of errors. The bill was filed for a specific performance of an agreement for the sale of land and for an account of payments, &c. The court of chancery had decreed a conveyance in fee of part of the premises to be executed by the respondent, and referred it to a master to take an account of the quantity of land to be conveyed, and of the payments, and to ascertain the balance, if any due to the respondent; on the payment of which the respondent was to execute the conveyance. And the question of costs was reserved until the

(q) John v. Jones, Seaton on Decrees, 73.
(s) Goodwin v. Miller, 2 Munf. 42.
(t) Kane v. Whittick, 8 Wend. 219.
(u) Johnson v. Everett, supra.
(v) Johnson v. Everett, 9 Paige, 638.
(c) 12 John. 500.
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coming in of the master's report. The court for the correction of errors held this to be but an interlocutory decree; although it settled the main point in controversy between the parties, to wit, that the complainant was entitled to a specific performance upon the payment of the balance due; but it left other material questions unsettled, viz. the quantity of land to be conveyed, and the balance due; and the reference to the master was for the purpose of investigating and settling those points.(w)

And it is said by Judge Spencer, in *Jaques v. The Methodist Episcopal Church*,(x) that no case can be found in which a decree directing a reference to a master, or a feigned issue, for the purpose of ascertaining any material fact in the case, has been held to be a final decree.

2. Final Decree.

A decree is *final* when all the facts and circumstances material and necessary to a complete explanation of the matters in litigation are brought before the court, and so fully and clearly ascertained, on both sides, that the court is enabled, upon a full consideration of the case made out and relied upon by each party, *finally* to determine between them, according to equity and good conscience.(y) In other words, when a decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the court; so that it will not be necessary to bring the cause again before the court, for its final decision, it is a final decree.(z) And a decree may be final, although it directs a reference to a master; if all the consequential directions depending upon the result of the master's report are contained in the decree, so that no further decree of the court will be necessary, upon the confirmation of the report—to give the parties the full and entire benefit of the previous decision of the court.(a)

Of this nature is a decree directing land to be conveyed, and appointing a commissioner to convey it; (b) a decree ascertaining the amount due, directing a sale, and giving costs; (c) or upon a bill for a specific performance, a decree made on the coming in of a master's report by which the quantity of land to be conveyed, and the balance of money to be paid are ascertained—directing that a conveyance be executed, on such balance being tendered.(d)

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(w) See also *Jaques v. Meth. Epis. Church*, 17 John. 558.
(x) 17 John. 558.
(y) *Per Sutherland, J.*, *Kane v. Whittick*, 8 Wend. 294. 1 Har. Ch. Pr. 490.
(z) *Mills v. Hong*, 7 Paige, 15. 2 Dan. 175. 638.
(b) *Larue v. Larue, 3 Little*, 961.
(c) *Field v. Ross, 1 Monro*, 137.
Of this nature also is a decree dismissing the complainant's bill; which may be pleaded in bar to a new suit, unless it is accompanied with a direction that the dismissal is to be without prejudice to the complainant's right to file another bill. (e) Directions of this sort are inserted where the dismissal is occasioned by any slip or mistake in the pleadings or in the proof. Thus, formerly, where a bill was dismissed for want of parties, it was expressed to be without prejudice. (f) And so where a bill was dismissed in consequence of facts not having been properly put in issue; (g) or of the agreement for the specific performance of which the bill was filed, turning out, upon the evidence, to be different from that actually proved. (h) So where, in a suit for specific performance, the complainant had precluded himself by the frame of his bill, from insisting upon compensation, although it was clear that he was entitled to it, the court ordered the bill to be dismissed without prejudice. (i)

A decretal order upon which an execution may be taken out is a final decree. (k) So is a decree disposing of the whole subject, deciding all questions in controversy, ascertaining the rights of all parties, and awarding costs; although it appoints a commissioner to sell part of the subject, and account for and pay the proceeds to the parties, with liberty to them to apply to the court to add other or substitute new commissioners, or for a partition of the subject to be sold in kind. (l)

A decree also which settles the rights of the parties and disposes of the general costs of the cause, and which contains the consequential directions for carrying the decree into effect, upon the coming in and confirmation of the report of a master to whom a reference is directed, to ascertain the amount to be paid, is substantially a final decree. (m)

And when a decree is made as to one of several defendants whose interests are not at all connected with each other, with a direction for the payment of the costs as to that defendant, such decree is final, as to him; although the cause may be still pending in court as to the rest. (n)

A decree upon a bill of interpleader, that the bill is properly filed, is a final decree. It is the only decree which the complainant is interested in obtaining. (o)

(e) 2 Dan. 175, 638. (f) Seaton on Decrees, 392.
(g) McNeil v. Cahill, 2 Bilgh. 263.
(Lindsay v. Lynch, 3 Sch. & Lef. 1.
(i) Stevens v. Guppy, 3 Russ. 171.
(k) Haskell v. Raoul, 1 McCord's Ch. R. 39.
(l) Harvey v. Branson, 1 Leigh, 108.
(m) Taylor v. Read, 4 Paige, 561.
(n) Royall's adm'rs v. Johnson, 1 Rand. 421.
(o) Atkinson v. Manks, 1 Cowen, 691.
Decree requiring a further order to complete it.] It is to be observed that there are many cases of decrees, which, although they are final in their nature, require the confirmation of a further order of the court before they can be acted upon. Of this nature are decrees in suits against infants, in which, save in certain excepted cases, a day is given to the infant to show cause against it, after he attains the age of twenty-one.\(^{(p)}\) In England, where a decree for a partition is made, and some of the parties are infants, the decree does not direct a conveyance by any of the parties till all the infants shall have attained the age of twenty-one, and have had an opportunity of showing cause against the decree. In the meantime the decree only extends so far as to make the partition, give possession, and order enjoyment accordingly, until effectual conveyances can be made.\(^{(q)}\) But in this state, when a sale is ordered, in a partition suit, the provisions of the statute are so ample and decisive as to dispense with the necessity of giving the infant a day.\(^{(r)}\)

The most ordinary case in which a further order is necessary, to complete the decree, is that of a decree for a foreclosure of a mortgage.

In the case of *Louver v. Andover*,\(^{(s)}\) which was a bill filed on behalf of a purchaser, for the specific performance of an agreement for the sale of an estate, a decree was made directing the master to appoint a time and place for the payment of the principal money, interest, and costs; and it was directed that, in default of payment, the bill was to be dismissed with costs to be taxed, &c. This, although a final decree, required a subsequent order of the court to complete it.

Reservation of liberty to apply.] Although it is the usual practice of the court, in making a decree, to make a complete decree upon all the points connected with the case, so as to make a final disposition thereof, yet it sometimes happens that a decision upon all the points cannot be pronounced until a future period. Thus, for instance, the interest of a fund may belong to a person for life, and after his death, the fund may be distributable amongst a particular class of individuals. Now, although the persons who form that class, as well as the tenant for life, must be, and in general are, before the court at the time when the decree is pronounced, the court will not, at that time, take upon itself to declare their interests in the fund; because it is a rule never to declare rights which are not immediately to be acted upon, lest events

\(^{(p)}\) Tuckfield v. Buller, 1 Dick, 941. \(^{(q)}\) 1 Dan. 395. \(^{(r)}\) Harris v. Youman, 1 Hoff. Rep. 183. \(^{(s)}\) 2 Dan. 642. \(^{(e)}\) 1 Bro. C. C. 397.
should occur, before the time of acting upon them, which may create an alteration in those rights. All that the court does, therefore, under such circumstances, is to decree the interest of the fund to be paid to the person entitled to the dividends during his life, and to declare that, upon his death, the parties interested in the fund are to be at liberty to apply to the court as they may be advised.

The same kind of liberty is also given in any other case in which it may seem necessary. And the effect of it is not to alter the final nature of the decree. A decree with such a liberty reserved is still a final decree; and when signed and enrolled, may be pleaded in bar to another suit for the same matter. The effect of it is, however, to permit persons having an interest under it, to apply to the court touching such interest, in a summary way, either by petition or motion, without the necessity of again setting the cause down. (t)

It may be as well to observe, in this place, that applications under such a reservation in a decree as has just been mentioned, may be made either by motion or petition; except in cases where the object is to have money paid out of court—in which case the application should be by petition; (u) unless indeed where the title to the fund is clear, as where the money has been carried over to the separate account of the party; (v) or where the application extends only to the payment of interest; in which cases, it seems, it may be made upon motion. (w) But although applications of this nature may be made by motion as well as petition, generally speaking, motions which have for their object to give effect to decrees and orders should be confined to cases where the order which is to be made upon the motion, arises out of recent proceedings concerning which there can be no doubt. (x)

The distinction between a final and interlocutory decree is, in practice, rather a nice one; and we have therefore dwelt the longer upon it. It is also a question of considerable importance to parties, with reference to the time for appealing—a longer time being allowed for appealing from a final than from an interlocutory decree.

Who bound by.] It is not our purpose, in this place, to enter, with much particularity, into the inquiries who are bound by, or who may take advantage of, the decree which is pronounced by the court. But

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(t) 2 Dan. 641.  (w) 4 Mad. 298.  
(u) Anon., 4 Mad. 238.  (v) Lord Shipbrookes v. Lord Hinche- 
(e) Heathcote v. Edwards, Jac. 504.  (x) Lord Hincho- 
inbrook, 13 Ves. 393.
it may be useful to observe that it is a general rule, that all who are
parties to a decree are bound by it;(*y) and none others.(x)

If any thing is pronounced against an infant, the decree, in general, gives
him a day to show cause against the same within a certain time after
he comes of age. The words of such a decree, are: "And this decree
is to be binding on the infant, unless he shall, within six months after
he shall have attained the age of twenty-one years, being served with
process for that purpose, show unto this court good cause to the con-
trary."(a) If the infant shows no cause within the time specified, the
decree is made absolute against him.(b) On the infant's coming of age
and before the decree is made absolute, he may put in a new answer,
and make another defence, and examine witnesses.(c) And the putting
in of a new answer after the infant comes of age, is good cause why the
decree should not be made absolute against him.(d)

But an infant who is aggrieved by a decree is not obliged to wait un-
til he is of age, before he seeks redress, but may apply for that purpose
as soon as he is advised. Neither is he bound to proceed by way of a
re-hearing, or bill of review, but may impeach the former decree by an
original bill; in which it will be enough for him to say the decree was
obtained by fraud and collusion, or that no day was given him to show
cause against it.(e) And it seems that, provided there is a foundation
for it upon the merits, an infant, before he comes of age, is entitled to
apply to the court to put in a better answer.(f)

It has been said that all decrees against infants give six months after
they come of age, to show cause.(g)

In another case,(h) it is laid down, by Lord Hardwick, that a day to
show cause is not given, except where a conveyance by the infant is di-
rected, either in form or substance. But in a case before the late as-
sistant vice chancellor of the first circuit,(i) his honor considered the
rule as being broader than Lord Hardwick stated it in the case last re-
ferred to, and that, in general, independent of statutory provisions, the

(y) Young v. Henderson, 4 Hayw. 189.
175. 1 Bnt. 187. 2 Ham. 404.
(a) 1 Newl. Ch. Pr. 501.
(b) Gilb. For. Rom. 160.
(c) Fountain v. Cain, 1 P. Wns. 504.
(d) Napier v. Effingham, 2 id. 401. Ben-
nett v. Lee, 2 Atk. 531.
(e) Napier v. Lady Howard, Mos. 68.
(f) Bennett v. Lee, 3 Atk. 528, 531.
(g) Napier v. Effingham, 2 P. Wns. 401. Eyre v. The Countess of Shafsbu-
(h) Sheffield v. Duchess of Bucking-
ham, 1 West, 684.
(i) Harris v. Youman, 1 Hoff. Ch. Rep.
178. See also Price v. Carver, 3 My. &
Ch. Rep. 146, and Winston v. Campbell,
4 Hen. & Munn. 477, it "was held that a
decree of sale against an infant is valid,
unless he be directed to join in the deed.

736, note.
infant must have his day wherever his inheritance is affected; whether he is decreed to execute a conveyance or not. That the exceptions in this state are decrees of foreclosure and for a sale in partition; and that those exceptions grow out of statutory provisions, and the constant course of the court.

The question whether, in a decree for strict foreclosure against an infant mortgagor, day should be given to the infant to show cause, was also discussed in that case, but not decided.

The above remarks apply only to infant defendants; for it is to be observed that an infant complainant is as much bound by a decree as a person of full age. (k)

And although it is a general rule that an infant defendant is not bound by a decree, if when he arrives of age he can show error in it; yet it seems that where a decree is obviously for his benefit, his rights may be absolutely bound by it. (l)

In the case of a feme covert, where a bill is brought against her and her husband, during coverture, and where he merely claims in her right, and dies, and the right survives to her, it seems that the wife may file a new answer, and make a new defence, and draw into question the validity of the decree obtained against her during coverture, and reverse it if there be just cause for it. (m) But if she, before her marriage, or her ancestors, mortgage lands, and the equity of redemption comes to her upon a bill brought by the mortgagee to foreclose, the married woman is liable to be absolutely foreclosed, though during coverture; and shall have no day given her, or her heirs, to redeem, after the coverture shall be determined. (n)

Who may take advantage of.] With respect to the persons who may have the benefit of a decree, it may be proper to observe, that a party to a suit may sometimes have the benefit of a decree, without appearing at the hearing. Thus, where a decree, in a suit by a residuary legatee against the trustees and executors, and against other residuary legatees who were out of the jurisdiction of the court, directed the usual accounts, the court ordered, upon the application of the last named persons, though still abroad, (they submitting to be bound by the decree,) that they should be at liberty to enter their appearance, and should have the same benefit of the decree as if they had put in their answer, and had appeared at the hearing. (o) And

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(n) Bannister v. Way, 2 Dick. 686.
in another case a bill had been filed by two persons, together with another person of the name of M. R., stated in the bill as a spinster; the cause being heard and a decree made, it appeared that M. R. was married at the time the bill was filed. On an affidavit by the solicitor of M. R. that her marriage took place previously to the filing of the bill, but that he was ignorant of the same, until after the decree, and that, to the best of his belief, the husband was not cognizant of any of the proceedings until after the decree, the court directed, (it being consented to by the defendants,) that on the husband’s undertaking to abide by the proceedings in the cause, and to be liable to the costs, he should be at liberty to go before the master and act upon the decree, as if he had been named a party upon the record.\(^p\)

And the court will sometimes order that the complainant, in one suit, shall be at liberty prosecute a decree obtained in another but similar suit, if the complainant in the latter delay prosecuting the decree.\(^q\)

So, in a creditor’s suit, if, after a decree is obtained, the complainant dies, another creditor may obtain an order for liberty to file a supplemental bill, if the representatives of the deceased complainant do not revive within a limited time.\(^r\) And a creditor coming in under a decree is permitted to prosecute the same, on account of delay, though only interested in the first part of the decree, and not in the whole of it, as the complainant was.\(^s\)

In a creditor’s suit also, residuary legatees, upon motion, obtained an order that they should be at liberty to go before the master in taking the accounts; although they were not parties.\(^t\) And leave has been given, upon petition, to the purchaser of the interests of a party, to attend the master in making the inquiry directed by the decree.\(^u\)

So, if a complainant is entitled to relief against both defendants, and one ought to indemnify the other defendant, who is decreed to pay the complainant, the court often gives liberty to that defendant to prosecute the decree against the other; as where the surety pays money, the principal must indemnify the surety, and the court will make the decree over.\(^v\)

**Decretal orders** It may be useful to state in this place the distinction between *decrees* and *decretal orders*; inasmuch as those terms are often confounded with each other.

\(^p\) Farrar v. Wyatt, 5 Mad. 549.
\(^q\) Torin v. Fawke, 1 Dick. 235.
\(^r\) Sheppard v. Messider, 2 id. 797. Sims v. Ridge, 3 Mer. 458.
\(^s\) Dixon v. Wyatt, 4 Mad. 392.
\(^t\) Edmunds v. Astland, 5 Mad. 31.
\(^u\) Newl. Ch. Pr. 505.
\(^v\) 1 Newl. Pr. 506.
\(^w\) Toosey v. Burchell, Jac. 159.
\(^x\) Walker v. Prewest, 2 Ves. 622.
A decree, as has been before remarked, is the order of the court made upon the hearing. A decretal order is an order in the nature of a decree, made upon motion or petition, either before or after the hearing. The order which has been before referred to,(as) as being made upon motion before hearing, in suits for the specific performance of contracts, for a reference to a master to inquire into the vendor’s title, &c. is a decretal order. Orders made upon petitions addressed to the court in a summary manner, either on behalf of infants, or under the authority of acts of the legislature, also come under the denomination of decretal orders; as do also those orders which are made upon petitions presented under the authority of decrees, which although final with regard to the persons having the immediate interest in the property, in the hands of the court, reserve a right to parties who, upon the determination of the immediate interest, shall be interested in the property, to apply to the court touching the same, as they shall be advised.(x)

SECTION II.

FORM OF DECREES.

Decrees, in general, consist of three parts: 1. The caption and title; 2. The recitals; and 3. The ordering part; to which may sometimes be added 4. The declaratory part; which when made use of, generally precedes the ordering part.(y)

Caption and title.] The decree commences with a caption, in this form: At a court of chancery held for the state of New-York, at the city of ..., [or town of ...,] on the ... day of ..., 1843; Present R. H. W. Chancellor, [or J. W. Vice-Chancellor of the ... circuit.](a) This caption should always state truly the place where the court was held when the decree was made.(a) And where it is material to either party,()(b) or, unless otherwise directed by the court,() it should correspond with the time of the actual entry of such decree. And where a decree is entered nunc pro tunc, as of a previous date, or otherwise, it should appear by some entry in the minutes of decrees, or

(a) Ante, p. 327, 328. (a) Rule 98.
(b) 2 Dan. 637. (b) Whitney v. Belden, 4 Paige, 140.
(y) 2 Dan. 683. (c) Barclay v. Brown, 6 Paige, 245.
(z) Rule 10.
in the minutes of proceedings in the cause, or in both, at what time the decree was actually entered.\(d\)

The caption is followed by the title of the cause. And it is to be observed that the parties, both complainant and defendant, should have the same titles in the decree as they have in the bill;\(e\) thus, if either party is described in the bill as 'executor or administrator, the decree must be accordingly.

**Recitals.** Formerly decrees contained recitals of the pleadings in the cause. This practice, however, has been abolished, as tending to too great proximity. In stating the evidence read in the cause, also, the present practice is merely to state it generally, without specifying the particular depositions which have been made use of.

Our form of recital is as follows: "This cause having heretofore (or, this day, as the case may be,) been brought on to be heard upon the pleadings filed and proofs taken therein; and the said pleadings and proofs having been read, and Mr. A. and Mr. B. of counsel for the complainant, and Mr. C. of counsel for the defendant, (\textit{T.}, and \textit{Mr. E. of counsel for the defendant F.}, &c.) having been heard, and the court having duly considered the said pleadings, proofs, and arguments, it is declared and adjudged," &c. &c.

It is not necessary to state in a decree that all the preliminary steps towards maturing the cause for hearing were taken; it being intended, where the cause is set for hearing, that it was done regularly; unless, the party attempting to impugn the decree shows the contrary.\(f\)

**Ordering part.** The ordering or mandatory part of the decree contains the specific directions of the court upon the matter before it. These directions, it is obvious, must depend upon the nature of the particular case which is the subject of the decree. Where the decree is merely interlocutory, and directs an issue, or an inquiry to be made, or account to be taken before a master, it usually contains a reservation of the further matters to be decided, and generally, also, of the costs of the suit till after the event of the issue or reference shall be known.

The mandatory clause commences as follows: "It is therefore ordered, adjudged, and decreed, and this court, in virtue of the power, therein vested, doth order, adjudge and decree," &c.

The reservation of further directions is not confined to the first decree, but will be repeated in every decree in which it may be necessary

\(d\) Barclay v. Brown, 6 Paige, 245.  
\(e\) Cure. Canc. 158.  
\(f\) Quarrer v. Carter's rep's, 4 Hen. & Manf. 249.
to direct a reference to a master. It is also to be observed, that after such a reservation, the court will not interfere upon the matter reserved, in a summary way; but the cause must be set down for hearing.

The statute requires all decrees for any debt, damages, or costs, to be rendered in dollars and cents.

Declaratory part.] Where the suit seeks a declaration of the rights of the parties, the ordering part of the decree should be prefaced by such a declaration. This, however, is not absolutely necessary, and the omission of it will not invalidate the decree. Sometimes the court directs an insertion, in the decree, of the reasons for making the declaration, and of the grounds upon which it proceeds in making it.

This however, is not very frequently done, though the utility of the practice has been often recognized. And it seems, that as a declaration of the rights of the parties is the act of the court, it ought not to be introduced where the decree is taken by the complainant upon the defendant's making default at the hearing.

Whenever a decree is made by consent, it should be so stated in the decree.

Where a bill contains a prayer for general as well as special relief, the court in making a decree, is not confined to the particular relief prayed for, but may grant such relief as is warranted by the case made out in the bill.

A decree must be founded on, and in conformity with, the allegations and proofs; and cannot be based upon a fact not put in issue by the pleadings.

The 135th rule of the court specifies the substance of a decree for the sale of mortgaged premises.

A decree may be made between co-defendants, grounded upon the pleadings and proofs between the complainant and the defendants. And it is the constant practice of the court to do so, to prevent multiplicity of suits. But such decree, to be binding upon co-defendants,

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(g) Seaton on Decrees, 36.
(a) Jennings v. Simpson, 1 Kean, 404.
(4) Id. ib. Cook v. Gwyn, 3 Atk. 689.
(o) Seaton on Decrees, 375.
(i) 1 R. S. 612, § 2.
(p) Crumbough v. Smooch, 1 Blackf. 305.
(2) Jenour v. Jenour, 10 Ves. 508.
(q) Carneal v. Banks, 10 Wheat. 191.
(r) Elliott v. Pell, 1 Paige, 269.
Maynard v. Mosely, id. 853.
(g) Chamley v. Lord Dunsmay, 2 Sch. & Lef. 710.
Onions v. Tyrrer, 1 P. Wms. 343.
7 Ves. 373.
Chamley v. Lord Dunsmay, 2 Sch. & Lef. 710.
Tyrer, 1 P. Wms. 343.
7 Ves. 373.
must be founded upon and connected with the subject matter in litigation between the complainant and one or more of the defendants.(s)

Nunc pro tunc clause.] If the decree is entered nunc pro tunc, the following recital and direction should be inserted: "And it appearing by affidavit, to the satisfaction of this court, that the complainant A. (or the defendant E.,) has departed this life since the argument of this cause, it is further ordered, that this decree be entered nunc pro tunc as of the — day of ——, 1843, the day when this cause was argued."

SECTION III.

DRAWING UP, SETTLING, ENTERING, AND ENROLLING DECREE.

Drawing up.] We have already seen that either party may, upon the hearing, deliver to the court and to the adverse party, a draft of the minutes of the decree to which he conceives himself entitled.(t) If this is done, the court will of course pass upon the draft or minutes submitted. If it is not done, the decree will be drawn up after the decision is made, by the register or clerk, from the minutes taken by him of the decision, or from the written opinion of the court, if one is delivered. Or it may be drawn up by the solicitor of the party in whose favor the decision is made.

If the party entitled to draw up an order or decree, neglects to do so for twenty four hours after the decision of the court is pronounced, any other party interested in having the order or decree entered, may apply to the register or assistant register, where the decision was made, to draw up and enter the order in conformity with the decision of the court, at the expense of the party applying.

Settling.] If the order or decree is special in its provisions, the party entitled to draw it up, should submit a copy to the adverse party, to enable him to propose amendments thereto, if he thinks proper. The draft and the amendments proposed, if any, are then to be delivered to the register, that the order or decree may be settled by him and entered. And where the register cannot understand the decision of the court, so as to be able to settle the order or decree in conformity therewith, he is then, and in that case only, to apply to the court to settle the same.(w)

(s) Elliott v. Pell, 1 Paige, 268.
(t) Ante, p. 315. See also, Rule 94.
(u) Rogers v. Rogers, 2 Paige, 473.
(v) Id. ib.
OR the solicitors may, for their own convenience, submit the decree directly to the chancellor or vice chancellor, to be settled by him. (x)

If the decree is settled by the register, the solicitor is allowed for attending him for that purpose; but if the question is submitted directly to the chancellor or vice chancellor, no additional charge therefor can be allowed. (y)

Entering.] When the draft of the decree has been settled and allowed by the court or register, it is in the next place to be entered by the register or clerk in his book of decrees, at length. It is not necessary to engross or copy the decree for this purpose. The decree is entered in the minutes, from the draft, which is not filed as a record, but merely as a memorandum of the decree which is to be entered. Therefore, a charge for engrossing or copying the decree to be entered is not taxable. (z)

Notice to the register or clerk to enter the decree is not necessary. (a)

Until a decree is settled and entered, it is considered as only inchoate, (b) and neither party can have any benefit from the decisions until that time. (c)

All orders and decrees made by the chancellor, unless otherwise specially directed, may be entered either with the register or assistant register, at the option of the solicitor. (d)

A decree is considered as entered from the time it is left with the register or clerk for that purpose, although, from a press of business, it may not be actually copied into the book of minutes for some time afterwards.

Entering nunc pro tunc.] Where one of the defendants dies after the argument of a cause, and before it is decided, it is customary to enter the decree nunc pro tunc, so that it may have relation back as of the day of the final hearing. (d) So, where the complainant died after the entry of an appeal from the decree of a vice chancellor, and after the cause was ready for a hearing upon the appeal, but the fact of his death being unknown to the counsel, the cause was afterwards heard and decided by the chancellor, upon the appeal; it was held that the decree upon the appeal might be entered nunc pro tunc as of a day previous to the death of the complainant and after the entering of the appeal. (e) So, where

(x) Rogers v. Rogers, supra.
(y) Id. ib.
(z) Doe v. Green, 2 Paige, 359.
(a) Hinde, 431. 2 Freem. 46.
(b) Whitney v. Belden, 4 Paige, 140.
(c) Rule 98.
(e) Vroom v. Ditmas, 5 Paige, 598.
the *cestui que trust* of the complainant had died after argument and before the decision of the cause by which the suit was determined, the court ordered the decree to be entered *nunc pro tunc* as of the time of the argument.\(^{(f)}\)

And decrees have been entered *nunc pro tunc* after a very long interval has elapsed from the time of pronouncing the decree; and even where the original decree has been lost, the court has permitted it to be entered *nunc pro tunc* from the office copy, after the lapse of twenty-three years.\(^{(g)}\)

In *Jesson v. Brewer*,\(^{(h)}\) where the pleadings in the cause, as well as the original decree, (which was pronounced twenty-one years before the application,) were lost, a paper purporting to be a copy of the decree, was allowed to be entered as the decree, and enrolled; it appearing from the minute book of the register that such a decree was pronounced at the time, and from a master's report that it had been acted upon.

*Entailing.*] A decree does not, strictly speaking, become a record of the court until it has been enrolled; and although the court itself, after it has been duly settled and entered, treats it as a foundation for ulterior proceedings, it is not considered of a sufficiently permanent nature to entitle it, in other courts, to the same attention that is paid by one court of record to the records of other courts of the same nature.\(^{(i)}\)

In fact, till a decree has been enrolled and thereby become a record, it is liable to be altered by the court itself, upon a rehearing; while a decree which has been enrolled is not susceptible of alteration except in a court of appeal, or by bill of review. For this reason it is that a decree which has not been enrolled, although it is, in its nature, a final decree, is considered as merely interlocutory and cannot be pleaded in bar to another suit for the same matter.\(^{(k)}\)

The advantage to be obtained by the enrolment of a decree is to prevent its being the subject of a rehearing, and to enable the party benefitted by it to plead it in bar to any new bill which may be filed against him for any of the matters embraced by the bill upon which the decree is founded.\(^{(l)}\)

It is declared by the 111th rule that no process shall be issued or other proceedings had on any final decree, until the same is duly enrolled.

\(^{(f)}\) Wood v. Keyes, 6 Paige, 478.  
\(^{(g)}\) Lawrence v. Richmond, 1 Jac. & W. 241. Donne v. Lewis, 11 Ves. 601.  
\(^{(h)}\) 1 Dick. 371.  
\(^{(i)}\) 2 Dan. 674.  
\(^{(j)}\) Id. ib. For. Rom. 183.  
\(^{(l)}\) Id. ib. Rule 112.
And such process must be issued from the office in which the decree is enrolled.

If a master is directed to sell real estate under such decree, he may give the notice of sale previous to the enrolment; but the decree must be enrolled and a certificate of the enrolment produced before the execution of a conveyance by the master. (m)

And where any previous decree or decreetal order disposes of any part of the merits of the cause, or is necessary to explain the final decree, it must either be recited therein or enrolled therewith, as a part of the final decree in the cause. (n)

Under this rule, it has been decided that where the decree is final as to any branch of the cause, or as to any of the parties, it must be enrolled before a deed can be executed, on a sale under that part of the decree, and before an execution can be issued to compel a compliance with such decree. (o) If the enrolment of any subsequent decree is necessary, it is to be made by a continuance on the record of the first enrolment. (p)

When enrolment to be made. The statute provides that after the expiration of thirty days from the time a final decree shall have been entered in the minutes of the court, if no appeal shall have been entered therefrom, and if no petition for a rehearing shall have been presented, upon being required by either party, the register, &c., by whom the decree was entered, shall attach together the bill, pleadings, and such other papers filed in the cause, as the chancellor shall from time to time, by general rules, direct together with the taxed bill of costs therein; and that he shall annex thereto a fair, engrossed copy of the decreetal order, signed by the chancellor or vice chancellor, and countersigned by the register, &c. who entered the same, together with a brief statement or abstract to be prepared in such form as the chancellor shall direct, not to exceed five folios, of the proceedings from time to time had in the cause. (q)

A decree may be enrolled nunc pro tunc, but an order for that purpose is irregular, if the petition on which it is made does not set forth the date of the decree to be enrolled. (r)

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(m) Rule 111.
(n) Idem.
(o) Minhorne's ex'rs v. Tompkin's Ex'rs. 2 Payne, 102.
(p) Id. ib.
(q) 2 R. S. 181, § 97.
(r) Parker v. Downing, 1 My. & Keen, 634.
An enrolment made *nunc pro tunc* will have relation back to the
time of the decree, and protect an intermediate sale.\(^{(e)}\)

A decree may be enrolled notwithstanding an abatement of the
suit.\(^{(t)}\)

*Enrolment how made.* The papers and proceedings so attached, an-
nexed and signed, are then to be filed by the register, &c., and are to
remain of record in his office; and such filing is to be deemed an en-
rolment of the decree and proceedings.\(^{(u)}\)

The chancellor, by the 186th rule, has specified the papers which, by
the statute, are required to be attached together and annexed to the final
decree on enrolment. They are the original bill or petition, and all oth-
er pleadings in the cause, including exceptions to pleadings, reports
thereon, and exceptions to such reports, petitions to revive, or in rela-
tion to any change of parties, or in any way affecting the merits of the
cause, and all reports affecting the merits, or which are necessary to ex-
plain the decree; together with the original taxed bills of costs of such
of the parties as are entitled to costs under the decree.

The bills of costs which are to be annexed to the decree on enrol-
ment, must be fairly engrossed without unnecessary erasures or interlin-
eations. And if they are not so, the taxing officer should direct them to
be re-engrossed before he certifies to the taxation thereof.\(^{(v)}\)

Where the decree of a vice chancellor has been appealed from subse-
quent to its enrolment, and it is afterwards affirmed, if the proceed-
ings are directed to be remitted to the vice chancellor, the decree of affir-
mance must be added to the original enrolment in the clerk's office, and
must be signed by the vice chancellor. But where the decree of affir-
mance does not direct the proceedings to be remitted to the vice-chancel-
lor, the original enrolment must be transmitted to the officer with whom
the decree of affirmance is entered, and the last decree should be added
to such enrolment and be signed by the chancellor.\(^{(w)}\)

The statement or abstract of the proceedings mentioned in the statute
must state as concisely as practicable the time of filing the original bill,
the defendants who appeared and answered, and those who appeared
and suffered the bill to be taken as confessed against them, and the de-
fendants against whom the same was taken as confessed for want of ap-
pearance; distinguishing those who neglected to appear after a personal

\(^{(e)}\) Goelet *v.* Lansing, 6 John. Ch. Rep. 75.

\(^{(t)}\) Gartside *v.* Isherwood, 2 Dick. 613. West's Rep. 673.

\(^{(u)}\) 2 R. S. 181, § 98, (orig. § 92.)

\(^{(v)}\) Stafford *v.* Bryan, 9 Paige, 48.

\(^{(w)}\) Clapper *v.* Howe, 8 Paige, 157.
service of process from those who were proceeded against as al
siontees, It must also show the changes of parties which have occurred during the
progress of the cause, and the manner in which the new parties were
brought before the court or made parties to the suit, so far as the same
can be ascertained from the minutes of the court and the papers on file.
And such other proceedings in the cause are to be recited therein as may
be necessary to a correct understanding of the decree. 

And to enable the register, &c. with whom the final decree is entered
to prepare this statement or abstract, the several officers of the court,
upon his written request, are required to transmit to him any information
contained in the records of their respective offices which may be
necessary. And the several officers with whom any pleadings or pa
ers are filed or deposited, are required by the 182d rule, to transmit
them, upon the application of a party or his solicitor, or upon the written
request of the register, &c. with whom the final decree is entered, to
the office where the decree is to be enrolled, at the expense of the party
requesting such enrolment.

If all the pleadings and other papers which are to be annexed to the
enrolment are not in the office where the decree is entered, the party
seeking the enrolment must apply at the proper office or offices and
have them transmitted to the office of the register, &c. where the decree
is to be enrolled. And he must also see that the necessary taxed bills
of costs are furnished.

Where the decree awards costs, to be paid out of the proceeds of a
sale, or otherwise, any party wishing an enrolment may give notice to
any other party entitled to costs under the decree, to file a taxed bill
thereof with the register, &c. with whom the decree is entered, within
fifteen days, or that the decree will be enrolled without such bill. If the taxed bill is not filed within the time, the party serving the notice,
on filing an affidavit of the service thereof, may have the decree enrolled
without annexing thereto such taxed bill. But if it is received
at any time before the actual enrolment of the decree, it will be considered
as in time, and must be annexed to the enrolment. If the taxed
bill is not filed, however, until after actual enrolment, the party will for
feit his right to costs under the decree.

What decrees, &c. may be enrolled.] Any decree or decretal order

(x) Rule 187. (a) Rule 183.
(y) Rule 188. (b) Rule 184.
(z) Rule 181. (c) Rule 185.
directing the payment of money, or affecting the title to property, if founded on petition where no bill is filed, may, at the request of any party interested, be enrolled in the same manner as other decrees. (d)

Decrees should be enrolled in all cases where a decree has been rendered, or an order of dismissal had, or any order in the nature of a decree, which determines the suit; whether such suit concerns real or only personal estate. (e)

It seems to have been formerly supposed that a decree for an account was never enrolled; for the reason that defects are very frequent in cases of that nature, and therefore the decrees should be left open, in order to give parties an opportunity to have a re-hearing where directions in a decree were imperfect. But in the case of Parker v. Downing (f) it was decided that there is no rule preventing the enrolment of a decree which, among other things, directs the taking of accounts.

In all cases where there are proceedings subsequent to a final decree which go to alter such decree, the proceedings should be enrolled; but not where such proceedings do not alter the decree. (g) And where such subsequent enrolment is necessary, it is made by a continuance on the record of the first enrolment. (h)

Filing enrolled decree. The statute requires the papers and proceedings attached, annexed, and signed in the manner above mentioned, to be filed by the register, assistant register or clerk, and to remain of record in his office. And it declares that such filing shall be deemed an enrolment of the decree and proceedings, with the like effect as was formerly given to enrolled decrees. (i)

The cases in which the enrolment of a decree will be vacated will be mentioned when we come to speak of the manner of rectifying decrees. (k)

(d) Rule 123.
(e) Hals. Dig. 176.
(f) 1 Mylne & Keen, 634
(g) Hals. Dig. 175.
(h) 2 Paige, 109.
(i) 2 R. S. 110, § 98.
(k) See post, Sec. V. p. 349.
SECTION IV.

DOCKETING AND DISCHARGING DECREES.

Docketing.] It is provided by the revised statutes that every final decree directing the payment of any debt, damages, costs, or sum of money shall bind and be a charge upon the lands, tenements, real estate, and chattels real of the defendant which he may have at the time of the docketing of such decree, or which he may acquire at any time thereafter.(l) But such decree will cease to be a lien from and after ten years from the time of filing the same.(m)

The manner in which decrees made previous to the act of 1840, are to be docketed is also specified in the statute.

The register, assistant register, or clerk is required to make and preserve an alphabetical docket, in which shall be entered, upon the request of any party thereto, all final decrees filed and enrolled, which direct the payment of any debt, damages, costs, or other sum of money.(n)

Upon such request being made, and on the payment of the fees for docketing the decree, and sending transcripts to the clerks of the supreme court, the register, &c. is to enter in such docket a statement of such decree, containing: 1. The names, at length, of all the parties to such decree, designating particularly those against whom it is rendered, the county of which they are respectively residents, if they are residents of this state, and if not, the state or country in which they reside; and their title, trade, or profession, if any such be stated in the bill or petition on which the decree is founded. 2. The amount of the debt, damages, costs, or other sum of money directed to be paid by such decree: 3. The hour and day of entering such docket. And such statement is to be repeated under the name of each person against whom the decree was rendered, in the alphabetical order of their names respectively.(o)

The register, &c. entering such docket, must immediately transmit a

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(l) 2 R. S. 188, § 101, (orig. § 96.)
(m) Id. ib. § 103, (orig. § 97.)
(n) Id. 181, § 99, (orig. § 93.)
(o) Id. ib. § 100, (orig. § 94.)
certified transcripts thereof to each of the clerks of the supreme court. Which transcripts are to be entered by such clerks with their docket of judgments in the supreme court, in the same manner as the transcripts of such judgments; except that they must designate in the margin of such entry that the same is made of a decree in chancery. (p)

But as a substitute for these provisions of the revised statutes, it is provided by the act concerning costs and fees in the courts of law, &c. passed May 14th, 1840, that no decree thereafter entered, shall be a lien upon real estate, unless docketed in the office of the clerk of the county where the lands lie. (q)

And by the 27th section of that act the decrees of the court of chancery are required to be docketed in the same manner, and with the like effect as judgments of the supreme court. That act directs that when a judgment shall be perfected in the latter court, or at any time within five years thereafter, the clerk, on request, and on payment of the fees, shall furnish the party with one or more certificates or transcripts containing all the facts necessary to make a perfect docket of the judgment; and on presenting the same to any county clerk, he shall immediately file the same, and docket the judgment in the manner required by law, specifying the court in which the judgment was recovered, the day and the hour on which it was perfected, and the day and hour of docketing the same. If the judgment is not docketed within ten days from the time when it was perfected, it will only be a lien from the time of docketing. But if docketed within the ten days, it will be a lien from the time it was perfected, except as against bona fide purchasers and mortgagees. (r)

Discharging.] It is provided by the revised statutes that a decree docketed in the manner therein directed, may be discharged by the register, assistant register, or clerk, with whom it was docketed, on producing to him a written acknowledgment of satisfaction signed by the party, in whose favor the decree was rendered, duly acknowledged before a vice chancellor or master in chancery. (s)

The court, also, has the power to order the docket of a decree to be discharged, upon a hearing of the parties and upon satisfactory evidence that such decree has been paid. (t)

(p) R. S. 183, § 101, (orig. § 95.)
(s) 2 R. S. 183, § 104, (orig. § 98.)
(t) Id. 183, § 105, (orig. § 93.)
Upon the decree being so discharged, and when the decree is reversed or vacated, the register, &c. with whom the same was filed, must transmit to the clerks of the supreme court a certificate of such fact; who are to enter the same in the transcript of the docket of the decree.\(u\)

The act of 1840 makes no provision for discharging a docket of a judgment or decree; and the above provisions of the revised statutes appear to be still in force.

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**SECTION V.**

**RECTIFYING DECREE.**

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1. BEFORE ENROLMENT.

*On petition or motion.* As long as the decree remains in the shape of minutes, that is, until it has been settled and entered by the register, it may be rectified upon application to the court by petition, or motion. And even important matters may be brought before the court upon an application to vary the minutes.\(v\) Thus, where the court directed an issue to be tried at the next assizes, and the decree was not drawn up or passed in sufficient time, the minutes were varied by directing the trial of the issue at the subsequent assizes.\(w\) So where facts are stated in the answer, which are not contradicted, and which, if true, would lead to a material alteration in the frame of the suit, the court will, on motion, permit the minutes of the decree to be amended, with a view to ascertain the the truth of those facts.\(x\)

It may be here observed that all applications to vary the minutes of decrees must be made to the court or officer by which the decree was pronounced, and that the chancellor has no power to alter a decree made by a vice chancellor; except upon appeal.\(y\) Therefore, where a de-

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\(u\) 2 R. S. 183, §§ 106, (orig. §§ 100.)


\(w\) Willis v. Farrer, 2 Young, & Jer.

\(x\) Harwood v. Fisher, 1 Young & Col. 110.

\(y\) See 2 Dan. 689.
creed had been made by Lord Cottenham, when master of the rolls, an application to him after he was lord chancellor, to vary the minutes of the decree, and which was not consented to, was refused.\(^{(z)}\)

Though the minutes of a decree may be corrected in the manner and for the causes above specified, yet after a decree has been settled and entered, the court will not entertain any application to vary it, unless upon consent of all parties, or in respect of matters which are quite of course;\(^{(a)}\) as where the decree is obviously wrong, or there is a clear mistake made by the court or counsel in drawing it up.\(^{(b)}\) The proper mode of having a decree rectified in matters of substance, is by applying to have the cause re-heard.\(^{(c)}\) Therefore, after a final decree, an order for the defendant to account before the master, so as to vary the relief granted by the decree, will not be granted on motion.\(^{(d)}\)

In cases, however, where a clerical error has crept into the decree, or in which some ordinary direction has been omitted, the court will entertain an application to rectify it even though it has been passed and entered.\(^{(e)}\) And so where the decree omitted the usual directions for the parties to be examined upon interrogatories, &c., Lord Eldon held that the decree might be corrected, by the insertion of the direction.\(^{(f)}\) So where a decree in a creditor's suit omitted the usual direction to take an account of the personal estate, his lordship ordered it to be inserted; even though the decree had not been pronounced by himself, but by the master of the rolls.\(^{(g)}\) So a decree will be amended, where, through inadvertence, costs have been given by it, to a party in a case where he was not entitled to them.\(^{(h)}\)

A decree may also be corrected or amended on motion or petition, not only as to mere clerical errors, but by the insertion of any provision or direction which would have been inserted as a matter of course, if the same had been asked for at the hearing, as a necessary or proper clause to carry into effect the decision of the court.\(^{(i)}\)

A decree cannot be rectified, however, by way of further directions. Further directions are not given upon motion. They are only granted.

\(^{(z)}\) Reece v. Reece, 1 My. & Craig.\(^{(a)}\)
Tomlins v. Palk, 1 Russ. 475.

\(^{(a)}\) 2 Dan. 686. 2 Harr. Ch. Pr. 329.


\(^{(b)}\) Rogers v. Rogers, 4 Paige, 199.

\(^{(c)}\) Id. ib. 2 Dan. 686. 2 Edw. 131.

\(^{(d)}\) Clark v. Hall, 7 Paige, 399.


\(^{(f)}\) Wallis v. Thomas, 7 Vsa. 292.

\(^{(g)}\) Pickard v. Matheison, 7 Vsa. 293.

\(^{(h)}\) See also 12 Vsa. 456, 458. 1 Swane.

\(^{(i)}\) Murray v. Blathford, 2 Wend. 573, n. 1 Russ. 475. 2 Mad. 391.
upon a hearing after a master’s report, or upon the cause coming on again for the purpose, in pursuance of a former order or decree. The court may then add to a decree: for instance, by allowing interest upon a sum reported by the master to be due; (k) or by declaring what are the rights of parties as ascertained under the first order or decree, and thus carry out and effectuate the object of the suit. But upon a hearing for further directions upon points of equity reserved, the court cannot materially alter or vary the first decree. (l)

It is a principle of the court that no alteration can be made in a decree, on motion, without a rehearing, except in a matter of clerical error or form, or where the matter to be inserted is clearly consequential on the directions already given. (m) Upon this ground, where the decree directed a commission to ascertain the boundaries of prebendarial lands, a motion that the decree might be extended to copyhold as well as to freehold lands, which was opposed, was refused. (n) So where an ejectment was ordered to be brought without restraining the defendant from setting up an outstanding term, the introduction of such a restraint was not permitted. (o) In Coleman v. Sarell, (p) Lord Thurlow would not allow a decree to be varied, by giving costs to a defendant who was a mere trustee, and, as such, would have been entitled to them if they had been asked for at the hearing. And in Brookfield v. Bradley (pp), the court declined to correct a decree in which the error was apparent, because the alteration proposed would require new directions upon the corrected fact.

It seems, the application to rectify a decree before enrolment, in matters of form, or where there is a clear mistake, may be made either by motion or upon a petition. (g)

An order or decree by consent, cannot be modified or varied in an essential part, without the assent of both parties to the same. But the court, upon the application of either party, may give such further directions as shall become necessary for the purpose of carrying such order or decree into effect according to its spirit and intent. (r)

(m) 2 Dan. 687. Clark v. Hall, 7 Paige, 289.  
(n) Willis v. Parkinson, 3 Swainst. 233.  
(o) Brackenbury v. Brackenbury, 2 Jac. & W. 391.  
(p) 2 Cox, 206.  
(pp) 2 Sim. & Stu. 64.  
(r) Leitch v. Campsten, 4 Paige, 476.
As to the manner of rectifying a decree, it is laid down that where the alteration asked for is merely consequential upon the decree itself, or the addition of some direction which has been omitted, the omission will be supplied by a distinct order, without altering or interlining the decree itself. But in cases of error in the direction of the decree, where the alteration cannot be made by supplemental order, the court will direct the register to attend with his book, and make the alteration in open court, which the chancellor will countersign with his initials.

Applications to the court to rectify decrees should be made within a reasonable time; otherwise they will not be granted. Therefore, where a party delayed a year and a half in applying to the chancellor to correct a mistake made in drawing up a decree, leave to amend it was refused.

Rehearing. It has been already stated that after a decree has been entered and before it has been enrolled, the proper method of having it rectified otherwise than upon the consent of all parties, or in respect of matters which are of course, is by applying to have the cause reheard. If any important error has occurred, or any thing material has been omitted in the decree, a rehearing should be applied for. Until the decree is enrolled, it is not a record of the court, and may be altered upon a rehearing, but not after enrolment; and an enrolment by one defendant, of a decree dismissing the complainant's bill, will prevent the cause being reheard at the instance of another defendant.

A rehearing is not considered a matter of course, except in the cases provided for by the rules of the court. In other cases it rests in the discretion of the chancellor. And if a motion for rehearing is made for delay, it will be refused. Where a decree of one chancellor is reversed by his successor in office, a rehearing will be granted by a third chancellor, on cause shown.

A rehearing may be applied for whether the decree or order is made upon the hearing of the cause, or of a demurrer or plea, or upon further directions, or upon exceptions. A decretal order cannot, in fact, be

(1) Tomlins v. Palk, 1 Russ. 476. See also, Skrymeher v. Northcote, 1 Swanst. 573, n.
(3) Rogers v. Rogers, 1 Paige, 188.
(5) Gore v. Purdon, 1 Sch. & Lef. 234.
(6) Land v. Wickham, 1 Paige, 256.
(8) Id. ib.
(9) Land v. Wickham, infra.
(10) 3 Dan. 109.
discharged in any other manner. And where an attempt was made to discharge an order pronounced by consent, upon further directions, by motion, on the ground that the party had been surprised, Lord Thurlow refused to make the order upon motion; although he appeared to think that where any thing is inserted in a decretal order, as by consent, to which the party has not consented, there must be some way of rectifying it: viz. by bill of review, but that it cannot be done by motion. (c)

The same rule also prevails where the order is made upon a petition; (d) in which case the proper course is to apply by petition of rehearing, in the same manner as upon a decree or decretal order. (e)

It seems also that an order made upon a petition presented in a matter under an act of parliament, and not in a cause, may be discharged upon motion, where the application to discharge is grounded upon irregularity in the petition itself, and is accompanied by an application to take the petition off the file. (f)

It is to be observed, however, that orders made upon motion, are not proper subjects for rehearing, but may be varied or discharged upon application, by motion, to the court. (g) But a decretal order made on motion, such as an order in a foreclosure suit under the statute, cannot be discharged on motion. (h)

A cause in which a decree has been made upon taking a bill as confessed, may be reheard. And where a bill has been taken as confessed against a husband and wife, and afterwards the husband died, the court allowed the cause to be reheard on the petition of the wife. (i)

A rehearing of a decree by default may also be had in the same manner as of other decrees. (k) And whatever decree is made upon the rehearing will be absolute, even though the party again makes default. (l)

So may an order for a rehearing be obtained by a complainant when the cause has been originally set down for hearing at the request of the defendant and a decree for dismissing the bill made upon default of the complainant’s appearance. (m) Thus in Terran v. Waite. (n) where an order of this nature had been obtained by the complainant, upon an application being made to discharge it, it was ordered that, upon the complainant paying costs to the defendant, and consenting also to pay

(c) Anon. 1 Ves. jan. 93.
(d) Bishop v. Willis, 2 Ves. 113.
(e) 2 Smith’s Ch. Pr. 27.
(f) In re Dovenbury Hospital, 1 My. & Keen, 279.
(g) 2 Dan. 110.
(h) Cadle v. Fewle, 1 Bro. C. C. 515.
(i) Tooke v. Clarke, 1 Dick. 350.
(j) 2 Dan. 645 to 653.
(l) 2 Dan. 859.
(m) 2 Dick. 782.
such costs as should be awarded against him on rehearing the cause, the order should stand, or otherwise be discharged.

And it is to be observed that the right to have a decree upon default reheard, is not confined to the party against whom the decree has been obtained. If the party obtaining the decree finds that he has not taken such a decree as he is entitled to, or has committed an error in the form or substance of it, he may have it reheard upon the usual terms.\(^{(o)}\)

Where by mistake sums paid into court under the decree were included in the balance reported due from the defendant, and the decree on further directions ordered those balances to be paid into court, it was held to be a proper case for rehearing the cause upon the latter decree, for the purpose of correcting the mistake.\(^{(p)}\)

A rehearing ought never to be applied for, however, where the defect in the decree or order is one which can be remedied by any of the methods before pointed out.\(^{(q)}\)

And it is to be borne in mind that as a rehearing will not be permitted after the enrolment of the decree, so it cannot be obtained till the decree or order has been settled and entered.\(^{(r)}\)

A rehearing can only take place for the purpose of altering the decree upon grounds which existed at the time when the decree was pronounced. Where, therefore, the object is not to correct the decree, but to remedy a grievance consequent upon it, resulting from a circumstance \textit{ex post facto}, and not making a part of the case as it originally stood, a rehearing will not be permitted.\(^{(s)}\)

Nor can there be a rehearing of a decree made upon an appeal from the decision of a vice chancellor or master of the rolls, except for the purpose of correcting a mere oversight in the decree of affirmance or reversal.\(^{(t)}\) Nor will a rehearing be granted on account of the discovery of new evidence or new matter;\(^{(u)}\) nor because the importance of testimony has only been ascertained since the decision; if the party had it in his power to ascertain its importance before the hearing and has neglected to do so and obtain the testimony; although the justice of the case might be promoted by it.\(^{(v)}\) Nor will it be granted to enable a party to obtain cumulative testimony, or for the purpose of contra-

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\(^{(o)}\) Baxter v. Wilson, 2 Atk. 152.
\(^{(p)}\) Brookfield v. Bradley, 2 Sim. & Sm. 11.
\(^{(q)}\) 3 Dan. 111.
\(^{(s)}\) Bowyer v. Bright, 13 Price, 316.

\(^{(t)}\) Attorney Gen. v. Ward, 1 Donn. Ca. in Ch. 102.
dicting witnesses examined by the adverse party; (w) or to enable a party to release the interest of a witness declared incompetent on the hearing, and to re-examine him. (x) Neither can there be a rehearing, for costs only; except in special cases. (y) Accordingly there can be no re-hearing by a party because he did not get costs or that costs, were given to another party; but where the original decree gave costs, there may be a rehearing to have the decree rectified, not by taking the costs from the party to whom they are decreed, but by throwing them upon the party or fund liable to pay them, by the rules of the court. (z)

Where upon the hearing of the cause the counsel for the defendants abandoned the defence, after hearing the opening argument in behalf of the complainants, the court refused to grant a re-hearing, upon the ordinary certificate of counsel. (a) To obtain a rehearing, under such circumstances, the defendants will be required to show a violation of duty on the part of their counsel, or that he had clearly mistaken the law or the facts. (b)

Who may apply for. Any party to the record, having an interest in the decree, may petition for a rehearing. Accordingly, it has been held that a party made a defendant in respect to an office, which he resigns before any decree is made in the suit, but continuing upon the record, and having an interest in the subject matter of the suit, acquired by his tenure of the office, is entitled to rehear the decree, when made. But a party who, after a decree made, is brought before the court by supplemental bill, to which he has appeared but not answered has no right to petition for a rehearing of the decree. And where such party joined in the same petition with other parties entitled to rehear, the court gave them leave to amend the petition by striking out his name. (bb)

Method of applying for. A rehearing is applied for upon petition. The petition must state the special matter or cause on which the rehearing is applied for, and the particular points in which the decree is alleged to be erroneous. And the facts, if they do not appear from the records of the court, must be verified by the affidavit of the party or of some other person. (c)

(w) Dunham v. Winans, 2 Paige, 24.
(x) Id. ib.
(a) Mulvany v. Dillon, 1 Moll. 19.
(b) Decarters v. La Farge, 1 Paige, 574.
(b) Id. ib.
(c) Rule 113.
The petition must be confined to the case upon the record. If it suggests, as the grounds of rehearing, facts not alleged in the pleadings, the application will be refused.\(d\)

One petition cannot seek the rehearing of orders made in different suits, though the parties in both suits are the same. Thus where two bills were filed by the same complainant, against the same defendant, and the defendant put in a plea to one and a demurrer to the other, which both came on for argument on the same day, and the vice chancellor made two separate orders, allowing them, with costs; whereupon the complainant presented a petition of appeal complaining of both the orders, the lord chancellor allowed an objection to the petition on the ground that it embraced several orders in separate suits.\(e\)

If any order of the court has been made since the decree, for the purpose of carrying its provisions into effect, it should be stated. And the circumstances of such an order having been made by consent, will not prejudice the right of the party to have the cause re-heard.\(f\)

The petition concludes with a prayer that the cause, &c. may be re-heard, and either that the decree may be reversed, or that it may be altered in such points as are objected to.

Where the petition is improperly framed, for example, if it makes a different case from that on which the decree was made, or introduces representations which were not made in the court below, the court will, on application by motion, order it to be taken off the file, with costs—the deposit to go in part of costs.\(g\) It seems, however, that it will, on such an occasion, introduce into the order a proviso that it is to be without prejudice to the party’s presenting another petition in more regular form.\(h\)

In the case of Wyld v. Ward,\(i\) the court of exchequer allowed the petition for re-hearing to be amended, for the purpose of stating the discovery of new evidence.

Certificate of counsel. A petition for re-hearing must be accompanied by the certificate of two counsel, that they have examined the case, and that in their opinion the decree is erroneous in the particular mentioned in the petition.\(k\) This is required in order to guard against an abuse of the right to have a re-hearing, by the pledge of counsel that

\(d\) Nevisen v. Staples, 4 Russ. 210. \(g\) Id. ib.
Wood v. Griffith, 1 Mer. 35. \(h\) Id. ib.
Boys v. Morgan, 3 My. & Craig, 361. \(i\) 2 Young & Jer. 361.
(f) Wood v. Griffith, supra. \(k\) Rule 113.
the case is fit to be re-heard.\(^{(l)}\) The counsel who sign the certificate are usually those who were concerned in the original hearing, or at least one of them; and "such credit is given by the court to their opinion that the cause ought to be re-heard, that it will, in general, order the cause to be set down," as a matter of course.\(^{(m)}\)

**Service of petition.** A copy of the petition, with the usual notice of presenting the same, must be served on the adverse party.\(^{(n)}\)

**Hearing of petition.** But although the general practice, in England, is for the lord chancellor to order the cause to be set down for re-hearing, as a matter of course, upon the certificate of counsel, he may, if he has any doubt upon the subject, order the petition itself to come on for hearing, before he orders it to be set down.\(^{(o)}\) And this is the usual practice here.

Where there is any irregularity in the petition, however, the proper course is for the party respondent to make a special application to the court, by motion, to have the petition taken off the file.\(^{(p)}\)

**Withdrawing petition.** After a petition for a re-hearing has been presented, it may be withdrawn on application by motion; provided it is consented to by the respondent. If not consented to, it cannot be withdrawn, but must come on, in its course.\(^{(q)}\)

**In what time re-hearing to be applied for.** A re-hearing cannot be granted by a vice chancellor, unless it is applied for within six months after the entry of the decree or order complained of, and before it is enrolled. And if the decree is affirmed on the re-hearing, it cannot be re-heard a second time.\(^{(r)}\)

A re-hearing before the chancellor may be applied for at any time before the decree is enrolled. But if a decree of the chancellor, or of a vice chancellor, has been affirmed by the chancellor on re-hearing or appeal, no further re-hearing will be allowed.\(^{(s)}\)

The above rule, so far as respects the re-hearing of decrees made by the chancellor, is in accordance with the English practice; by which, as long as there has been no enrolment, there is no limitation as to the time within which it is necessary to apply for a re-hearing.\(^{(t)}\)

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\(^{(l)}\) Monkhouse v. The Corporation of Bedford, 17 Ves. 390.  
\(^{(m)}\) Per Lord Hardwick, in Cunyngham v. Cunyngham, Amb. 91. See 18 Ves. 325. 13 id. 423.  
\(^{(n)}\) Rule 113.  
\(^{(o)}\) Fox v. Mackreth, 3 Cox, 159.  
\(^{(q)}\) Thomson v. Thomson, 10 Ves. 30.  
\(^{(r)}\) Rule 112. See 2 R. S. 177, § 57, orig. § 59.  
\(^{(s)}\) Idem.  
\(^{(t)}\) See 3 Dan. 116.
dingly a re-hearing has been granted in England, at the distance of two years, on the application of a defendant, of a decree nisi made absolute against him, according to the regular practice of the court. (u) The court has also re-heard a cause at the distance of eighteen years from the time the decree complained of was pronounced; (v) and has refused to discharge an order for a re-hearing, though at the distance of twenty-four years. (w)

A re-hearing may be obtained after the decree has been carried into execution. (x) And the having acted under it, is no objection to the decree being re-heard, upon the petition of the party who has so acted under it. (y) Where, after the trial of an issue, a party was desirous of changing the form of the issue, the court allowed him to present a petition for a re-hearing of the decree or order directing it; and permitted the petition to come on for hearing at the same time as a motion for a new trial of the issue. (z)

In Fournier v. Paine, (a) a re-hearing by way of appeal from an original decree, appears to have taken place after an appeal from an order made upon exceptions to the report of the master, under the decree. In fact, as long as the decree or order remains unenrolled, it is open to a re-hearing. But under the English practice, if a party is desirous of obtaining a re-hearing, he should, to prevent disappointment, immediately after it is passed and entered, enter a caveat against its being enrolled. (b) And having done that, he is obliged to present his petition for a re-hearing within the time limited for that purpose by the practice of the court; (c) for if he delays it, and the decree is enrolled, he will be too late, unless he can vacate the enrolment upon some of the grounds hereafter pointed out.

In this state a caveat is not in use. By our practice, under the rules of the court above referred to, if the decree is made by a vice chancellor, a re-hearing must be applied for within six months, at farthest, from the time the decree is entered. But the other party is not bound to wait that length of time before he can enrol his decree. He may, as we have already stated, (e) enrol it at any time after the expiration of thirty days, but not before; and if the other party wishes to have the cause

(u) Carew v. Johnstone, 2 Sch. & Lef. 300. Knight v. Young, 2 Ves. & B. 186. See also Legard v. Daly, 1 Ves. 192.
(v) Mills v. Banks, 3 Peer Wms. 3.
(w) N. ib.
(x) 2 Dan. 117.
(y) Brophy v. Holmes, 2 Molloy, 1. (a) White v. Lisle, 3 Swanst. 351. (b) 3 Dan. 117.
(c) 3 My. & Keen, 207, n. (c) 1d. 118.
(e) Aste p. 343.
re-heard, the only safe course is for him to present his petition within the thirty days.

The same remarks will apply to decrees rendered by the chancellor; except that there is no other limitation as to the time for applying for a re-hearing, than that it be asked for before the decree is enrolled.

The 112th rule provides that if a re-hearing is not applied for within thirty days after the decree or order complained of is entered, the court may require payment of the costs incurred by the adverse party by any proceedings under the decree or order, as a condition of granting the re-hearing.

*Stay of proceedings.* If it is necessary to stay the proceedings in the cause until a petition for re-hearing can be presented, the party may apply *ex parte* for an order to show cause why the prayer of the petition should not be granted, and to stay the proceedings in the meantime. *(f)*

A copy of such order, petition, and the affidavit or certificate on which it is founded must be served the same length of time before the day, as in the case of special motions, *(see Rule 89,)* unless the court shall specially direct a shorter notice to be given. *(g)*

*Deposit on re-hearing.* If a re-hearing is granted, the petitioner will lose the benefit thereof unless he shall, within ten days thereafter, deposit with the register, &c. fifty dollars, to answer the costs and damages of the adverse party if the decree or order is not materially varied. *(h)*

Where there is an original and supplemental cause, or two supplemental causes, they are considered as one, and the payment of one deposit only is necessary. *(i)*

*Course of proceeding.* If, when the re-hearing is called on, the petitioner does not appear, his petition will, upon reading an affidavit of service of notice of motion, be dismissed with costs. And so if the other party does not appear, the court will, upon reading a similar affidavit, proceed to re-hear the cause *ex parte.* *(k)*

The pleadings are opened and the evidence read in the same manner as upon an original hearing. *(l)* The same objections may be raised, for want of parties, *(m)* or upon other grounds, as upon an original hearing. *(n)*

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The party obtaining the re-hearing has the right to open and close the argument. (o)

All parties interested in supporting the decree or order which is sought to be re-heard are entitled to be heard; but no party except the one who obtains the re-hearing can be heard in opposition to it. If, therefore, any party who is not included as a co-petitioner in a petition of re-hearing, is desirous of procuring a re-hearing, he must present a separate petition; (p) otherwise he will be precluded from all benefit of the re-hearing; even though the result of it should be to show that the decree was completely wrong, as well against him as against the party obtaining the re-hearing. (q)

Upon a re-hearing, the decree is open for the party obtaining it, only in the matters complained of; but as to the opposite party, it is open at large. (r) Thus, upon a petition by the defendant, for a re-hearing, the decree thereon may give the complainant more extensive relief than was given by the original decree. (s)

An objection of substance may be raised by a defendant, for the first time, upon a re-hearing; even though it may prove fatal to the whole bill. (t)

An application will not be treated as one for a re-hearing, unless it is apparently so, and made in due form, according to the settled practice of the court. (u)

Upon a re-hearing, the court will give the complainant leave to amend by adding parties, in the same manner as upon an original hearing; and will order the re-hearing to stand over for the purpose. And it has gone to the extent of allowing the complainant to add the attorney general as a party, either by converting the bill into an information and bill, or into an information only. (v)

Evidence upon re-hearing. Upon a re-hearing, all depositions taken

case is open; and that the party supposing himself aggrieved has a right to insist upon a reconsideration of any part of it.

(o) Rule 115.
(p) 2 Smith, 34.
(q) 3 Dan. 4. Tasker v. Small, 1 C. P. Coop. Rep. 255.
(r) Rawlins v. Powell, 1 P. Wms. 300. Dale v. Roosevelt, 6 John Ch. Rep. 256. Conesqua v. Fanning, 3 id. 594. But see Glover v. Hedges, (Saxon's Ch. Rep. 113,) in which case it was held by the court of chancery in New Jersey, that on a petition and order for re-hearing generally, the whole

(s) Sullivan v. Jacobs, 1 Molloy, 479.
(u) Harrison v. McMennomy, 2 Edw. 251.
(v) Gardner v. Dering, 2 Edw. 131.
(w) President of St. Mary Magdalen v. Sibthorp, 1 Russ. 154.
previous to the original hearing, though not then made use of, may be read.\(w\)

If, since the hearing, a witness has been convicted of perjury, the circumstance may be brought before the court upon a re-hearing.\(x\) So, also, where a witness, in answer to a bill exhibiting against him since the original hearing, had confessed that on the day he was examined he took a bond from the complainant, whereby the latter bound himself that, if he recovered the estate in question, he would convey part of it to the witness, the answer was allowed to be read at the re-hearing, to take off the effect of the witness' evidence.\(y\)

It is only in cases in which the evidence was capable of being produced at the hearing that it can be read at a re-hearing.\(x\) No new evidence can be gone into, unless it be that arising from documents which were omitted to be read at the original hearing. For which purpose, it seems the court will, even pending the re-hearing, make an order for proving them \textit{viva voce}, saving just exceptions.\(a\)

In the case of \textit{Higgins \textit{v. Mills}},\(b\) a party on special application, by motion, obtained an order to prove documents \textit{viva voce} on a re-hearing, upon an affidavit of his solicitor that he had made diligent search for them before the hearing, but without being able to find them until after the hearing. But such an order was upon the terms of his paying the costs of the application.

If new evidence is discovered after the original hearing, the proper course is to obtain leave to file a supplemental bill in the nature of a bill of review, to come on for hearing at the same time with the re-hearing of the original decree.\(c\)

The court of exchequer has gone the length of giving a party liberty to exhibit interrogatories to prove exhibits, upon an application supported by affidavit of the complainant, that the exhibits in question have come to his knowledge since the original hearing.\(d\) That court has also permitted the petition of re-hearing to be amended, for the purpose of stating such a discovery.\(e\)


\(x\) 3 Dan. 194. (a) Id. ib. For Rom. 183. Walker


\(a\) 5 Russ. 287. (d) Williamson \textit{v. Hutton, 9 Price}

\(b\) 3 Dan. 125, n. (a) (e) Wyld \textit{v. Ward, 2 Young & Jer.}

\(c\) 2 Yerg. 140. 381.
In the case of *Hood* v. *Pimm*,(f) the court, on motion, permitted the complainants, who had, through the inadvertence of counsel, omitted to prove a will of real estate, in consequence of which the bill was dismissed at the original hearing, to prove the will at the re-hearing; which was postponed on the terms of their paying the costs of the application, and the costs of the day and of the original hearing.

It is also to be observed, that, in no case, will the court permit new evidence to be given, at a re-hearing, as to any matter which was not in issue upon the original hearing.(g)

Where the party obtaining a re-hearing makes use of evidence on the re-hearing which was not read below, he can only be permitted to do so on condition of giving up his deposit.(h)

**Costs.** The costs of a re-hearing, as well as of an original hearing, are in the discretion of the court; but generally, if a re-hearing is denied, it will be with costs.(i)

By one of Lord Lyndhurst’s orders,(k) it is directed that the deposit shall be paid to the adverse party when the decree or order is not varied in any material point, together with the further taxed costs occasioned by the appeal or re-hearing, unless the court shall otherwise order. Under this order it has been held that the court has a discretion over the deposit as well as over the costs.(l)

A respondent can in no case be made to pay costs; but where he has made use of evidence which was not read at the hearing, that circumstance should be taken into consideration in disposing of the costs of re-hearing.(m)

**By supplemental bill in the nature of a bill of review.** Matter discovered after a decree has been made, though not capable of being used as evidence of any thing which was previously in issue in the cause, but constituting an entirely new issue, may be brought before the court by a supplemental bill in the nature of a bill of review.(n) A party will not be allowed, however, except under very special circumstances, to file a bill of this kind, or to prosecute it after he has obtained leave to file it, unless he performs all that the decree commands him to do.(o) But he need

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(f) 4 Sim. 101.
(g) Holt v. Barleigh, Prec. in Ch. 293.
(h) 3 Dan. 125, 128, 97. Hedges v. Cardonnel, 2 Atk. 408.
(i) Id. 137, 97.
(j) Ord. 1826, XLII.
(o) Rattenbury v. Fenton, Cook’s Orders, 31.
(m) Williams v. Goodchild, 2 Russ. 91.
(n) Partridge v. Usborne, 5 Russ. 195.
(o) Id. ib.

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only perform so much of the decree as at the time of filing his bill, he is bound to perform. And if the proceedings under the decree are not, at the time, in such a state as to enable the adverse party to bring him into default, he may file a bill of this nature, although the decree has not been performed. (p)

Yet under special circumstances the court has dispensed with a strict performance of the decree. This was done where there was a decree for the payment of money to a person resident out of the country whose appearance to the bill of review could not be compelled. The court first ordered the money to be paid into court. Upon an application on the ground of poverty, the party was permitted to give security for the amount. (q) So where a conveyance of mortgaged premises, which was decreed, would have extinguished a party’s right, a conveyance was ordered to the clerk in court in trust, for the party who should be held entitled. (r) And again, where the party made oath that he was not worth £40 besides the matter in dispute in the cause, performance of the decree was dispensed with. (s)

The court, however, uses great caution in allowing the rule to be dispensed with. The great amount of the sum decreed is not a sufficient reason. (t)

To entitle a party to file such a bill, it is necessary that the new matters should be discovered after the decree, or at least after the time when it could have been introduced into the cause; because a party is not to be permitted to amend his case after the hearing, in respect of matter which was before in his power. (u)

It has been decided with reference to a bill of this nature, that the question always is, not what the complainant knew, but what, with reasonable diligence he might have known. And that the decisions with regard to bills of review, upon facts newly discovered, appear to have been upon new evidence, which if produced in time, would have supported the original case, and are not applicable where the original cause would not have admitted the introduction of the evidence, as not being put in issue originally. (uu)

Where a party was aware of the fact in question, or by reasonable

(p) Partridge v. Usborne, 5 Russ. 195. (i) Partridge v. Usborne, 5 Russ. 250.
(q) Cock v. Hobb, Tolthill, 173. (u) Ord v. Noel, Mad. & Geld. 130.
(r) Balstone v. Byron, cited 5 Russ. (uu) Brigham v. Dawson, 1 Jacob, 943.
(s) 2 Freeman, 97. 1 Hoff. Ch. Pr. 571.
diligence could have acquired the information, before the decree, he should have filed a supplemental bill shortly after the discovery, or after gaining that information which could put him upon inquiry. He cannot, in such a case, resort to this bill after going to a decree.\(^{(v)}\)

The rule is not that a party should be taken strictly to know every thing which he could have discovered. An instance is given by Lord Eldon, of an omission to look into a box for documents, which no human prudence would have suggested as the place of their deposit. An omission of this character would not prevent a bill.\(^{(w)}\)

A supplemental bill in the nature of a bill of review, may also bring before the court new matter discovered since the decree, although it could not have been used in evidence in the cause, from not being regularly in issue.\(^{(x)}\)

It is not sufficient that the matter sought to be brought before the court is new. It must also be material.\(^{(y)}\) The sense which is to be given to the word material is of the highest importance; and in the case last referred to, the court says the true rule is to be collected from the case of *Norris v. Le Neve.*\(^{(z)}\) In that case it was held to be sufficient to entitle a party to a bill of review, if the new proof did not come to his knowledge until after publication, or when, by the rules of the court, he could make use of it. It was also decided in that case that notice to the party’s attorney, &c. before the cause was heard, was notice to the party himself.

The new matter must be such as, if unanswered in point of fact, would either clearly entitle the complainant to a decree, or would raise a case of so much nicety and difficulty as to be a fit subject of judgment in a cause.\(^{(a)}\)

In the case of *Blake v. Foster,*\(^{(b)}\) it was held by the court of chancery, in Ireland, that to entitle a party to file a bill of this nature after a reversal of the decree in parliament, he should satisfy the court that the new matter discovered is such as will materially affect the ground of the lords’ order. And as the court had not, in that case, knowledge of the grounds upon which the house decided, it refused the application; in order that the materiality of the newly discovered facts might be determined on appeal from the order refusing the application.

*Application for leave to file.* A supplemental bill in the nature of a

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\(^{(v)}\) *Pendleton v. Fay,* 3 *Paige,* 396.  
\(^{(w)}\) *Young v. Keighly,* 16 *Ves.* 353.  
\(^{(x)}\) *Partridge v. Usborne,* 5 *Russ.* 195.  
\(^{(y)}\) *Ord v. Noel,* Mad. & Geld. 130.  
\(^{(z)}\) 3 *Atk.* 26.  
\(^{(a)}\) *Ord v. Noel,* *supra.*  
\(^{(b)}\) 2 *Molley,* 312.
bill of review cannot be filed without special leave of the court first obtained.\(\textit{aa}\)

The application should be made by petition founded upon an affidavit of the discovery of new matter.\(\textit{bb}\)

The petition should also state that the decree has not yet been enrolled. It should be served upon the other party, with the usual notice of presenting the same.

\textit{In what time bill to be filed.} Bills of this nature are required by the 173d rule, to be brought within the time limited for bringing an appeal: i.e. within six months as to final decrees, and fifteen days as to interlocutory decrees or orders made by a vice chancellor;\(\textit{c}\) and within two years after enrolment of a final decree, and within fifteen days after notice of any other order or decree, including decrees for the general costs of the cause, made by the chancellor.\(\textit{d}\)

\textit{Deposit or security.} Upon filing this bill, the complainant must make the like deposit, or give security to the adverse party in the same amount which would be required on an appeal from the order or decree complained of.\(\textit{e}\) The security required upon an appeal, is a bond in the penalty of at least \$250, and the deposit, if one is made, must be of that amount.\(\textit{f}\)

But where the complainant in a bill of this nature, through a mistake as to the practice, neglects to give security or to make the requisite deposit, the court may permit him to do it \textit{nunc pro tunc}.\(\textit{g}\)

\textit{Supplemental bill when to be heard.} If the court allows a supplemental bill in the nature of a bill of review to be filed, it will be necessary to have a re-hearing of the cause in order that the decree may be varied. For this purpose the party should present a petition for a re-hearing, at the same time that he applies for leave to file a bill. And the order should provide that the party have leave to file the bill; that the cause be re-heard; and that the supplemental bill come on for hearing at the same time with the re-hearing.\(\textit{h}\)

If an original bill is wholly defective, and there is no ground for proceeding upon it, it cannot be sustained by filing a supplemental bill founded upon matters which have subsequently taken place.\(\textit{i}\)

A bill purporting to be a supplemental bill, will not be ordered, on

\(\textit{aa}\) Rule 173. Pendleton v. Fay, 3 Page, 204.
(\textit{bb}) Pendleton v. Fay, supra.
(\textit{c}) 2 R. S. 172, \$ 65. (orig. \$ 59.)
(\textit{d}) Id. 605. \$\$ 78, 79. Id. 594, 5, \$\$ 21, 92.
(\textit{e}) Rule 173.
(\textit{f}) Rule 116. 2 R. S. 605, \$ 80.
(\textit{g}) Webb v. Pell, 1 Paige, 564.
(\textit{h}) 3 Dan. 125, n. (a)
(\textit{i}) Candler v. Pettit, 1 Paige.
motion, to be taken off the file, on the ground that it is not in fact such. The course is to demur, in such a case. (k)

II. AFTER ENROLMENT.

By petition.] The general rule is that a decree regularly obtained and enrolled, cannot be altered except by bill of review. (l)

But the court will, in some cases, so far as to rectify decrees in which there have been clerical mistakes, or surprise, although such decrees have been actually enrolled. (m)

And in such cases, it seems the course is to apply by petition. (n)

In cases of miscasting, where the matter demonstratively appears upon the decree itself to have been mistaken, it may be explained and rectified by order; (o) so, likewise, if some part of the decree be omitted in the enrolment, it may be inserted, upon motion to the court. But under the denomination of miscasting is not to be including any pretended miscasting or misvaluing, but only error in auditing and numbering. (p)

In Weston v. Haggerston, (g) Lord Eldon held that all errors on the face of the schedules, could be rectified, even after enrolment, but that there could be no correction except of such apparent errors. And he therefore held that no affidavit introducing a new fact, could be permitted, after enrolment.

In a case where the master had made a mistake in his report, directing a sum of money to be paid to two defendants, whereas he was ordered by the decree to direct the payment of it to one only, the court ordered the docketing of the enrolment to be altered accordingly. (r)

A decree against several defendants will only be opened in favor of him who asks it. (s)

If any irregularity has occurred in the enrolment of a decree, or in the proceedings to accomplish that object, the court will, upon application by motion, order it to be vacated. (t)

Thus in Parker v. Downing, (u) an enrolment was vacated because

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(o) For. Rom. 184.  
(p) Beames' Ord. 3.  
(r) Yow v. Townsend, 1 Dick. 59.  
(s) Hodges v. Mullikin, 1 Bland. 507.  
the order to enrol it munre pro tunc was irregular, by reason of the petition upon which it was made not setting forth the date of the decree.

In the case of Beekman v. Peck, (v) a decree entered by default, and enrolled, was set aside on motion, and on payment of costs; the complainant having been previously served with notice of the motion and copies of the affidavits on which it was intended to be made.

It is not a matter of course, however, to set aside an order taking the bill as confessed, merely upon an affidavit of merits, even before a decree in the cause. (w) But the sworn answer which the defendant intends to put in must be produced; or he must state, in his affidavit or petition to open the default, the nature of his defence and his belief in the truth of the matters constituting such defence. (x) The affidavit of the solicitor in such a case, showing a meritorious defence, and the nature thereof, is not sufficient, unless he is himself acquainted with the facts; and even then a sufficient excuse must be shown for not producing the affidavit or sworn answer of the defendant. (y)

Where a final decree has been entered, if the defendant applies to set aside his default and open the decree, he must, upon the motion, produce the answer he proposes to put in; so that the court may be satisfied as to the sufficiency thereof, and be apprised of the nature of the defence. (z)

And the court is less indulgent in opening a decree pro confesso than in setting aside one obtained on a default at the hearing. (a) And where the order to take a bill pro confesso is regular, the court, in opening it, will impose equitable terms. For example, it will not permit the defence of usury to be set up, so as to deprive the complainant of the amount actually due, with legal interest. (b)

The court will not set aside a decree made by consent. (c)

Where the cause has been heard upon its merits, the court will not exercise this discretionary power, (d) unless there has been something in the nature of a surprise upon the party affected. (e) And with regard to what amounts to a surprise, the rule has been laid down

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(v) Wells v. Cruger, 5 Paige, 164.  
(w) Hunt v. Wallis, 6 id. 371.  
(x) Hunt v. Wallis, supra.  
(y) Id. ib.  
(a) Knight v. Young, 2 Ves. & Bes. 184.  
(b) Wager v. Stickle, 3 Paige, 407.  
(c) Harrison v. Ramsey, 2 Ves. 488.  
(d) Bradish v. Gee, Amb. 299. King v. Wightman, 1 Anst. 80.  
(e) Charman v. Charman, 16 Ves. 115.  
(c) 3 John. Ch. Rep. 424.
by Lord Eldon, that "if the party enrolling the decree has said that which might lead the other party to believe that the decree would not be enrolled, that would be a surprise."(f) But it is not every expression that may lead the party to suppose that the decree will not be enrolled which will induce the court to vacate an enrolment. In order to establish such a case, there must be fraud or deception on the part of the party enrolling, which has misled the other party.(g)

It seems also that where the case has not been heard upon its merits, the court will exercise a discretionary power of vacating an enrolment and of giving the party an opportunity of having the merits of his case discussed. Thus where a decree of dismissal was made by default, owing to the neglect of the complainant’s solicitor in providing counsel to attend at the hearing, the enrolment was vacated.(i)

The court also has power, after enrolment, to open a regular decree obtained by default, and to discharge the enrolment, for the purpose of giving the defendant an opportunity to make a defence on the merits, where he has been deprived of such defence either by mistake or accident, or by the negligence of his solicitor.(k) And such decree may be opened after a sale has been made by a master under the decree, where the complainant himself became the purchaser of the premises, and has not parted with his interest therein to a bona fide purchaser, or mortgagee.(l)

So, where a bill has been taken pro confesso for want of an answer, while the defendant was in an unsound state of mind, and had, from that circumstance, omitted to put in an answer, a similar order was made.(m)

Where, upon a bill filed by a husband for a divorce, a vincolo matrimonii, a decree dissolving the marriage contract was made, and after enrolment both parties joined in a petition to the court, requesting that the enrolment of the decree might be opened and vacated, and the decree reversed, the court granted an order according to the prayer of the petition, and dismissed the complainant’s bill; but without prejudice to the rights which third persons might have acquired under the decree.(n)

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(f) Stevens v. Guppy, supra.

(g) Barnes v. Wilson, 1 Russ. & My. 486. 2 Dan. Pr. 685. Balguy v. Chorley, 1 Mylne & K. 840.

(i) Robson v. Cranwell, cited 1 Ves. 205.


(l) Id. ib.

(m) Benson v. Vernon, cited 1 Ves. 206. See also Kemp v. Squire, 1 Ves. 205.

(n) Colvin v. Colvin, 2 Paige, 385.
By bill of review.] A bill of review is resorted to for the purpose of correcting a decree after it is enrolled, in other respects than mere form or on account of surprise.(o)

Bills of this nature are filed for errors of law apparent on the face of the decree, and for matters dehors the record, such as the discovery of new evidence.(p)

A bill of review for error apparent must be for an error in law arising out of the facts admitted by the pleadings, or recited in the decree itself, as settled, declared or allowed by the court. It cannot be sustained upon the ground that the court has decided wrong upon a question of fact.(q)

It is not necessary to obtain leave to file a bill of this nature where it is brought to correct errors on the face of the record. Aliter, where it is brought upon the discovery of new matter.(r)

The further consideration of bills of review will be deferred until we come to treat of the different kinds of bills, post, Book IV, Chap. 6.

SECTION VI.

DECREES PRO CONSENSO.

Where the bill is taken pro confesso, the cause must be brought to a hearing, as well as in other cases.(s)

If, upon the hearing, the complainant appears to have any equity against the defendant, the court will decree accordingly. And it is to be observed that where a bill is to be taken pro confesso, the court hears the pleadings, and itself pronounces the decree, and does not permit the complainant to take such a decree as he thinks will stand, (as it does in ordinary cases when the defendant makes default at the hearing.) Therefore, where a supplemental bill brought against judgment creditors to have their several demands bound by the decree, was taken pro confesso, and it appeared that the suit had become necessary

(p) Edwardson v. Maseby’s Heirs, 4 J. J. Marsh. 500.
(q) Bleight v. McIvoy, 4 Mono. 146.
(s) Geary v. Sheridan, 8 Ves. 192.
by the unreasonable refusal of the defendants to comply with a plain-
ly equitable request, the court decreed, inter alia, that they should pay
the costs of the suit.\(u\) And in the case of London v. Ready,\(v\) where
it appeared, upon hearing the case, that the complainant had no equity,
the bill was dismissed.

Like any other decree of the court it cannot be impeached collateral-
ly, but only upon a bill of review, or to set it aside for fraud.\(w\) And
therefore where a bill was filed for an account of matters which were
embraced in a former bill filed some years before, which had been taken
pro confesso for want of an answer, and the defendant insisted upon the
decree in the former suit in bar to the new one, the new bill was dis-
missed, with costs.\(x\)

In Knight v. Young\(y\) however, where an attempt was made on
the part of a defendant, by motion, to get rid of a decree taken pro con-
fesso upon a sequestration, and to put in an answer, on the defendant's
own affidavit that he had been deranged, Lord Eldon, although he re-
fused the application, appeared to think that a case might occur in
which such a proceeding would be allowed, upon the ground of imbe-
cility of mind; when the fact was established by other evidence than
that of the defendant himself. And in Bolton v. Glassford,\(z\) his
lordship, although he did not go the length of admitting the party to
set aside the decree generally, as if the cause had never been before the
court for hearing, gave relief to the party by limiting the effect of the
decree. It appears, however, from the statement of the case in Knight
v. Young, that previously to doing this, his lordship had satisfied him-
self, by the affidavits and documents in the cause, that the defendants,
although they held out a long time, did not mean that the cause should
be heard pro confesso, and that an answer had, in fact, been prepared
stating the circumstances upon which they relied, the truth of which
was established by many other documents.

It has been already stated, that a cause in which a decree has been
made upon taking a bill pro confesso, may be re-heard.\(a\) And where
a bill had been taken pro confesso against a husband and wife, and after-
wards the husband died, the court allowed the cause to be re-heard, on
the petition of the wife.\(b\)

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\(u\) Barrett v. Birmingham, 1 Irish Eq. Rep. 417.
\(v\) 1 Sim. & Sta. 44.
\(x\) Ogilvie v. Hearne, 13 Ves. 563.
\(y\) 2 Ves. & B. 184.
\(z\) Cited 2 Ves. & B. 186.
\(a\) Ante, p. 353.
\(b\) Tooke v. Clarke, 1 Dick. 350.
The court is less indulgent, however, in opening a decree pro confesso than in setting aside one obtained on a default at the hearing.\(^{(c)}\) And where the defendant applies to set aside his default, and to have a decree of this nature opened, the court will require him to produce, upon the motion, the answer he proposes to put in; so that the court may be satisfied as to the sufficiency thereof, and be apprised of the nature of the defence.\(^{(d)}\)

We have before seen that where the court opens an order of this nature regularly entered, it will impose equitable terms.\(^{(e)}\)

The statute relative to proceedings against absent, concealed, and non-resident defendants, provides that if the defendant against whom a decree pro confesso shall have been made, under that statute, or his representatives, shall afterwards appear and petition to be heard, such petitioner may, upon paying or securing to be paid such costs as the court shall adjudge, be admitted to answer the complainant’s bill. And the suit is then to proceed as if no decree had been made.\(^{(f)}\)

But the defendant or his representatives, must so appear within one year after notice in writing of the decree shall have been given to him or them; and within seven years after the making of the decree, if such notice shall not have been given.\(^{(g)}\)

If the defendant or his representatives shall not so appear before the expiration of one year after such notice shall have been given, and if notice is not given before the expiration of seven years after the making of the decree, that court shall then confirm the decree against the defendant and against all persons claiming under him by virtue of any act subsequent to the commencement of the suit; and may make such further order in the premises as shall be just and reasonable.\(^{(h)}\)

The defendant cannot institute a new suit while the decree on the bill pro confesso is in force. He must apply under the statute for relief.\(^{(i)}\)

If he comes in and applies within the time prescribed, no other terms can be imposed upon him than the payment or giving security for costs.\(^{(k)}\) In the case of The Bishop of Rochester v. Knapp,\(^{(l)}\) it was held he should pay such costs as had accrued, and give security for subsequent costs.

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\(^{(c)}\) Knight v. Young, supra.
\(^{(d)}\) Wells v. Cruger, 5 Paige, 164.
\(^{(e)}\) Ante, p. 367.
\(^{(f)}\) 2 R. S. 187, § 135, (orig. § 133.)
\(^{(g)}\) Id. ib. § 140.
\(^{(h)}\) Id. ib. § 141.
\(^{(k)}\) 1 Hoff. Ch. Pr. 568.
\(^{(l)}\) Dick. 70.
The proceedings under a decree *pro confesso*, are the same as those under other decrees made upon a hearing. If the decree directs a reference to a master, the reference must be proceeded with in the master's office in the same way as any other reference.\(^{(m)}\)

A bill taken *pro confesso*, however, cannot be read before the master as evidence of the state of the account.\(^{(n)}\)

Taking a decree *pro confesso* will not amount to a confession of any fact not alleged in the bill.\(^{(w)}\)

A defendant who has appeared by a solicitor, is entitled to notice of all the subsequent proceedings in the cause, although he suffers the complainant's bill to be taken as confessed. And a decree taken against him *ex parte*, without giving his solicitor notice of hearing, will be set aside as irregular.\(^{(v)}\)

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SECTION VII.

DECREES BY DEFAULT.

We have already mentioned the cases in which a decree may be taken by default at the hearing.\(^{(x)}\)

Decrees of this nature differ little in point of form from ordinary decrees made upon hearing all parties; the principal variation being in the omission of the recital of the evidence, which in other decrees is always entered as read.\(^{(y)}\) The omission of the evidence, however, does not extend to cases in which the object of the suit is to establish a will against an heir at law; because in such cases the court will not declare the will well proved without hearing the evidence read.\(^{(z)}\)

A decree of this nature is not considered as a judgment of the court, but as the act of the party who obtains it, conceiving what the judgment of the court would be if the other party had appeared. And it is taken at the peril of the party obtaining it, if he cannot support it by his pleadings and proofs.\(^{(a)}\) Thus it is the constant practice of the court,

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\(^{(m)}\) 1 Dan. 698.
\(^{(n)}\) Dominicetti v. Latti, 2 Dick. 588.
\(^{(w)}\) Carneal's heirs v. Day, 2 Littell, 297.
\(^{(v)}\) Hart v. Small, 4 Paige, 551. See also Dos v. Green, 9 Id. 347.
\(^{(x)}\) Ante, p. 322.
\(^{(y)}\) 1 Smith, 417. 2 Dan. 646.
\(^{(z)}\) Webb v. Liscoat, 3 Atk. 25. 1 Dick. 88, S. C.
\(^{(a)}\) Carew v. Johnston, 2 Sch. & Lef.

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186. Stubb v. ———, 10 Ves. 30.
upon a default, to hear the affidavit of service of the notice of hearing read, and to tell the counsel to take his decree. (b)

In this respect a decree by default differs from a decree pro confesso; which, as we have seen, is the act of the court, and not of the party. (c)

The cases in which decrees of this nature will be opened or rectified have been already pointed out. (d)

SECTION VIII.

DECREES BY CONSENT.

A decree by consent is binding, unless procured by fraud. (e) But by this, must be understood that the parties are competent to consent. (f)

A decree may be made by consent in a cause relating to the separate property of a married woman, in which she and her husband are co-complainants. (g)

As respects infants, although the court will not, in general, make any decree by consent where they are concerned, without referring it to a master to inquire whether it will be for their benefit; yet when once a decree is pronounced without that previous step, the infants will be bound by it. (h)

A decree or order made by consent of the counsel for the parties, cannot be set aside either by re-hearing or appeal (i) or by bill of review; (k) unless by clerical misprision any thing has been inserted in the order, as by consent, to which the party had not consented; in which case Lord Thurlow appears to have considered that a bill of review would lie. (l) If, however, the decree has been obtained by fraud, relief may be had against it by original bill. (m) The consent of counsel to a decree is to be given upon their own conception of the authenticity of their instructions; (n) and as the client is bound by the act of

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(b) 1 Hoff. Pr. 557.
(c) Ante, p. 369.
(d) Ante, p. 353, 367, 8.
(f) 2 Dan. 617.
(g) Stinson v. Ashley, 5 Russ. 4.
(h) Per Lord Thurlow, Wall v. Rushby, 1 Bro. C. C. 487.
(i) 2 Dan. 617, and cases there cited.

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(m) Brash v. Oss. Amb. 299.

(n) Mole v. Smith, 1 Jac. & W. 673.
his counsel, he must, if the counsel has consented without sufficient authority, seek his remedy against the counsel.\(^{(a)}\)

A person affected by a decree, but not a party, may aver and prove that it was entered by an agreement of the parties, though it contradict the record.\(^{(p)}\)

A decree of nullity declaring void a marriage contract, or a decree for a divorce, or a separation or limited divorce, cannot be entered by consent.\(^{(q)}\)

\(^{(a)}\) Bradish v. Gee, Amb. 999.
\(^{(p)}\) Stark's adm'r v. Thompson's ex'rs,
\(^{(q)}\) Rule 170.

3 Monro, 302.
BOOK II.

Proceedings subsequent to the Decree.

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CHAP. I.

APPEALS.

Sect. 1. From what Decrees or Orders, and on what grounds, an Appeal lies.

2. Who may Appeal.

3. Evidence upon.

4. Effect of Appeal.


6. To the Chancellor, from a Vice Chancellor.

7. To the Court for the Correction of Errors, from the Chancellor.

8. To the Chancellor from a Surrogate.

9. From a Surrogate to a Circuit Judge.

10. To the Chancellor from a Circuit Judge.

11. To the Chancellor from a Court of Common Pleas.

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The next step of procedure in a cause, subsequent to the decree, is to bring an appeal to a higher tribunal, for the purpose of having the decree reversed or modified, if either party is dissatisfied with it, and is advised to resort to that measure. The subject of appeals will therefore claim our attention in this place, before we enter upon the manner of carrying a decree into execution.

And while upon the subject, we shall not only treat of the ordinary appeals which, according to our arrangement, properly belong in this place, but of appeals in special cases, as, appeals to the chancellor from circuit judges, and from courts of common pleas, and from surrogates to circuit judges. It will be more convenient to exhaust the subject at once, than to return to it again in some other connection.
SECTION I.

FROM WHAT DECREES OR ORDERS, AND ON WHAT GROUNDS, AN APPEAL LIES.

It is impossible to point out all the grounds upon which a party may appeal from a decree or order of this court; as they are as numerous and as various as the cases themselves. In fact, wherever the court is called upon to determine a question of law or of fact, the decision may be the subject of an appeal by any party who considers himself aggrieved by it. The only case in which a party cannot appeal from the decision of the court is where the determination complained of is merely the result of the exercise of discretion on the part of the judge, in a case where the matter was fairly a subject for the exercise of discretion. In such cases, the practice of the court will not allow an appeal from the discretion of one judge to that of another. Upon this ground it is that the courts have adopted the rule that there can be no appeal upon the question of costs.\(^{(a)}\)

But if costs are given contrary to statute, or to a standing rule of the court, and do not rest in discretion merely, an appeal will lie.\(^{(b)}\) So where a party is entitled to costs as a matter of strict right, if the court below refuses to give costs, the erroneous decision as to such costs may be corrected on appeal.\(^{(c)}\) And if a party appeals, having a substantial ground of appeal, and brings in the question of costs along with it, he may proceed with respect to the costs, though he does not succeed on the substantial ground of appeal. But a point which, on the slightest consideration, appears to have no substance, is not to be put forward merely for the purpose of covering an appeal on the question of costs.\(^{(d)}\)

What has been said above respecting appeals as to costs, must be understood as applicable only to the costs of interlocutory proceedings. The revised statutes authorize an appeal from a decree as to the general

\(^{(b)}\) Molloy, 19. Ashby v. Kiger, 3 Rand. (c) Id. lb.
\(^{(c)}\) Owen v. Griffith, 1 Vea. 250. (d) Attorney General v. Butcher, 4
costs in the cause, provided the appeal is entered within fifteen days after notice of the decree. (e)

The operation of the rule prohibiting appeals for costs is confined to cases in which costs are to be paid by one party to another, and do not form any part of the relief sought by the bill; and it is liable to exception where the costs are payable out of a fund, or are chargeable upon an estate, or are part of the relief to which the party is entitled, and the facts of the case distinctly appear upon the face of the proceedings themselves; so that it is not necessary, in determining the question of costs, upon the appeal, to enter into any investigation of the merits. (f)

Upon this ground, Lord Hardwick, in the case of Owen v. Griffith (g) entertained an appeal by an incumbrancer who had brought his bill to compel the payment of his charge, out of an estate which he had extended by elegit upon a judgment, and to whom the judge below had refused his costs, although he had given him his principal and interest; his lordship holding that an incumbrancer upon an estate, for a just debt, has a lien upon the estate for his costs, as well as his demand; and that therefore the appeal, although for costs, affected the merits of the case.

The same distinction was recognized in Cooper v. Scott (h) and in Jenour v. Jenour. (i) In the latter case the question arose upon the interest of the parties in a trust fund which had been separated from the general residue; and the bill prayed that the costs of the suit might be paid out of the general estate. Upon the hearing the costs were ordered to be paid out of the general estate; but on the appeal, although the decree, upon the right to the fund was affirmed, Lord Eldon corrected the decree, as to costs, by directing them to be paid out of the particular fund, and not out of the general estate; holding that the costs were not within the common rule.

So, in Taylor v. Popham (k) Lord Eldon states the rule to be that where the costs are disposed of as subjects of relief, though they are the subject of appeal, it is not an appeal for costs. (l)

In a more recent case (m) it was decided that as a party interested in a fund might appeal from a decree directing costs to be paid out of that fund;

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(e) 2 R. S. 605, § 79.
(f) Angell v. Davis, 4 M. & C. 360.
(g) Winslow v. Collins, 3 Paige, 59.
(h) 1 Ves. 250.
(i) 1 Eden, 17. 1 Bro. C. C. 141, n.
(k) 10 Ves. 569.
(m) Bagot v. Bagot, cited 3 Dan. Ch. Pr. 103.

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so parties personally ordered to pay costs might appeal from the decree, on the ground that the costs ought to be paid out of the fund.

It is a general rule, as already observed, that the exercise of the discretion of the court is not the subject of appeal. (n) Upon this principle there can be no appeal from an order concerning the mere practice of the court, or course of proceeding in the cause. (o)

In the case of Rowley v. Van Benthuysen, (p) Mr. Justice Bronson observed, “The line of separation is not always very strongly marked between questions which are purely of a discretionary character, and those which depend upon some established principle of equity jurisprudence. And the practice and principles of the court are so intimately connected that it may sometimes be difficult to determine whether a particular order shall be regarded as disposing of the right of the party, or merely regulating the course of proceeding in the cause.” And he refers to the article of the constitution respecting the court for the correction of errors; which is as follows: “When an appeal from a decree in chancery shall be heard, the chancellor shall inform the court of the reasons for his decree. And when a writ of error shall be brought on a judgment of the supreme court, the justices of the court shall assign the reasons for their judgment.” And the learned judge proceeds to remark, “Nothing but a ‘decree’ brought up by ‘appeal,’ in the one case, or a ‘judgment’ removed by ‘writ of error’ in the other, can be reviewed in this court. This is legal language, and as no contrary intention is manifested on the face of the instrument, it must be understood in its legal sense. It cannot extend to every decision of the inferior tribunal, but only to such decrees and such judgments as, on well settled principles, may be reviewed on appeal or by writ of error.” “I know not upon what principle it can be maintained that this court has jurisdiction to review the practice of the court of chancery in a matter wholly collateral to the subject of controversy. What is a decree in chancery? Like a judgment at law, it is the sentence pronounced by the court upon the matter of right between the parties; and this sentence is founded on the pleadings and proofs in the cause. None of the various orders which are so often made in the progress of the suit, for time to answer or produce witnesses, for leave to amend, setting aside a default, or the like, have ever been, or can, with the least degree of propriety, be called decrees,

(n) Read v. Hodgens, 2 Moll. 261.  
(p) Supra.
within the meaning of that word as used in the constitution. A decree may be either final or interlocutory; but in either case it is an adjudication upon the merits, and not an order in relation to some collateral matter.”

The revised statutes do not specify what decrees or orders may be appealed from; and as the decisions upon the subject are conflicting, the question cannot be considered settled, except as respects orders which are merely initiatory. It is settled that no appeal lies from a mere initiatory order; as for instance, an order for an attachment to bring a party into court to answer for an alleged contempt; (q) or an order for the examination of one of several defendants as a witness, where all exceptions are reserved until the hearing; (r) or a temporary order of the court awarding an injunction. (s)

Neither will an appeal lie from an order directing a sale of the property in litigation, and that the money be brought into court; such order not affecting the merits, and relating only to the preservation of the property. (t) Or from an order refusing a re-hearing of a motion for instructions to a master as to the examination of a witness. (u) And it seems that an appeal will not lie to the court for the correction of errors, in any case, from an order of the chancellor refusing a re-hearing; unless under very peculiar circumstances. (v)

But if an order for an attachment contains a final determination or adjudication, that the defendant is in contempt, he may appeal therefrom. (w) An appeal also lies from an order directing a suit to stand revived against the representatives of a deceased party, if the rights of the appellant are in any way affected by such revival of the suit. (x) So an order directing an issue is a proper subject of appeal. (y) And a refusal to grant an issue, in a proper case, when directly applied for, and where, in the exercise of a sound discretion, an issue should have been directed, is a good ground of appeal. (z) But the omission of the court below to award an issue, is not a ground of appeal if neither party asked for an issue on the hearing. (a)

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(q) McCredie v. Senior, 4 Paige, 378.
Bael v. Street, 9 John. 443.
(r) Per Chancellor Walworth, 2 Wend. 239.
(s) Trustees of Huntington v. Nicoll, 3 John. 566.

(z) Id. ib.
(w) McCredie v. Senior, supra.
(x) Rogers v. Patterson, 4 Paige, 450.
(y) Townsend v. Graves, 3 Paige, 453.
(a) Belknap v. Trimble, id 677. Town-
(b) Townsend v. Graves, supra.
In the case of Beach v. The Fulton Bank,\(^{(b)}\) it was decided by the court for the correction of errors that an appeal will lie from an order refusing to open proofs in a cause, for the purpose of re-examining a witness who, since his examination, has disclosed facts material and pertinent to the issue, which he did not disclose when on examination. This decision was upon the ground that the order appealed from affected the merits of the cause.

An appeal does not lie to the chancellor to reverse an *ex parte* order of a vice-chancellor which is merely irregular. The proper remedy of the party against whom such *ex parte* order has been made is to apply to the vice chancellor to vacate or modify it.\(^{(c)}\) Nor will it lie from an order or decree refusing to discharge an executor and to appoint a receiver in his stead;\(^{(d)}\) or for a mere error in figures in carrying out a principle of apportionment, in the distribution of funds among creditors.\(^{(e)}\)

In the case of Tripp v. Vincent,\(^{(f)}\) it was held that an appeal would lie to the chancellor from an order of a vice chancellor made subsequent to a final decree in a cause. An appeal will also lie to the court for the correction of errors from an order of the chancellor, refusing to dissolve an injunction;\(^{(g)}\) and from an order dissolving an injunction.\(^{(h)}\) And in the case of Hoyt v. Gelston,\(^{(i)}\) the supreme court was of opinion that an appeal would lie from a decision refusing to grant an injunction.

No appeal will lie from an order or decree entered by consent.\(^{(k)}\) And it is to be observed, that for this purpose, an order made at the hearing, for the cause to stand over with liberty to the complainant to add parties, is considered as an order made by consent, and cannot be appealed from; for, in truth, the want of parties is, in its nature, a reason for dismissing the complainant’s bill, and it was a matter of relaxation on the part of the court when it permitted the cause to stand over. If the complainant is dissatisfied with the opinion of the court, as to the want of parties, he should let the bill be dismissed and then appeal from the order of dismissal.\(^{(l)}\) But this rule does not apply to cases in which, upon a demurrer for want of parties, the demurrer is allowed, with lib-

\(^{(b)}\) 2 Wend. 225.
\(^{(c)}\) Gibson v. Martin, 8 Paige, 481. Rogers v. Hosack’s *ex’rs*, 18 Wend. 319.
\(^{(d)}\) Rogers v. Hosack’s *ex’rs*, 18 Wend. 319.
\(^{(e)}\) Id. ib.
\(^{(f)}\) 8 Paige, 176.
\(^{(g)}\) McVicar v. Wolcott, 4 John. 510. LOMAX v. Fisco, 9 Rand. 247.
\(^{(h)}\) Simpson v. Hart, 14 John. 65. Martin v. Dwell, 6 Wend. 11.
\(^{(i)}\) 13 John. 140.
\(^{(k)}\) Beresford v. Adair, 9 Cox, 156.
property to the complaint to amend. In such cases, the complainant, by acquiescing in the undertaking to amend, does not preclude his right of appeal. (m) And it seems, that a party dissatisfied with a decree will not prejudice his right to appeal by consenting to an order consequential upon the decree. (n)

Neither will an appeal lie from a decree entered by default. (o) But as respects decrees entered pro confesso, the rule is not quite so well settled. In Rowley v. Van Benthuyzen, (p) the court for the correction of errors decided that an appeal would not lie from an order of the chancellor refusing to vacate an order that the bill be taken pro confesso, and that the defendant have leave to put in an answer. (q)

In 1840 that court decided, in the case of Murphy v. The American Life Insurance and Trust Company, (r) that a defendant in a bill of foreclosure, who suffers the bill to be taken pro confesso and permits a decree of sale to be made without opposition, is not entitled to prosecute an appeal.

But in 1841, the same court decided that an appeal would lie from a decretal order of the chancellor refusing to open the sale of mortgaged premises and grant a re-sale, on the application of the defendant; although he has permitted the bill to be taken pro confesso against him. (s)

But it is to be observed, that the appellant in that case, did not ask to set aside or vacate the decree, but only the sale.

SECTION II.

WHO MAY APPEAL.

A person having no interest in the subject matter of a suit, or whose interest has ceased since the commencement thereof, cannot bring an appeal. (t) And a mere interest in the costs gives no right of appeal in respect to any other matter. (u)

Neither can a person bring an appeal, in general, unless he was, or

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(n) Wood v. Griffith, 1 Mer. 35. (p) 25 Wend. 949.
(o) Kane v. Whittick, 8 Wend. 219. (q) Tripp v. Cook, 25 Wend. 243.
(p) 16 Wend. 369. (r) Reid v. Vanderheyden. 5 Cowen, 719. (s) Idley v. Bowen, 11 Wend. 238.
(q) See also Hoye v. Penn, 1 Bland, 35. Ringold's case, id. 5, 19. Shye v. (t) Id. ib.
(u) Id. ib.
represents, a party in the matter in the court below; although he may have an interest in the question.\(v\)

Yet, it is not necessary that the person who appeals should be actually a party to the record; provided he has an interest in the question which may be affected by the decree or order appealed from. Even creditors coming in before the master under a decree, have been held entitled to appeal, although not parties to the bill, because the decree affected their interest.\(w\) In Hungerford's case,\(x\) the creditors complained that the property had not been applied as it ought; and it was objected that they could not come in under the decree and impeach it; but it was answered that they might, for if the decree contained in itself a wrong disposition of the property, they, coming in as creditors, had a right to appeal, because the decree bound their rights. In Osborne v. Usher,\(y\) the same principle is admitted; and it has been held that if the right of a remainderman, or of any person entitled to the estate, in any way, is bound by the decree, he must have a right to appeal from it, as well as the person against whom it was made.\(z\) Upon this ground it has been determined that a tenant in tail in remainder expectant, after the determination of a prior estate tail (who would not be a necessary part to a suit affecting the entailed estate, against the prior tenant in tail,) has a right to appeal against the decree in that suit; and that he may file a supplemental bill for the purpose of making himself a party to the suit, in order to appeal from it.\(a\)

It has also been determined that a purchaser under a decree, although not a party to the suit, may appeal from an order setting aside a bidding and ordering a new sale before the master.\(b\) And a creditor coming in before a master and having a claim disallowed on exceptions to the report, may appeal from the order disallowing the exceptions.\(c\)

But an appeal cannot be sustained by a person who is not interested in the subject matter. Although there may have been an interest when the suit was commenced, if such interest is terminated during its progress, his right to interfere further in the litigation is at an end.\(d\) Therefore, where a party has released all his interest in the suit, he has no right to appeal from an order made therein which cannot prejudice him, although


\(w\) Gifford v. Hort, 1 Sch. & Lef. 409.

\(x\) Cited id. ib.

\(y\) 6 Bro. C. C. 90.

\(z\) Gifford v. Hort, supra.

\(a\) Id. 411.

\(b\) Ryder v. Earl Gower, 6 Bro. P. C. 306.

\(c\) Winchelsea v. Garrett, 1 My. & Keen, 263.

\(d\) Idley v. Bowen, 11 Wend. 238.
it may be wrong as against other parties. Accordingly, where a party against whom a decree has been made, sells his right to the subject matter of the suit, an appeal from such decree in the name of such party cannot be sustained. But if the purchaser is entitled to appeal, he must make himself a party to the suit, and bring the appeal in his own name. And it seems that after a decree against the right of a party has been made, such party cannot dispose of his claim to another, so as to give the latter a right to appeal from the decree.

No person can appeal from a decree or order unless he is injured or aggrieved by it. And a party who is aggrieved by one part of a decree only, cannot, by appeal, call in question another part of the decree in which he is not interested, although the appeal is broad enough to embrace it.

But it is not necessary a party should have appeared in the court below, to entitle him to appeal. Thus, it has been held that a party who is aggrieved by an erroneous decree or order of a vice chancellor, may appeal therefrom to the chancellor, although he did not appear to argue the case before the vice chancellor—unless the order or decree appealed from is irregularly obtained, so that it can be set aside on that ground, upon a proper application for that purpose.

It is to be observed, that it is only in cases in which the interest of the party wishing to appeal will be bound by it, that an appeal will be permitted at the instance of a party not on the record. In no other case can he have ground to complain of the decree or order.

Any one of several against whom a decree is rendered, may appeal from it.

An appeal cannot be prosecuted by the appellant in forma pauperis, but he must give security for costs. And if he succeeds, he may have dives costs on the appeal, although he sued as a poor person in the court below.

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(e) Steele v. White, 9 Paige, 478.  
(f) Mills v. Hodge, 7 Paige, 18.  
(g) Id. ib.  
(h) Cuyler v. Moreland, 6 Paige, 273.  
(j) Johnson v. Johnson's heirs, 1 Dana, 366.  
(m) Winchelsea v. Garety, 1 My. & Keen, 253.
SECTION III.

EVIDENCE UPON APPEAL.

Appellate courts which proceed according to the course of the civil law, may allow the parties to introduce new allegations or further proofs. Such is the settled practice of the ecclesiastical courts in England, and of the admiralty courts in this country. But from the organization of the court for the correction of errors in this state, it is doubtful whether any such right exists on appeals from the sentences or decrees of the court of chancery in testamentary causes. (m) In those courts where the right does exist, it is not a matter of course to receive further proofs upon an appeal. (n) If the appellant wishes to offer new evidence, he should, in his petition of appeal, ask leave to produce further proofs, and state his excuse for not producing such evidence in the court below. (o)

On an appeal however, from the decree of a vice chancellor, the cause is not before the chancellor in the nature of a re-hearing, but is an appeal, strictly; and on such appeal, no other evidence or pleading can be received or read than that which was read upon the hearing before the vice chancellor. (p) And the rule is the same in the court for the correction of errors with respect to appeals from the chancellor. (q) Yet if the decree of a vice chancellor is reversed on appeal to the chancellor, it seems the chancellor may, in his discretion, allow the respondent to introduce new testimony as to facts discovered subsequently to the hearing before the vice chancellor, before he proceeds to make a final decree upon such appeal. (r)

When the case of Mitchell v. Lenox, just referred to, was heard before the chancellor, previous to its going to the court of errors, he suggested that where the newly discovered testimony was in favor of the respondent, the proper course probably would be to hear the appeal upon the original testimony; and if the decision of the court below was found to be erroneous, and was reversed on that ground, to ask the ap-

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(n) Id. ib.
(o) Id. ib.
(p) Mitchell v. Lenox, 14 Wend. 662.
(r) Wendell v. Lewis, supra.
pellate court, instead of proceeding to make a final decree to remit the
cause to the vice chancellor, with permission to the respondents to open
the rule for closing the proofs, so that the newly discovered evidence
could be introduced before a final decree was made; or, that after the
reversal of the decree by the chancellor, the cause should be retained
before him with a similar permission. (s)

Where a question arises upon the hearing of the appeal, as to what
papers were before the court below, if such papers are not referred to in
the order or decree appealed from, resort must be had to the minutes of
the clerk, and to the papers marked by him as read, to ascertain what
papers were read or used before the vice chancellor. (t) And when a
party opposing a motion or petition has papers to read in opposition
thereto, and the application is decided in his favor upon the opening of
the case, on the papers of the adverse party, if he desires to have the
benefit of his papers in opposition to the application, upon appeal, he
should have such papers entered in the minutes of the court below and
marked as read. (u)

It is the duty of the clerk, upon the hearing of a cause before the
vice chancellor, to enter in his minutes all the papers read, or which
are agreed to be considered as read, or which are offered in evidence
and overruled by the court. And a certified copy of the clerk's minutes
is the proper evidence of those facts, upon the hearing of an appeal to
the chancellor. If the clerk, by mistake, neglects to enter in his min-
utes any paper which was read, or considered as marked and read, be-
fore the vice chancellor, the proper course is to apply to the court be-
low to correct the minutes. (v)

The party whose duty it is to furnish the papers on the hearing of an
appeal should be prepared with the proper evidence to show what pa-
ters were read before the vice chancellor, and, if required, to show that
the papers furnished by him are correct copies. (w)

Depositions read on the hearing in the court below without objection,
cannot be rejected in the appellate court. (x)

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(s) See 6 Paige, 235.
(t) Bloodgood v. Clark, supra.
(u) Id. ib.
(v) Studwell v. Palmer, 5 Paige, 166.
(w) Id. ib.
(x) Johnson v. Rankin, 3 Bibb, 87.

Pillow v. Shannon, 3 Yerg. 508. Rens-

paes v. Mortun, Hardin, 338.

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SECTION IV.

EFFECT OF APPEAL.

What questions are brought up by it.] An appeal from the final decree only, does not bring before the appellate court, for review, a question which has been definitively adjudicated and disposed of by an interlocutory decree or order previous to such final decree.\(y\) So upon an appeal from an order carrying into effect a previous interlocutory order which has not been appealed from, the appellant is not entitled to have the order appealed from, reversed, upon the ground that the previous order, not appealed from by him, was erroneous.\(z\)

But where the decree to be pronounced in the appellate court upon the matters appropriately brought up upon the appeal, requires the modification of some previous order to make it consistent with such decree, such order may be modified accordingly. That principle, however, applies only to cases where the different orders or decrees are so blended together that the decision upon the one appealed from, necessarily involves the consideration of the other.\(a\) And it has been held that no such necessary connection exists between a decree confirming a master's report upon a reference, and the previous order directing the reference and settling the principles upon which it is to be conducted.\(b\)

The opinion of the court in the case of Atkinson v. Manks,\(c\) seems to have been misunderstood by the reporter, or he would not have stated in the head note of that case, as one of the points decided, that "an appeal from the final decree necessarily opens for consideration all prior orders or decrees any way connected with the final decree." It appears from the statement of facts,\(d\) that there was an appeal in that case not only from the final decree, but from the original decree also; so that the question as to the effect of an appeal from the final decree in bringing up prior interlocutory orders or decrees could not have arisen. The opinion of the court in that case, it should also be observed, which was

\(y\) Maps v. Coffin, 5 Paige, 296.  
\(z\) Bullitt's heirs v. Thorp, 1 A. K. Marsh.  
\(a\) Kane v. Whittick, 8 Wend. 219.  
\(b\) Id. ib.  
\(c\) Copous v. Kauffman, 8 Paige, 583.  
\(d\) Id. 697.  
\(e\) Per Sutherland, J. in Kane v. Whittick, 8 Wend. 235, 239.
delivered by Judge Sutherland, was subsequently explained by himself, in the case of *Whittick v. Kane*, before referred to, as having a different import from that conveyed by the report in *1st Cowen*.

And in the *Bank of Orange County v. Fink* *(e)* the chancellor came to the conclusion that on an appeal from a final decree, the merits of an interlocutory decree previously made in the same suit, cannot be inquired into; especially where the time for appealing from the interlocutory decree has expired. The point was not exactly decided, however, as the case was disposed of upon another ground.

But the chancellor's opinion in that case, undoubtedly expresses the true rule. He observes: "The statute, for reasons which are perfectly obvious, has limited the right of appeal from interlocutory orders and decrees to fifteen days. It is evident, however, that this statutory limitation is a mere nullity if an appeal from the final decree in the cause necessarily brings up for review before the appellate court, every interlocutory order made in the course of a long litigation, which has had any effect whatever in producing the final result. It is a general rule that upon an appeal from any order or decree of the inferior tribunal, the appellate court is to make such a decree as the court below ought to have made when the decree or order appealed from was entered. Where the court below, therefore, upon the papers before it at the final hearing, is authorized to go back and correct an erroneous proceeding connected with the matter then under consideration, the appellate court may itself go back and correct such error; if the court below was called on by the appellant to make the correction but neglected to do so. But if the situation of the cause was such, at the final hearing, that the court below could not, upon the papers then before it, and according to the settled course of proceeding, go back for the purpose of looking into the alleged error in a previous order or decree, it would be a violation of all principle for the appellate court to reverse the final decree because the court below, at the time of making such decree, had not done what it had then no power to do."

Where a cause is brought to a hearing before a vice chancellor, upon pleadings and proofs, and there is an appeal from the whole decree or decretal order made on such hearing, the cause is before the chancellor until the decision upon the appeal; and an application to appoint a receiver may be made to the chancellor. It is otherwise, however, where there is an appeal from the decision of a vice chancellor, as to a collateral matter not embracing the whole cause.(f)

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*(e)* 7 Paige, 87. *(f)* Jenkins v. Hinman, 5 Paige, 309.
An appeal from a decretal order consequent upon a final decree, will not authorize the appellate court to reverse or alter the final decree.(g)

The appellate court will decide on those parts only of the decree of the court below which are complained of in the petition or notice of appeal.(h)

Appeal from part of a decree.] A party cannot be allowed to appeal piece-meal, i.e. he cannot appeal from part of a decree at one time and afterwards appeal from another part. The rule is that if a party appeal from a part of the decree, he admits the remainder to be correct.(i)

Appeal when a stay of proceedings.—1st. Appeals to the court for the correction of errors.] The statute declares that an appeal to the court for the correction of errors shall not be effectual for any purpose, until the bond for costs required by the revised statutes shall be given.(k)

The statute also declares that if the appeal be made from an order or decree directing the payment of money, such appeal shall not stay proceedings unless a bond be given by or on behalf of the appellant, to the adverse party, in a penalty at least double the sum decreed to be paid, with two sufficient sureties, conditioned that if the appellant shall fail to prosecute his appeal, or if the same be dismissed or discontinued, or if the decree appealed from, or any part thereof, be affirmed; then that such appellant will pay the amount directed to be paid by such decree, or the part of such amount as to which the decree shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant by the court for the correction of errors, upon the appeal.(l)

If the decree appealed from directs the assignment or delivery of any securities, evidences of debt, documents, chattels, or things in action, the issuing and execution of process to enforce such decree will not be stayed by such appeal, unless the articles required to be assigned or delivered, be brought into court, or placed in the custody of such officers or receivers as the court shall appoint; or unless a bond in a penalty at least double the value of such articles, be given to the adverse party, with two sufficient sureties, conditioned that the appellant will abide and obey the order of the court of errors.(m)

If the decree appealed from directs the execution of any conveyance or other instrument by any party, proceedings under it will not be stayed by the appeal until the appellant shall have executed the conveyance.

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(g) Taylor v. Read, 4 Paige, 561.  
(h) Sands v. Codwise, 5 John. 531.  
(i) Norbury v. Meade, 3 Bligh, 261.  
(k) 2 R. S. 605, § 80.  
(l) Id. ib. § 89.  
(m) Id. 606, § 83.
or instrument directed, and deposited the same with the register or assistant register, to abide the final order and decree of the court for the correction of errors.\(^{(n)}\)

If the decree or order direct the sale, or the delivery of the possession of any real property, the issuing and execution of process to enforce the same, shall not be stayed until a bond is given conditioned that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon; and that in case the appeal be dismissed or discontinued, or the order or decree be affirmed, the appellant will pay the value of the use and occupation of the property from the time of such appeal until the delivery of the possession thereof pursuant to such order or decree.\(^{(o)}\)

The chancellor has decided, under this section, that where the respondent has the legal estate in the lands decreed to be sold, and is in the possession thereof, and in the receipt of the rents and profits, it is not necessary for the appellant to give security for the payment of such rents and profits, or against waste.\(^{(p)}\)

Whenever, in the foregoing cases, an appeal shall be perfected by bringing into court, or depositing, pursuant to its order, any articles required to be so deposited, or any instrument required to be executed, or by giving of a bond as prescribed, such appeal shall stay all further proceedings in the court of chancery, upon the order or decree appealed from, and upon the subject matter embraced in such order or decree, but shall not prevent the court from proceeding upon any other matter included in the bill and not affected by such order or decree.\(^{(q)}\)

The 87th section of the statute further provides, that if an appeal be made from an \textit{interlocutory order} of this court, in a cause brought either for the payment of any sum of money, or to compel the delivery or assignment of any securities, evidences of debt, \\&c., or to compel the execution of any conveyance or other instrument, or in causes in which a decree may be made for the delivery of the possession, or for the sale of any real property; this court may, in its discretion, require the doing of such other acts and things by the appellant as in similar cases are required to be done by him to stay the execution of a final decree, on an appeal therefrom. And until such acts or things so required to be done shall be performed, an appeal from an interlocutory order shall not stay any proceedings thereon.

In all other cases not provided for by the sections of the statute above

\(^{(n)}\) 2 R. S. 606, § 84.  \(^{(o)}\) Id. ib. § 85.  \(^{(p)}\) Quackenbush v. Leonard, in Chancery, February 21st, 1843.  \(^{(q)}\) 2 R. S. 607, § 88.
referred to, the filing and perfecting an appeal by giving bond for payment of costs, shall stay all proceedings in the court of chancery, upon the order or decree appealed from, and upon the subject matter thereof, except, 1. Where the order directs the sale of perishable property, such property may be sold by a special order of the court, after the making of such appeal, and the proceeds thereof be brought into court; 2. When the order appealed from is interlocutory, either party may proceed at his own expense, under the direction of the court, upon proper cause shown, to take testimony in the cause conditionally, to be used thereafter, in the same cases in which testimony thus taken in an action at law may be used; or 3. When the order is for the commitment of any person for a contempt, or for the purpose of enforcing the rights or remedies of any party, proceedings on such order shall be had notwithstanding such appeal, or the same shall be stayed as the court may direct, on such terms as it shall think proper to impose.\(^{(r)}\)

It has been decided by the court for the correction of errors, that a decree of the court of chancery appointing a receiver, on the petition of the stockholders of an insurance company, is equivalent to an order for the assignment and delivery of the securities, evidences of debt, &c. of such corporation; and that to stay the execution of such a decree, for the purpose of prosecuting an appeal, the party against whom the decree is made must bring the property into court, or execute a bond to the opposite party with two sufficient sureties, in a penalty at least double the value of the property, conditioned to abide the order of the court of errors. And that a bond conditioned only for the prosecution of the appeal, and for the payment of the costs and damages that may be awarded against the appellant, is not enough to stay the issuing or execution of process to enforce the decree.\(^{(s)}\)

The act of May 2d, 1839, repealing the act to regulate the trial by jury, &c. contains a provision that an appeal from any decision or order made by the chancellor, either in awarding or refusing an issue, shall not stay proceedings in the cause pending the appeal, unless specially directed by the chancellor.\(^{(t)}\)

2d. Appeals to the chancellor from a vice chancellor—when a stay of proceedings.] The revised statutes contain a provision that the chancellor, by general rules to be varied as occasion may require, shall prescribe the effect of all orders and decrees made by a vice chancellor, either before or after notice of an appeal shall be given, in what cases,

\(^{(r)}\) 2 R. S. 607, § 89.  
\(^{(s)}\) Sea Ins. Co. v. Ward, 90 Wend. 588.  
\(^{(t)}\) Laws of N. Y. 1839, p. 292, § 3.
to what extent, and on what terms, any such order or decree shall be suspended or affected by an appeal, &c. (u)

Under this section of the statute, the 116th rule has been framed; which requires the same bond or security for costs as upon an appeal from the chancellor, and adopts the provisions of the statute respecting appeals to the court for the correction of errors, which have been already given, (w) as applicable to appeals from a vice chancellor; with the necessary variations as to form merely. This rule also contains an additional requirement, that the appellant can, in no case, stay the proceedings upon an interlocutory order in any other way than by a special application to the chancellor himself; unless he gets the certificate of probable cause hereafter mentioned.

In the case of Gregory v. Dodge, (w) the chancellor decided that a suit brought to compel the defendant to pay over to the complainants a balance alleged to be due on certain joint dealings, comes within the 87th section of that statute; and that upon an appeal from an interlocutory order in such a suit the court may require the doing of such other acts and things by the appellant as is specified in that section, to make such appeal operate as a stay of proceedings.

It was also decided in that case, that in all the cases coming within the 87th section, the making the deposit, or giving the bond, as required by the 90th section, and the filing the certificate of the vice chancellor, as required by the 116th rule, will stay the proceedings under the order appealed from in the first instance; but that the respondent may afterwards apply to the court, for an order requiring the appellant to give the further security specified in the 87th section.

The 116th rule also provides that no appeal by a defendant from any interlocutory order or decree of a vice chancellor, in a suit for the payment of money, or to compel the delivery or assignment of any securities, evidences of debt, documents, chattels or things in action, or for the delivery of possession of real estate, or a sale thereof, shall operate as a stay of proceedings for more than fifteen days from the time of perfected such appeal, unless a special order for the stay of proceedings be made by the vice chancellor, or the appellant shall, within the fifteen days, have executed and filed a bond with two sufficient sureties in such penalty as the vice chancellor shall direct, and conditioned to pay the debt or damages which may finally be decreed against him in

(u) 2 R. S. 178, § 67, (orig. § 61.)
(c) Ante, p. 388, 389.
(w) 3 Paige, 99.
case the appeal shall be dismissed, or the order or decree shall be affirmed.

And no appeal from any interlocutory order or decree of a vice chancellor shall operate as a stay of proceedings for any time, unless a special order to that effect be made by the chancellor, or unless the appellant, at the time of entering the appeal, shall, in addition to the deposit or security required in such cases, procure and file with the clerk a certificate of the vice chancellor that there is probable cause for appealing; that the order or decree appealed from involves the merits of the cause, or some part thereof; and that it is reasonable and proper that the questions arising on such appeal should be decided by the chancellor before the final decree in the cause, and before any further proceedings are had on such interlocutory order or decree, before the vice chancellor. (x)

The certificate of probable cause, authorized by the above rule, is a mere chamber proceeding, like the approval of the sureties in an appeal bond, and cannot be vacated by the court below. (y)

Such certificate, upon an appeal from an interlocutory order of a vice chancellor, will not stay proceedings which would not be stayed upon a similar appeal from an interlocutory order of the chancellor. Therefore it will not deprive the respondent of the right to apply for security for the debt, &c. as a condition of the further stay of proceedings. (z)

It has been settled, that an appeal from an order refusing a re-sale of premises sold by a master, will not, of itself, prevent the purchaser from completing his purchase. And the appellant will not be entitled to an order staying the purchaser from completing his purchase, and taking possession of the premises, without giving security for the payment of the rents and profits of the premises in the meantime, and that no waste shall be committed. (zz)

And it has been decided that where the whole fund, which is the subject of litigation, is in court, and a decree is made directing its payment to one of the parties, from which decree the adverse party appeals, it is not necessary for the appellant to give security for the payment of the money which is in court, in order to make the appeal a stay of proceedings. (a)

A decree or order directing the appellant to pay costs to the adverse

(x) Rule 116.
(y) Graves v. Maguire, 6 Paige, 379.
(z) Id. ib.
(zz) American Ins. Co. v. Oakley, 9 Paige, 496.
(a) City Bank v. Bangs, 4 Paige, 385.
party, is a decree directing the payment of money, within the meaning of the statute. And to make the appeal, a stay of proceedings, so far as relates to the collection of such costs, a bond must be given to the adverse party, in double the amount of the costs, either separately or in connection with the usual appeal bond.\(b\)

Where the costs awarded to the adverse party have not been taxed at the time of entering an appeal, if the appellant wishes to stay the proceedings for the collection of such costs, the officer who approves the bond for the stay of proceedings should fix the penalty at such sum as he shall consider to be at least equal to double the probable amount of the costs.\(c\)

In the case of Hart v. The Mayor, &c. of Albany,\(d\) where an appeal from an order dissolving an injunction involved an important question of right between the parties, and there was probable cause for appealing, and no particular injury could arise to the respondents from the delay, the chancellor, after hearing both parties upon the application for such relief, granted a temporary injunction restraining the further proceedings of the defendants in relation to the subject matter of the first injunction, until the appellants had a reasonable time to be heard before the appellate court.

It was also held in that case that an appeal from the decision of the chancellor denying an application for an injunction, or for an order to stay proceedings in another suit, does not operate as an injunction or as a stay of such proceedings pending the appeal.

The act of 1839, amending the act relative to trial by jury and the taking of testimony in chancery, declares that an appeal from any decision, or order made by the chancellor, either in awarding or refusing an issue, shall not stay proceedings in the cause pending the appeal; unless specially directed by the chancellor, or vice chancellor before whom the cause is pending.\(e\)

Effect of appeal upon injunction.] Where an injunction is dissolved by a vice chancellor, an appeal from his order does not uphold the injunction or suspend the operation of the order; nor will even the certificate of such vice chancellor have that effect.\(f\)

If an order granting an injunction is appealed from, the injunction will not be dissolved by the appeal; although the present or immediate power of the court below to punish the party for a breach of injunction

\(\text{\(c\)}\) Id. ib. 
\(\text{\(d\)}\) 3 Paige, 381.
\(\text{\(e\)}\) Laws of 1839, p. 292, § 3. 
\(\text{\(f\)}\) Vol. I.
pending the appeal would probably be suspended until after the appeal was disposed of.\(^{(g)}\)

**Effect of, as to power of court below.** The court below cannot correct, on motion, or by bill of review, any error apparent on the face of the proceedings in a decree which has been appealed from and affirmed by the appellate court.\(^{(h)}\)

Where the respondent draws up and enters the order which is appeal-ed from by the adverse party, it does not lie with the respondent to object that such order is not in conformity to the decision of the court as to the part thereof which is appealed from. But the court by whom the order was made may direct the order to be corrected, so as to con-form to the decision, notwithstanding the appeal. And if the order is thus amended, the appellant is at liberty to elect either to abandon the appeal, or to consider it as applicable to the order as amended.\(^{(i)}\)

If a party who has appealed from an order of the court below is pro-ceeding to carry it into effect, notwithstanding the appeal, application may be made to the court below by the other party to stay such irregu-lar proceedings.\(^{(k)}\)

After proceedings have been instituted for the purpose of bringing an appeal, and before the appeal has been perfected, the court below will sometimes interfere. Thus where, upon an appeal to the court for the correction of errors, from a decree of the court of chancery directing the payment of money, the appeal bond, through inadvertence, was defective in the condition thereof, so as not to operate as a stay of proceedings upon the decree, and in consequence thereof an execution was taken out and levied upon the property of the appellants before they had time to get the appeal bond amended in pursuance of a permission of the court to that effect, the chancellor ordered the proceedings upon the execu-tion to be stayed, upon filing the amended bond with sufficient security; and that the execution be suspended upon payment of the sheriff’s fees thereon.\(^{(l)}\)

After a decree in chancery has been appealed from to the court for the correction of errors, it seems that the chancellor has no longer any jurisdiction over the matter; so that he cannot modify an injunction which by the decree appealed from was ordered to be issued.\(^{(m)}\)

The chancellor has no power re-hear or modify an order or decree which has been affirmed on appeal to the court for the correction of er-rors upon the same point as to which the re-hearing or modification is

\(^{(g)}\) Graves v. Maguire, *supra.*

\(^{(h)}\) Campbell v. Price, 3 Munf. 227.

\(^{(i)}\) Hunt v. Wallis, 6 Paige, 371.

\(^{(k)}\) Vail v. Remsen, 7 Paige, 206.

\(^{(l)}\) Clark v. Clark, 7 Paige, 607.

\(^{(m)}\) Sea Ins. Co. v. Ward, 20 Wash. 598.
sought; unless the right to alter or modify is reserved in the original order or decree, or in the decree of affirmance. (n)

An appeal from an order refusing a re-sale of premises sold by a master will not, of itself, prevent the purchaser from completing his purchase, without a special order obtained upon giving security for the payment of the rents and profits of the premises in the meantime, and that no waste shall be committed. (o)

SECTION V.

MISCELLANEOUS PROVISIONS.

On an appeal, the burden lies upon the appellant. He must show the decree or order appealed from to be clearly wrong; otherwise it will be affirmed. (p)

Where the appellate court reverses the decree appealed from, it exercises as it were, an original equity jurisdiction, and places that decree upon the record which the court below ought to have made. (q)

Who entitled to be heard.] All parties interested in supporting the decree or order appealed from are entitled to be heard in support of the decree; but no party, except the appellant, can be heard in support of the appeal. If, therefore, any party who is not included as a co-appellant, in a petition or notice of appeal, is desirous of appealing, he must present a separate petition or give a separate notice; (r) otherwise he will be precluded from all benefit of the appeal, even though the result of it should be to show that the decree was completely wrong, as well against him as against the appellant. Thus where one of several defendants appealed, and an order was made dismissing the bill, upon grounds which were equally applicable to other defendants who did not join in the appeal, it was held that such other defendants could have no benefit of the order, although it rendered the decree useless. (s) Nor can the appellate court reverse a decree against a party who has not appealed; even though the court below had no jurisdiction to make the decree against him. (t)

(p) Lloyd v. Trimleston, 9 Molloy, 81. (q) Diffenderffer v. Winder, 3 Gill Paige, 486.
(r) 2 Smith, 30. 3 Dan. 194.
(s) Tasker v. Small, 1 C. P. Coop. Rep. 255.
(t) Tate v. Liggot, 2 Leigh, 54.
It seems, however, that if the result of the appeal had been otherwise, and the appeal had been dismissed, or the decree only slightly varied, the defendants who did not appeal, would, if they had been heard in support of the decree, have been entitled to their costs, either to be paid directly by the defendant who appealed, or by the complainant. Such costs to be added to the complainant’s own costs, and reimbursed to him by the appellant.

What points may be raised upon appeal.] An appellate court will not decide an appeal upon a ground which has not been passed upon or submitted to the court below. Nor will it allow new points to be raised upon the hearing of the appeal; that is, no party shall be allowed to surprise or mislead his adversary. Therefore if counsel raise a point for the first time upon the hearing which might have been obviated had it been made in the court below, he will not be allowed to do so. But where a cause has been defended in the court below, and upon appeal a point is made which could not be obviated in the court below by proof or amendment, the appellate court ought not to refuse cognizance of it.

The court will decide on those parts only of the decree of the court below which are complained of in the petition or notice of appeal. And the appellant cannot allege error in the decree as against another party who has not appealed.

Neither can parties avail themselves, upon appeal, of any irregularity in the court below, which they have consented to, or waived.

Appeals may embrace more than one order, &c.] Where two distinct orders are made in the same cause, they may be both included in one notice of appeal and in the same appeal bond; provided the penalty of the bond is sufficiently large, and the condition of the bond is broad enough, to secure the payment of the whole amount required to be secured on both appeals. In the case of Bouchier v. Dillon, after a petition of appeal had been presented complaining only of one order of the court below, leave was given by the house of lords to extend the appeal to other orders.

(d) Beekman v. Frost, 18 John. 558.
(e) Sands v. Codwise, 5 John. 531.
(f) Oldham v. Rowan, 4 Bibb, 544.
(g) Wickliffe v. Clay, 1 Dana, 569.
(h) Tyler v. Simmons, 6 Paige, 127.
(i) 5 Bligh, (New Series) 688.
Cross appeals. Sometimes, where there is an appeal against a part of a decree, the respondent, or some other party, may feel himself aggrieved by another part. In such cases the proper course is to bring a cross appeal. Where that is done, the two appeals may be brought on to be heard at the same time, and one order be made in both.(d) As the appellant, in the original appeal, seeks a reversal or variation of the decree or order, on the ground of its having taken from him too much, or given him too little, so the respondent, by the cross appeal, aims at a reversal or variation of such decree or order, on the ground of its having given the appellant too much or too little to the respondent.(e) The following case is given by Mr. Urquhart,(f) as one proper for a cross appeal. A files a bill to recover an estate, insisting that he is entitled to it under a conveyance made by B., and also under another deed made by C. The defendant avers that he is in possession, under a title derived from D. the admitted original owner, from whom all make title, and that neither B. nor C. had power to make the conveyances under which the complainant claims. The court below decrees that the complainant is entitled under the deed of B. who was not restrained from aliening, but not under the deed of C. who was so restrained. The defendant appeals, complaining of the decree for declaring that the complainant is entitled under the deed of B. On this appeal nothing can be argued but the validity of the claim under the deed of B. If the complainant wishes to bring his right to the estate before the court, under the deed of C. he must file a cross appeal.

In fact, unless the respondent is satisfied with the decree appealed from he should in all cases, bring a cross appeal. Where the appellant does not succeed in reversing any part of the decree, and the respondent has not brought a cross appeal, the appellate court cannot reverse or modify the decree in a part thereof which is erroneous as to such respondents.(g)

There are cases where the original appeal has been dismissed and relief granted under the cross appeal. And sometimes both appellants have succeeded in part, in their respective appeals.(h)

Another proper case for a cross appeal is where one party appeals from the substance of the decree, and the other appeals from the decree for giving or refusing costs.

(d) Blackburn v. Jepson, 9 Ves. & B. 359. Hawley v. James, 10 Wend. 61, 85. In this case there were eight several appeals, and only one decree in the appellate court.
(e) Palmer's Prac. 33.
(f) Urquhart, 37.
(h) Palmer's Prac. 33.
Amendment of bill by adding parties.] The appellate court will give the complainant leave to amend by adding parties, in the same manner as upon an original hearing; and will order the hearing of the appeal to stand over for that purpose. And it has gone to the extent of allowing the complainant to add the attorney general as a party, either by converting the bill into an information and bill, or into an information only. (i)

Indeed, if the court perceives that it cannot make the proper decree for want of the necessary parties, the objection is never too late. It may not only be made at the hearing, by a party, but the court may make it of its own accord, at or after the hearing. (k)

Order or decree by consent.] If the order or decree appealed from purport, on its face, to have been taken by consent of the party appealing, it will be deemed by the court above, on appeal, to have been so taken; and they will not hear evidence upon the question whether it was so taken. (l) If it was, in fact, not taken by consent, the party should have applied to the court below, to have the mistake in the entry corrected. (m)

Waiver of appeal.] If a party proceeds to carry into effect an order from which he has appealed, it will be considered as a waiver of the appeal; as the two proceedings are inconsistent with each other. (n) So where, upon the dismissal of a bill by the court below, leave is given to the complainant to amend, which he proceeds to do, it will be considered a waiver of his right to appeal from the order dismissing his bill. (o)

Dismissing appeal.] If a party who has appealed from an order, is proceeding to carry it into effect, notwithstanding the appeal, the respondent may apply to the appellate court to dismiss the appeal, on the ground that the proceeding under the order, by the appellant, is a waiver of the appeal, or to compel him to elect in which court he will proceed. (p) And where a party drew up and entered an order not warranted by the decision of the court, and appealed therefrom, and the court afterwards set aside the order as improperly entered, the appellate court, upon the application of the respondent, ordered the appeal to be dismissed. (q)

(i) President of St. Mary Magdalen v. Sithorpe, 1 Russ. 154.
(k) 2 Hoff. Pr. 38.
(l) Atkinson v. Manka, 1 Cowen, 691.
(m) Id. ib.
(n) Vail v. Remsen, 7 Paige, 206.
(p) Vail v. Remsen, 7 Paige, 206.
(q) Hunt v. Wallis, 6 Paige, 371.

(a) McElwain v. Willis, 2 Wend. 549. See also Brooks v. Hunt, 17 John. 484.
If an appeal is dismissed, it is generally dismissed with costs.\(r\)
Where the appeal bond is not duly acknowledged according to the provisions of the 172d rule, the appeal is irregular, and may be dismissed for that cause.\(s\)

**SECTION VI.**

**APPEAL TO THE CHANCELLOR FROM A VICE CHANCELLOR.**

*Within what time to be brought.*\(t\) Any party complaining of any interlocutory or other order, previous to a final decree made by any vice chancellor, may, within fifteen days after notice of such order, appeal therefrom to the chancellor.\(t\)

And any party complaining of any final decree made by a vice chancellor, may appeal therefrom to the chancellor within six months after such decrees shall have been entered in the minutes of the court. And such appeal may be made notwithstanding the decree may have been enrolled.\(u\)

If a party in whose favor an interlocutory decision of a vice chancellor is made, wishes to limit the time for appealing, he should have the order entered, and serve a copy; or give formal notice thereof, to the adverse party, without delay; as the latter has fifteen days after the receipt of notice of such order, to appeal from the decision.\(v\) Parol notice, where a copy of the order has not been served, is not sufficient.\(w\)

As a party cannot have legal notice of an order until it is drawn up and perfected, the time for appealing from it does not begin to run against the party entering the order until the actual entry thereof, although the caption of the order bears date as of a previous day.\(x\) Where, however, the appellant draws and enters the order, he is deemed to have had notice of such order from the time it is actually entered by him.\(y\) And where the party who is entitled to draw up the order, enters it as of the time the decision of the court was pronounced, he cannot afterwards object that it was not actually entered at that time.\(z\)

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\(r\) 3 Dan. 197.
\(s\) Ridabock v. Lorry, 8 Paige, 197.
\(t\) 2 R. S. 178, § 65, (orig. § 59.) Eldridge v. Howell, 4 Paige, 457.
\(u\) Id. ib. 4 Paige, 457.
\(v\) Studwell v. Palmer, 5 Paige, 57.
\(w\) Tyler v. Simmons, supra.
\(y\) Id. ib.
\(z\) Whitney v. Belden, supra.
The court has no power to extend the time for appealing; not even upon the ground of the mistake of the party, it being fixed by statute; and the lapse of time is an absolute bar to the appeal. (a) Nor can the court vacate the order, and cause it to be entered as of a more recent date, to enable a party to appeal therefrom. (b) But if a party to a suit before a vice chancellor, is misled by any mistake or neglect of the clerk, as to the time of the entry of a final decree, whereby he does not perfect his appeal until after the expiration of the time for appealing, it would be sufficient ground for an application to the vice chancellor to have the decree re-entered, so as to give him an opportunity of appealing within the time fixed by statute. (c)

But where the time for appealing depends upon a rule of the appellate court, such court, upon a sufficient excuse shown, may suspend its rule and allow an appeal, although such appeal was not brought within the time prescribed by the rule for appealing. (d)

It seems, that an order directing an issue, cannot be appealed from after the trial has taken place. (e)

An appeal to the chancellor from a final decree of a vice chancellor as to the general costs in the cause, may be made at any time within six months from the time of entering the decree. (f)

Method of appealing—notice.] The statute declares that appeals to the chancellor from a vice chancellor, shall be made by serving notice thereof on the solicitor of the adverse party, and on the register, assistant register, or clerk with whom the decree or order appealed from was entered. (g) This is done by delivering to the register, &c. a written notice stating that such decree or order, or some particular part thereof, to be specified in the notice, is appealed from. (h) The notice required to be served on the solicitor of the adverse party, must be served within the time limited by the statute for appealing. (i)

This notice must be served upon the solicitors of the several parties, whose interests as to such appeal, are adverse to the appellant. (k) A mere constructive notice is not sufficient. (l)

The notice above mentioned, takes the place of the petition of appeal which is used in our court for the correction of errors and in the English

(b) Id. ib. Cadwell v. Mayor, &c. of Albany, 9 Paige, 672.
(c) Barclay v. Brown, supra.
(e) De Taetet v. Bordenave, Jacob, 516.
(g) 2 R. S. 198, § 66, (orig. § 60.)
(h) Rule 117.
(k) Id. ib.
courts. The 119th rule declares that no petition of appeal addressed to the chancellor need be presented on appeals from orders or decrees of vice chancellors; and that no transcript need be returned; but that the original pleadings and other papers in the cause may, by order of the chancellor, and at the expense of the party procuring such order, be transferred from one office to another as occasion may require; and that the expense of such transfer may be taxed as a necessary disbursement.

Under this rule, it has been decided that it is not necessary to obtain an order for the transfer of the papers, except where the inspection of original papers may become necessary on the hearing. And that where a transfer of the papers becomes necessary, the party applying for it must, by affidavit, state the particular reasons which render a removal of the papers necessary. (m)

**Bond and deposit.** Within the time limited by statute for appealing, the appellant must make the necessary deposit, or file the bond required to be given as security for costs on the appeal. (n) The bond here spoken of is required to be in the penalty of at least $250, with sureties, to be approved of by such officer as the chancellor shall designate for that purpose, conditioned for the diligent prosecution of the appeal, and for the payment of all costs and damages that may be awarded against the appellant thereon. (o)

The approval of an appeal bond is an act requiring the exercise of judgment and discretion on the part of the approving officer; and under the prohibition of the statute, (2 R. S. 204, § 6,) a master who has acted as solicitor or counsel in the cause or matter in which the appeal is taken, or whose law partner has thus acted, cannot regularly approve such bond. (p)

If a bond is not given, the appellant must deposit the sum of $250 with the register, assistant register, or clerk, to be applied, under the direction of the court, for the payment of all costs and damages that may be awarded against the appellant on the appeal. (q) But a deposit is not necessary if a bond is given. (r)

The bond may be approved by any vice chancellor or injunction master, or by the register, assistant register, or clerk with whom the appeal is entered; to be signified by his approval endorsed thereon. (s)

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(m) Eames v. Sanger, 3 Paige, 556.  
(n) 2 R. S. 605, § 80.  
(o) Rule 117.  
(p) Id. ib., § 81.  
(q) 2 R. S. 605, § 80. Rule 116.  
(r) Rule 116.  
(s) McLearn v. Chaffier, 5 Paige, 550.
But if the bond is approved of by the register, instead of the clerk of the vice chancellor with whom the appeal is entered, it is a mere irregularity which will be considered as waived if the adverse party does not apply to the chancellor to dismiss the appeal within a reasonable time after notice of such irregularity.\(^{(f)}\) The power of the court to dispense with the usual formality with respect to the approval of bonds on appeals from vice chancellors, arises from the fact that the form and manner of giving the security upon such appeals are regulated by a rule of the court, and not by statute.\(^{(w)}\) It is otherwise as to appeals to the court of errors; which are regulated by statute.\(^{(v)}\)

The bond must be executed by at least two responsible sureties who are residents of the state, and householders.\(^{(w)}\) They should justify in double the amount of the penalty of the bond. And the officer who approves the bond should, in his certificate, state that he approves of the sufficiency of the sureties as well as of the form of the bond.\(^{(x)}\)

It is not necessary that the appellant should join in the bond.\(^{(y)}\)

The appellant's solicitor may be one of the sureties.\(^{(x)}\)

If the officer who approves of the bond does not know that the sureties offered are responsible, it is his duty to examine them as to the nature of their property and the place of their residence, and to require them to justify in at least double the penalty of the bond. And he should annex the affidavit of justification to the bond, and require it to be filed therewith.\(^{(a)}\)

The appellate court has power to authorize an amendment of the bond, either as to the amount, or as to the approval thereof; \(^{(b)}\) or, with the consent of the obligors therein, by adding the name of another surety.\(^{(c)}\)

Where two distinct orders are made in the same cause, they may both be included in the same appeal bond; provided the penalty of the bond is sufficiently large, and the condition is broad enough to secure the payment of the whole amount required to be secured on both appeals.\(^{(d)}\)

It has been mentioned that an appeal bond cannot regularly be approved by a master who has acted as solicitor in the cause or matter in which the appeal is taken, or whose law partner has thus acted.\(^{(e)}\)
But liberty will be given by the appellate court to amend by filing a new bond *nunc pro tunc*, or by procuring the same bond to be approved of by the officer.\(^{(f)}\)

The revised statutes contain a general provision that whenever a bond is required by law to be given by any person in order to entitle him to any right or privilege conferred by law, or to commence any proceeding, it shall not be necessary for such bond to conform in all respects, to the form thereof prescribed by any statute; but the same shall be sufficient if it conform thereto substantially, and does not vary in any matter to the prejudice of the rights of the party to whom or for whose benefit such bond shall have been given.\(^{(g)}\)

Whenever such bond is defective in any respect, the court, officer, or body who would be authorized to receive the same, or to entertain any proceedings in consequence thereof, if the same had been perfect, may, on the application of all the obligors therein, amend the same in any respect. And such bond shall thereupon be deemed valid from the time of the execution thereof.\(^{(h)}\)

The 172d rule requires appeal bonds to be duly proved or acknowledged in the manner prescribed by law for the proof or acknowledgment of deeds of real estate, before the same shall be received or filed.

Under this rule it has been decided by the chancellor that where, by mistake, a bond has not been acknowledged before a proper officer, the error may be corrected by a new acknowledgment of the bond filed. But where the object of the appeal is to take advantage of a mere technical error on the part of the respondent, the court will not allow such a mistake in the acknowledgment of the appeal bond to be corrected.\(^{(i)}\)

Where the appeal bond is not duly acknowledged according to the provisions of the 172d rule, the appeal is irregular, and may be dismissed for that cause.\(^{(k)}\)

**Papers on appeal.** In the 3d section of the present chapter, and in the 11th chapter of the 1st Book, relative to Hearings, we have mentioned what papers are to be furnished,\(^{(l)}\) and by whom,\(^{(m)}\) and what papers may be read upon the hearing of an appeal.\(^{(n)}\)

**Place of appeal cause on the calendar.** In making up the chancellor's calendar, appeal causes are to be placed thereon as of the same

\(^{(f)}\) McLauren v. Charrier, 5 Paige, 530.
\(^{(g)}\) 2 R. S. 558, § 33.
\(^{(h)}\) Id. ib. § 34.
\(^{(i)}\) Ridabock v. Levy, 9 Paige, 197.
\(^{(k)}\) Id. ib.
\(^{(l)}\) Ante, p. 314, 394.
\(^{(m)}\) Ante p. 315.
\(^{(n)}\) Ante, p. 315, 394.
date at which they were entitled to be placed on the calendar of the court below.(o)

Hearing of appeal.] When an appeal is in readiness to be heard, it may be noticed for hearing by either party.(p)

The appellant's counsel is entitled to open and close the argument.(q)

If the appellant makes default at the hearing, the decree or order appealed from will be affirmed with costs. But if the respondent makes default, the cause must be heard ex parte; and the decree or order will not be reversed or modified, unless it is shown to be erroneous.(r)

The only effect of the respondent's default is to deprive him of costs, if the decision of the vice chancellor is affirmed; or to preclude him from the right of appealing to the court of errors if the decision is reversed.(s) Where the appellant fails to appear, the court will presume the decision of the vice chancellor to be correct, and will affirm the same, with costs, without any argument upon the merits.(t)

The statute provides that on the hearing of an appeal the chancellor shall annul, affirm, modify, or alter the order or decree appealed from, or make such other order in the cause, as justice shall require, and may remit the cause to the vice chancellor, for further proceedings or may direct the same to be had before himself, as the circumstances of the case may require.(u)

It has been decided under this section that where, by an appeal, the whole cause is brought before the court, if the chancellor does not make a final decree, the whole case will remain before him for a decision upon the equity reserved, unless he shall think proper to remit it to the vice chancellor.(v) But when the appeal is upon a collateral matter not embracing the whole suit, the case is otherwise.(w) In this case the vice chancellor had directed an issue, upon the hearing; from which both parties appealed. And the chancellor entertained a motion for a receiver.

In Brockesway v. Copp,(x) it was decided that where, upon an appeal from an interlocutory order of a vice chancellor, the same is reversed with costs, and no order is obtained to remit the proceedings to the vice chancellor, the defendant may either cause the order of the chancellor to be enrolled, and obtain an execution for his costs on the appeal, or he

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(p) Rule 190.
(q) Rule 190.
(r) Stiles v. Burch, 5 Paige, 139.
(s) Id. ib.
(t) Id. ib.
(u) 2 R. S. 178, § 68, (orig. § 65.)
(v) Jenkins v. Hinman, 5 Paige, 309.
(w) Id. ib.
(x) 9 Paige, 578.
may proceed as for a contempt, and apply for an attachment against the complainant for the non-payment of the costs.

Appeals from interlocutory orders of the vice chancellors, made on motion or petition, need not be placed on the calendar, but may be heard on any regular motion day or in term.(y)

Interest.] Where a decree for costs is appealed from after the costs have been taxed, and security is given by which the proceedings for the collection of the costs is stayed pending the appeal, the respondent, upon an affirmance of the decree appealed from, is entitled to interest on the taxed bill of costs, as damages for the delay caused by the appeal.(x) And the rule is the same with respect to a decree directing the payment of money.\(^{(a)}\)

Effect of the death of a party.] The chancellor will not\(^{(a)}\) proceed to the hearing of a cause upon appeal, after the fact of the death of one of the parties is known, until the suit is revived; unless it is heard with the consent of those who have succeeded to the rights of the deceased party. But where, after the entry of an appeal from the vice chancellor, and after the cause was ready for a hearing, the complainant died, but the fact of his death being unknown, the cause was heard and decided by the chancellor upon the appeal, it was held that the decree upon the appeal might be entered \textit{nunc pro tunc}, as of a day previous to the death of the complainant, and after the entering of the appeal.\(^{(b)}\)

New solicitor on appeal.] The appellant may prosecute his appeal by a new solicitor, without any order of the court below to change the solicitor.\(^{(c)}\) And where this is done, the service of papers in the appeal cause while it is pending before the chancellor, need not be made upon the original solicitor.\(^{(d)}\)

Papers how entitled.] Upon an appeal from an order or decree of a vice chancellor, the proceedings should be entitled as in the original suit.\(^{(e)}\) But in appeals from the decisions of surrogates and circuit judges, the proceedings in the court of chancery, after the filing of the petition of appeal, must be entitled in the appeal cause.\(^{(ee)}\)

\(^{(a)}\) Rule 190.
\(^{(c)}\) Van Valkenburgh v. Fuller, 6 Paige, 10.
\(^{(d)}\) Vroom v. Ditmas, 5 Paige, 599.
\(^{(e)}\) McLaren v. Charrier, 5 Paige, 530.
\(^{(ee)}\) Hawley v. Donnelly, 8 Paige, 415.
SECTION VII.

APPEALS, FROM THE CHANCELLOR TO THE COURT FOR THE CORRECTION OF ERRORS.

Power of the court on appeal.] The court has full power to correct and redress all errors that may happen in the court of chancery. (f)

Upon any order or decree of the court of chancery being brought by appeal to this court, the court shall examine all errors that shall be assigned, or found, in such order or decree; and shall hear and determine such appeal, and all matters concerning the same; and shall have power to reverse, affirm, or alter such order or decree, and to make such other order or decree therein as justice shall require. (g)

But the court will not, in all cases, examine into the full merits of the cause. Thus, if the parties in the court below neglect to except to the master's report, the court for the correction of errors will not enter into an investigation of the calculations made by the master, but will consider the exceptions waived by the neglect to except. (h) So, on an appeal from an order granting an injunction to stay proceedings at law, the court for the correction of errors will not hear and decide on the merits of the case if the court below had not heard the cause on the merits previous to the order. (i)

And on an appeal from an interlocutory order, the court will not permit evidence to be read which was not read in the court below; nor will they hear and decide on the merits, unless the merits have also been heard in the court below. (k) But if the merits are fully before the court, even on an appeal from an interlocutory decree, the court will take them into consideration and make a final decree. (l)

In the case of Sands v. Codwise, (m) it was decided that the court for the correction of errors would decide on those parts only of the decree of the court below which are complained of in the petition of appeal.

Within what time appeals to be brought.] Appeals from final de-

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(f) 2 R. S. 166, § 25. (orig. § 24.)
(g) 1d. ib. § 28. (orig. § 27.)
(i) Trustees of Huntington v. Nicoll, 2 John. 566.
(j) Deas v. Thorn, 3 John. 543.
(l) 3 John. 581.
crees of the court of chancery must be made within the same time after the enrolment thereof as is prescribed for bringing writs of error upon judgments at law; subject to the same exceptions and provisions in favor of persons under disability at the time of rendering such decree, and subject to the same restrictions, except where provision is otherwise specially made by law.\(n\)

Writs of error are required to be brought in two years after the rendering of the judgment or final determination, except in the following cases:

The exceptions are, where the person against whom the judgment or decree is made shall be, at the time, 1. within the age of twenty-one years; or 2. insane; or 3. imprisoned on any criminal charge, or in execution upon some conviction of a criminal offence, for any term less than for life; or 4. a married woman.\(o\)

The time during which any such disability continues, is not to be deemed any portion of the time above limited for bringing a writ of error or appeal; but such person may bring the same after the time so limited and within two years after such disability is removed.\(p\)

If the person entitled to bring such writ or appeal, dies during the continuance of any disability specified in the statute, his heirs, devisees, executors, or administrators entitled by law to bring such writ or appeal, may bring the same, at any time within two years after such death.\(q\)

But the existence of any disability specified in the statute will not authorize the bringing of a writ of error or appeal upon any judgment or decree after the expiration of five years from the time of rendering the same.\(r\)

In the case of Jenkins v. Wild,\(s\) Chief Justice Savage expresses an opinion that there is a test of the question, whether a decree is final or interlocutory, arising from the peculiar language of the section of the statute which limits the time for appealing from final decrees.\(t\) That section requires appeals from such decrees to be brought within the same time after the enrolment thereof, as is prescribed for bringing writs of error. The chief justice observes—"The term enrolment is not applicable to an interlocutory decree or order, nor to any but a final decree. It seems to follow that none are final decrees but such as are

\(n\) 2 R. S. 605, § 78. Id. 594, § 21.  
\(o\) Id. 594, § 22.  
\(p\) Id. ib.  
\(q\) Id. 595, § 22.  
\(r\) Id. ib. § 24.  
\(s\) 14 Wend. 539.  
\(t\) 2 R. S. 502, § 78.
capable of enrolment. All others are but interlocutory, although they do decide the principle in controversy."

The time for appealing from interlocutory orders or decrees, including decrees for the general costs of the cause, is fifteen days after notice of such order or decree shall have been given to the party against whom the same was made, or his solicitor.(u)

We have already inquired, in the last section, relative to appeals from vice chancellors—in what cases and in what manner notice of the entry of an order or decree must be given to the opposite party, in order to limit his time for appealing.(v) The remarks there made, and the decisions referred to, are also applicable to appeals from the chancellor to the court of errors. It may be added, however, that in the case of Jenkins v. Wild,(w) it was held by the court of errors, that notice in the section relative to appeals to that court, does not mean knowledge, but a regular formal notice to be given. This notice must be given, and implies a positive act of the party in whose favor the decree is made, to limit the right to appeal. Possibly, the party entering the order or decree would be estopped, as in 4th Paige, 273, from alleging that he had no notice of his own acts. The statute does not require notice to be given to the prevailing party.

The distinction between final and interlocutory decrees, has been already stated.(x)

If the appeal is not made within the proper time, the objection should be taken by motion. It is too late to do so at the hearing.(y) And putting in an answer to the petition is a waiver of all objections of form.(x)

Mode of appealing—notice.] The appellant must, within the time prescribed by law for making an appeal, deliver to the register or assistant register, with whom the decree or order is entered, a written notice, stating that such decree or order, or some particular part thereof, to be specified, is appealed from.(a) And within eight days thereafter, he must serve a like notice on the solicitor of the adverse party, or the appeal will be considered as waived.(b) It has been decided that this last clause of the 117th rule, applies to appeals from the chancellor to the court for the correction of errors only, and is not applicable to appeals from a vice chancellor.(c)

(u) 2 R. S. 605, § 79.
(w) 14 Wend. 544.
(x) Ante, p. 396 330.
(a) Rogers v. Cruger, 3 John. 564.
(b) Rule 117.
(c) Eldridge v. Howell, 4 Paige, 457.
Bond, or deposit. Within the time allowed for appealing, the appellant must also make the deposit, or file the bond required to be given, as security for costs on such appeal.(d) This deposit or bond is the same as is required upon appeals to the chancellor from a vice chancellor.(e) And the bond is to be approved of by the same officers and in the same manner as upon appeals of the latter description. But this difference is to be noticed. The method of approving bonds upon appeals to the court of errors, being regulated by statute, is a formality which the court cannot dispense with.(f) But as respects appeals from a vice chancellor, it is a provision by rule of court merely; and if any irregularity occurs it may be corrected, or may be waived by the adverse party.(g)

The assistant register, or clerk, is not authorized to approve of a bond on an appeal entered with the register. It must be approved by a vice chancellor, injunction master, or the officer in whose office the appeal is to be entered.(h)

We have already seen, that in certain cases, if a party appealing from the decision of a vice chancellor, wishes to make the appeal operate as a stay of proceedings in the court below, he must give, in addition to the usual security for costs, a bond for the performance of the decree appealed from.(i) The same security is required, in similar cases, upon an appeal from the chancellor to the court for the correction of errors.

It has been decided with respect to bonds of this character, that where the amount of the penalty is very large, the officer who approves the same, is authorized to receive more than two persons as sureties. And it is not necessary that each of the sureties should justify in double the penalty of the bond, provided the amounts in which they can each severally justify, are equal, in the aggregate, to two sureties who are worth double the penalty of the bond.(k) But the approving officer is not authorized to split up the justification of the sureties in an ordinary appeal bond of $250, or in a bond the penalty of which is less than $1000.(l) In the above case, the penalty of the bond was $38,500.

Petition of appeal. A petition of appeal addressed to the court for the correction of errors must be filed in the office of the register, or as-

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(d) Rule 117. (h) Rogers v. Patterson, supra.
(e) See ante, p. 401. (i) See ante, p. 388, 391.
(g) Hawley v. Bennet, 3 Paige, 104. (l) Id. ib

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sistant register with whom the decree or order appealed from is entered, within eight days after the entering of the appeal in the court of chancery, or the appeal will be considered as waived, and that court may proceed, notwithstanding the appeal.\(m\)

This petition, whether filed in the recess or during the sitting of the court, must pray that the decree or order appealed from may be sent to the court for the correction of errors and filed with the clerk thereof without delay.\(n\)

In this petition it is sufficient to set forth the decree, decretal or other order appealed from, without reciting the pleadings in the cause; and stating that the said decree, decretal or other order, or some part thereof (specifying what part or parts,) is erroneous, and that the same ought to be reversed or modified as the case may be.\(o\)

The petition of appeal must be signed by one counsel.\(p\)

No person is considered a party respondent in a petition of appeal who is not named therein and called upon by the prayer thereof to answer the same.\(q\)

**Amendment of petition.** The court of errors will permit a petition of appeal to be amended after it has been presented.\(r\) Thus if any error is discovered in the petition, or if the appellant is advised that some previous orders are so connected with the order appealed from that it will be impossible to do justice to his case without extending his appeal to these former orders,\(s\) or if there appears to be a defect of proper parties,\(t\) he should apply for liberty to amend his appeal.

To obtain leave to amend, a petition must be presented, of which four days\(u\) notice in writing is to be given to the opposite party; and it should be accompanied by a copy of the petition.\(v\)

Applications to amend the petition of appeal are not confined to the appellant, but may also be made by the respondent; who is interested in seeing that all the proceedings are correct. But the respondent's petition should pray, "that the appellant may be ordered to amend his appeal in the particulars set forth, and to amend the respondent's copy.\(w\)

If an appeal be amended after the respondent has put in an answer

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\(m\) Rule 9, court of errors.  
\(n\) Idem.  
\(o\) Rule 10.  
\(p\) Fulton Bank v. Beach, 9 Paige, 182.  
\(q\) Gardner v. Gardner, 5 Paige, 170.  
\(r\) Palmer's Prac. 38.  
\(s\) Bouchier v. Dillon, 5 Bligh, (New Series) 714.  
\(t\) Sydney on Appeals, 93, 94.  
\(u\) See Rule 31, court of errors.  
\(v\) 3 Dan. 146.  
\(w\) Id. ib.
therefo, and it is considered necessary that a new answer should be put in to the amended appeal, he must obtain an order for leave to withdraw the former answer, and put in a new one; in which case the respondent will be entitled to costs.\((x)\) An order to this effect may be obtained on petition. But if the respondent do not voluntarily apply for such an order, and put in his answer, the appellant may proceed against him by a new peremptory order, and may get the cause set down ex parte.\((y)\)

**What papers to be annexed to petition.** The officer of the court of chancery with whom the petition of appeal is filed must make and annex to the same the decree, decretal or other order appealed from, and such other order as may be required to be returned to this court, without any of the pleadings, proofs, and exhibits in the cause.\((z)\)

In case the cause had been set down for hearing and heard prior to the decree or order appealed from, then the officer must cause to be annexed also a copy of the minutes taken by the register or assistant register as to what was read or used in the court below, or offered and overruled on objection, or admitted at the hearing.\((a)\)

Authenticated copies of the pleadings, proofs, and exhibits, or such of them as may be relied on by either party, must be produced at the hearing, by the parties.\((b)\)

**Filing petition, &c.** The appellant must cause the petition of appeal, with the matter annexed, to be brought into the court for the correction of errors and filed with the clerk thereof, by the day mentioned in such petition, or when duly prepared by the officer as directed. Or in default thereof, he will lose the benefit of such appeal, unless the court shall see cause to allow a further day for that purpose.\((c)\)

The phrase used in the rule last referred to, "by the day mentioned in such petition," has been continued in the last edition of the rules from rule seven of the former edition; without attending to the fact that under the present rule the petition prays that the decree, &c. may be sent to the court for the correction of errors "without delay," whereas under the former rule the petition was that the decree be sent to the court on the first day of the next session thereof, or if filed during the sitting of the court, that it be sent without delay.

Orders to file petitions of appeal may be entered in vacation, by the clerk, with the like force and effect as if entered by direction of the court during its session.\((d)\)

\((x)\) 3 Dlan. 140.  
\((y)\) Palm. Pr. 43.  
\((z)\) Rule 11.  
\((a)\) Idem.  
\((b)\) Idem.  
\((c)\) Rule 12.  
\((d)\) Rule 16.
Order to answer petition. Upon filing the petition of appeal, the appelleant may obtain an order as of course for the respondent to answer the petition in eight days after service of a copy thereof or be precluded. If the respondent does not comply with this order he will be precluded from answering the petition of appeal, and the appelleant may be heard ex parte; unless the respondent is an infant. In the case of Irving v. Dunscomb, it was held that an order to answer a petition of appeal was irregular if entered before the petition, with the transcript annexed, was actually returned and filed in the court for the correction of errors.

In that case the chancellor observed: "The petition of appeal is in the first instance to be filed in the court of chancery. If the court of errors is in session, it is returned here immediately, with the transcript of the decree, and of the minutes of the hearing annexed thereto. But if filed in the recess, it is to be returned here on the first day of the next session. In the first case the court is possessed of the cause by relation, from the time when the petition was returnable during the session. And I apprehend it would be regular, under the 26th rule, to enter an order to answer during the recess of the court. In the latter case, however, this court is not possessed of the cause until the first day of the next session. But in neither case can an order to answer be regular until the petition of appeal, with the transcripts annexed, is actually returned and filed in this court."

The present rule on the subject (the 16th) allows orders to answer petitions of appeal to be entered at any time by the clerk, of course, in the minutes of the court, upon the written request of the solicitor, attorney, or counsel, at the peril of the party, with the like force and effect as if entered by direction of the court during its session.

A copy of the order to answer the petition must be served upon the solicitor for the respondent; or if none is employed, upon the respondent personally. It is not sufficient that the petition has been served. Service of the order to answer is necessary.

Withdrawal of appeal.] If the appellant finds it expedient to withdraw his appeal, he must obtain leave of the court to do it; by petition; of which four days notice, to the respondent's solicitor, must be given, together with service of a copy of the petition. But the court
will not grant the prayer of it without directing the payment of costs, nor, in some instances, without the consent of the respondent's solicitor. For there may be cases in which it would be unjust to permit the appellant to withdraw his appeal, and thereby leave him at liberty, at a considerable distance of time afterwards, to bring a new appeal; which he might do, notwithstanding the withdrawing of his former appeal. (l)

Waiver of appeal.] If a party proceeds to carry into effect the order or decree from which he has appealed, it will be considered a waiver or abandonment of the appeal. (m)

Dismissing appeal.] If the respondent has reason to think the appeal is irregularly filed, he should move to have it dismissed. (n) This motion should be made before the petition of appeal is answered; for if the respondent treats it as an effective appeal, by answering it, he will not be entitled to costs. (o)

If the appeal is made after the time allowed for appealing, the objection should be taken by motion to dismiss the same; and it cannot be taken at the hearing. (p) Answering is a waiver of objections of a formal nature. (q)

Answer to petition of appeal.] At any time after the filing of the petition in the court below, and without waiting for the actual return thereof to the clerk of this court, the respondent may put in his answer thereto. (r)

If an order is entered under the 13th rule, requiring the respondent to answer, and he fails to do so, the appellant, as already stated, may be heard ex parte; unless the respondent is an infant.

And it seems the appellant may move for an order that the order or decree appealed from be reversed; and for such further direction as grows out of such reversal. (s)

The answer to the petition must be signed by counsel. (t)

Answers are of two kinds, general and special.

The general answer, (which is the kind most commonly used,) admits the making of the decree or order complained of by the appellant; refers thereto when produced; insists that the same is a fit case to equity; and prays that it may be affirmed; and that the petition of appeal may be dismissed, with costs.

(l) Palm. Pr. 43. (r) Rule 9.
(m) See ante, p. 398. (s) Chamberlin v. Fitch, 2 Cowen, 244.
(n) Palm. Pr. 44. (t) Fulton Bank v. Beach, 9 Paige, 180.
(o) Norbury v. Meade, 3 Bligh, 574. (u) Waters v. Travis, 8 John. 566.
Henshaw, 8 Cowen, 353. (w) Rogers v. Cruger, 3 John. 664.
If the respondent brings a cross appeal, the answer should be qualified thus, "that the said decree, so far as the same is complained of by the said petition and appeal, is agreeable to equity," &c.

An answer is special when particular facts are stated, or some specific matter is alleged, either upon the merits of the cause, or upon any defect in form in the appeal; such as that there are not proper parties; or that the decree or order appealed from did not become final but remains under review or re-hearing; or that the date or purport of the decree or order is erroneously stated in the petition. (u) But special answers have not, for a long time, been deemed necessary, or used in practice. In fact, the matters here noticed are more properly grounds for an application to the court to dismiss the appeal for irregularity. (v)

Cross appeals.] Cross appeals are brought in a similar manner, and for the same reasons, as cross appeals in the court of chancery. (w)

A cross petition of appeal, is, in form, the same as an original appeal; except that it must be entitled "The petition and cross appeal," &c. and should specify the particular parts of the decree or order of which the petitioner complains. It is presented and moved, and an order made upon it in the same manner as upon an original appeal. (x)

By the practice of the house of lords, security for costs in cross appeals, is not necessary. (y)

The order to answer a cross appeal may be entered of course, it would seem, under the 16th rule; and it may be served in the same manner as the order in an original appeal. But the respondent, in the cross appeal, being appellant in the original appeal, et e contra, by which both parties are in court, service of the order upon the solicitor of the respondent in the cross appeal is sufficient. (z)

The answer to a cross appeal is in the same form with that to an original appeal; except that the title is, "The answer of A. B. to the petition and cross appeal of C. D." And that, towards the end, instead of saying "that the decree, &c. is just," &c. it should be "that the decree, in so far as is complained of by the said C. D., is just, and agreeable to equity," &c. (a)

(u) 3 Dan. 137.  (v) Id. ib.  (w) See ante, p. 397.  (x) 3 Dan. 138.  (y) Id. ib.  (s) Palm. Pr. 34.  (z) Id. ib.
Case on appeal.] The 14th rule directs a case to be made and printed for the use of the court, and specifies what it shall contain.

The respondent must make up this case and furnish the necessary copies thereof, if he has, at or before the service of his answer to the petition of appeal, given a written notice to the adverse party, of his election to do so; otherwise, the appellant is to make it up and furnish copies thereof.(b)

Although the above rule directs the depositions to be printed, yet it seems, from analogy to the practice of the house of lords in England, that the court may, if it thinks proper, hear evidence used in the court below, though not printed.(c)

By the practice of the house of lords, the case must be signed by one or more of the counsel who attended at the hearing in the court below, or who are counsel upon the appeal. And in the case of The Fulton Bank v. Beach,(d) the chancellor allowed a fee for two counsel to be taxed.

Points.] Each party, at the commencement of the hearing, must deliver to the members of the court, printed copies of the points he intends to rely upon in argument, with a reference to the authorities on which he relies in support of the same.(e)

The points should be signed by counsel.

Manner of printing case and points.] All cases and points prepared and served on the members of the court, must be printed in royal octavo form, on sized paper, with a wide margin.(f)

Service of case.] The party who makes the case, must, within thirty days after the cause is at issue in this court, (i.e. after the answer to the petition is filed,) serve upon the attorney or solicitor of the adverse party, or on one of his counsel, or transmit to such attorney, &c., by mail, directed to him at his place of residence, three printed copies of the case. Otherwise, the party who ought to have served such case shall not have the right to bring his cause on to be heard, without the consent of the adverse party, until after the expiration of thirty days after such copies of the case shall have been served.(g)

Solicitors counsel, and guardians ad litem on appeal.] The solicitors and guardians ad litem of the respective parties in the court below, are to be deemed the solicitors and guardians ad litem of the same

(b) Rule 14.  
(c) Stackpool v. Stackpool, 4 Dow, 992. Palmer's Pr. 50.  
(d) 2 Paige, 188.  
(e) Rule 14.  
(f) Rule 15.  
(g) Idem.
parties respectively, in the court of errors, until others are retained or appointed, and notice thereof served on the other party.\(^{(h)}\)

No member of the court of errors shall, as solicitor or counsel, be concerned in, or argue, any cause in that court, unless he was, without reference to such court, actually retained and employed in the cause in the court below, before the decree below was rendered.\(^{(i)}\) But this rule does not extend to causes in which any member of the court was actually retained as solicitor or counsel previous to his becoming a member thereof.\(^{(k)}\)

*Notice of argument.*] All causes which have been put at issue in the court of errors (by the filing of an answer to the petition of appeal,) may be brought on to argument upon the notice of either party.\(^{(l)}\)

This notice must be served at least fourteen days before the day on which it is intended to bring on the same, and which must be some day on which the court will be in session.\(^{(m)}\)

A copy of such notice must also be furnished to the clerk of the court at least four days before the day appointed for the argument.\(^{(n)}\)

*List of causes, or calendar.*] The clerk must make a list of the causes thus noticed, arranging them in the order in which the answer to the petition was filed. And when the court is ready to proceed to the hearing of causes, the same are to be called in the order in which they stand on such list.\(^{(o)}\)

A cause cannot be entered on this list or calendar until after the petition of appeal and the respondent’s answer thereto have been filed.\(^{(p)}\)

*Hearing.\]* Not more than one counsel will be allowed to open the argument, nor more than two to answer; and no more than one counsel shall reply or close; except in special cases where there are distinct parties on the same side, having distinct interests in question.\(^{(q)}\)

If the parties prefer, they may submit a printed instead of an oral argument.\(^{(r)}\)

If the reasons of the court below are not annexed to the cases delivered, the cause will not be heard unless it appears, by affidavit, that application has been made therefor, and that the same could not be obtained.\(^{(s)}\)

When any preliminary question, not made in the court below, and not

\(^{(h)}\) Rule 17.  
\(^{(i)}\) Rule 29.  
\(^{(k)}\) Idem.  
\(^{(l)}\) Idem.  
\(^{(m)}\) Idem.  
\(^{(n)}\) Idem.  
\(^{(o)}\) Idem.  
\(^{(p)}\) Idem.  
\(^{(r)}\) Rule 30.  
\(^{(s)}\) Rule 9.  
\(^{(s)}\) Rule 19.
involving the merits of the cause, is presented for argument, it will be first argued and passed upon by the court; and the argument upon the merits will be postponed until such preliminary question shall have been disposed of, unless the court shall otherwise direct. (t)

Under this rule, it is the practice, when a cause is called, to raise any question as to the regularity of the appeal, the time of its being filed, neglect of any requisition of the statute or rules, or as to the character of the order or decree appealed from. (u) It is very common, however, to make a motion to dismiss the appeal on any regular motion day after the same is entered. (v) And in Rovley v. Van Benthuysen, (w) Bronson, J. considers this the regular course.

It seems, however, that the court of errors will not, under any circumstances, previous to the hearing of an appeal, modify or dissolve an injunction granted by the court below. (x)

Default of parties on the hearing:] The court will not hear an ex parte argument in favor of the affirmance of a decree. (y) But if the cause has been regularly noticed, for argument and placed on the calendar by the respondent, and the appellant does not appear to argue on his part, or does not furnish the printed cases required by the 14th rule, the decree will be affirmed with costs, together with such damages as the respondent would have been entitled to if the decree had been affirmed on argument. (z)

Whenever any matter is moved for hearing, whether upon the merits, or upon a preliminary or interlocutory question, pursuant to notice, and the party whose right it is to appear and oppose, shall make default, the court will proceed and hear the matter ex parte. And no decision will be given upon the mere default of appearance, except as provided in the 21st rule. But where the respondent has elected to make the case, if he does not appear and furnish the cases when the cause is reached on the calendar, the adverse party may have the default entered, and may then furnish the cases, and submit or argue the cause ex parte, out of its place on the calendar, at any time thereafter. (a)

Abatement of suit, &c.] Where a party in whose favor a decree or order has been made, dies after the entry thereof and previous to the service of notice of the same, and the opposite party is desirous to appeal to the court of errors, his course is to defer the prosecution of the appeal

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(t) Rule 24.  
(u) 2 Hoff. Pr. 46.  
(v) Id. ib.  
(w) 16 Wend. 389.  
(y) Rule 21.  
(z) Idem.  
(a) Rule 29.
until the suit has been revived in the court of chancery in favor of the representatives of the deceased, and due notice given him of the decree or order by the solicitor of the substituted parties. Notice given by the solicitor of the party deceased may be regarded as a nullity.(b) So where there is an abatement after notice of appeal and before the petition of appeal is presented, it seems the practice is to revive the cause in the court below, by bringing in the representatives of the deceased party.(c)

But where either party dies after the appeal is presented in the court of errors, the practice is to bring in the proper parties there.(d) It is not necessary in such case to revive the cause in the court of chancery, as was done in *Jeffson v. Hamilton*, 9 *John.* 442.(e)

It seems that if a party in whose favor the decree was made should die after notice of the decree given to the opposite party, and within the fifteen days allowed for appealing, an appeal would be held valid if the petition of appeal and the bond were dated as of a day anterior to the death of the deceased party.(f) But where an appeal was made after a suit abated, and before a revival in the court below, and a bond was executed to the representatives of the deceased party, it was held that the bond was void and the appeal irregular; and the appeal was accordingly dismissed.(g)

Where a decree is made in the court of errors against a deceased party, after his death, the suit must be revived in the court of chancery, against his representatives before any proceedings can be had, to carry the decree into effect.(h)

If the appellant dies pending the appeal, the suit must be revived in the name of his heir or representative. A petition for that purpose should be presented stating the appeal, and the abatement, and the transmission of the right to the petitioner.(i) So much of the nature of the suit should be stated in this petition as to show that the petitioner holds the proper legal relation to sustain it, such as heir or executor.(k)

This petition is *ex parte*, and the order made upon it is an order of course.(l)

Whether a respondent can apply, upon the death of the appellant,
for an order that the appeal be revived against his representatives, is a point not settled by any decisions of the court of errors or by any rule of the court. By the practice of the court of chancery, however, if one of several complainants dies, the survivors may elect to proceed, or not; and on the application of a defendant, the court will direct that if the suit is not revived within a limited time, it be dismissed.(m)

If the respondent dies pending the appeal, his heir at law or personal representative may petition to be substituted in his place; or the appellant may obtain a similar order.(n)

Where a party to an appeal died after issue was joined thereon, but before the cause was argued, and the cause was afterwards heard and decided and remitted to the court of chancery by the court of errors in ignorance of the death of the party, it was held that the court below must carry the decree into effect though it was not entered as of a day previous to the party's death; and that the suit must be revived below, and carried on as if the party had died subsequent to the decree.(o)

If the heir of the deceased party who applies for a revivor is an infant, his prochein amy or guardian must unite in the petition.(p)

Evidence upon appeal.] The case required by the 14th rule must contain such of the depositions, affidavits, &c. as were read or used on the hearing of the cause or matter before the chancellor, and upon which the decree or order appealed from was founded.(q)

This excludes, by implication, any other evidence. Indeed, the rule is well settled, that no evidence can be received in the appellate court which was not laid before the court below. Nor can any evidence which was received below, be objected to above, unless the admission of improper evidence be among the points of appeal.(r)

It may be mentioned, also, that where evidence has been rejected below which the court of errors thinks ought to have been received, the usual course is to remit the cause to the court of chancery. It seems however, that before doing this, the court of errors will look at the rejected evidence, in order to see whether, if it were admitted, it would affect the opinion of the appellate court, in forming its judgment.(s)

Prosecuting appeal in forma pauperis.] An appeal may be prosecut-

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(m) Pell v. Coon; Hopk. 450. Leggett v. Dubois; 2 Paige, 311.
(n) Palmer's Pr. 90. Sidesy, 119. Urqu. 84.
(p) Palm. Pr. 81.
(q) See Rule 14, Court of Errors.
ed by a party in forma pauperis, in a proper case. To obtain leave to do
so, a petition must be presented, accompanied by affidavit of poverty. (t)
By the English practice, this affidavit states that the petitioner is not worth the sum of five pounds, wearing apparel and the matters of
the cause only excepted. (u)

Decision.] At the conclusion of the argument of the appeal, the
presiding officer of the court states the question—"Shall this decree be
reversed?" And the court proceeds to decide the question, after hear
ning the opinions of such of the members of the court as wish to state the
reasons for their votes. But if any member wishes further time to ex
amine the questions to be decided, the court will postpone the de
cision. (v)

If a majority of the court do not vote for a reversal, the decree is of
course affirmed. (w)

When the cause presents distinct questions, they are to be decided
separately. (x)

The president of the senate is entitled to vote upon a question, and ex
press an opinion, equally with the other members. This rule also ap
plies to a president pro tempore. (y)

If the court is equally divided, the decree will be affirmed. Such
affirmance cannot, however, be considered as settling the law in the
court for the correction of errors, except so far as relates to the particu
lar cause. (z)

Where a decree is affirmed in this manner, it ought to be without pre
judice to the legal rights of the parties. (a)

A decree may be affirmed or reversed if ten members concur in the
decision; provided there be present at the decision nineteen members;
and this, although the nine do not vote, or have not heard the argu
ment. (b)

Decree.] If the decree to be entered is simple, such as a mere rever
sal or affirmance, the clerk draws it up. In very special cases some
member of the court frequently prepares the decree. This was done in
Hawley v. James, (16 Wend. 61.) (c) If counsel attend, they settle the
decree among themselves, if they can agree as to its provisions. If not,
the court will settle it, after hearing the drafts, on the last day of the session.(d)

If a party to the record has died between the hearing and decision, the decree may be entered nunc pro tunc as of the day of the hearing.(e)

Costs.] The costs which are awarded by the court for the correction of errors, upon appeal, are to be taxed by a taxing master of the court of chancery; and when thus taxed, the payment thereof is to be enforced by the court of chancery according to the practice of that court.(f)

It has been held, however, that the costs need not be inserted in the remittitur before it is sent down. It may be done after it is filed in the court below.(g)

Upon an affirmation of a decree, costs are allowed as of course. The costs in the court for the correction of errors, are not regulated by statute but by the rule prevailing in the English courts. Whenever the merits of the case are disposed of by the decree of the court for the correction of errors, it may adjudge as to the costs.(h)

Upon the reversal of a decree, costs are not allowed.(i)

Where there were two appeals from two distinct orders of the chancellor, and two cases printed, the court for the correction of errors directed that no allowance should be made for any part of the second case which was contained in the case made on the first appeal. It also consolidated the orders of affirmation, and made but one decree of affirmation as to both appeals.(k)

Re-hearing appeals.] In February, 1839, the court for the correction of errors, adopted the following order, which was intended to settle the question as to all future applications for the re-hearing of causes; after

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(d) 2 Hoff. Pr. 51. See Palm. Pr. 99.
(e) Murray v. Blatchford, cited 2 Hoff. Pr. 51. Ante, p. 172. In the case of Van Veichten v. Van Veichten, after the appeal to the court for the correction of errors was noticed for argument, it being expected that J. V., one of the parties, would die before the cause could be argued, and the parties being willing to submit the same on printed arguments, Mr. Rhoades, on the 19th of January, 1841, obtained an order of the appellate court that the cause be entered in the clerk’s minutes as submitted on that day. On the next day J. V. died, and on the 28th of December thereafter, the decree of the chancellor was affirmed with costs. A special order was thereupon obtained, that the decree of affirmation be entered nunc pro tunc as of January 19th, 1841. And, on taking down the remittitur, an order was obtained, January 24th, 1843, from the chancellor, that the decree to be entered on filing the remittitur be entered and the remittitur filed nunc pro tunc as of January 19th, 1841. These orders saved the expense and delay of reviving the cause in both courts.
(f) Rule 28.
(g) Legg v. Overbagh, 4 Wend. 190.
(h) Murray v. Blatchford, 2 Wend. 294.
(i) Id. ib.
(k) Fulton Bank v. Beach, 2 Paige, 186.
there had been a final judgment or decree upon the merits, either upon an appeal or a writ of error:—"Ordered, that this court will not order a re-argument, nor will it re-consider any case, on the ground that it was decided on an equal division of the members of the court, or for any other reason, after the cause has been decided here, upon the merits."(l)

And in the case of *The People v. The Mayor, &c. of New York*,(m) that court decided that it would not grant a re-hearing after pronouncing final judgment on the merits of a case, and after the judgment had been drawn up, settled, and entered of record, although the members of the court were equally divided on the question of reversal.

It seems, however, that if, in settling the final judgment, before it is entered of record, difficulties occur as to the decree or rule to be entered, new points may be argued or old points re-argued, if the court deem it expedient; and that even after the entry of the judgment, before the record is remitted, mere clerical errors and defects in form may be corrected, or even a new clause added, to carry out the judgment of the court.(n)

*Remittitur.* The statute directs that when an appeal shall have been heard and determined, all the proceedings, together with the decree or order therein, and all things concerning the same, shall be remitted to the court of chancery, where such further proceedings shall be had as may be necessary to carry it into effect.(o)

The remittitur (by means of which the proceedings are transmitted to the court below, after the decree is made in the court for the correction of errors,) contains a copy of the decree or order of the court for the correction of errors, annexed to the petition of appeal and the matters thereto attached, as brought into the appellate court, under the seal of that court, and signed by the clerk thereof.(p) When the decree is affirmed or reversed by the default of either party, the remittitur must not be sent to the court below, until the expiration of ten days thereafter, unless the court for the correction of errors shall specially direct otherwise.(q)

The remittitur is made out by the clerk of the court for the correction of errors.

*General rule as to practice on appeals to the court for the correction of errors.*

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(l) See 25 Wend. 257, per Walworth, ch. 2. 2 R. S. 167, § 39. (orig § 36.)
(m) 25 Wend. 252.
(n) 1d. ib.
(o) Rule 27.
(p) Rule 23.
of errors.] In all cases not expressly provided for by rule, the practice of the court for the correction of errors on appeals, shall be conformable to that of the house of lords in England, when sitting as a court of appeals.(r)

Proceedings in court below.] In some cases the appellate court, instead of affirming or reversing the decree appealed from, will give directions to the court below to rectify the same. In such cases the order of the appellate court must be made a rule or order of the court of chancery.(s) So also must it be if the appellate court reverses the decree; because it may otherwise be carried into execution. In England where a decree is affirmed by consent, an application to make the decree a rule or order of the court below will not be granted.(t) Nor indeed can it be necessary there, under any circumstances, where a decree is simply affirmed: unless the proceedings under it have been suspended pending the appeal.(u)

An order to make a decree of the appellate court a rule or order of the court of chancery, may, by the English practice, be obtained of course, on motion, upon production of the decree signed by the clerk of the appellate court.(v)

But in Rogers v. Hosack,(w) it was declared to be the settled practice, here, to require the remittitur from the court for the correction of errors to be presented to the chancellor previous to its being filed; to enable him to see whether any thing special is required which entitles the adverse party to be heard before the order of the court for the correction of errors can be fully complied with; so that the proper order may be entered on such remittitur, under the special direction of the court.

To prevent any unnecessary delay, where the chancellor is required by the decree of the appellate court to give special directions, as to which both parties have a right to be heard, the party to whom the remittitur is delivered, instead of making an ex parte application in the first instance, may give notice to the adverse party for some regular motion day, either in term or vacation, that he will file the remittitur and ask for such order or decree thereon as he may think himself entitled to, or as the court may deem proper, to carry into effect the decree or order of the court for the correction of errors.(x)

The order granted by this court, upon filing the remittitur is, "that

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(r) Rule 34 of Court for the Correction of Errors.
(s) Attorney Gen. v. Scott, 1 Ves. 419.
(t) Id. ib.
(u) 3 Dan. 147.
(v) Id. 148. 2 Har. Ch. Pr. 351. Saston on Decrees, 392, n. 2. Hand’s Pr. 194.
(w) Page, 108.
(x) Id. ib.
the decree of the court for the correction of errors be, and the same is hereby made a decree of this court," &c. &c.

SECTION VIII.

APPEAL TO THE CHANCELLOR FROM A SURROGATE.

When an appeal lies.] The revised statutes authorize appeals to be made from the orders, decrees, and sentences of surrogates in all cases, to the court of chancery, except where provision has been made for appeals to circuit judges, and except appeals from orders concerning any admendment of dower.(y)

The chancellor has decided that an appeal does not lie directly to him from the sentence or decree of a surrogate confirming the probate of a will of personal property, upon allegations against the validity of the will filed in the surrogate's office pursuant to the directions of the 31st section of the article of the revised statutes relative to wills of personal property; &c. (2 R. S. 61,) but that, under the 35th and 55th sections of the title relative to wills and testaments, (id. 62, 66,) the party complaining of the sentence or decree of the surrogate must appeal, in the first place, to the circuit judge.(yy)

Within what time to be brought.] Appeals from a decree for the final settlement of the account of any executor, administrator, or guardian, must be made within three months after such decree shall have been recorded.(z) Appeals from an order for the appointment of a guardian, or for his removal, or upon a refusal to make such removal, must be made within six months after such order shall have been entered.(a) In all other cases not specified, and not otherwise limited by law, appeals from the orders, decrees, and sentences of surrogates must be made within thirty days after the order, decree, or sentence shall have been made.(b)

The thirty days mentioned in this last section are to be computed from the time when the order, decree or sentence is pronounced, and not from the service of a copy thereof.(c)

The chancellor has decided that a decree of a surrogate, upon an ac-

{y} 2 R. S. 609, § 104.  
{z} 2 R. S. 610, § 105.  
{a} Id. ib. § 106.  
{b} Id. ib. § 107.  
{c} Bay v. Van Rensselaer, 1 Paige, 423.
count taken against an administrator, made on the application of one or more creditors of the estate, but without citing the next of kin of the intestate, is not a decree for the final settlement of the account of the administrator; and that an appeal from such decree must be made within thirty days after the entry thereof. (d)

Where an appeal is not entered within the time limited by the statute, the court of chancery, acting as an appellate court, can afford no relief to the appellant. (e)

Bond.] No appeal from a surrogate will be effectual until a bond be filed with the surrogate, with two sufficient sureties to be approved by him, in the penalty of at least $100, to the adverse party, conditioned, substantially, that the appellant will prosecute his appeal and will pay all costs that shall be adjudged against him by the court of chancery. (f)

Petition of appeal.] The appellant must file a petition of appeal addressed to this court, with the register or assistant register, within fifteen days after the appeal is entered in the court below, or the appeal will be considered as waived; and any party interested in the proceedings in the court below may thereupon apply to the chancellor ex parte, to dismiss the appeal, with costs. (g)

The petition of appeal must briefly state the general nature of the proceedings in the court below, and of the sentence, order, or decree appealed from; and must specify the part or parts thereof complained of as erroneous; except where the whole sentence, order, or decree is alleged to be erroneous; in which case it will be sufficient to state that the same and every part thereof is erroneous. (h)

Where the appeal is from the sentence or decree of a surrogate on the settlement of the accounts of an executor, administrator, or guardian, if the appellant wishes to review the decision of the surrogate as to the allowance or rejection of any particular items of the account, such items must be specified in the petition of appeal; or the allowance or disallowance of any such items will not be considered a sufficient ground for reversing or modifying the sentence or decree appealed from. (i)

The petition should name the persons intended to be made defendants in the appeal, and should pray that they may answer the same. (k)

If a party who is interested in the sentence or decree appealed from is

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(d) Bronson v. Ward, 3 Paige, 189.
(e) Id. ib.
(f) 2 R. S. 610, § 108.
(g) Rule 118.
(h) Idem.
(i) Idem.
not made a party to the petition, he may apply to the chancellor to dismiss the appeal, or for leave to proceed in the court below notwithstanding the appeal.\(\text{l}\)

The omission to file the petition of appeal within the fifteen days required by the 118th rule, is not such a waiver as to deprive the court of chancery of all jurisdiction over the case, or to authorize the surrogate to proceed as if no appeal had been entered. But it is such a waiver as entitles the court of chancery to declare the appeal deserted and to authorize the surrogate to proceed, notwithstanding the appeal.\(\text{m}\)

\textit{Transcript.} The appellant must cause the transcript of all the proceedings before the surrogate, to be made, authenticated, and returned to the court of chancery within twenty days from the time of entering the appeal in the court below, or the chancellor may dismiss the appeal; unless further time is allowed for the return of the transcript.\(\text{n}\)

The appellant need not wait for the return of the transcript before filing his petition of appeal. But the respondent cannot be compelled to answer the petition until the transcript is returned.\(\text{o}\)

An application to dismiss the appeal for not procuring the transcript to be returned and filed within the time prescribed by the 118th rule, will not be granted \textit{ex parte}. Notice of the application must be given to the appellant's solicitor.\(\text{p}\) And the court will not dismiss an appeal for such neglect of the appellant, where he shows a sufficient excuse. It is too late to give notice of an application to dismiss the appeal, after the respondent, or his solicitor, has notice of the fact that the transcript is actually returned and filed, though not within the time prescribed by the rule.\(\text{q}\)

The mode of compelling a return of the transcript by the surrogate, or of correcting any omissions or imperfections therein, is by order and by attachment for disobedience to the same, in conformity with the practice of the court of chancery in similar cases.\(\text{r}\)

And if the surrogate's return does not contain all the proceedings before him which either of the parties deem requisite for a correct under-

\(\text{l}\) Halsey v. Van Amringe, 4 Paige, 279.  
\(\text{m}\) Halsey v. Van Amringe, 4 Paige, 279.  
\(\text{n}\) Rule 118.  
\(\text{o}\) Halsey v. Van Amringe, supra.  
\(\text{p}\) Vreedenburgh v. Calf, 7 Paige, 419.  
\(\text{q}\) Id. ib.  
\(\text{r}\) Halsey v. Van Amringe, 4 Paige, 279.
standing of the questions arising upon the appeal, the proper course is to apply to the chancellor, before the hearing of the cause, for an order for a further return. (s)

When appeal stays proceedings.] An appeal from a surrogate suspends all proceedings on the order appealed from until such appeal is determined, or until the appellate court shall authorize proceedings thereon. (t) But this section does not apply to appeals from an order appointing a collector or special administrator on the estate of any deceased person; to appeals from orders directing the sale of perishable property; from orders appointing appraisers of personal property; nor from orders for the service and publication of notices. Appeals from such orders will not stay or affect any proceedings under them. (u)

Appeals from orders for the commitment or awarding process for the commitment of any executor, administrator, or guardian, for not returning an inventory, rendering an account, or obeying any other order of a surrogate; and from orders for the commitment of any person refusing to obey any subpoena, or to testify when required, according to law, will not stay the execution of such orders or process, unless the party committed shall give bond as required by statute. (v) Such bond must be executed at the time of filing the appeal, by the appellant and two sufficient sureties, to be approved by the surrogate, to the people of this state, in a sufficient penalty, not exceeding $1000, conditioned that if the order appealed from shall be affirmed, such person will, within twenty days after such affirmation, surrender himself to the custody of the sheriff, to whom he shall have been committed, in obedience to such order or process. (w)

Appeals from the order of a surrogate suspending or removing any executor, administrator, or guardian, will not affect any such order until the same is reversed. (x)

Notice of appeal.] The filing of the appeal in the office of the surrogate, and perfecting the same by giving a bond in the cases required by law, is declared by statute to be sufficient notice of such appeal, to the adverse party, without any other notice. (y)

Order to serve copy petition.] If the petition of appeal has not been served on the respondent, he may have an order of course that the appellant deliver a copy of the petition of appeal to the solicitor or guar-

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(a) Halsey v. Van Amringe, 6 Paige, 12.
(b) Id. ib. § 111.
(c) 2 R. S. 610, § 109.
(d) Id. ib. § 112.
(e) Id. ib. § 110.
(f) Id. ib. § 111.
(g) Id. ib. § 116.
(h) Id. ib. § 117.
dian ad litem of the respondent, within ten days after service of the notice of such order, or that the appeal be dismissed. And if the same is not delivered within the time limited, the respondent, upon due notice to the adverse party, may apply to the chancellor to dismiss the appeal, with costs.(x)

Order to answer.] After the petition of appeal and the transcript of the proceedings in the court below have been filed with the register, or assistant register, the appellant may have an order of course that the respondent answer the same within twenty days after service of a copy of the petition of appeal and notice of the order, or that the appellant be heard ex parte.(a)

If the respondent is an adult, the petition and notice must be served upon his solicitor, if he has appeared, either in the appellate court or in the court below, by a solicitor in chancery; or upon the surrogate, if he has not appeared by such solicitor.(b)

The respondent cannot be compelled to answer the petition of appeal until the transcript is returned by the surrogate.(c)

Guardian ad litem for infants.] Where the respondent is a minor, if he does not procure a guardian ad litem, to be appointed, upon the appeal, within twenty days after the filing of the petition of appeal, the appellant may apply to the chancellor, ex parte, for the appointment of one for him.(d) If the minor has appeared by his guardian ad litem in the appellate court, the appellant may have an order of course that the guardian ad litem answer the petition of appeal within twenty days after service of a copy thereof, and notice of the order, or that an attachment issue against him.(e)

Parties.] Upon an appeal from an order or decree of a surrogate, all the parties to the proceedings before him who are interested in sustaining the decree or order appealed from should be made parties to the petition of appeal.(f) No person is considered a party respondent in a petition of appeal who is not named therein and called upon by the prayer of the petition, to answer the same.(g)

It seems that a person interested in the subject matter of the suit may make himself a party to an appeal from the surrogate, although he was not a party to the proceedings in the court below.(h) But a party in interest who claims to come in as an intervener, either in the court be-

(a) Rule 118.
(b) Idem.
(c) Idem.
(d) Rule 118.
(e) Rule 118.
(f) Gilchrist v. Rose, 9 Paige, 66.
(g) Gardner v. Gardner, 5 Paige, 170.
(h) Foster v. Tyler, 7 Paige, 49.
low or in the appellate court, must apply by petition to be made a party to the proceedings, before he can be permitted to take a part therein.\(^{(i)}\)

It is not absolutely necessary that an appeal from an order of a surrogate appointing a guardian for an infant, should be in the name of the infant as the nominal appellant; nor that the appellant should have any pecuniary interest in the appointment or removal of the guardian, to entitle him to bring an appeal in his own name.\(^{(k)}\) But it is proper the infant himself should be a party to the appeal; especially where the appeal is from an order removing a guardian, or refusing to appoint the person by whom the appeal is brought.\(^{(l)}\) Even where the appeal is from an order appointing a guardian, if the infant does not himself appeal, by his next friend, the appellant may make him a party to the petition of appeal, jointly with the person appointed as guardian by the surrogate. But in that case, as the guardian himself must be made a party, there is no absolute necessity for making the infant a party also.\(^{(m)}\)

Upon an appeal from the sentence of a surrogate disallowing a will, the chancellor will not change the appellant—he being the executor who propounded the will before the surrogate—by substituting the legatee, in order to give the legatee the benefit of the executor's testimony in favor of the will.\(^{(n)}\)

**Dismissing appeal.** A party to the proceedings before the surrogate, whose interests are affected by the appeal, and who is not made a party to the petition, may apply to dismiss the appeal, so far as it affects his rights or stays the proceedings before the surrogate, to his injury.\(^{(o)}\) Or the party may, in such a case, apply to the chancellor for leave to proceed in the court below, notwithstanding the appeal.\(^{(p)}\)

It has been already mentioned that an application to dismiss an appeal on account of the neglect of the appellant to procure a return of the transcript of the proceedings within the time prescribed by the 118th rule must be upon notice to the appellant or his solicitor. It cannot be made *ex parte* as in case of a neglect to file the petition of appeal.\(^{(q)}\)

And the court will not dismiss an appeal for such neglect of the appellant, if he shows a sufficient excuse for not procuring the return of the transcript within the time limited. And after the respondent, or his

\(^{(i)}\) Foster v. Tyler, 7 Paige, 49.
\(^{(k)}\) Scribner v. Williams, 1 Paige, 550.
\(^{(l)}\) Underhill v. Dennis, 9 Paige, 203.
\(^{(m)}\) Id. ib.
\(^{(n)}\) Halsey v. Van Amringe, 4 Paige, 279.
solicitor, has notice that the transcript is actually returned and filed, though not within the time prescribed in the rule, it is too late to move to dismiss the appeal.(r)

**Papers how entitled.** An affidavit upon which an application is founded to dismiss an appeal, for the neglect of the appellant to file his petition of appeal, may be entitled as in the proceedings before the surrogate.(s) But after a petition of appeal has been regularly filed, showing who are the parties to the appeal, affidavits and other papers in the appeal cause should be entitled in the names of the appellants, as appellants, against the respondents, as such.(t)

**Answer to petition of appeal.** Where the appeal is from the sentence or decree of a surrogate on the settlement of the accounts of an executor, administrator, or guardian, the respondent must, in his answer, specify any items in the account as to which he supposes the sentence or decree erroneous as against him.(u) And upon the hearing of the appeal, the sentence or decree may be modified as to such items, in the same manner as if a cross appeal had been brought by the respondent.(v)

**Cross appeal.** The provision of the 15th rule just referred to, seems to take away the necessity, in a great measure, of cross appeals, yet it does not expressly prohibit them. Nor is there any statutory provision of that nature, that we are aware of.

In a recent case(w) the chancellor decided, that where an appeal from the decree of a surrogate upon the settlement of the accounts of an executor, &c. is not in relation to the allowance or rejection of particular items of the account, or if the respondent wishes the decree modified in any other respect than as to particular items of the account, he must bring a cross appeal.

Should a cross appeal be brought, doubtless the practice already pointed out with respect to cross appeals in the court for the correction of errors, would be applicable, substantially.(x)

**Hearing.** Appeals from the decisions of surrogates as to the appointment or removal of guardians, &c. need not be placed on the calendar, but may be heard on any regular motion day, or in term.(y) Appeals from the decisions of surrogates upon summary applications also are to be heard as special motions.(x)

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(r) Ante p. 498.  
(s) Foster v. Tyler, 7 Paige, 48.  
(u) Rule 118.  
(v) Id. ib.  
(w) Collins v. Hoxie, 9 Paige, 81.  
(x) See ante, p. 414.  
(y) Rule 190.  
But all other appeals are considered calendar causes and are to be heard at the terms only; unless otherwise specially directed by the chancellor.\(a\)

Such appeals as are necessary to be placed on the calendar have priority from the time when the matter arose before the surrogate.\(b\)

_Papers upon the hearing._] The papers which are to be furnished for the chancellor upon the hearing of an appeal from the sentence or decree of a surrogate are, a copy of the surrogate’s return, including the transcript of the appeal as entered in the court below, and copies of the petition of appeal and answer to the same filed in the appellate court (if any,) together with the points of the respective parties upon the appeal.\(c\)

_Decree._ Upon the affirmation of a decree of a surrogate directing the payment of a balance found due from the appellant, the respondent may have the decree of affirmation enrolled, and may take out execution thereon in this court.\(d\)

Upon a reversal or modification of the decree appealed from, the proceedings may be remitted, with instructions to the surrogate to enter a final decree upon the principles settled by the court;\(e\) or to take such further proceedings as may be necessary.\(f\) Or if a just cause of action nevertheless appears, this court may retain the cause.\(g\)

Where the personal representative of a decedent appeals from a sentence or decree of the surrogate directing the payment of money by the appellant, upon the final settlement of his accounts, and such sentence or decree is affirmed, the decree of this court will direct the payment to the respondent, of interest on the sum awarded to him by the judge _a quo_; as damages for the delay occasioned by such appeal.\(h\)

It has been held that the respondents, in an appeal from the sentence or decree of a surrogate, upon the settlement of the account of an executor or administrator, directing the distribution of the estate, are not entitled to a modification of the decree as between themselves; nor to a modification as against the appellant, except as to erroneous items in the account, as provided for by the 119th rule.\(i\)

_Practice generally._] The 118th rule directs proceedings on appeals from surrogates, to be conducted by solicitors and counsel and by guar-
diants *ad litem* of minors according to the ordinary course of practice of this court in other cases; except when regulated in a different manner. Though it may observe the laws and principles of decision which govern the surrogate’s court.\(^{(k)}\)

Where a surrogate makes an order, under the act of May 1837, requiring an administrator to give further security within a specified time, and the administrator immediately appeals from such order, and perfects his appeal before the expiration of the time limited by the order for the giving of such further security, the surrogate has no authority, pending the appeal, to make the further order directed by the statute, revoking the letters of administration, until the appellate court shall have authorized further proceedings before the surrogate, upon the order appealed from.\(^{(l)}\)

It seems that, where an administrator appeals from the order of a surrogate requiring further security, before the further order has been made revoking the letters testamentary, in consequence of the neglect to give such further security, the respondent may, in a proper case, apply to the appellate court for an injunction to prevent the administrator from wasting the assets of the decedent pending the appeal.\(^{(m)}\)

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**SECTION IX.**

**APPEAL FROM A SURROGATE TO A CIRCUIT JUDGE.**

*In what cases it lies.*] The revised statutes authorize an appeal to be made to a circuit judge from the decisions of surrogates by which any will of real estate shall have been admitted to record; or any will of personal estate shall have been admitted to probate; or by which any such will shall be refused to be admitted to record or probate.\(^{(n)}\)

*Within what time to be made.*] Such appeal must be made within three months after the decision of the surrogate is made and entered.\(^{(o)}\)

*Bond.*] The appellant must, at the time of filing the appeal, execute and file with the surrogate a bond in the penalty of one hundred dollars, to the people, with sureties to be approved by the surrogate, conditioned for the diligent prosecution of the appeal, and for the payment of

\(^{(k)}\) Vanderheyden *v.* Reid, Hopk. 408.

\(^{(l)}\) Vreedenburgh *v.* Calfr. 9 Paige, 128.

\(^{(m)}\) Id. ib.

\(^{(n)}\) 2 R. S. 66. § 55. Id. 698, § 90.

\(^{(o)}\) Id. ib.
such costs as shall be taxed against him, in the event of his failure to obtain a reversal of the decision appealed from. And no appeal will be valid until such bond is filed. (p)

*Staying proceedings.*] Upon the appeal being filed with the surrogate, it will have the effect to stay the recording or the probate of the will, until the appeal be determined. (q)

*Petition of appeal.*] The appellant must present a petition of appeal to the circuit judge, naming, among other things, the persons who are interested in sustaining the decree of the surrogate, and making, at least all of those who appeared before the surrogate, in opposition to the appellant, parties to the appeal. It should also pray that a day may be fixed for the persons thus made respondents, and the appellants, to be heard on such appeal; so that due notice of the hearing may be given to such of the parties as are entitled to appear and sustain the decision of the surrogate. (r) This petition must be in the same form as that required upon an appeal from the surrogate to this court. (rr)

*Answer to petition.* There must also be an answer to the petition of appeal by the parties interested in sustaining the decision of the circuit judge, (s) in the form prescribed by the 118th rule.

*Surrogate's return.*] Upon the appeal being perfected, and upon the surrogate being paid the legal fees, he must immediately transmit to the circuit judge a copy of such appeal, and copies of the will, and of all papers, documents, and testimony produced before him in relation to the subject of the appeal, duly certified by him, under his official seal, with a statement of the decision made by him, and the reasons of such decision, if required. (t)

The circuit judge, upon due proof that an appeal has been made, and of the unreasonable neglect of the surrogate to transmit the same with the copies directed by the statute, after having been paid or tendered his fees, may enforce such return by attachment, as in the case of a witness refusing to obey a subpoena to attend a circuit court. (u)

The surrogate's return should state who propounded the will before him, when the proceedings to prove it were instituted; who were ascertained by him to be the next of kin of the decedent, and which of them, if any, were infants; who were cited to attend upon the proving

(p) 2 R. S. 66, § 56.
(q) Id. ib. § 55.
(r) Chaffee v. The Baptist Miss'y Convention, in Chan'y, Jan'y 23, 1842.
(s) Stewart v. Nicholson, in Chan'y, April, 6th, 1841.
(t) See ante, p. 495.
(u) Stewart v. Nicholson, supra.
(v) 2 R. S. 609, § 91.
(w) Id. ib. § 92.

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of the will; and who did in fact attend and litigate the will before him.(v)

Guardian ad litem for infants.] If either of the respondents is an infant who has no general guardian, or whose general guardian has an adverse interest, the circuit judge should appoint a guardian ad litem to protect the rights of the infant, on the appeal.(w)

Parties.] Where, by the will of the testator, his whole property is devised and bequeathed to a stranger, all the heirs and next of kin of the testator have a technical interest in opposition to the will, and should therefore be made parties to an appeal, either to the circuit judge or to the chancellor, from a decision relative to the probate of such will; even though they did not in fact appear, to litigate the suit before the surrogate.(x) And a decree made upon an appeal to which only a part of the heirs and next of kin of the testator are made parties, will not affect the rights of those who are not made parties and have had no opportunity to be heard upon the appeal.(y)

Time and place of hearing.] The statute directs that upon the appeal and copies of the papers being received by the circuit judge, he shall appoint a day and place for the hearing of the parties; which time must be, at least, twenty days, and not more than three months from the time of appointing the same.(z)

Notice of hearing.] The appellant must give fourteen days notice of hearing, to the parties who appeared before the surrogate in opposition to such appellant. This notice must be served on them personally if they can be found; and if not, by leaving the same at their respective places of residence, with some proper person.(a)

Hearing, &c.] At the time and place appointed, and at such other times as the matter shall be adjourned to, the circuit judge is to proceed to hear the allegations of the parties, upon the proofs submitted by them to the surrogate, and shall affirm or reverse the decision of the surrogate as shall be just.(b) Another section of the statute directs that if it appears to the circuit judge that the decision of the surrogate was erroneous, he may, by order, reverse such decision. And if such reversal is founded upon a question of fact, he must direct a feigned issue to be made up, to try the questions arising, and must direct the same to

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(c) Chaffee v. The Baptist Missionary Conv., in Chan'y, Jan'y 23rd, 1843.
(w) Id. ib. Stewart v. Lipsenard, supra. Rule 118.

(y) Id. ib.
(z) R. S. 608, § 93.
(a) Id. ib. § 94.
(b) Id. ib. § 95.
be tried at the next circuit court to be held in the county where the surro-
gate's decision was made. (c)

Issue, how made up and tried.] Such issue is to be made up and
tried in the same manner as issues awarded by the court of chancery.
But a new trial may be granted by the supreme court, in the same man-
ner as if it had been formed in a suit originally commenced in that
court. (d)

The final determination of such issue will be conclusive, as to the
facts therein controverted, in respect to wills of personal estate only,
upon the parties to the proceedings. If the determination is in favor
of the validity of the will, whether it be of real or of personal estate,
or in favor of the sufficiency of the proof thereof, the surrogate to whom
such determination shall be certified must record the will, or admit the
same to probate, as the case may be. But if the determination is against
the validity of the will, or against the competency of the proof thereof,
the surrogate is to annul and revoke the record or probate thereof, if
any has been made. (e)

Decree.] In the decree or order of the circuit judge, or in the pro-
ceedings returned by him to the surrogate as hereafter mentioned, it
must appear which of the respondents named in the petition of appeal
appeared before the circuit judge; and that those who did not appear
were duly notified of the time and place of hearing, as directed by the
statute. (f)

Costs.] If the decision of the surrogate is affirmed, the circuit judge
is to award costs, to be paid by the party appealing, either personally,
or out of the estate of the deceased, as he shall direct. If the decision
is reversed upon a question of law, costs will in like manner be award-
ed against the party maintaining the decision of the surrogate, either
personally or out of the estate of the deceased. (g) And payment of
the costs thus awarded, may be enforced by the surrogate after the pro-
ceedings have been remitted to him, in the same manner as if such costs
had been awarded by him. (h)

The costs and expenses of making up an issue, and of trial thereon,
and all subsequent costs thereon, are to be paid by the party appealing,
in case of his failure to impeach the validity or execution of the will.
Such costs and expenses may be collected in a suit upon the bond re-
quired to be given upon the appeal; which may be prosecuted for that pur-

(c) 9 R. S. 66, § 57.  
(d) Id. 67, § 58. Id. 609, § 98.  
(e) Id. ib. §§ 59, 60.  
(f) Chaffoe v. The Baptist Miss'y Conv., in Chan'y, Jan'y 93d, 1843.  
(g) 2 R. S. 608, § 96. Id. 67, § 69.  
(h) Id. ib. § 97.
pose, whenever directed by the surrogate.(i) If the appellant succeeds in impeaching the validity or execution of the will, the party maintaining such validity or execution may be required by the surrogate to pay the costs and expenses of the proceedings, either personally, or out of the property of the deceased; and such payment may be enforced by process of attachment.(k)

Fee of circuit judge.] For attending, hearing, and determining any such appeal, the circuit judge is entitled to receive a fee of five dollars from the appellant, to be allowed and recovered as the other costs of the proceedings.(l)

Certifying determination to surrogate.] The circuit judge having made his decision upon the appeal, must, whether it be an affirmation of the sentence or decree of the surrogate, or a reversal upon a question of law, certify such determination to the surrogate, with the award of costs made by such circuit judge; and the copies of papers sent to such circuit judge must be by him returned to the surrogate.(m)

Further proceedings before surrogate.] After such affirmation, or such reversal upon a question of law, of the surrogate's decision, the surrogate must proceed in the manner directed in the first title of the sixth chapter of the second part of the revised statutes, (2 R. S. 56,) unless an appeal to the chancellor is brought.(n) And if the circuit judge reverses the decision of the surrogate upon a question of fact, and an issue is thereupon awarded and tried, upon the final determination thereof being certified to the surrogate, he must also proceed in the manner directed in the said sixth chapter.(o)

SECTION X.

APPEAL TO THE CHANCELLOR FROM A CIRCUIT JUDGE.

When it may be brought.] In the last preceding section, we have seen in what cases an appeal lies to a circuit judge from the decisions of surrogates relative to the proof or admitting to record of wills.

From the decision of a circuit judge, upon such an appeal from a surrogate, an appeal lies to the court of chancery when no feigned issue

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(i) 2 R. S. 67, § 61.
(k) Id. ib. § 62.
(l) Id. 609, § 99.
(m) 2 R. S. 609, § 97.
(n) Id. ib.
(o) Id. ib. § 98.
has been awarded by the circuit judge for the trial of any question of fact, as is authorized by the statute.(p)

Within what time.] Such appeal must be made within one month from the time such decision of the circuit judge has been certified to the surrogate and entered in his office.(q)

How made.] Such appeal must be filed with the surrogate, and must be accompanied by a bond in the same penalty and with the same conditions as prescribed by law, in case of an appeal from the order of a surrogate admitting a will to probate.(r)

The chancellor has decided that it is not necessary the appeal bond should be conformable, in all respects, to the form prescribed by the statute; but that it will be enough if the bond is sufficient in substance, so as to secure to the party for whose benefit it is given, all his rights.(s)

Therefore, where the condition of the appeal bond was, to pay all costs which should be taxed against the appellants in the event of their failure on the appeal, instead of being to pay such costs in the event of their failing to obtain a reversal of the decision appealed from, it was held the bond was good in substance, and need not be amended.(t)

Return by surrogate.] Upon an appeal being perfected, the surrogate must certify and return to this court, the decision of the circuit judge, and the copies of the will, papers and testimony returned by such judge, upon making his decision, to the surrogate's office.(u)

This court may enforce such return in the same manner as returns to process issued by it; and upon the same being made, shall proceed thereon as in cases of appeals from surrogates.(v)

This return is styled by the rules, a transcript of the proceedings, and it is required to be authenticated and returned to this court within twenty days from the time of entering the appeal in the court below, or the chancellor may dismiss the appeal, unless further time is allowed for the return of the transcript.(w)

Notice of appeal.] The filing of the appeal in the office of the surrogate, and perfecting the same by giving a bond, will be deemed sufficient notice of the appeal so the adverse party, without any other notice.(x)

Petition of appeal.] The notice of appeal which is filed in the office of the surrogate, being general in its terms, it cannot be ascertained

(p) 2 R. S. 609, § 100. (t) Id. ib.
(q) Id. ib. (w) 2 R. S. 609, § 102.
(r) Id. ib. § 101. Ante, p. 439. (e) Id. ib. § 103.
(s) Foster & Tyler v. Foster, 7 Paige, (x) Rule 118.
49.
with any degree of certainty, who the appellant intends to make parties to the same, until he has filed his petition of appeal here. This petition should be similar to the petition of appeal required on an appeal to a circuit judge, or upon an appeal from a surrogate to the chancellor, before mentioned, and should name the persons who are intended to be made parties respondents to the appeal. (y) It should also pray that a day may be fixed for the parties to be heard on such appeal, so that due notice of the hearing may be given to such of the parties as are entitled to appear, to sustain the decision appealed from. (x)

**Answer to petition.** There must also be an answer to the petition of appeal by the respondents therein, in the form specified by the 118th rule. (a)

**Order to answer petition.** The appellant, at any time after the petition of appeal and the transcript of the proceedings in the court below have been filed with the register or assistant register, may have an order of course that the respondent answer the petition within twenty days, in the same manner as upon an appeal from the surrogate to the chancellor, or that the appeal be heard *ex parte.* (b) If the respondent is a minor and has appeared in this court by his guardian *ad litem,* the appellant may have an order of course that such guardian *ad litem* answer the petition of appeal within twenty days, or that an attachment issue against him. (c)

**Order to deliver copy of petition of appeal.** If the petition of appeal, after having been filed, is not served on the respondent, he may have an order of course that the appellant deliver a copy of such petition to the solicitor or guardian *ad litem* of the respondent, within ten days, or that the appeal be dismissed. And if the petition is not delivered within that time, the respondent, on notice to the appellant, may apply to the chancellor to dismiss the appeal with costs. (d)

**Appointing guardian ad litem.** If the respondent is a minor, he must procure a guardian *ad litem,* to be appointed within twenty days after the filing of the petition of appeal, or the appellant may apply to the chancellor *ex parte,* for an order appointing such guardian. (e)

**Parties.** An application to the surrogate to prove a will of personal estate may be made either by the executor or by any other person in-

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(y) Foster v. Foster, 7 Paige, 51. (d) Rule 118.
(a) Stewart v. Nicholson, supra. (e) Rule 118.
interested in the estate, under the will. And where the executor institutes the proceedings in his own name, any other person who is interested in proving the will, may intervene and make himself a party to the proceedings, if he thinks proper to do so.\(^{(f)}\)

It seems that a person interested in proving a will may make himself a party to an appeal from the decision of the surrogate, although he was not a party to the proceedings in the court below. But a party in interest, who claims to come in as an intervener, either in the court below or in the appellate court, must apply by petition to be made a party to the proceedings, before he can be permitted to take a part therein.\(^{(g)}\)

Where the wife, as the next of kin, appeals to the circuit judge from the decision of a surrogate admitting a will to probate, which decision is affirmed, the husband cannot appeal from the order of affirmation, in his own name, without joining his wife in the appeal.\(^{(h)}\)

Entitling papers.\(^{(j)}\) Previous to filing the petition of appeal, the affidavits and other papers may be entitled in the same manner as the proceedings before the surrogate; but after this court has become fully possessed of the case, by the filing of the petition of appeal, showing who are the respondents, as well as who are appellants, the papers, as between such parties, must be entitled accordingly.\(^{(i)}\)

Course of practice.\(^{(k)}\) The statute directs that the court of chancery shall proceed upon such appeals in the same manner as upon appeals from surrogates; and requires the court to prescribe, by rule, the course of practice thereon, as well as upon appeals from surrogates.\(^{(k)}\) Accordingly it is provided by the 118th rule that upon such appeals the proceedings shall be conducted by solicitors and counsel, and by guardians \textit{ad litem} of minors according to the ordinary course of practice of this court, in other cases; except where otherwise specified.

\[\text{SECTION XI.}\]

\[\text{APPEAL TO THE CHAUNCELLOR FROM A COURT OF COMMON PLEAS.}\]

By the revised statutes, whenever the overseers of the poor of any city or town, discover any person, resident therein, to be an habitual

\(^{(f)}\) Foster v. Foster, 7 Paige, 46.  \(^{(g)}\) Id. ib.  \(^{(h)}\) Id. ib.  \(^{(i)}\) Id. ib.  \(^{(j)}\) 2 R. S. 611, § 120.  \(^{(k)}\) Id. ib.
drunkard having property to the amount of $250, which may be endan-
gered by means of such drunkenness, it is made their duty to make ap-
lication to the court of chancery for the exercise of its powers and ju-
risdiction.\(l\)

If such drunkard has property to an amount less than $250, the over-
seers may make such application to the court of common pleas of the
county; which is vested with the same powers in relation to the person
and estate of such drunkard as are by statute conferred on the court of
chancery, and shall, in all respects, proceed in the like manner, subject
to an appeal to the court of chancery.\(m\)

Appeals from any order, judgment or decree of a court of common
pleas, made pursuant to these provisions of the statute, must be filed
and entered within three months after the making thereof. And they
must be accompanied by a bond, with such sureties as the court shall ap-
prove, to the opposite party, in the penalty of $100, conditioned for the
payment of such costs as shall be awarded against the appellant, in case
of the order, judgment, or decree being affirmed.\(n\)

The statute also directs the court of chancery to proceed upon such
appeal in the same manner as upon appeals from surrogates, and to pre-
scribe, by rule, the course of practice thereon.\(o\) In pursuance of this
direction, the court, by the 118th rule, has made the same regulation of
the practice as that already mentioned in relation to appeals from a cir-
cuit judge.\(p\)

Appeals of this nature need not be placed on the calendar; but may
be heard as special motions.\(q\)

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**C H A P II.**

**EXECUTION OF DEGREE.**

If the party against whom a decree is rendered, does not appeal from
the same within the time limited by law, the opposite party proceeds to
enforce the same by the process of the court.

*By what process.* It is a general principle that this court has the

\(l\) 2 R. S. 69, § 2.

\(m\) Id. ib. § 3.

\(n\) Id. 63, § 6. Id. 611, § 119.

\(o\) Id. 611, § 190.

\(p\) See ante, p. 499.

\(q\) Rule 120.
power to issue all process necessary to carry its decrees into effectual execution.\(^{(a)}\)

The first step to enforce the execution of a decree, if the party against whom it is pronounced, refuses or neglects to obey it, is a writ of execution; which is a process of this court, under its seal, reciting a decree of the court, or the substance, or some part thereof, and requiring obedience to so much of the ordering part as is recited and as it concerns the party to perform.\(^{(b)}\)

A writ of assistance is, in ordinary circumstances, the first and only process for giving possession of land under a decree of this court.\(^{(c)}\)

An injunction is not necessary, before a writ of assistance.\(^{(d)}\)

Where the decree directs deeds or other instruments to be executed by a party to the suit, the ordinary process of contempt must be employed to enforce their execution.\(^{(e)}\) But in some instances a master of the court is authorized to execute conveyances, which, previous to the passing of an act authorizing it, were required to be executed by the parties; as in mortgage and partition cases, on sales by a master.

If, after a foreclosure and sale of mortgaged premises, the mortgagor refuses to deliver up the possession, on demand, to the purchaser under the decree, the court, on motion for that purpose, will order the possession to be delivered to the purchaser, though the delivery of possession is not made part of the decree. And in case of disobedience, an injunction issues; and if the party refuses to comply with it, a writ of assistance issues to the sheriff, of course.\(^{(f)}\)

But before a party can be proceeded against as for a contempt for not performing a decree, a writ of execution commanding him to obey the decree, must be issued and served upon him. If the party neglects to perform the decree, the court, upon affidavit of service of the writ of execution and of the party’s disobedience, will make an order that he be proceeded against by the ordinary process of contempt.\(^{(g)}\)

\textit{Execution how issued.} An execution must be sealed and issued by the register, assistant register, or clerk, with whom the decree is enrolled; who is prohibited from suffering any process to pass his seal if it does not appear to be warranted.\(^{(h)}\)

The solicitor has no right to alter an execution after it has been issu-
ed by the register or clerk. Neither have the registers or clerks any
right to issue executions in blank to be filled up by the solicitor.(i)

When and upon what decrees executions may be issued.] The revised
statutes empower this court to enforce performance of any decree, or
obedience thereto, by execution against the body of the party; or by
execution against his goods and chattels, and in default thereof, his
lands and tenements.(k)

In some decrees the sum of money adjudged due is to be paid, or the
duty is to be performed, within a time specified therein. In others, it is
decreed to be paid or done generally, without fixing a time. In either
case a clause is inserted that the party have execution to enforce the de-
eree. Whether a time is fixed, or not, an execution may be taken out
at once, as soon as the decree is enrolled, in the same manner as it is
issued upon a judgment at law when docketed.(l)

But no process can be issued on any final decree until the same has
been enrolled.(m) If a decree is final as to any branch of the cause,
or as to any of the parties, it must be enrolled before execution can be
issued to compel a compliance with such decree.(n)

A party who is equitably entitled to costs, must apply to the court
to obtain a positive order for the payment thereof before the can take
out an execution for them.(o) Upon such an order, the statute(p) has
authorized the issuing of a precept to commit the party to prison if he
refuses to pay the amount which is thus ordered to be paid to the ad-
verse party. But as the revised statutes have authorized this court to
enforce the performance of a decree only, by an execution against the
property of the party, as on a common law judgment, it may be doubt-
ful whether a ft. f/a. can be issued upon a mere order for the payment of
interlocutory costs.(q)

The "act to abolish imprisonment for debt,"(r) prohibits the arrest or
imprisonment of any person upon any execution issuing out of any court
of equity, in any suit or proceeding instituted for the recovery of any
money due upon any judgment or decree, founded upon contract, ex-
press or implied, or for the recovery of any damages for the non-per-
formance of any contract.

But by the second section of the act, the above exemption is declared

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(i) Merritt v. Townsend, 5 Paige, 80.
(k) 2 R. S. 183, § 110, (orig. § 104.)
(l) 2 Hoff. Ch. Pr. 93.
(m) 2 R. S. 183, § 110, (orig. § 101.)
Rule 111.
(n) Minthorne's ex're v. Tompkin's
ex're, 2 Paige, 109.
(o) Van Ness v. Cantine, 4 Paige, 55.
(q) Van Ness v. Cantine, supra.
(r) 1 R. S. (3d ed.) 907, § 1.
not to extend to proceedings as for contempts to enforce civil remedies.\(^{(s)}\) And by another provision of the revised statutes,\(^{(t)}\) proceedings as for a contempt may be resorted to in all cases where attachments and proceedings as for contempts have been usually adopted and practised in courts of record, to enforce the civil remedies or to protect the rights of any party to a suit.

The chancellor has decided that where, upon an appeal by the defendant from an interlocutory decision of a vice chancellor, such decision is reversed with costs, and no order is obtained to remit the proceedings to the vice chancellor, it is optional with the appellant to have the decree of the chancellor enrolled and to take out a fi. fa or ca. sa. thereon, or to proceed as for a contempt, and apply for a precept to commit the complainant to prison until the costs are paid.\(^{(u)}\) So, upon an appeal, to the court of errors from an interlocutory order of the chancellor, the decree is final, so far as respects the costs awarded on the appeal; and these costs may be collected on an execution, in the usual manner.\(^{(v)}\)

And in the case of *Patrick v. Warner*,\(^{(w)}\) it was held that a party who is committed to jail on a precept in the nature of an attachment for the non-payment of costs, is not exempt from imprisonment, under the act to abolish imprisonment for debt.

But a party thus imprisoned is entitled to the jail liberties.\(^{(x)}\) And unless the commitment is for costs only, he may be discharged from imprisonment under the statute, upon presenting a petition and making an assignment of his property.\(^{(y)}\)

But where a party is committed for the non-payment of a fine imposed upon him by the court, for the breach of an injunction, or other contempt, he must be confined by the sheriff within the walls of the prison.\(^{(x)}\)

In the case of *Patrick v. Warner* the chancellor observes that if an order for the payment of interlocutory costs cannot be enforced by the imprisonment of a party, the adverse party would, in most cases, be without remedy, although the property of the person liable to pay them, was more than sufficient to pay all his debts.

**Execution against corporations.** If a decree be against a corporation aggregate, and it is not obeyed, the process against them is a *distringas*, and afterwards a sequestration. The form of the *distringas* is,

\(^{(s)}\) 1 R. S. (9d ed ) 806, § 2.  
\(^{(t)}\) 2 R. S. 534, § 1, sub. 8.  
\(^{(u)}\) Brockway v. Copp, 2 Paig's, 578.  
\(^{(v)}\) Id. ib.  
\(^{(w)}\) 4 Paig's, 397.  
\(^{(x)}\) Id. ib.  
\(^{(y)}\) People v. Bennett, id.  
\(^{(z)}\) Id. ib.
in general terms, to compel the defendants to appear and answer a con-
tempt alleged against them,—the endorsement on the writ expressing
the nature of the contempt.(a) If a sequestration issues to enforce the
performance of a decree for the payment of money, the goods of the
corporation and the rents and profits of its real estate, will be applicable,
under that process, to the payment of the demand.(b)

Against absent defendants.] In case of a decree against an absent
or absconding defendant, the statute directs that upon the coming in of
the master's report of the proofs and examinations had before him, the
court shall make such order thereupon as shall be just. Process shall then
issue to compel the performance of such decree, either by sequestration
of the real and personal estate of the defendant, or such part thereof as
shall be deemed sufficient; or where any specific estate or effects are de-
manded by the bill, by causing possession of the property so demanded,
to be delivered to the complainant.(c)

In the case of Goodrich v. Day.(d) which was a suit brought to have
a mortgage given to the defendant, and which was a cloud upon the
complainant's title, declared void on the ground of usury, and to have
it delivered up and cancelled of record, the chancellor made a decree
accordingly, upon the bill being taken as confessed by the defendant,
(who was a non-resident of the state,) without service of process, upon
an order for his appearance duly published. And the decree directed
him to pay the complainant's costs of suit to be taxed—the payment to
be enforced by the sequestration of the real and personal estate of the
defendant, according to the directions of the statute.

Against heirs, devisees, &c.] Every final decree rendered in a suit
by a creditor against an heir or devisee, has preference as a lien on
the real estate descended, to any judgment or decree obtained against
such heir personally, for any debt or demand in his own right.(e) And
a sale under an execution upon such decree, will overreach all aliena-
tions of the estate made subsequent to the commencement of the
suit.(f)

In the case of Morris v. Mowatt,(g) the chancellor thought it prob-
able that in order to give the purchaser under a decree of this court, a
legal title sufficient to protect him in a court of law from a sale under a
previous judgment against an heir, it might be necessary to issue an ex-

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(a) 1 Newl. 688.
(b) Davis v. Davis, 2 Atk. 24. Wy.
(c) R. S. 137, §§ 125, 136, (orig.
(d) In Chan. Jan. 23d, 1843.
(e) 2 R. S. 494, § 48.
(f) Id. ib. § 49.
(g) 2 Paige, 592.
execution upon the decree, and have the property sold by the sheriff in the usual manner.

In suits brought against several heirs jointly, or several devisees jointly, the amount which the complainant shall be entitled to recover shall be apportioned among the heirs of the ancestor, or among all the devisees of the testator, in proportion to the value of the real estate descended to such heirs, or devised to such devisees, respectively, as the case may be; and such proportion only shall be recovered of each heir or of each legatee.\textsuperscript{(a)} The costs are also to be apportioned in the same manner; and the decree must express the amount recovered against each defendant, and the execution must conform to the decree.\textsuperscript{(b)}

Upon a decree against infant heirs or devisees, no execution can be executed against them within one year after the rendition of the decree. But if there are any adult defendants in the same suit, the execution may be executed against them.\textsuperscript{(c)}

The solicitor issuing an execution in such a case, must endorse thereon the names of the defendants who are infants, and must direct the sheriff not to execute the same against them until the expiration of one year.\textsuperscript{(d)}

\textit{Against lands held in trust.} Lands, tenements, and real estate held by any one in trust, or for the use of another, are liable to decrees and executions against the person to whose use they are holden, in the cases, and in the manner prescribed in the first chapter of the second part of the revised statutes.\textsuperscript{(e)}

\textit{Levy necessary.} Until an actual levy, no goods or chattels are bound by an execution as against a purchaser without notice.\textsuperscript{(f)}

\begin{itemize}
\item\textsuperscript{(a)} 2 R. S. 455, § 52.
\item\textsuperscript{(b)} Id. ib. § 53.
\item\textsuperscript{(c)} Id. ib. § 54.
\item\textsuperscript{(d)} Id. ib. § 55.
\item\textsuperscript{(e)} Id. ib. § 56.
\item\textsuperscript{(f)} 2 R. S. 183, 111, (orig. § 105.)
\end{itemize}
C H A P. III.

PROCEEDINGS UNDER DECREES AND ORDERS.

Sect. 1. Upon Issues at Law.
   I. Issues under the Act of 1839.
   II. Feigned Issues.
   2. For an Action at Law.

SECTION I.

PROCEEDINGS UPON ISSUES AT LAW.

The various cases in which orders for issues at law may be allowed, and the proceedings to obtain such orders, we do not intend to enter into the consideration of, in this place. Reserving those branches of the subject for a future chapter, it is proposed to speak in this section, of the proceedings under decrees directing issues at law, from the time of the granting of the order for such issues.

It may be premised, however that there are two methods of trying, in courts of law, issues, joined in this court, viz., by feigned issues awarded in the old way, at the hearing, and by issues at law, under the act of May 2d, 1839. The chancellor has decided that that act does not deprive the court of the power it formerly possessed, to award an issue at the hearing, upon pleadings and proofs, where a material fact is rendered doubtful in consequence of conflicting testimony. (a)

I. OF ISSUES AT LAW UNDER THE ACT OF 1839.

Omitting, for the present, all the previous proceedings, we commence with the

Order for issue.] The 67th rule provides, that if the form of the is-

(a) New Orleans Gas Light & Banking Co. v. Dudley, 8 Paige, 452.
sue to be tried is settled by the court, the order for such issue shall state
the several questions to be passed upon by the jury, and the names of
the parties to the issue, and which party is to be considered as holding
the affirmative upon each question to be tried.

_Filing copy of order._] Upon the filing of a certified copy of such
order, with the clerk of the circuit court, or other court before which
the trial is directed to be had, such court is to be deemed to be fully
possessed of the cause for the trial thereof, in the same manner as if a
formal record of a feigned issue had been made up and sent into such
court to be tried.(b)

_Noticing cause for trial._] Either party may give notice and bring
on the trial, unless the trial is put off by the court on sufficient cause
shown, as in other cases.(c)

_Neglect of party to appear, &c._] If the party holding the affirmati
ve of such issue neglects to appear, or to give evidence in support
thereof, a verdict may be taken in favor of the adverse party.(d) But
the probability of the absence of the complainant's counsel, at the
time of the trial, has been held a reasonable ground for putting
it off.(e)

_Reference to a master to settle issues._ If it is referred to a master to
settle the form of the issue or issues to be tried, he must settle the same
in the form of interrogatories to be answered by the verdict of the jury.
Such interrogatories are to be stated at length in his report; and he
must also state which party is to be considered as holding the affirmative
of each question, or issue, upon the trial.(f)

Where, upon a reference for the purpose of settling issues and deter-
mining in what county the trial should be had, each party swore to a
great number of material witnesses residing in the counties where the
parties respectively desired to have the issue tried; but they did not
state, in their affidavits the matters they expected to prove by such
witnesses, it was held, that the master should have rejected, or dis-
garded, these affidavits on both sides. Or that he should have called
the parties before him and examined them on oath as to the matters
they expected and believed they would be able to prove by the witne-
ses respectively, and as to the grounds of such belief.(g) So, in an
affidavit of the number and materiality of witnesses, in reference to the

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(b) Rule 67.
(c) Idem.
(d) Idem.
(e) Bearblock v. Tyler, 1 Jac. & W. 225.
(f) Rule 67.
(g) Meach v. Chappell, 8 Paige, 135.
proper place for the trial of issues directed by the court, the party must state the substance of what he expects and believes he will be able to prove by the witnesses respectively; to enable the court or master to judge of their materiality.\(^{(k)}\)

*Filing copy order, and master’s report.* Upon filing a certified copy of the order, directing the issue, and of the master’s report, after it has become absolute, or has been confirmed, upon exceptions, the court before which the trial is directed to be had shall be deemed to be possessed of the cause.\(^{(t)}\)

*In what court issue to be tried.* An issue at law may be tried either before a circuit court, a court of common pleas, mayor’s court, or the superior court of the city of New-York.\(^{(k)}\)

Under the above section of the statute the court has power to direct the trial to be had in any county of the state, according to the convenience of the parties. The court will, therefore, at the time of granting the order, either designate the place of trial in the order, or direct the master to inquire and report in what court and county the issue ought to be tried.

The revised statutes contain a provision that all issues of fact which shall be joined in the court of chancery, and which shall be sent to the supreme court for trial, shall be tried at a circuit court, or sittings of the supreme court, in the proper county; unless the supreme court shall, on the motion of either party, in cases of great difficulty, or which require great examination, order such trial to be had at the bar of the said court.\(^{(l)}\)

*Admissions.* In directing an issue, the court will order the parties to make such admissions as are necessary to raise the question to be determined.\(^{(m)}\)

*Production of papers.* It will also order the parties to produce, at the trial, all documents in their possession, custody, or power, which the other parties may require or which the court may think necessary for a complete investigation;\(^{(n)}\) and if such order does not form part of the original order directing the issue, it may be obtained afterwards, upon motion.\(^{(o)}\)

In *The Earl of Fingal v. Blake*,\(^{(p)}\) an issue *devisavit vel non* being di-

\(\text{(k)}\) Meach v. Chappell, 8 Paige, 135. \(\text{(n)}\) Carte v. Hodgkin, id. 349.
\(\text{(t)}\) Rule 67. \(\text{(o)}\) Marsh v. Siobald, 2 Ves. & B. 375.
\(\text{(l)}\) 9 R. S. 409, § 1. \(\text{(p)}\) 1 Molloy, 158.
\(\text{(m)}\) Fenwick v. James, Seaton on Decrees, 348.
rected, at the hearing, the lord chancellor, although he thought himself bound to follow the authorities, in the terms of his order upon the devisees to lodge papers, by confining it to papers relating to the matter, expressed an opinion that that comprised almost all papers, private letters, and memoranda of the testator; inasmuch as inferences might be drawn touching the state of his mind, or the influence exercised over it from apparently trifling or immaterial entries; declaring his preference, if the point were open, of an unqualified order for all papers of the testator, indiscriminately.

The court will order documents which are in the possession of another defendant to be produced on the trial of an issue; (p) even though such defendant declines to be a party to the issue. (r) But although the court has power over every party in the cause who is interested in the question to be tried, to compel such production as may be necessary for a complete trial, such production will not be ordered of documents which the party holds in a distinct character, such as mortgagee, &c. (s) In a case however, before the court of exchequer, the defendants in a tithe suit were ordered to produce, at the trial of an issue, deeds produced by them at the hearing, though belonging to their landlord, who was not a party, or to admit, at the trial, the facts which the deeds were produced on the hearing to prove. (t)

It is to be remarked that the ordinary order for the production of books, papers, and writings before the master, will not be sufficient to compel their production at the trial. Such production must be specially ordered, and usually forms part of the order directing the issue. Where that is not the case, a special application must be made to the court. (u)

It has been decided in Virginia that any papers may be read at the trial of an issue which were read upon the hearing of the cause, or at a former trial. (v)

**Examination of parties.** Some doubt appears to exist with respect to the right of the court, when it directs an issue, to order the parties themselves to be examined, without their consent. The act of May 2d, 1839, and the rules of the court, are silent upon this point. Instances occur, however, in the books, in which orders for such examinations have been made; (w) and again there are others in which they have

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(p) Marsh v. Sibbald, supra.
(s) Id. ib.
(t) Pulley v. Hilton, 10 Price, 118.
been refused. Upon looking at these cases, however, it will be found that the rule is against the examination when the issue is directed at the hearing of the cause, or upon further directions; unless the party is merely a nominal one. But that, where the issue is directed upon an interlocutory application, on the ground that the affidavits on both sides are conflicting—as where an injunction is asked for upon the affidavit of one party, and opposed upon that of another, and an issue is in consequence directed—there it is considered quite fit that they should both be examined.

Where the court directs a party to be examined as a witness, no objection is waived, except that which arises from his being a party in the cause; and the meaning of the order is not that he should be a witness for the party himself, or for the other side, but that he should be a witness for the court; in fact that he should undergo a examination for the purpose of eliciting the truth more clearly than can be done by affidavit or depositions in writing.

Special jury.] By the English practice, if either of the parties require a special jury, a motion for one should be made to the court of chancer.

View.] Where lands are in question, the court will sometimes order the jury to have a view; and where they are to have a view of a particular manor, the court will order them, in some instances, to take a view of the whole, and ascertain the bounds of it.

Defendant to name an attorney.] According to the practice in the English courts, it is the duty of the defendant in the issue to name an attorney to appear for him in the court of law in which it is to be tried; and if he neglects to do so, an order may be obtained that he name an attorney in four days; and that in default, the issue be taken as tried and a verdict given for the complainant.

Judge bound to try issue.] A judge at law before whom an issue has been ordered to be tried has no authority to decline trying it, or to refer it to another mode of trial, e.g. by arbitration. But if the parties think proper to refer it to arbitration, and a reference is adopted by consent, the effect is to abandon not merely the direction to try the issue, but the whole proceeding.

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(a) Vide Howard v. Braithwaite, 1 Ves. & B. 374.
(b) 2 Dan. 740.
(c) Anon., 2 P. Wms. 69.
(d) Prac. Reg. 963.
(f) Woodley v. Johnson, 1 Molloy, 394.

(g) De Tastet v. Bordensave, supra.
Proceedings upon trial. The course of proceedings upon the trial of an issue is generally the same as that adopted in ordinary trials at law; except where the court of chancery has given some special directions upon the subject. (g)

Examination of witnesses. It is to be observed, however, that where a devisee seeks to establish a will of real estate, against the heir, the rule of the court requires that the due execution of the will should be proved by the examination of all the attesting witnesses to it who are in existence or capable of being examined; and that the same course is also necessarily required upon the trial of an issue devisavit vel non; (h) except when the circumstances are such that, by the common rules of evidence, proof of the witness' hand writing may be substituted for the testimony of the witness himself; as where the witness is dead or abroad, or is insane; (i) or where, after diligent search, he cannot be found. (k)

The rule above mentioned requiring all the witnesses to a will to be examined, applies, however, in general, only to the case of a bill filed to establish a will, and an issue directed by the court thereupon. Where the bill was filed by the heir at law, to restrain the devisee from setting up a legal estate as a bar to an ejectment, upon the hearing, and an issue devisavit vel non was directed—in which the devisee was plaintiff—upon a motion for a new trial, on the ground that all the attesting witnesses had not been examined, it was held that the case stood upon a ground directly opposed to that upon which the ordinary cases of bills to establish wills rested; and such was the form of his application, that if he failed upon that issue, he would not be bound himself. (l)

Where an order for an issue directs all the witnesses to be examined, but the plaintiff, conceiving his case to be made out, declines calling some of them, the judge himself will call them. (m)

Upon the trial of a feigned issue in a suit by a wife for a divorce, the judge may allow proof of acts of cruelty on the part of the defendant, for the purpose of showing that the affections of the husband were alienated from the wife; that there was a course of abuse from the time of his connexion with another woman, down to, and terminating in a separation from his wife; and that such cruelty resulted from that connexion

(g) 2 Dan. 749.
(h) Id. ib. Townsend v. Ives, 1 Wils. 417.
(k) Powell v. Cleaver, 2 Bro. C. C. 503. 5 Ves. 404. 9 Id. 381.
(m) Tatham v. Wright, 2 Russ. & My. 1.
(n) Groom v. Chambers, 9 Mont. & Ayr. 743.
and was part of the plan contrived between them to drive the wife from home, in order that the intimacy might be more easily carried on.

New witnesses. In the case of Apthorp v. Comstock, the order for an issue directed that no witnesses not before examined should be introduced on the trial, unless the party producing them should, at least fifteen days before such trial, give notice to the opposite party, or his solicitor or attorney, of his intention to produce such witnesses, with their names, additions, and usual place of abode. But this provision was not to extend to such new witnesses as were called to impeach other witnesses, nor where the judge should be satisfied there was a reasonable excuse for not giving such notice, or for giving a notice for a shorter period of time.

Reading depositions in the cause. In directing an issue, the court will order the depositions taken in the cause to be read at the trial of the issue; without requiring a foundation to be laid, by proving examined copies of the bill and answer. The object of the court, however, in making such an order, is merely that of dispensing with the strict legal proof of the record. It is not intended to authorize the reading of the depositions of witnesses, in cases in which the court of law would not admit them to be read upon proof of the record in the ordinary way; i.e. unless proof be given that the witness is dead, or abroad or otherwise unable to attend. It therefore generally adds to the order a direction that the depositions of the witnesses shall be read at the trial of the issue, in case the witnesses, or either of them, shall be dead at the time of the trial, or be proved at that time to be in such a state of health as not to be capable of attending the trial.

In Jones v. Jones, a motion was made before Lord Thurlow, for leave to read the deposition of a witness in the cause, on the ground of his age or inability to attend; but his lordship thought the application should be made to the judge who tried the cause; and refused to make any order on the subject. It seems, however, that there is no absolute rule requiring that the inability of a witness to attend shall be left to the decision of the judge at nisi prius. Where, therefore, the court directing the issue can be satisfied that the question of the ability or inability of the witness to attend, can have but one conclusion, it will itself decide it.

In a case where witnesses had been examined in the cause, and upon

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(p) 3 Dan. 744.  (q) 1 Cox, 184.  
(s) Palmer v. Lord Aylesbury, 15 Ves. 178.  
(t) Corbett v. Corbett, 1 Ves. & B. 335.
the hearing, an issue was directed, but, before the trial, the plaintiff in the issue died, having appointed one of the witnesses, who had been examined, his executrix, whose name, and that of her husband, were in consequence substituted for that of the testator, as plaintiffs in the issue, the court ordered that the depositions of the executrix, in the cause, should be read at the trial of the issue; on the ground that if she had died, her depositions would have been admissible, and that her becoming plaintiff was tantamount to her death. (u)

Where a witness who has been examined in a cause, and afterwards *viva voce* upon the trial of an issue, dies, and a new trial of the issue is directed, not only his depositions in the cause may be read at the new trial, but what he swore to at the former trial may be given in evidence. (v)

In the case of *Apthorp v. Comstock*, (w) the order for an issue directed that either party should be at liberty, at the trial, to re-examine any witness whose testimony had been read upon the hearing of the cause, or to read their depositions if they were dead, or out of the jurisdiction; as also to read the deposition of any witness of the opposite party.

*Depositions taken de bene esse.* It is the practice of the courts in England, not to allow the examination of a witness *de bene esse*, with a view to the trial of an issue, after the depositions of other witnesses in the cause have been published. (x) But where a witness who has not before been examined in the court of chancery, has been produced upon a trial at law, and another trial of the same matter is to be had, the court will entertain a motion for the examination of such witnesses *de bene esse* with a view to such second trial. (y)

And so, after the trial of an issue in the cause, an application on the part of the complainant for liberty to examine a witness who was above seventy years old, *de bene esse*, for the purpose of securing his testimony in case of his death, upon the ground that it was intended to move for a new trial, was granted. (z)

When depositions taken *de bene esse* have been read at the hearing of a cause, it is a matter of course to order them to be read at the trial of an issue, notwithstanding an irregularity in the examination. And the court will not discharge the order on the ground of such irregularity; although the party complaining of it did not know of the irregu-

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(u) *Andrews v. Lady Beauchamp*, 7 Sim. 65.  
(w) *Coker v. Farewell*, 2 P. Wms. 563.  
(x) *Palmer v. Lord Aylesbury*, 16 Ves. 299.  
(y) Anon. cited by Lord Eldon, Ibid.  
(z) Anon. 6 Ves. 273.  
(s) 2 Paige, 485.
larity in question till after the hearing, and the time was very short between the publication of the depositions and the hearing of the cause; as the party complaining of the order might have applied for time to enable him to examine whether the depositions had been regularly taken. (a)

Who may attend trial of issue. A person who is interested in the result of an issue, but who refuses to be a party to it, may nevertheless be allowed to attend the trial, by counsel. (b) He will, in such case, be included in the order for the production of documents. (c)

Minutes of court below. Where the trial of the issue is had under the act of May 2d, 1839, the court awarding the issue is to be informed of the proceedings upon, and result of, the trial, by the minutes of the court at law. The 67th rule provides that a copy of the minutes of the court before which the issue is tried, containing the verdict of the jury upon the issues, certified by the clerk, shall, upon the hearing in this court, be sufficient evidence of the trial and verdict.

Judge's certificate. After the trial of a feigned issue, the judge certifies how the verdict was found, and whether the same was satisfactory to him, or not.

New trial, when to be applied for. By the English practice, an application for a new trial of an issue must be made before the hearing on further directions. (d) But the rule is otherwise here. In Apthorp v. Comstock, (e) and in Van Alst v. Hunter, (f) the motion for a new trial was allowed to be made at the hearing upon the equity reserved. In the latter case the court say a new trial has been as often granted in that way as upon a previous petition, or distinct motion for the purpose.

The application for a new trial must be made within a reasonable time. Thus, in Legard v. Daly, (g) where five years and a half had elapsed since the trial, the court refused the application upon that ground. And in Van Alst v. Hunter, (h) a motion for a new trial, made the second term after the nisi prius record and certificate of the judge had been filed, on an ex parte statement of the evidence, was denied, on the ground of the delay and the want of proper documents.

New trial, how applied for. The 5th section of the act of May 2d,

(a) Gordon v. Gordon, 1 Swanst. 166. (c) 9 Paige, 485.
(d) Attorney Gen. v. Montgomery, (g) 1 Ves. 192.
(e) 2 Dan. 746, 783. (h) Supra.
48.
1839, directs the chancellor, by general rules, to prescribe the manner of proceeding to obtain a new trial of the issues, when necessary.\(^{(i)}\) In pursuance of this direction, the 67th rule provides that where a seigni-ed issue or any other issue, has been awarded and tried, if either party wishes to apply to this court for a new trial, on the ground of any erroneous decision or misdirection of the court or judge before whom the issue was tried, or that the verdict was against the weight of evidence, a case is to be made up and settled in the manner prescribed in the rules of the supreme court in relation to causes pending in that court. And where more than one judge was present at the trial of the issue, the case may be settled by the senior judge who was present and presided, or by the judge who may have been designated by the court for that purpose, upon the trial.

Where this court directs a suit at law to be brought, the application for a new trial must be made to the court in which such action is pending. But where an issue is directed to be tried in a court at law, the application for a new trial must be made to the court of chancery.\(^{(k)}\) The reason of this distinction is laid down by Lord Eldon to be, that if this court thinks proper to consider the case upon the record as fit to be governed by the result of a trial, the review or propriety of which belongs to a court of law, the opinion of a court of law is sought in such a form that it is regarded as conclusive, whether the judgment is obtained upon a verdict or in any other shape; but upon an issue directed, this court reserves to itself the review of all that passes at law; and one principle upon which the motion for a new trial is made here, and not to the court of law, is, that this court regards, the judge's report, with a view to determine whether the information collected before the jury, together with that which appears upon the record, is sufficient to enable it to proceed satisfactorily, to which it did not consider itself competent previously.\(^{(l)}\)

The application for a new trial must be made to the chancellor or vice chancellor who directed the issue: i.e. to the same jurisdiction.\(^{(m)}\)

The form of the issue will not be changed upon a motion for a new trial. If the party is desirous to question the form of the issue, he must do so by presenting a petition for a re-hearing of the decree or order.

\(^{(i)}\) Laws of 1839, p. 293.  
\(^{(l)}\) Bottle v. Blundell, 19 Ves. 500.  
\(^{(m)}\) See 2 Dan. Pr. 755. Fownes v.
directing it. (n) In *De Tastet v. Bordenave*, (o) a petition for a re-hearing was presented at the same time that a notice of motion was given for a new trial; and upon the hearing of the petition, Lord Eldon said that if it had been lodged before the trial, an application should have been made, by motion, to stay the trial; but that if the application for the re-hearing was not made till after the trial, it came too late.

In *White v. Lisle*, (p) however, his lordship permitted a petition for a re-hearing to be brought on at the same time with a motion for a new trial.

**New trial—when and for what reasons granted.** This court directs issues to be tried at law to inform the conscience of the court as to facts doubtful before, and therefore expects, in return, such a verdict, and on such a case, as shall satisfy the conscience of the court to found a decree upon. If, therefore, upon any material or weighty reason the verdict is not such as to satisfy the court that it ought to found a decree upon it, there are several cases in which this court has directed a new trial, for further satisfaction, notwithstanding it would not be granted in a court of common law; because it is *diverso intuitu*, and because the court proceeds on different grounds. (q)

**Verdict contrary to weight of evidence.** Accordingly, the court will grant a new trial not only in cases where the verdict is against evidence, but it will nicely balance the evidence on both sides; and where it finds that the verdict is contrary to the weight of evidence, it will direct the issue to be tried over again. (r) Therefore, if the judge before whom the issue is tried certifies the verdict to be against evidence, the chancellor will direct a new trial. (s) But it seems to be the general principle acted upon by the court, that if the application rests solely on the ground that the verdict given by the jury was against the weight of evidence, and the judge states that, upon the whole, he is not dissatisfied with that verdict, which is the usual form in which judges intimate their opinion that the verdict ought not to be disturbed, the court will not grant a new trial. (t)

But even in that case the court will grant a new trial upon the production of new evidence which was not before the jury upon the original trial. (u) So if, after a trial, a witness be convicted of perjury, or a

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*(o) Jacob, 516.*

*(p) 3 Swanst. 349.*


*(r) Stace v. Mabbot, 2 Ves. 559.*

*(s) Gibbs v. Hooper, 2 My. & Keen, 355.*

*(t) Id. ib.*
party of forgery, this will be considered as a good ground for a new trial.\(^{(v)}\) This court, however, will not set aside a trial at law, for any matter which might have been made use of at the trial;\(^{(w)}\) or when it is of opinion that the evidence, though newly discovered, will not afford a foundation for a different verdict.\(^{(x)}\)

**Surprise.** Where it can be shown that a party has been taken by surprise, and evidence was produced at the trial which he could have no reason to expect would be produced, the court has directed the issue to be tried again. Thus, if after an issue is directed, the plaintiff obtains an order ex parte, to strike out the name of a co-plaintiff and makes use of him as a witness, and has a verdict, the court will set aside the trial.\(^{(y)}\)

**Fraud.** The court will also grant a new trial in cases in which a fraud has been practised upon the party applying.\(^{(z)}\)

**New evidence.** As it is the rule of the court that it will not grant a new trial upon the production of new evidence, unless it is shown that there has been some surprise or fraud upon the party applying,\(^{(a)}\) still less will it do so where the party is in possession of the evidence, but either in the exercise of discretion or from neglect does not produce it at the trial;\(^{(b)}\) or where it can be shown that, though he was not in possession of it himself, he had full notice that it was in the power of the other party to produce it. Upon this ground, the circumstance of evidence having been made use of at the trial of an issue, which was discovered after the answer of the defendant was put in, the consequence of which was that the verdict was contrary to the answer, and to the true sense and meaning of the issue, was not held a sufficient reason for directing a new trial—there having been no surprise upon the party applying; who, before the trial, had opposed a motion made by the other party for the express purpose of having the trial postponed in order that the issue might be rectified.\(^{(c)}\)

Where a party, upon the trial of an issue, produces evidence which is a surprise upon the other party, and which would have been sufficient, under other circumstances, to entitle him to the verdict, he wil.

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\(^{(v)}\) Tilley v. Wharton, 2 Vern. 378. See also Coddington v. Webb, id. 240. Sewall v. Freeston, 1 Ch. Ca. 65.

\(^{(w)}\) Carless v. Smallridge, 1 Ch. Ca. 23. 2 Freem. 178. Montgomery v. Attorney Gen. 9 Mod. 358.

\(^{(x)}\) Colgrave v. Jeson, 3 Atk. 197.

\(^{(y)}\) Exton v. Turner, 2 Ch. Ca. 80.

\(^{(z)}\) Willis v. Farrar, 3 Young & Jer. See also Codrington v. Webb, id. 240. Gibbs v. Hooper, 2 My. & Keen. 353.

\(^{(a)}\) 2 Dan. 740.

\(^{(b)}\) 1 Ves. jn. 133.

\(^{(c)}\) Legard v. Daly, 1 Ves. 192.
not be permitted, although the jury find against such evidence, to have a new trial.\(^{(d)}\)

As the court will not grant a new trial upon the mere production of new evidence, unless it can be shown that there was a fraud or surprise upon the party applying, so it will not permit a party who has practised a fraud, and set up documents which were proved to be forgeries, and by that means prejudiced his own case, to say that, whether the documents were true or false, there is other evidence which makes them immaterial.\(^{(e)}\)

**Absence of material witness.** The court will grant a new trial on the ground that a material witness for the party was absent from the trial. But it will not do so on the mere ground that the testimony of the witness who was absent would only corroborate that of several others to a fact. It must be shown that there is something particular in his evidence which is of importance; and that it was not in the power of the party to have the trial put off.\(^{(f)}\)

**Misdirection of judge.** A new trial may also be granted on the ground of a misdirection of the jury by the judge who tried the issue.\(^{(g)}\) So, if the court feels satisfied, from the report of the judge, that the points in the case have not been distinctly presented to the jury, it will, without entering into the question whether the verdict was or was not satisfactory upon the facts, direct a new trial.\(^{(h)}\) But where an application is made for a new trial, on the ground of an improper summing up by the judge, the court will not accede to it if it is satisfied that, upon the evidence as it stands, the jury could not have given a different verdict, had the case been properly summed up.\(^{(i)}\) Neither will a new trial be granted because the judge made to the jury an inaccurate representation of the defect of the defendants' answers.\(^{(k)}\)

**Misconduct of jury.** The court will also order a new trial of an issue where it sees reason to be dissatisfied with the conduct of the jury.\(^{(l)}\)

**Irregularity in the trial.** It has been said that to induce this court to set aside a former trial of an issue for an irregularity in the trial, and for that cause to grant a new one, there must, in general, be a certifi-

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\(^{(d)}\) Carrington v. Jones, 2 Sim. & Sts. 135.  
\(^{(e)}\) Kemp v. Mackrell, 2 Ves. 580.  
\(^{(f)}\) Cleve v. Cascoigne, 1 Amb. 322.  
\(^{(g)}\) Id. ib.  
\(^{(h)}\) Bearblock v. Tyler, Jac. 571.  
\(^{(i)}\) Tatham v. Wright, 2 Russ. & My. Rep. 156.  
\(^{(k)}\) East India Co. v. Bazett, Jacob, 91.  
\(^{(l)}\) Plessanta v. Ross, 1 Wash. Virg.
cate from the judge or court before whom it was tried, of a verdict against evidence, or other misbehavior of the jury, &c. (m) This, however, does not appear to be the present practice. Frequent instances occur in the books where the court has set aside the verdict in such cases, without any such certificate by the judge, and even in opposition to it, where he has expressed himself satisfied with the verdict. (n)

Improper reception or rejection of testimony.] The court will not direct a new trial of an issue merely on the ground that improper testimony was received on the trial; or that the judge rejected that which was proper; if, upon the whole facts and circumstances, the chancellor is satisfied that the result ought not to have been different, had such testimony been rejected in the one case, or received in the other. (o)

Where verdict affects the inheritance.] If the suit relates to the right to land, the court will frequently grant new trials of issues, even in cases in which the issue has been properly tried, and the verdict is satisfactory upon the evidence; the practice of the court being adverse to making a decree to bind the inheritance where there has been but one trial at law. (p) This is the case especially where the object is to establish a will against an heir at law; for as the heir, but for the interference of the court, would be entitled to take the opinions of successive juries by new ejectments, this court will not bind him by one trial only, but will direct a second. (q) And if it happens that one verdict goes one way and the other another way, the court will, ordinarily, on motion, order a third trial; which is commonly conclusive. (r)

After two concurring verdicts for the same party, the chancellor is not bound to direct a new trial notwithstanding both verdicts were in opposition to the opinions of the judges before whom the issues were tried, and a verdict had originally been rendered in favor of the other party. (s)

In the case of a will, even after two trials, in both of which the verdict has been in favor of the will, the court, where it was not satisfied with the manner in which the last trial was conducted, has directed a third trial; and that, even though it did not appear from the judge's re-

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(m) Prac. Reg. 263.
(n) See East India Co. v. Bazett, supra.
(q) Stace v. Mubbot, 2 Ves. 355.
(s) Van Alst v. Hunter, 5 John. Ch.
(r) Prac. Reg. 263.
(s) McRae's ex'x v. Wood's ex'x, 1 Hea. & Munf. 849.
port, that there was any reason to disturb the verdict.(t) It seems, also, that even after three trials, the court will, if it sees reason to be dissatisfied with the verdict, grant a fourth.(s)

In general, however, the court will not direct a new trial after a third, unless upon some special ground.(v)

It is to be remembered that it rests entirely in the discretion of the court to award a second trial of an issue, or not, according to the circumstances and testimony in the case.(w) Even in the case of suits to bind the inheritance, the court will not set aside the verdict and grant a new trial merely because it is asked for, without any ground laid for it.(x) It will, however, in cases of that nature, where the matter is of great importance, direct a second trial, for the solemn determination of the matter, without setting aside the first verdict. The effect of which is that the first verdict may be given in evidence upon the second trial, and will have its weight with the jury.(y)

It seems that in such cases, the court makes it a condition of granting a second trial, that the applicant shall pay to the other party the costs of the first.(z)

If the judge certifies that he is dissatisfied with the verdict, the court does not, as of course, grant a new trial, though it is the ordinary practice to do so.(a)

Effect of a verdict on first trial, upon the second trial.] Where a verdict upon a former trial is given in evidence upon a second trial, it is necessary for the person who gives it in evidence to show upon what title it was obtained. And, on the other side, they are at liberty to show on what kind of proofs it was given, which, if there is anything impeaching the evidence on which the first verdict was given, will be very material.(b) And even where the person who is guardian to an infant party to an issue, has been guilty of mal-practices to obtain the verdict, that fact may be given in evidence to impeach it.(c)

Further directions.] After the issues at law have been tried, the cause, unless a new trial is moved for and granted, must be heard for further directions, upon the equity reserved. By the English practice,

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(z) White v. Wilson, 13 Ves. 88. (a) Id. ib. See also Edwin v. Thomas, 1 Vern. 489.
(y) Id. ib. (c) Id. ib.
this cannot be done until after the first four days of the term next after
the trial have elapsed, in order that the party against whom the verdict
has been found, may have an opportunity of moving for a new trial.\(d\)

The cause then comes on in the regular course, when such final or oth-
er decree as the cause calls for will be pronounced.

The decree of the court is usually in accordance with the finding of
the jury upon the issue, or, if there have been more trials than one,
with the last verdict. The court, however, will, even then, if it thinks
that the issue as tried does not answer the purpose for which it was in-
tended, direct a new issue or issues, in such form as may suit the justice
of the case.\(e\) And in \textit{Armstrong v. Armstrong},\(f\) the master of
the rolls, without directing a new issue, decided at once against the par-
ties in whose favor the verdict was found; and his decision was sustain-
ed upon appeal.

Although the court will not make a decree contrary to a positive de-
nial, on oath, by the defendant's answer, upon the evidence of one wit-
ness only, but will, where the evidence of such witness is supported by
corroborating circumstances, send the matter to an issue,\(g\) it will ne-
evertheless make a decree upon the verdict, although it appears by the
postea that only one witness was examined.\(h\)

If, after an issue has been directed, the cause is brought on for fur-
ther directions, and it appears that the parties have not gone to trial of
the issue, the court, if it is dissatisfied with the grounds upon which the trial
of the issue was not suffered to take place, will still direct it to be tried.
Thus, where an issue was directed to try the validity of a debt claimed
against a testator's estate, and at the trial of the issue, the executor en-
tered into a compromise with the debtor, subject to the opinion of the
court; and upon the case coming on again for hearing, the master of the
rolls was of opinion that the compromise was improper, and directed
the parties to proceed to try the issue, the executor paying all the costs
of the former proceedings at law.\(i\)

So if it appears that the judge, before whom the issue was to be tried,
declines trying it, and refers it to arbitration, the court will make an or-
der to have an issue tried, if the party dissatisfied with the award ap-

\(d\) 2 Dan. 758.
\(e\) Ib. ib. Blackburn v. Gregson, 1 v. Donald, 9 Ves. 275.
Bro. C. C. 433, 4. \(h\) 2 Dan. 758.
\(f\) 3 My. & Keen, 45. \(i\) Legh v. Holloway, 8 Ves. 213.
\(g\) Pember v. Matthews, 1 Bro. C.
plies for a new trial. The case is otherwise, however, where the reference is adopted by consent of both parties.

Costs of issues at low. The costs of a feigned issue do not follow the verdict as a matter of course, but the finding of the jury is returned to this court, and the costs are in the discretion of the court.

These costs cannot be obtained upon motion, but the cause must be set down upon further directions. And where a person, not a party to the suit, went before the master, under the decree, claiming to be a party interested, and, upon an issue directed, obtained a verdict, it was said that if the court decided against a new trial, he must be made a party, for the purpose of bringing him before the court upon further directions.

But the general rule is, that the costs of an issue follow the event, and are given to the party who prevails at law. There are exceptions to this rule, however. Thus, in the case of a bill to establish a will against an heir at law, he has a right to know how he is disinherited; and if an issue is directed to try the will, he will have his costs, although the will is established; unless there are peculiar circumstances in the case which will induce the court to refuse them.

In some cases, an heir will be ordered to pay the costs of an issue, but it must be a very strong case to induce the court to charge him—such as the spoilation or secret of a will; or where he vexatiously contests the will, by falsely setting up insanity in the testator. On the ground of vexation, also, the court will decree the costs of an issue against an heir who fails, where he himself has filed a bill to set aside a will for insanity, instead of proceeding by ejectment.

Where the plaintiff in an issue gives notice of trial, but does not proceed, the costs for not going to trial should be moved for in this court, and not in the court of law. The proper course in such cases is to apply, by motion, for an order that the plaintiff may proceed to trial at a specified time, or that the issue be taken pro confesso.

When a new trial of an issue is directed, the court usually reserves the consideration of the costs of the former trial. But in Standen v.

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(4) Woodley v. Johnson, 1 Molloy, 394.
(5) Id. ib.
(6) 2 Harr. Pr. 570, 2 Dan. 759.
(n) Standen v. Edwards, 1 Ves. jun. 133.
(o) Id. ib.
(p) Beames on Costs, 234, Prac. Reg.
(q) Beames on Costs, 3 Atk. 387.
(r) Beary v. Eyre, supra.
(s) White v. Wilson, 13 Ves. 92.
(u) Scaife v. Scaife, 4 R ave. 309.
(v) Anon 9 P. Wms. 68.
(w) Bearblock v. Tyler, 1 Jac. & W. 225, 2 Dan. Pr. 759.
Edwards, an order was made that the defendants, who were infants, on whose behalf the application for the new trial was made, might pay the costs of the former trial, before they proceeded to a new trial.

Costs of motion for new trial.] Where the motion for a new trial is denied, the costs are not costs in the cause, and cannot be recovered by the successful party, unless the motion is expressed to be denied, with costs.

II. FEIGNED ISSUES.

It has been before remarked that the act of May 2d, 1839, regulating the trial by jury, &c. does not deprive the court of the power it previously had, to award feigned issues at the hearing upon pleadings and proofs.

Drawing up and settling a feigned issue.] Upon the granting of an order for a feigned issue, a draft of the pleadings in an action of assumpsit is prepared by the plaintiff’s solicitor, (or by the solicitor of whichever party is ordered by the court to prepare it.) In the declaration, the pretended plaintiff declares that he laid a wager of a certain amount, with the defendant, on the question in dispute; and avers that the fact is as he contended it was, and that he therefore brings his suit for the amount of the wager. The defendant, by his plea, admits the wager, but avers the contrary to be the fact. Whereupon the issue is joined which is ordered to be tried.

When the complainant’s solicitor has prepared the pleadings, he serves a copy upon the defendant’s solicitor. If the parties are unable to agree upon the issue, it is to be settled by a master; and the order usually contains a direction to that effect. For this purpose a copy of the pleadings is made and left in the master’s office; who thereupon issues a summons for the other party to attend; on the return of which the issue is settled by the master.

When the issue has been settled, the master certifies accordingly; which certificate is filed in the proper office.

Service of issue as settled.] A copy of the issue as settled, with notice of trial endorsed, is then served upon the opposite party.

(x) 1 Ves. jun. 135.
(y) See also Edwin v. Thomas, 1 Vern. 489.
(z) Waite v. Lisle, 4 Mad. 914. See also Devie v. Lord Brownlow, 2 Dick. 796.

(a) See ante, p. 446.
(b) 2 Smith, 80.
(c) See Act of May 14th, 1840, abolishing circuit rolls, &c. Laws of 1840, p. 334, § 21.
(d) Id. 81.
Proceedings in court of law.] After the issue is agreed upon, or settled by the master, the subsequent proceedings are regulated by the practice of the court in which it is to be tried; subject, however, to the control of this court over the parties as to the mode and terms of trying such issue. (e)

The decree or order directing the feigned issue, either specifies the time when it is to be tried, or directs the master to fix the time. But it seems the court has no power to make a compulsory order to force the parties to proceed on the issue. If, however, the plaintiff makes default in taking the record down for trial at the time appointed, the court will order the issue to be taken pro confesso against him. (f)

Yet, when there is reasonable ground shown for the indulgence, the court will, upon application, give the plaintiff leave to postpone the trial. (g) After an order to take the issue pro confesso, the cause should be set down for further directions, and to have the issue taken pro confesso pursuant to the order. (h)

The practice with respect to the production of documents, the examination of parties, and of witnesses, and in short, with respect to all the proceedings upon the trial of a feigned issue, is nearly the same as that upon the trial of issues at law under the act of 1839.

According to the former practice, after the verdict was rendered, the same was endorsed on the postea, and the record brought into this court and filed with the register; upon which the cause was noticed for hearing on further directions. (i) But the act of May 14th, 1840, concerning costs and fees in courts of law, &c. has abolished the circuit roll and postea, and directed the copy of the pleadings furnished for the court upon the trial, with a certified copy of the minutes of trial annexed, to be filed instead. (k)

Proceedings in this court after trial.] The party obtaining the verdict must, under this section, obtain from the clerk of the court in which the cause was tried, a certified copy of the minutes of trial, annex it to the pleadings, file the papers in the register's or clerk's office, and thereupon notice the cause for hearing upon further directions.

If a new trial of a feigned issue is sought for by either party, it is to be applied for in the same manner as in the case of an issue at law, and will be granted for the like causes. (l)

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(e) 1 Turn. Pr. 450.
(f) Bearbreek v. Tyler, 1 Jae. & W. Rep. 150.
(g) Id. ib.
(h) 1 Nawl. Pr. 352.
(k) Laws of 1840, p. 334, § 91.
(l) See ante, p. 454 et seq.
It seems that the plaintiff in an issue may suffer a non suit, and that if he does so advisedly, in consequence of any unforeseen occurrence at the trial which would have rendered further proceeding with it unsafe, the court will grant him a new trial, notwithstanding the non suit. (m)

After the trial of an issue, the plaintiff cannot move to dismiss his own bill, with costs; although he might have done it before the trial actually took place. (n)

SECTION II.

ACTION AT LAW.

In what cases directed.] Wherever the foundation of a claim is a legal demand, and the question whether a new trial should or should not be had, can be discussed with more satisfaction in a court of law than in a court of equity, this court will direct an action at law. (o)

The court, in dismissing the complainant's bill, will sometimes do so without prejudice to his right to proceed at law. (p) It will also, where the complainant's right to equitable relief depends upon a legal title, retain the bill for a certain period—giving the complainant liberty, in the meantime, to bring an action for the purpose of establishing his right at law, in order to found the equitable relief. (q)

The cases in which the court retains the bill, with liberty to the complainant to proceed at law, are those in which it is necessary for him to establish his right at law in order to found the equitable relief. (r) And the practice cannot be made use of to enable the complainant first to try whether he has any claim at law, and then, if he fails there, to come into this court to try to raise an equity. (s)

Where the bill is retained, with liberty to the complainant to bring an action at law, within a limited time, the bill will be dismissed unless an action is brought within the time limited; further directions being reserved only in the event of a trial taking place. (t)

(m) Richards v. Symes, 2 Atk. 319.
(n) Carrington v. Holly, 1 Dick. 261.
(o) 2 Dan. 763.
(q) Id. ib. Seaton on Decrees, 356.
(r) Walton v. Law, 6 Ves. 150.
(s) Id. ib.
(t) 2 Dan. 640, 763.
Form of action.] In directing an action at law, the court always directs it to be brought in such a form that the result shall be regarded as conclusive. (w)

Special directions.] The court will also provide for a satisfactory trial by restraining the parties from setting up any legal obstacles to the fair trial of the case; such as outstanding terms, or the statute of limitations, or a bankruptcy. (v) It will also order the parties to make such admissions at the trial as may be necessary to bring the matter in dispute properly before the court. (w) And it will give the same directions as to the examination of the parties, and the reading of depositions, and the production of documents, as are given upon directing issues. (x)

The rule as to producing papers on a trial at law directed by this court is this: If the court directs a trial, it is directed in such a way that all productions which the court conceives to be useful upon that trial, the creature of its own direction, shall be made. Upon this principle the court will order documents which are in possession of another defendant, to be produced on a trial at law directed by the court. (y)

Where the bill seeks relief, as well as discovery, the court will not, upon motion, aid the complainant in proceeding at law without the authority and control of the court. Any such proceeding must be under the authority and control of this court. Therefore, in such a case this court would not, on motion, order that an outstanding term should not be set up by the defendant against an ejectment brought by the complainant; (x) or direct the defendant to produce deeds, &c. on the trial of the suit at law. (a)

Where an action at law was directed to be brought, and it was ordered that the defendant should not insist upon a title set aside by the decree, which order he disobeyed; whereupon the plaintiff read the decree, but was nevertheless nonsuited; upon his application to the court for a commitment of the defendant for the contempt, and to be established in the possession, the same was ordered accordingly. (b) And in the case of Bayley v. Morris, (c) where no special direction was given as to not setting up a legal title, and the defendant in the action set up a legal title in trustees; whereupon the plaintiff was non-

(u) Bootle v. Blundell, 19 Ves. 500.
(v) Pemberton v. Pemberton, 13 Ves. 375.
(w) Id. ib.
(x) See ante, p. 448 et seq.
(z) Stevens v. Praed, 2 Ves. jun., §19.
(a) Id. ib.
(b) Hylton v. Morgan, 6 Ves. 393.
(c) Aston v. Lord Exeter, id. 268.
(d) Anon. 1 Ch. Ca. 267.
(e) 4 Ves. 788.
suited, the court, upon petition, ordered the defendant to pay the costs of the nonsuit.

**Parties.** As the action can only be between the parties who are interested in the legal estate, the court, for the protection of those who are equitably interested, will make it part of the order that they shall be at liberty to attend the trial by counsel, &c. to make such defence as they may be advised.\(^{(d)}\)

In such cases, if an abatement in the suit occurs before the trial of the action, by the death of any of the defendants who are at liberty to attend the trial, the suit should be revived before the trial takes place. But it is otherwise where the abatement occurs by the death of a defendant who has no such liberty.\(^{(e)}\)

**Trial, and subsequent proceedings.** The action is tried in the usual manner. If a new trial is desired by either party, it must be moved for in the court in which the action is brought, and not in this court.\(^{(f)}\) And this rule applies even to cases in which the court has given special directions with regard to the trial: such as for the examination of the parties, &c.\(^{(g)}\)

If a new trial is not moved for, or if a new trial is had, after the verdict thereon, the cause should be set down for further directions, in the same manner as after the trial of an issue.\(^{(h)}\) And in the meantime no proceedings should be taken at law in consequence of the verdict, except moving for a new trial, without the sanction of the court.

The hearing upon further directions is not the time when any mistake committed at the trial below can be rectified. Therefore, where, upon further directions, the complainant applied to have the damages given by the verdict at law increased, on the suggestion that interest was omitted to be given, through a mistaken supposition that it would be given in equity, the court refused to interfere with the verdict.\(^{(i)}\)

If, in the course of an action directed by this court, the mode is misconceived, application should be made to this court, by petition, to enable it to do justice.\(^{(k)}\)

**Costs.** The consideration of the costs of an action at law is generally reserved, by the order directing or permitting the action, together with the other costs of the suit, till the cause comes on upon further

\(^{(d)}\) See the decree in Button v. Sidbotham, 3 Ves. jun., 591, n.  
\(^{(e)}\) Humphreys v. Hollis, Jacob, 73.  
\(^{(f)}\) Aethorp v. Comstock, 2 Paige, 482.  
\(^{(g)}\) Fowkes v. Chadd, 2 Dick. 576.  
\(^{(h)}\) Ex parte Kensington, Coop. Ch. Rep. 96.  
\(^{(i)}\) 2 Smith, 92. See ante. p. 460.  
\(^{(k)}\) Stevens v. Prasad, 2 Ves. jun. 519.  
\(^{(l)}\) Holworthy v. Mortlock, 1 Coa, 141.
directions; when the court will make such order respecting them as the justice of the case requires. In general, however, the costs of the action follow the verdict; as in the case of issues.\(^1\)

Where an action is directed to be brought in a court of law, and the plaintiff in the action resides abroad, the motion that he may give security for costs should be made in this court.\(^m\)

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**SECTION III**

**PROCEEDINGS IN THE MASTER'S OFFICE.**

*Subjects of reference.* The duties of masters are various, and difficult to be specified; for there is no question of law or equity or disputed fact or facts, which a master may not have occasion to decide upon, or respecting which he may not be called upon to report his opinion to the court. And it would be tedious to specify in this place every head of reference to a master; because they are almost as numerous as the matters subject to the jurisdiction of the court itself. It may be observed generally, however, that references to a master upon decrees or decertal orders are made for either of the following purposes: 1. To take accounts and make computations; 2. To make inquiries; 3. To perform some special ministerial acts directed by the court, such as the sale of property, the settlement of deeds, the appointment of new trustees, &c.

*Competency of master to act.* The revised statutes prohibit any judge, commissioner, or other judicial officer, from demanding or receiving any fees, &c. for giving his advice in any matter or thing pending before him, or which he has reason to believe will be brought before him for decision, or for drafting or preparing any papers or other proceedings relating to any such matter or thing; except where fees are allowed to him as such judge or officer, for such services.\(^n\)

This section has generally been considered as extending to masters of this court. And it was accordingly decided in the case of *McLaren v. Charrier*,\(^o\) that where a master has, in the character of a solicitor or counsellor, given advice, or prepared any pleadings, &c. in a cause

\(^1\) 2 Dan. 736. *Stevens v. Pead*, supra.

\(^m\) Desprez v. Mitchell, 5 Mad. 87.

\(^n\) 2 R. S. 275, § 6.

\(^o\) 5 Paige, 530.
or matter pending in or brought before the court or has made or opposed motions or petitions in such cause or matter, or where his law partner has been thus employed or consulted although not the solicitor or counsel on record, such master cannot afterwards act as a master, or do any judicial act requiring the exercise of judgment or discretion which is in any way connected with such cause or matter.

But the restrictions of the statute do not extend to a master who has acted merely as chancery agent of the solicitor in the cause, in the receipt and service of papers. Nor do they prevent a master who is not the solicitor or counsel on record, from taking an affidavit, or doing any other mere ministerial act.\(^{(p)}\)

The statute also declares a master who is solicitor or counsel in the cause, or who is connected in business with the solicitor or counsel therein, incompetent to act as master in such cause.\(^{(g)}\)

The office of master is local, so far only as to require the person holding it to reside in the county for which he was appointed;\(^{(r)}\) and provided he complies with this requisition, he may act as master in any county in the state.

By the act of March 4, 1840,\(^{(s)}\) it is provided that in cases of a reference pending before a master; or where he has advertised any property for sale, after his term of office has expired but before a successor has been duly qualified; or where his term of office expires during the pendency of the reference, or before the sale advertised by him is completed, he may proceed in such reference, or complete the sale, and pay over the proceeds thereof; provided the same is done within six months; unless restrained by an order of the chancellor from so doing. And the chancellor may, by order, authorize the master, after the expiration of the six months, to proceed and complete such business.

Previous to this act, the master could not proceed, in any case, after his term of office had expired, without special authority from the court.\(^{(t)}\)

To what master references are to be made.—1. References of course.] An order for a reference, when entered of course—unless it is a reference of exceptions—must be executed by a master residing in the same county with the solicitor who obtained the order, unless a different master is agreed upon by the parties. Or, if there is no master in the same

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\(^{(p)}\) McLaren v. Charrier, supra. See The People v. Spalding, 3 Paige, 326.

\(^{(g)}\) 1 R. S. 107, \(\S\) 13, (orig. \(\S\) 8.)

\(^{(r)}\) See 1 R. S. 101, \(\S\) 11, (orig. \(\S\) 9.)

\(^{(s)}\) Laws of 1840, p. 26, \(\S\) 1.

\(^{(t)}\) 1 R. S. 107, \(\S\) 14.
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counties legally competent, the order may be executed by a master in an adjoining county.\(^{(u)}\)

2. *Special order of reference.* If the reference is by a special order or decree of the court, it may be made to any particular master by name, or to any master in a particular county or place, in the discretion of the court. And if no particular master, or county, or place is specified, the order or decree must be executed by an injunction master or a taxing or exception master only; unless some other master is agreed upon by the parties.\(^{(v)}\)

Where the decree directing a reference is general, if the parties do not agree upon a master to execute the same, the party entitled to prosecute the decree must carry it into the office of an injunction master, or of a taxing or exception master; and it is irregular to carry it into the office of an ordinary master to be executed, except by consent.\(^{(w)}\)

3. References in New York city. An order of reference, when obtained of course by a solicitor residing in the city of New-York, unless it is a reference of exceptions, must specify the name of the master. If the parties or their solicitors do not agree upon a master to be designated in the order, the register, assistant register, or clerk entering the same, must select the name of one of the masters residing in that city, by lot, to be inserted therein. And if such master is absent from the city, or is interested in the object of the reference, or otherwise legally disqualified from executing the order, the name of another is to be selected in the same manner.\(^{(x)}\)

The act of March 4th, 1840, concerning masters in chancery,\(^{(y)}\) authorizes the assistant vice chancellor of the first circuit to execute the powers and duties of masters in chancery, in such cases as the chancellor may direct, in the same manner as other vice chancellors may execute such duties. In pursuance of this section, the chancellor made an order, on the 24th of March, 1840, by which the assistant vice chancellor of the first circuit is designated as the injunction master of that circuit. And he is authorized to execute every power and duty which the former injunction master, as such, was authorized to execute. In other cases also, where by the rules and practice of the court a reference to compute the amount due upon a mortgage, or any other reference, is to be executed, (except references in causes belonging to the fourth class of calendar cases,) or where any other duty is to be performed by

\(^{(u)}\) Rule 99.  
\(^{(v)}\) Idem.  
\(^{(w)}\) Quackenbush v. Leonard, in Chan. Feb'ry 21, 1843.  
\(^{(x)}\) Rule 99.  
\(^{(y)}\) Laws of 1840, p. 26, § 3.
an ordinary master, such reference may be executed, or such duty may be performed, by the said assistant vice chancellor, with his assent; although no special directions to that effect are contained in the order of reference, or otherwise.

4. References of exceptions. A reference of exceptions is to be executed by such vice chancellor as may be agreed upon by the parties, with his assent, or by an exception master who may be thus agreed upon, or by the exception master who is nearest or most convenient to the residence of the solicitor of the party excepting, or to the residence of the solicitor of the adverse party, and who is legally competent to execute the reference. But when the solicitors of both parties reside more than thirty miles from any exception master who is competent to act, the reference may be executed by any other master nearest or most convenient to the residence of either of such solicitors, or by the nearest exception master.(z)

5. Where there has been a previous reference. Where there has been one reference on exceptions to an answer, if a second or third answer is referred for insufficiency, on the old exceptions, it should be referred to the same master, if he is still in office and is legally competent to act in the case.(a)

Change of master. After a cause has been referred to a master, it cannot be withdrawn from that master without an order of the court. And such an order will not be made, unless on very special occasions, such as the incapacity of the master, from illness, to attend to the business; which, to justify such a removal, must be shown to be of a very urgent nature.(b) In one case,(c) it appears that Lord Eldon directed a cause to be removed, on the allegation of counsel, that he found the master in such a state, from his advanced age and infirmity, that it was not proper to go into the business before him. Sometimes, where a master has died and a successor has not been appointed, the court will make an order that the cause, if the matter of the reference requires immediate attention, should be transferred to another master.(d)

Fixing time and place of hearing:] Upon bringing into the master’s office a decree or order of reference, the master must assign a day and place for hearing the parties.(e)

It is customary to deliver to, and leave with the master, a certified copy of the decree or order of reference for his use. And this has re-

(a) Rule 99.
(b) 9 Dan. 791.
(c) Anon. 9 Ves. 341.
(d) 2 Dan. 792.
(e) Rule 100.
cently been held to be absolutely necessary. Thus, in the case of *Quackenbush v. Leonard,* (f) the chancellor decided that it is irregular for the master to issue a summons to proceed upon a reference, until the decree is actually entered and an authenticated copy thereof brought into his office. The possession of the decree or order of reference by the master is necessary, not only that he may know he has authority to execute the reference and to summon parties to appear before him, but also to enable him to exercise a proper discretion in fixing a reasonable time for the service of the summons upon the parties who are to attend before him, in reference to the nature of the matters to be inquired into, and the residence of such parties and their solicitors.(g)

The discretionary power committed to the master, in this respect by the 100th rule, must be exercised in such a manner as to do justice to both parties. And he should not permit the party who has the prosecution of the reference, to fix the time and place thereof, and the time of service of the summons, so as to suit his own convenience only.(h)

**Summons.**

*Nature and form.*] The parties who are interested in the subject matter of the reference, are brought before the master by means of a summons or warrant.

A summons is a paper entitled in the cause and signed by the master, appointing a time and place for the parties concerned to attend him on the matter of the reference. The summons itself is very general in its form; but it is usually followed by an underwriting, or memorandum expressing the object of the attendance.

A summons may be issued by the master to compel the attendance of parties for various purposes, during the progress of the reference, as well as to bring them before him primarily.

The 100th rule requires the master, before whom a reference is to be had, to give to the party bringing in the decree or order of reference, a summons for the adverse party to attend at the day and place appointed by him.

The summons for this purpose, is usually in this form:

*[Title of cause.]* “By virtue of an order of reference in this cause, dated the ... day of ..., I do appoint the ... day of ... at ... o'clock

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(f) In Chancery, Feb. 21, 1843.  
(g) Ibid.  
(h) Ibid.
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in the . . . . noon, at my office, in the village of . . . . , to consider of the matter referred. At which time and place all parties concerned are to attend.

Dated the . . . . day of ) A. B., Master in Chancery.

. . . ., 1843.

Under the old practice, the attendance of a party upon a summons was not required of him until the second, and, in some cases, not before a third summons had been served upon him.(i) But now, every summons for attendance before a master, is to be considered peremptory.(k)

Underwriting.] This summons should be properly underwritten, or the nature of the reference to be proceeded in, or the object of the attendance should be stated in the body of the summons.(l) It is not absolutely necessary that the summons should be underwritten; although that is the usual practice.(m) But the master, before he signs it, should see that it is properly underwritten, or that there is sufficient appearing in the body thereof to apprise the party upon whom it is served, of the nature of the proceedings which are to be had before the master.(n) Even upon a general summons, however, if the party was not misled, perhaps the court ought not to set aside the proceedings for irregularity.(o)

The form of the underwriting is as follows:

"To proceed upon the exceptions to the answer of the defendant J. S."

This, as its name implies, is written at the foot of the summons; and need not be signed by the master.

S rvice of summons.] The summons must be served on the adverse party or his solicitor such time previous to the day appointed for hearing as the master may deem reasonable, and shall direct—taking into consideration the nature of the matters to be examined, and the residence of the parties.(p)

But the time of service, unless otherwise ordered by the court, must not be less than two days, where the solicitor of the adverse party resides in the city or town where the hearing is to take place, and not less

(i) 1 Newl. Pr. 324.
(4) Rule 104. The 59th of the English Orders of 1898, is the same.
(l) Manhatan Co. v. Everton, 4 Paige, 278.
(m) Id. 278.
(n) Id. ib.
(o) Id. ib.
(p) Rule 100.
than four days where he resides elsewhere, not exceeding fifty miles from the place of hearing, nor less than six days if over fifty, and not exceeding 100 miles; and where he resides more than 100 miles from the place of hearing, not less than eight days.(g)

By the 122d rule, in all services of orders, notices, and proceedings, where a time is given or stated, the time, unless otherwise expressly provided, shall be taken to be one day inclusive and one day exclusive. But if the time expires on Sunday, the whole of the succeeding day shall be included.

In computing the time of service of a summons, the whole of the day on which the same was served is to be excluded.(r)

At the foot of the summons the master also directs within what time he same is to be served, as follows:

"I direct that the above summons, be served on the defendant, or his solicitor, two days previous to the day appointed therein.

A. B., Master in Chancery."

The chancellor has decided that a personal service of the summons upon the party himself, to attend before the master and to produce or execute papers, or to be examined, under a decree or order of the court, is not necessary for the purpose of bringing such party into contempt for disobeying the summons; a service upon his solicitor alone being sufficient.(s)

**Prosecution of the Decree or Order of Reference.**

As a general rule, the party obtaining an order of reference is entitled to the prosecution thereof, in the first instance. And where a decree is made on the hearing, directing a reference in which both parties have an interest, the complainant's solicitor is entitled to prosecute the reference; unless the court, in making the decree, thinks proper to commit the prosecution thereof to the other party.(t)

In order, however, to prevent delay in the prosecution of the decree or order of reference by the party whose duty it is to prosecute it, it is provided by the 101st rule that if such party does not procure and serve the summons within thirty days after the decree or order is entered,

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(g) Rule 109.
(r) See Vandenburgh v. Van Renesse, 6 Paige, 147.
(s) Merritt v. Annae, 7 Paige, 151.
any other party or person interested in the matter of the reference shall be at liberty to apply to the court, by motion or petition, to expedite the prosecution of the decree or order.

The chancellor has lately decided that, under this rule, if the complainant's solicitor neglects to carry the decree into the master's office, and to take out and serve a summons upon the defendants solicitor within the thirty days, the latter should apply to the court, upon notice to the adverse party, to have the prosecution of the reference committed to him; or for such other order as may be proper to expedite the proceedings.(w)

The 101st rule also provides, that if after the proceedings have been commenced by the service of a summons to attend before the master, the party entitled to prosecute such decree or order does not proceed with due diligence, the master shall be at liberty, upon the application of any other person interested, either as a party to the suit or as coming in to prove his debt or establish a claim under the decree or order to commit him the prosecution of the reference.(w)

It has been decided, that where a party wishes to take from the complainant's solicitor the prosecution of a decree or reference, under this clause of the rule, he should give to the solicitor of the complainant notice of the application to the master, and of the papers upon which it is founded. Or, he should deliver to the master the evidence of the complainant's neglect, and procure a summons for the adverse party, underwritten to show cause why the prosecution of the decree should not be taken from him and committed to the applicant. And that upon the return of this summons, the master should proceed to decide the question; after giving the party a reasonable time to answer the affidavits and other evidence upon which the application was founded, if copies thereof have not been served with the summons.(w)

It was also settled, in the case last referred to, that where the evidence of the want of due diligence exists in the master's office, the master's certificate or the fact is all that is required. But that the complainant is, in all cases, entitled to notice of what is intended to be used as evidence against him upon the application.

The master's decision under this rule is not conclusive; and if he refuses the application to commit the prosecution of the reference to an-

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(w) Quackenbush v. Leonard, supra.
(v) See Holley v. Glover, 9 Paige, 9. See also Quackenbush v. Leonard, supra.
other party, the court may, upon a proper application for that purpose, commit the prosecution to such party. (a)

And the court may commit the prosecution to another party, although the suit has abated, if the party who is entitled to prosecute the order of reference neglects to revive the suit. (y)

Regulating course of Proceedings.

At the time and place appointed in the summons for the hearing of the parties, the master must proceed to regulate, as far as may be, the manner of its execution; as for example, to state what parties are entitled to attend future proceedings, to direct the necessary advertisements, and to point out which of the several proceedings may properly be going on pari passu; and as to what particular matters interrogatories for the examination of the parties appear to be necessary; and whether the matters requiring evidence, shall be proved by affidavit or by examination of witnesses; and in the latter case, if necessary, to issue his certificate for a commission. And if the master shall think it expedient so to do, he may then, or upon any subsequent attendance, and from time to time, as circumstances may require, fix the time within or at which any proceedings before him shall be had. (x)

Upon the return of the first summons, the master should regulate the manner of executing the reference, and the several steps to be taken by the parties, so far as it can then be conveniently done; and at any subsequent attendance of the parties before him, he should give such further directions in relation to the proceedings as may become necessary, in the progress of the reference. (a)

It is to be observed, that if either party intends to make use of affidavits as evidence, upon the reference, he should, upon the return of the first summons, apply to the master for permission to do so. For it has been decided that if the master does not direct, at the time appointed for considering the decree, to admit affidavits as evidence, he cannot afterwards receive them, unless by consent. (b)

Master’s right to proceed de die in diem.] Formerly a master could not proceed with a reference de die in diem, without a special order of the court. (c) But by the 102d rule, (which corresponds with the 58th

(a) Wyatt v. Sadler, 5 Sim. 450.  
(b) Gibbs v. Payne, 4 Sim. 554.  
(c) Purcell v. McNamara, 11 Ves. 363.

(a) Story v. Brown, 4 Paige, 119.
of the English Orders of 1828,) the master is permitted to proceed _de die in diem_, or by adjournment from time to time, as he may think proper.

When he may proceed ex parte.] When some, or one, but not all of the parties, attend the master at the time and place appointed, whether the same is fixed by the master personally, or upon a summons, the master may proceed _ex parte_ if he thinks it expedient, considering the nature of the case. And if he has proceeded _ex parte_, such proceeding shall not be reviewed by him, unless, upon a special application to him by the party who was absent, the master shall be satisfied such party 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.(d)

**Parties entitled to attend the Master.**

It has already been mentioned that the master, upon the return of the first summons, may state what parties may attend subsequent proceedings before him. The wide discretion given to the master in this particular, by the rule, is doubtless to be exercised in subserviency to the well established principles of the court respecting parties in equity.

**General rule.** The general rule of the court appears to be that all parties beneficially interested, either in the estate, or in the fund in question, are entitled to attend before the master on all those proceedings which may affect their interests, or increase or diminish their proportion in the fund. Thus, all parties entitled to a distributive share of a residue are entitled to attend on those proceedings which tend to increase or diminish the residuary fund.(e) The only exception to this rule appears to be the case of a reference to the master of the title to an estate purchased under a decree; in which case the master will only allow the vendor’s solicitor to attend before him on the inquiry.(f) This rule, however, is subject to some limitations, if the fund distributable under a will is sufficient. Thus, general legatees only are allowed to attend on those proceedings which strictly affect or relate to their legacies, and not on the general proceedings. But if the fund is not sufficient to pay the legacies in full, they are entitled to attend all pro-

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(d) Rule 104.
(e) 9 Smith, 61.
(f) Id. 99.
ceedings which relate to, or may affect the fund out of which they are to be paid.(g)

*Persons entitled to real or personal estate.*] Parties entitled only to the personal estate are not entitled to attend those proceedings which affect the real estate alone. And the converse of the rule prevents those interested solely in the real estate, from interfering with proceedings relating exclusively to the personal estate; supposing always that these proceedings have no collateral bearing on each other. For if either fund may be affected by the deficiency of the other, each party may be indirectly interested in both, and is then entitled to attend.(h)

*Trustees.*] Trustees are not allowed (except in proceedings carried on by themselves) to attend before the master in cases where all the *cestui que trust* are before the court. But if there are any parties in being, or who may come into being, who may become interested, and whose interests are only represented by the trustees, and are not too remote, the trustees will be allowed to attend the proceedings affecting those interests.(i)

If a receiver of an infant's estate has been appointed, and that infant is tenant in tail in possession; and there is no direction in the will or settlement for the rents to accumulate, the trustees cannot attend on passing the receiver's account, although they may represent an interest not in esse; for in the event of the infant's dying under age, the accumulations will go to the next of kin.(k)

*Executors.*] An executor, as the legal representative of his testator, is entitled to attend on all proceedings relating to the charges of creditors seeking payment out of the personal estates. But after there has been a report of debts, if all the parties interested in the personal estate are before the court, he is only entitled to attend on those proceedings in which he is personally interested as an accounting party.(l)

*Persons having charges.*] Parties having charges on an estate, or on a fund, are, if the estate or fund is sufficient, entitled only to attend on the proceedings brought in by themselves. But if there is a deficient fund, each incumbrancer is entitled to attend on the charges of those incumbrancers who claim a priority over him, but not on those who do not charge to be of a prior date to his security.(m)

*Creditors.*] The same rule applies to creditors coming in to prove their debts under a decree.(n)

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(c) 2 Smith, 92.  
(h) Id. ib.  
(d) Id. ib.  
(i) Id. 93.  
(k) Hare v. Rose, 9 Ves. 558.  
(m) Id. ib.  
(n) Id. ib.
Quasi parties.] The rule that all persons interested in the result are entitled to attend before the master, applies not only to those who are parties to the restrictions, but to those who are quasi parties, by having come in under the decree and established a claim; who, subject to the general rules already mentioned, are entitled to notice of all proceedings which affect their interests.(o)

On bill taken pro confesso.] Where a defendant, after appearing in the cause, has suffered the bill to be taken pro confesso against him and a decree to be made, for want of an answer, as well as in cases where the decree has been made upon the answer of the party, it is necessary to serve him with warrants upon all proceedings in the master’s office by which his interests are in any way affected.(p) And in a case where a decree had been made against a defendant pro confesso, and upon the cause coming on before the court, for further directions, upon the master’s report, it appeared that the complainant had not served the defendant with notice of the proceedings under the decree, before the master, it was ordered, although no person appeared for the defendant, that the order confirming the report should be discharged and the report taken off the file, and that the account should be taken by the master de novo.(q)

A distinction, in this respect, exists between decrees pro confesso under the statute, for want of appearance, and decrees pro confesso, for want of an answer. In the former, there being no one whom the complainant can serve, all the proceedings must necessarily be ex parte.(r)

Right of parties to take copies.] Parties who have a right to attend upon the reference, are entitled to take copies of all proceedings in writing brought into the master’s office, which in any way affect their interest; and will be allowed the costs of such copies in taxation.(s) And this right extends not only to the copies of such matters brought in by the complainant, but to such as are brought in by co-defendants. In fact, the right is solely regulated by the influence of the proceeding upon the estate or fund, and interest of the party claiming to attend in the result of that proceeding.(t)

Mode of correcting master’s decision as to parties.] If the master refuses to allow a party to attend before him who thinks he has a right to do so, the proper method of obtaining the opinion of the court upon the

(o) 2 Dan. 804.
(p) King v. Bryant, 3 My. & Craig, 183. 2 Dan. 805.
(q) Parry v. Perryman, cited 2 Dan.
(r) Thompson v. Trotter, cited 3 My. & Craig, 588.
(s) 2 Smith, 91, 2.
(t) Id. 92.
question, is to present a petition praying that the party may be permitted to attend the master on the reference. (u)

A copy of this petition, with notice of presenting it should be served upon all the parties interested in the reference.

*Production of Documents.*

*When and how directed.*] Almost every decree ordering a reference to a master, contains a direction that the parties produce before him, upon oath, all deeds, books, papers and writings in their custody or power, relating to the matter of the reference, and that the parties be examined upon interrogatories as the master shall direct. (v) The words, “as the master shall direct,” apply to both branches of the direction, viz. to the production of deeds, &c. and to the examination on interrogatories. And they are considered important as vesting the master with a discretion upon the subject of production; so that where they were, by accident omitted in the decree, they were, on motion, ordered to be added. (w)

The 103d rule directs that where, 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 decree or order, 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 should not deem it necessary that they 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.

This rule is precisely similar to the 60th English order of 1828; under which it has been held that the master has a right to require, by his warrant, that all such documents as he shall think proper shall be left in his office. And that a refusal to leave them, in pursuance of such a warrant, will be considered a disobedience of the original order of the court directing their production, and may be treated accordingly. (z) So, where books and papers are brought into the master's office in compliance with an order of the court, or by a third person, as evidence in favor of either of the parties to the reference, it is a contempt of court to take such papers out of the custody of the master without his consent and contrary to his direction. (y)

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(u) 2 Dan. 303.
(v) Seaton on Decrees. 11.
(w) Punderson v. Dixon. 5 Mad. 121.
(z) Shirley v. Earl Ferrers, 1 Russ. & My. 98.
(y) Wells v. Glen. in Chancery, Jan'y 16th, 1839.
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It has been decided that although the language of the decree is general that the parties produce all books, papers, &c., the master is to exercise a discretion in determining what books and papers are necessary to be produced. (a) If he certifies, therefore, that the party has not produced them, the court will not look at the excuse of a proffer of inspection in another place. (a)

But this discretion of the master is limited by the rules which guide the court in compelling a discovery and production of documents in other cases. (b)

Summons for production.] The mode of proceeding to enforce the production and deposit of documents, is by taking out and serving a warrant in the usual form, underwritten to the following effect:—"At which time the defendant is to produce before me, and deposit in my office, all such deeds, books, and papers as are in his custody or power, relating to the matters referred to me." Should any particular documents have been mentioned in any answer or examination, or in any schedule or other proceeding, they may be referred to in the underwriting to the warrant. (c) But a party can only be ordered to bring in documents specified in any pleading, examination, or schedule, or other proceeding in cases where such pleading, &c. can be read as an admission against such party. And the master's certificate of a defendant's default in the production of papers, founded on an admission contained in the answer of another party, will be irregular. (d)

If the party is prepared to bring in such deeds, &c. as may be in his possession, custody, or power, a schedule of them should be made out, and an affidavit that the items contained in such schedule are the only deeds, &c. in the party's custody or power relating to the matters in question, having been sworn, it is deposited, together with the deeds, &c. in the master's office. And of this the master grants a certificate. (e) This certificate is confined merely to the fact of the deeds, &c. mentioned in the affidavit having been produced by the party; without stating whether the master is satisfied with the production. Nor is it usual to call upon the master to make such a certificate. (f)

Upon the books, &c. being produced before the master, those parts which do not relate to the subject of the litigation may be sealed up.

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(a) In the matter of the Parishes of Llantrisant, 1 Russ. & My. 25. Henm. Dunn, Mad. & Geld. 340.
(b) Bennett's Off. Mast. 78.
(c) 3 Dan. 807, n.
(d) Kemp v. Wade, 2 Keen, 687.
(e) Bennett's Off. Mast. 79.
(f) Cotton v. Harvey, 19 Ves. 301.

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And it is a contempt of the court for the adverse party to break open the parts thus sealed up.\(g\)

If there is reason to suppose that the party has not made a full disclosure, all parties interested in the production or delivery of the books, &c. may examine such party as to the fact whether the order of the court has been fully and fairly complied with.\(h\) In such cases the master should allow a reasonable time to inspect the books and papers delivered, and to prepare interrogatories for the examination of the party, if necessary.\(i\)

**Further time for producing.**] If the party is not prepared to bring in the documents at the time appointed, his solicitor should attend upon the return of the warrant, and apply to the master for further time to do so, according to the circumstances.\(k\) Or, if he wishes to take the master’s opinion, under the discretionary power given to him by the rule, as to whether all the documents, &c. should be produced, he should attend for that purpose upon the return of the summons; when the master will direct what documents are to be produced, and fix a time for bringing them in.\(l\)

If the party requires further time to enable him to produce documents before the master, and the latter will not extend it, the party may apply to the court, by motion;\(m\) and having obtained time, he may apply for and obtain a still further extension.\(n\) He must make such application, however, before he is in contempt, i.e. before the period limited by the order *nisi* for the production of the documents has expired; before which time he will not have incurred any contempt and will not be liable for the costs of the certificate of default, or of the order *nisi*.\(o\)

**Application to the court for inspection.**] If an application has been made to the master to order an inspection of the documents, under the 103d rule, which has been refused by him, the court may be applied to for an order dispensing with the production, upon giving an inspection of the documents.\(p\)

**Production how compelled.**] If, upon the return of the summons for the production of documents, the party neither produces them, nor attends the master to ask for further time, or to take his opinion upon the propriety of limiting the production, or if, having obtained an extension

\(g\) Dias v. Merle, 2 Paige, 494.

\(h\) Hallett v. Hallett, 2 Paige, 432.

\(i\) Gower v. Lady Baltinglass, Tur. & Russ. 195, n.

\(j\) Id. ib.

\(k\) Bennett’s Off. Mast. 79.

\(l\) 2 Dan. 809.

\(m\) Hand’s Pr. 132.

\(n\) Id. ib.

\(o\) 2 Dan. Pr. 810.

\(p\) Jones v. Powell, Seaton on Decrees, 491.
of time from the master, or court, or having attended the master upon the return of the summons and obtained a limited order for production, the party fails to produce the documents within the time limited, the party requiring the production may proceed to enforce it by application to the court.\(^{(q)}\)

By the English practice, upon the certificate of the master, of the default, a motion may be made to the court that the party may produce the documents within four days, or that process of contempt be issued against him.\(^{(r)}\)

But if the master does not certify the default of the examinant, the court will not order him to certify whether he was or was not satisfied with the production made by the examinant; it not being usual, when the master is satisfied that there has been a full production, to certify his satisfaction.\(^{(s)}\) The mode of correcting the master's judgment, in this particular, seems to be, for the person dissatisfied with the master's opinion, to move that he may be at liberty to exhibit fresh interrogatories for the examination of the party;\(^{(t)}\) for the master's certificate as to the production of documents cannot be excepted to,\(^{(u)}\)

Should the master refuse his certificate, on the ground that the party is not compellable, upon the construction of the decree, to make any production, it will be proper to move for an order on the party himself, that he make the required production.\(^{(v)}\)

In this state, if the party refuses to produce the documents, the proceeding to compel him to do so, must be under the general statute respecting contempts.\(^{(w)}\)

But it is to be observed, that such proceedings cannot be founded upon the master's certificate of the defendant's default, alone. The 3d section of that statute requires that the court shall be satisfied by due proof, by affidavit, of the facts charged, upon an application for an attachment against a party. Consequently, a master's certificate alone, would not be sufficient evidence of the default.

The proceedings to enforce the production of documents, are the same as in other cases of contempt; which proceedings will be described in a future chapter.

A contempt incurred by the non-production of documents, pursuant to a master's summons, under a decree or order, must be cleared in the same manner as other contempts, i. e. by producing the master's certifi-
cate of the party's having deposited the documents required, and mov-
ing to discharge the process upon payment of costs.(x)

Application for re-delivery of documents.] If the party depositing
documents in a master's office, should require the use of them for the
purpose of enabling him to put in his examination, he may obtain an or-
der, upon motion or petition, for the delivery of them to him for that
purpose.(y)

And when the purposes of their production are satisfied, an order may
be obtained for the re-delivery of such documents, either by motion or
petition.(z)

Examination of parties.

In what cases allowed, and manner of taking.] It is provided by the
105th rule, that the master shall be at liberty to examine any party or
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 examination or evidence be-
ing taken down at the time by the master, or by his clerk, in his pres-
ence, and preserved, in order that the same may be used by the court if
necessary.

The examination of parties under this rule, is in the discretion of the
master; and in the exercise of this discretion he may not only refuse to
examine a party, but having examined him, he may re-examine him to-
ties quoties if he thinks proper, without a special order of the court.(a)

If the master declines examining any party when required (which he
usually does by refusing to allow the interrogatories carried in for his
examination,) the proper way of taking the opinion of the court upon
the propriety of the master's decision, appears to be to wait until he has
made his report, and then excepting to it on the ground of his refusal
to examine the party.(b)

1. Upon interrogatories. If the master determines that the party
shall be examined upon interrogatories, instead of viva voce, the inter-
rogatories for that purpose are to be prepared by the solicitor or coun-
sel of the party conducting the reference, or asking for the exam-
ination.

Form of interrogatories. As the object of such interrogatories is

(a) 9 Dan. 813.
(b) Hand's Pr. 137.
(c) Id. 156, 8.
(d) See Coweside v. Cornish, 2 Ves. 970. 1 Dick, 149, S. C.
(e) Chennell v. Martin, 4 Sim. 340.
(f) 9 Dan. Pr. 816.
chiefly to sift the conscience of the party and to obtain admissions from him, they consequently partake more of the nature of the interrogating part of a bill than of interrogatories for the examination of witnesses; and are not subject to the same restrictions as to leading questions, &c. (c)

In a late case, (d) however, the vice chancellor appears to have thought that in a creditor’s suit, where the decree is made in the ordinary form, no special interrogatory for the examination of a defendant ought to be allowed, although a case for directing special inquiries is made on the record.

Interrogatories need not be signed by counsel. (e)

By whom carried in. Interrogatories may, it seems, be carried in by any party for the examination of another party. Thus, interrogatories may not only be carried in by the complainant for the examination of the defendant, and vice versa, but they may be carried in by one defendant for the examination of a co-defendant. (f) One executor, however, cannot examine his co-executor to prove that money which he had received, and which he alleges to have been paid over to his co-executor, had been properly applied by him; as, by such examination the co-executor would discharge himself also. In such cases the court prefers leaving it to the executor who has paid the money over to the other, to discharge himself by his oath, to allowing one party to examine the other. (g)

Summons to settle. The interrogatories, when prepared and copied, are carried into the master’s office; who thereupon issues a summons, underwritten “to settle the interrogatories left by the complainant for the examination of the defendant.” (h) A copy of the interrogatories should be served, with the summons, upon the party to be examined. (i)

Settling interrogatories. Upon the return of the summons to settle, the master, in the presence of the parties, peruses the interrogatories and settles them. After which they are engrossed and signed by him. (k)

Certificate of allowance. A certificate is then given by the master of

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(c) 2 Dan. Pr. 816.
(d) Moore v. Langford, 6 Sim. 392.
(e) Purcell v. McNamara, 17 Ves. 435.
(f) Simmons v. Gutteridge, 13 Ves. 269.
(g) Dines v. Scott, Tur. & Russ. 358.
(h) Bennett’s Off. Mast. 70.
(i) Hoff. Mast. 93.
(k) Bennett’s Mast. 70.
his allowance of the interrogatories, which must be filed in the office of the register or clerk.(f)

According to the latest decisions in England, the proper method of bringing before the court an objection to the interrogatories as settled by the master is to wait until the master has filed his certificate of allowance, and then to except to it; instead of presenting a petition or making a motion to the court to vary or suppress them.(m)

With respect to the form of the exceptions to the certificate, it is settled that if one general exception is taken to it, because the master ought not to have allowed all the interrogatories, the party excepting will succeed if he shows the master was wrong in allowing one. But if the exception is, "because the master ought not to have allowed any of them," then, if one is proper, the general exception fails as to all.(n)

 Exceptions to the master's certificate will lie as well on account of what he strikes out of the interrogatories, as of what he allows in them.(o)

But it seems that if the master disallows the interrogatories altogether it is not usual for him to certify such disallowance, but he proceeds to make his report without them.(p) In that case, there being no certificate of the master to which exceptions can be taken, the party must wait till the master has made his report, and then except to the report, on the ground of his having refused to examine the party.(g)

New interrogatories. It has been before stated that the master may examine a party toties quoties, if he thinks proper.(r) For this purpose the master may receive new interrogatories whenever he thinks it necessary. And this he may do even after a motion for the payment of money into court, upon an admission in the examination to former interrogatories.(s)

Fresh interrogatories may be received by the master, without an order of the court to warrant them.(t)

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(f) Bennet, 70.
(m) Chennell v. Martin, 4 Sim. 340.
(n) Moore v. Langford, 6 Sim. 323.
(s) See also Pearson v. Knapp, 1 My. & Keen, 319. And see Coatham v. West, 1 Beavan, 380.
(g) Chennell v. Martin, 4 Sim. 349.
(t) Id. ib. And see Ex parte Charter, 2 Cox. 168. But Simmons v. Gutteridge, 13 Ves. 262.
(s) Hatch v. ————, 19 Ves. 116.
Examination when to be brought in.] The master having settled the
interrogatories and signed his certificate, the party to be examined is
to prepare his examination forthwith, if required. The time allowed
for this purpose is entirely in the discretion of the master; but a month
is the time usually limited, unless under special circumstances. (u) If
there is any unnecessary delay, the master may issue his warrant under-
written, "At which time the defendant B. is to bring in his examination
to the interrogatories settled by the master." On the return of this war-
rant, the master, on hearing the parties, appoints a day by which the ex-
amination is to be brought in. (v) Sometimes the party's solicitor signs
the master's book, undertaking to bring it in by that time. (w)

If the party wishes to obtain further time for putting in his examina-
tion, he may obtain a month by application to the court, upon motion;
the order upon which is to be served on the adverse parties. (x) This
application is a matter of course, and does not require notice. (y)

Preparing examination.] If the party to be examined intends to put
in his examination, he should, upon the settlement of the interroga-
tories by the master, and filing his certificate thereof, if the certificate is
not excepted to, or if exceptions thereto are disallowed, prepare his ex-
amination without delay.

And for the purpose of enabling him to prepare his examination, he
may obtain an order for the re-delivery to him of any documents which
he has delivered into the master's office and which it is necessary he
should have in his possession. (x)

Form of examination.] An examination is entitled in the cause, and
is described in the heading, or caption, as "The answer and examina-
tion of the above named defendant [or complainant.] C. D., to interro-
gatories exhibited on behalf of the above named complainant [or defen-
dant.] and allowed by . . . . , one of the masters of this honorable court,
to whom this cause stands referred pursuant to a decree [or an order.]
made on the hearing thereof, bearing date the . . . . day of . . . ., 1843."

An examination is in the nature of an answer, and not of a deposi-
tion, and is governed by nearly the same rules as answers. (a) It does
not, however, commence with any protestation, but proceeds at once, to
answer the interrogatories seriatum, viz: "To the first interrogatory
this examinant saith," and there is no general traverse at the end:

(u) Bennett's Off. Mast. 79. (y) Hand's Pr. 128.
(o) Id. 73. (e) Hand, 137.
(w) Id. ib. (e) 2 Dan. 833.
(e) Id. ib.
An examination is generally, though not invariably, or necessarily, prepared by counsel. As it may be objected to for insufficiency or impertinence, however, and as it is the foundation upon which the other party will build a charge against the examinant, he should be careful how the same is framed.\(b\)

It need not be signed by counsel—there being no rule or order of the court requiring that it should be so, as in the case of a pleading.\(c\)

The examination must be engrossed and sworn to before the master to whom the cause is referred,\(d\) or, as it seems, before any other master, or a commissioner.\(e\)

In the case of Hull v. Bodily,\(f\) where the defendant, in his examination, stated that he had received no more than such a sum, to his remembrance, the examination was held to be sufficient.

Where a defendant is examined by the complainant in relation to the amount due him on account of certain property sold by the defendant on commission, it is not sufficient for the defendant to refer to his books of account produced before the master. But he must give the best answer he can from recollection and information, aided by a recurrence to the books and papers immediately within his control and possession, accompanied by such explanations responsive to the questions put, as are necessary to prevent improper conclusions being drawn from his answers.\(g\)

In stating his accounts, if the defendant has set forth in the schedule to his answer, all his receipts and payments down to the time of filing his answer, he must, in his examination, state only the subsequent receipts and payments, and carry on the account from the foot of his answer to the time of putting in his examination.\(h\)

Method of taking examination in certain cases.\] If the party to be examined resides out of this state, a commission may be issued to take his examination; or, it seems an application may be made to the court for an order that it be taken in the same manner as an answer under the 41st rule.\(i\)

If the examinant is not in a competent state of mind to put in his examination, the usual course is for the court to appoint some person to put in his examination for him.\(k\)

\(\) 2 Dan. 592. 2 Smith, 117.
\(\) 2 Smith, 117. Bonus v. Flack, 18
\(\) Bennett’s Off. Mast. 79.
\(\) 1 Hoff. Pr. 583.
\(\) 1 Vern. 470.
\(\) 1 Turner’s Pr. 584.
\(\) See 1 Hoff. Pr. 532.
But in the case of Piddock v. Brown, where the complainant had filed a bill to be relieved against a security which he was drawn in to execute by fraud and imposition, without any valuable consideration, and a decree was made for an account, and that all parties should be examined upon interrogatories; upon its being represented that the complainant was a weak man and easily prevailed upon to say or admit any thing that was not true, how much soever to his prejudice, the court directed that in case the defendant exhibited interrogatories against the complainant, the master should take care to examine the complainant in person, in order to see that no advantage should be taken of his weakness.

Exception to examination.] Exceptions for scandal or impertinence, will be reserved for consideration until we come to speak of scandal and impertinence generally, in proceedings in the master's office.

It is provided by the 106th rule, that if a party wishes to complain of any examination of a party before him, on the ground that it is insufficient, he may file exceptions thereto with the master. And without any order of reference, he may take out a summons for the master to examine the matter upon such exceptions.

A copy of the exceptions should be served upon the adverse party together with the summons. It is not necessary to file them in the register's office. In form, they are similar to exceptions to an answer.

Upon the return of the summons, the master proceeds to look into the examination and to decide as to its sufficiency.

In deciding on the sufficiency or insufficiency of an examination, the master must always take into consideration the relevancy or materiality of the statement or question referred to in the exception.

Master's certificate upon exceptions.] If the master considers the examination insufficient, he gives a certificate to that effect—particularizing the interrogatory or interrogatories, or part of an interrogatory, which he considers not sufficiently answered. And when he finds the examination insufficient, he should, in his certificate, fix a time within which a further examination is to be put in.

If the master considers the examination sufficient, he must also give a certificate to that effect. Which certificate should be filed.

And notice of its being filed must be given to the adverse party. If not excepted to within eight days, it becomes absolute of course.

(1) 3 P. Wms. 288.
(m) Rule 106.
(n) Bennett's Off. Mast. 76.
(o) Case v. Abel, 1 Paige, 630.
(p) See Chalk v. Thompson, 4 Sim. 350.
(q) Case v. Abel, 1 Paige, 630.

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Exceptions to master’s certificate. [ Which ever way the master certifies, the proper method of obtaining the opinion of the court upon his judgment is by excepting to his certificate. (r)

If the master certifies the examination sufficient, an exception in general terms “for that the master has certified the examination sufficient, whereas he ought to have reported it insufficient,” is regular. And it is not necessary to state in what respect the examination is insufficient. (s)

The court, in considering the sufficiency or insufficiency of an examination, upon exceptions to the master’s certificate, will look at it to see whether there is any substantial defect, and not with a critical eye, holding insufficient every examination that is not framed with the strict accuracy of special pleading. (t)

The proceedings upon a master’s certificate as to the sufficiency of an examination, are substantially the same as upon a report on exceptions to an answer for insufficiency. (u) But upon exceptions to a master’s certificate of the sufficiency or insufficiency of an examination, the parties are confined to the objections taken before the master. (v)

Further examination.] When the master’s certificate of the insufficiency of an examination has become absolute, by the neglect to except to the same within eight days, the complainant, upon filing an affidavit of that fact, may enter an order of course that the examinant put in his further examination, and pay the costs of the exceptions and the proceedings thereon within such time as the master may prescribe, (or may have prescribed in his report,) or that an attachment issue against him. (w) If the examinant fails to put in his further examination within the time limited, the complainant, upon filing the master’s certificate showing the default, may have an order of course for an attachment. (x)

If the master certifies that the examination is insufficient, the complainant may add new interrogatories, to be approved of by the master, if he shall deem such further interrogatories necessary. And the order will then be that he put in his further examination to the exceptions and the new interrogatories together, within such time as the master shall direct. (y) But if the examination is sufficient, the complainant will not be permitted to re-examine the examinant to the same point.

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(r) Chalk v. Thompson, supra. See also Purcell v. McNamara, 12 Ves. 166. Chennell v. Martin, 4 Sim. 340.
(s) Purcell v. McNamara, supra.
(t) Per Sir W. Grant, M. R. in Purcell v. McNamara, 12 Ves. 166.
(u) Case v. Abeel, 1 Paige, 630.
(v) Rule 106.
(w) Case v. Abeel, supra.
(x) Id. ib.
(y) Id. ib. But see Anon. 3 Atk. 511.
without special permission of the court, on cause shown, and upon notice of the application.\(^{(x)}\)

On three examinations being reported insufficient, the court will order the party to be committed, as he will be if no examination at all is put in. But when he puts in his examination, he is entitled to be discharged out of custody, notwithstanding it is objected to as insufficient; for he is not to be kept there until the sufficiency of the examination is ascertained.\(^{(a)}\)

*Examination, how compelled.* Hitherto we have proceeded upon the supposition that the examinant, on the return of the summons for that purpose, proceeded to put in his examination. If, however, the party neglects to attend the usual summonses, or if, having attended them, the examination is not put in within the time limited by the master, or by the order of the court, a certificate of such default must be obtained, and an application be made to the court, by motion, for an order that the party may put in his examination within a specified time, or that an attachment issue.\(^{(b)}\)

The motion for an attachment, however, cannot be made upon the master's certificate alone; but an affidavit of every material fact must also be produced to the court.\(^{(c)}\)

If process of contempt is resorted to, to compel an examination, the proceedings will be similar to those in other cases of contempts.

With respect to *quasi* parties, however, such as creditors or other persons coming in to claim before the master, under the 105th rule of the court, the method of enforcing their obedience to the order of the court is different from the course of proceeding against a party to the record. By the English practice, in such cases, the court does not proceed by the ordinary process of contempt, but by immediate committal to the custody of the warden of the fleet. And there the process stops; as a *quasi* party cannot be proceeded against to a sequestration—that remedy being confined to parties to the suit.\(^{(d)}\)

*Supplemental examination.* The court will allow a supplemental examination to be put in, for the purpose of correcting a mistake. Thus, where, in an examination put in by two co-executors, it was stated that their receipts had been joint; but it appeared by affidavit that such statement was made through mistake and inadvertence, and that one of

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\(^{(x)}\) *Case v. Abeel, 1 Paige, 630.*

\(^{(a)}\) *1 Newl. 591. Bonus v. Flack, 18 Ves. 287.*

\(^{(b)}\) *2 Dan. 880.*

\(^{(c)}\) *See 9 R. S. 533, § 3.*

\(^{(d)}\) *2 Dan. 830.*
the executors had in fact received nothing, liberty was given to him to put in a supplemental examination to correct the mistake.\(e\)

\(Who\ may\ read\ examination.\) Copies of the examination of a party, upon interrogatories, like copies of all other proceedings before a master, may be taken by all parties to the cause who are interested in them.\(f\) And any party to the suit may avail himself of an admission in such examination, to charge the examinant.\(g\) An examination, however, like an answer, can only be made use of as evidence against the party putting it in, and cannot be read as evidence in favor of, or against, any other party.\(h\)

A party examining another is not bound to make use of the examination before the master. But if he declines doing so, the master may read it himself.\(i\) In fact the examination is taken for the information of the master; and he is at liberty to look at it, whether read by the party examining or not; for the purpose of ascertaining the view taken of the case by the examinant, and of seeing how far his statement is contradicted or borne out by the other evidence before him. Upon the same principle the court will allow an examination to be read, upon the hearing of exceptions to the master's report; although it has not been made use of by the party exhibiting the interrogatories before the master.\(k\)

2. \(Viva\ voce\ examination.\) The 105th rule, as already observed, authorizes the master to examine the parties \(viva\ voce\), as well as upon written interrogatories, whenever he shall think it expedient. The chancellor has decided that a \(viva\ voce\) examination does not alter the rights of the parties; and that, therefore, there can be no cross-examination by the party's own counsel. His answers are testimony, when responsive, and he may accompany them with any explanation fairly responsive to the interrogatory.\(l\)

\(Costs\ of\ examination.\) If the master certifies the examination of a party to be insufficient, the party examining may move, upon the master's certificate, for the costs of, and occasioned by, the insufficiency of the examination.\(m\) And where a summons has been taken out to consider the sufficiency of an examination, and the master is of opinion that it is sufficient, he should so certify; in order that the examinant may apply for his costs.\(n\)

\(e\) Hewes v. Hewes, 4 Sim. 1.
\(g\) 2 Smith, 132.
\(h\) Id. ib. 2 Dan. 828. See also Dine v. Scott, 1 Tor. & Russ. 356.
\(i\) Gilbert v. Wetherell, 2 Sim. & Stau. 259.
\(j\) Id. ib.
\(l\) Benson v. Le Roy, 1 Paige, 132.
\(m\) Hubbard v. Hewlett, 2 Mad. 469.
\(n\) 2 Smith, 190.
Evidence before the master.

General rules.] The general rules of evidence which govern the courts of common law, as well as this court, regulate also the proceedings in the master's office. (o) Where the court directs an inquiry into a fact before a master, it is in the nature of a new issue joined; and what would be evidence in any other case will be evidence before the master. (p)

Before entering upon the evidence, however, the party conducting the reference should bring into the master's office a statement of his case, technically called a

State of facts.] This state of facts is the ground work of the master's report, and the basis upon which the evidence is founded. (q) It details the circumstances which the party intends to prove. This is necessary, in order to enable the opposite party to cross-examine the witnesses, and to know what evidence it will be necessary for him to adduce to support his own case. And it seems that the examination of witnesses, taken before such a state of facts has been brought in, would be irregular. (r)

In general, the state of facts should be brought in by the party supporting the affirmative. But this is a rule of convenience; and a state of facts may be brought in tendering a negative issue; upon which it will be competent to the party bringing it in, to examine witnesses in support of his negative statement. (s) It seems, however, that, in such a case, the other party can only cross-examine the witnesses. He cannot regularly adduce evidence in support of the affirmative proposition without bringing in a counter state of facts. (t) The objection that he has not done so, however, may be waived by the conduct of the other party. (u)

Kinds of evidence. There are six sorts of evidence to which a master may have recourse, to establish any fact before him: 1. Admissions; 2. Proceedings in the cause; 3. Affidavits; 4. Depositions in another cause; 5. Examinations of parties; 6 Examination of witnesses.

1. Admissions.] To save the expense and delay which often occurs

in establishing a fact by strict evidence, the master may allow parties who are competent for that purpose, to admit any given facts to be true. But only competent persons can by their solicitors make admissions. Therefore a solicitor acting for an infant or married woman, cannot, in strictness, make admissions for them to their disadvantage. (v) But it is said the admission of one co-partner, of joint contracts during a partnership may be taken and made use of as evidence against his co-partner, a defendant, to charge him therewith. And where a master reports any thing to be admitted by parties before him, and that report is excepted to, the fact admitted must be taken to be prima facie true, and requires at least an affidavit to falsify it. (w)

These admissions are signed by the solicitor for the party making them. And by an old order of the court in England, they are required to be so signed. And it is ordered that any memorandum of admission before the master, subscribed by the parties making it, is to be conclusive on the party on whose behalf the same is subscribed; so that the other side shall not be put to any proof of the matter. (x)

2. Proceedings in the cause.] The parties are at liberty to make use of all the proceedings which are of record in the cause, whether pleadings, or in the nature of evidence—such as the depositions of witnesses, or affidavits which have been made use of or filed on former occasions. (y)

Depositions taken in the cause, in order to be admissible as evidence, must be evidence as between the parties to the particular proceedings. Thus, though the depositions of the complainant's witnesses may be used against him by any of the defendants, and though the complainant may use the depositions of the defendant's witnesses against that defendant, yet the complainant cannot use them against a co-defendant, whose witnesses they are not. Nor can co-defendants, who have not joined in one examination, use the depositions of the witnesses of other defendants, either as between themselves or as against the complainant. (x)

The pleadings may be used before the master for the same purposes that they can be used for before the court, viz. as admissions by the party on whose behalf they are filed. They cannot be made use of as evidence for or against any other party. (a)

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(a) Bennett’s Mast. 15.
(w) Id. ib. 3 P. Wms. 149, n.
(x) Id. 16.
(y) 2 Dan. 830.
(z) 9 Smith, 197. (Amer. ed. of 1843, by Graham, 139.)
(a) Id. ib. 2 Dan. 830. Hoare v. Johnstone, 9 Keen, 553. Kemp v. Wade, id. 690.
The right to use the proceedings in the cause as evidence, is subject to the same rules and restrictions as govern the admission of similar evidence before the court. But if the proceeding has really the character of evidence upon the matter directed by the decree to be inquired into, it may be received as evidence before the master, whether it was made use of at the hearing or not. (b)

3. Affidavits.] It is a general rule, that affidavits are not admissible as evidence before a master, unless the order of reference contains a direction to that effect. Accordingly, in strict practice, whenever a reference is directed by a decree or decretal order, under which it becomes necessary to establish facts by the testimony of living witnesses, such testimony must be obtained by examination of the witnesses; and a master cannot proceed upon an inquiry, before him in any adversary proceeding, upon affidavit, unless by consent of all parties; as the effect of proceeding upon affidavit is to deprive the other side of the power of cross-examination. (c) For this reason it is that the master cannot, strictly speaking, receive affidavits under a decree in which infants are concerned. (d) Yet, if the infant's solicitor concurs in the use of affidavits, it seems the infant will be bound. (e)

It does not appear, however, that a positive assent to reading affidavits is required. The mere circumstance that a party has allowed affidavits to be used without objecting to them, will be sufficient to prevent his afterwards raising an objection to the master's report on the ground that the witnesses ought to have been examined upon interrogatories. (f)

Upon a reference to a master to examine the defendant on interrogatories relative to an alleged contempt, and to take such other proof concerning the contempt as shall be produced before him by either party, the master is not authorized to receive the ex parte affidavits of witnesses, unless he is specially directed by the order of reference to receive such affidavits as proof. And, as a general rule the court will not allow ex parte affidavits to be used on such a reference, but will compel the parties to produce and examine the witness before the master, so that they may be cross-examined by the adverse party. (g)

It is true, the 102d rule authorizes the master to determine whether the matters requiring evidence shall be proved by affidavit or by the ex-

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(b) Smith v. Alhus, supra.
(c) Rowley v. Adams, 1 My. & Keen, 545. And see Willan v. Willan, 19 Ves. 590, 3.
(d) Tillotson v. Hargrave, 3 Mad. 594.
(e) Id. ib.
(f) Morgan v. Lewis, cited 1 Newl. 333.
(g) Cumming v. Waggoner, 7 Paige, 803.
amination of witnesses. But that rule only extends to cases in which affidavits are admissible, or not objected to by the parties, and was not intended to authorize the master to receive affidavits in cases where they were not previously admissible.\(^{(h)}\)

And it has been held that if the master does not decide, at the time appointed for considering the decree, to admit affidavits as evidence, he cannot afterwards receive them, except by consent.\(^{(i)}\)

But the rule excluding affidavits upon inquiries before the master, except when read by consent, extends only to decrees or decretal orders. Where the reference is made by motion or petition, in that stage of the cause in which the court proceeds upon affidavit, the master may, it is said, do the same.\(^{(k)}\) And so, whenever the matters referred to a master, originate in a summary application, as in petitions of lunacy or bankruptcy, the master proceeds by affidavit. And the same rule applies to references under petitions authorized by particular statutes, where no suits are depending; as for example, in the case of a reference upon a petition under a statute, which provided a summary remedy by petition in cases of abuses of trusts created for charitable purposes.\(^{(l)}\)

And upon summary applications relative to infants, or the sale of their real estate, affidavits may be received by the master.

So, where references are made to a master upon interlocutory motions in the cause, for preliminary inquiries, such as inquiries into titles, or into the amount of principal and interest due upon a mortgage, the master has the same power to examine witnesses as under a decree.\(^{(m)}\) And he is bound in such cases, by the 102d rule, to settle what course he will adopt.\(^{(n)}\)

The answer of one defendant cannot be used before a master, as an affidavit, against another defendant.\(^{(o)}\)

In the case of Eoott v. Parks,\(^{(p)}\) on consent, liberty was given to the master to receive evidence by affidavits instead of depositions taken on interrogatories under a commission; with a power, if a cross-examination should seem necessary, to resort to interrogatories, notwithstanding the publication of the evidence by affidavit.

Affidavits are also sometimes required by the master as a matter of assurance or precaution. Thus, a creditor coming in to claim before a

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\(^{(a)}\) See 2 Smith, 129.  
\(^{(i)}\) Gibba v. Payne, 4 Sim. 554.  
\(^{(k)}\) Sonnet v. Powel, Seaton on Decrees, 22.  
\(^{(l)}\) Ex parte Greenhouse, 1 Swans. 60.  
\(^{(m)}\) 2 Dan. Ch. Pr. 834, 5.  
\(^{(n)}\) See Woodroffe v. Tiliterton, 8 Sim. 238.  
\(^{(o)}\) Hoare v. Johnstone, 2 Keen, 553.  
\(^{(p)}\) 1 Molluy, 465.
master under a decree for the benefit of creditors is required to support his claim by an affidavit that the amount claimed is justly due, and that neither he nor any other person for his use, has received the amount claimed, or any part thereof, or any security or satisfaction therefor.\(^{(q)}\) In Fladong v. Winter,\(^{(r)}\) Lord Eldon said the reason of this practice was, that a party ought not to be allowed to come in and claim a debt without giving that assurance that it is due which arises from his affidavit; but that if his claim is contested, no attention is given to the affidavit.

So, if sureties are necessary, either on the appointment of a receiver or otherwise, or if the master is to certify that a deed has been executed, or other matters of a similar nature, an affidavit is proper. So, also, if attendances are disputed in the bill of costs of a solicitor, he sometimes proves them by his own affidavit.\(^{(s)}\)

4. **Depositions in another cause.** Depositions of witnesses in another cause, between the same parties, may be read before a master without an order to warrant it;\(^{(t)}\) though such an order is necessary to authorize the reading of such depositions before the court at the hearing.\(^{(u)}\) In Lubiere v. Genou,\(^{(v)}\) however, the court made an order for the reading of the depositions in a cross cause, on an account before the master directed in the original cause. But it is to be observed, that in that case a difficulty was suggested, arising from the circumstance that the cross bill had been dismissed.

5. **Examination of parties.** We have already seen in what cases parties in the cause may be examined upon interrogatories before the master.\(^{(w)}\) The answers to these interrogatories (styled the examination,) may be read before the master as evidence against the party by whom they are put in; but cannot be used in his favor, nor against another party.

6. **Examination of witnesses.** 1st who may be examined. All persons who are competent to be examined as witnesses in a cause before the hearing, are competent to give evidence before the master, upon inquiries directed by the decree; subject, however, to this qualification, that as to those witnesses who were examined in the cause, there must be an application to the court for leave to examine them, before their

\(^{(q)}\) Morris v. Mowatt, 4 Paige, 149.  
\(^{(r)}\) 19 Ves. 196.  
\(^{(s)}\) 2 Smith, 138.  
\(^{(t)}\) Anon. 3 Atk. 594.  
\(^{(u)}\) Hand, 114.  
\(^{(v)}\) 3 Ves. 579.  
\(^{(w)}\) See ante, p. 484.
examination can be taken. But as to persons who were not witnesses, they may be examined without such leave. And this, although the party tendering the interrogatories had not gone into any proof at the former hearing of the cause; and although the same matter was in issue, and might have been, though it was not, proved before the decree.

**Parties.** The admissibility of a party as a witness, depends upon the same rules and principles as the admissibility of parties to be witnesses before hearing.

To authorize the examination of a party who has not been previously examined before a master under a decree, the same order must be obtained as is necessary to authorize the examination of a party before the hearing. This order may be obtained of course, after decree, saving just exceptions.

But where a party has been previously examined as a witness, a special application is necessary, as in other cases. And the master will be directed to settle the interrogatories for the purpose of precluding the re-examination of the party to matters as to which he has been before examined.

2. **Upon what points witnesses may be examined; and herein as to a re-examination.** The rule requiring a previous order of the court for the examination of a witness before the master, is founded upon the same reason which requires a special order of the court to authorize the re-examination of a witness before the hearing. viz. the danger of perjury which would be incurred by a witness depositing a second time to the same fact, after having seen where the cause pinches, and how his testimony bore upon it, and the anxiety which the court therefore feels to prevent improper tampering with witnesses, and inducing them to retract or contradict, or explain away what they have stated in their former examination, upon a second.

For the same reason, also, the court in granting an order for the re-examination before the master of a witness already examined, will put the party under the terms of having the interrogatories approved and settled by the master; who, in settling them, will see that the witness is

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(a) 2 Dan. 835.
(b) Smith v. Althus, 11 Ves. 564. Purcell v. McNamara, 17 id. 434.
(c) Hough v. Williams, 3 Bro. C. C. 190.
(d) See ante, p. 255 et seq.
(e) Van v. Corpe, 3 My. & Kae, 378. Paris v. Hughes, 1 Keen, 1.
(f) Paris v. Hughes, supra. And see Purcell v. McNamara, 17 Ves. 434.
(g) Vaughan v. Lloyd, 1 Cox, 312.
(h) 2 Dan. 835.
not examined a second time to the same facts. (g) The order does not restrain the master from examining the witness as to points upon which he has been before examined; but he is nevertheless bound, in settling the interrogatories, to take care that they do not extend to matter embraced in the witness' previous examination; unless he is expressly directed to examine as to such matters. (h)

But the general rule has exceptions. Thus, a witness who has been examined at or before the hearing, merely to prove exhibits, may be examined to prove other deeds, papers, &c., before the master, without a special order. (i) So where the first examination has failed, accidentally, and without fraud, by reason of the witness' having been then incompetent, the court will order his re-examination before the master upon the same point—the interrogatories to be settled by the master. (k) And in Rowe v. Adams, (l) the master of the rolls allowed a witness who had been examined in the cause, and had afterwards made an affidavit in support of a state of facts before the master, to be examined viva voce before the master upon the subject of his affidavit. But in the case last referred to, the vice chancellor states the rule to be well settled that a witness who has been examined in a cause cannot be examined again before a master, without an order. This rule is also recognized in Metford v. Peters. (m) And in Smith v. Graham, (n) Lord Eldon actually suppressed the deposition of a witness before the master, who had been examined previous to the decree, with costs; because such deposition had been taken without order. (o)

Although the same witnesses who have been examined before the decree cannot be re-examined by the same party in the master's office, yet other witnesses may be examined before the master to the same points to which witnesses have been already examined before the decree. (p) The reason of the practice is, that the object in directing an inquiry being to obtain further evidence, further examination is essential. In Willan v. Willan, (q) Lord Eldon said, "At the hearing of the cause, the court sees all the evidence; and if, instead of deciding upon the inference, it directs inquiries, the decree directing those inquiries is, in truth, the leave of the court given for further examination upon the very point."

The rule prohibiting the re-examination, before a master, without an

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(g) Vaughan v. Lloyd, supra.
(h) Sandford v. ——, 1 Ves. jun. 398.
(j) Sandford v. ——, supra. See also Callow v. Minea, 9 Vern. 472.
(k) 1 My. & Keen, 543.
(m) 8 Sim. 630.
(n) 2 Swanst. 364.
(o) See also Bennett's Mast. 14.
(p) Smith v. Althus, 11 Ves. 564.
(q) 19 Ves. 590.
order, of a witness who has been previously examined in the cause, does not prevent a witness who has been examined by one party before the hearing from being examined by another party after the hearing. He is not, in such a case, called for the purpose of mending his evidence given before the hearing; and if he does mend it, he is adverse to the party who calls him. (r) So in Pearson v. Rowland, (s) under a commission before decree, the defendant brought up his witnesses to prove a will, but when the witnesses attended, not having the will, he declined to examine them; but they were examined by the complainant. After the decree, the defendant examined the witnesses without an order, and the court refused to suppress the depositions; holding the examination to be regular.

If a witness has been re-examined before the master without an order for the purpose, the opposite party should apply, by a special motion on notice, to suppress the depositions with costs. (t)

3. Procuring attendance or testimony of witnesses.—Subpoena.] The attendance of witnesses before a master, upon a reference, is enforced, when necessary, by process of subpoena, similar in form to that used before examiners. The 76th rule provides, that process of subpoena to compel the attendance of witnesses before a master, shall issue of course; the time and place of attendance being specified therein; and that such witnesses may be punished for contempt, if they fail to attend and submit to an examination.

This rule also declares that no witness shall be compelled to appear before an examiner or commissioner, more than forty miles from his place of residence, unless by special order of the court. The terms of this rule would not preclude the issuing of a subpoena to compel the attendance of a witness before a master, from any part of the state.

But in the case of Lawrence v. Dakin (u) the chancellor said that he would not encourage the practice of compelling witnesses to attend before a master at a great distance from their places of residence, when they might as well be examined under a commission issued upon the certificate of the master. And that in accordance with the spirit of the 75th rule, the court ought not to compel the attendance of witnesses before a master, at a greater distance than forty miles; unless there is something in the nature of the examination which requires the personal attendance of the witness before the master.

It was also held in that case, that in ordinary cases, where the witness-

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(r) Metford v. Peters, 8 Sim. 630.
(e) 2 Swans. 266, n.
(f) 2 Smith, 134.
(s) In Chancery, April 6, 1841.
es reside at a greater distance than forty miles from the master's office, the proper course is to obtain a commission for their examination before a master or examiner, in their neighborhood.

By the English practice, when a subpoena is served upon a witness, a memorandum in writing, of the time and place of attendance, signed by the master, is left with the witness at the time the writ is shewn to him. (v)

But here, the usual course is to serve the witness with a copy of the subpoena.

**Commission.** The 102d rule authorizes the master, upon the return of the first summons, to issue his certificate for a commission to examine witnesses, if he shall think it necessary.

A commission to take the testimony of a witness, to be used before a master, can only be obtained upon the master's certificate that it is necessary. (w) And if it is issued without such certificate, it will be irregular. (x)

It seems that an exception does not lie to this certificate, but that if it is improperly granted, a motion may be made to discharge the order for the commission. (y)

The order for a commission is entered of course, upon the master's certificate. And the commission is sued out and executed in the same manner as commissions for the examination of witnesses in other cases. (z) It is returnable to the office of the register, &c. issuing it, and not to the master; and copies of the depositions are furnished to the solicitors for the respective parties. (a)

**Witnesses, how examined before master.** The examination of witnesses before a master is effected either by exhibiting interrogatories, or by _viva voce_ questions addressed to the witness himself in the master's presence. The former is the old practice. The 106th rule authorizes the master to examine any witness, either upon written interrogatories, or _viva voce_, or in both modes, as the nature of the case may appear to him to require; the examination or evidence being taken down at the time by the master, or by his clerk in his presence, and preserved, in order that the same may be used by the court if necessary.

1. **Examination upon interrogatories.** If the master thinks it expe-
dient to examine a witness upon interrogatories, the party calling the witness must prepare the interrogatories and have them engrossed and signed by counsel. It has been stated, that upon the examination of parties before a master, the interrogatories are settled by him, and need not be signed by counsel.\(b\) But the interrogatories for the examination of witnesses must be signed by counsel, though they need not be settled by the master—unless where they are directed to be settled by the order of the court—as in the case of witnesses who have been before examined in the cause.\(c\)

If they are directed to be settled by the master, he must sign his allowance of them in the same manner as he signs interrogatories for the examination of parties.\(d\)

The rule confers a discretion upon the master as to allowing interrogatories to be used. But if he refuses to receive them in a proper case, it seems the proper course is to apply to the court, by motion, that he may be directed to receive them.\(e\) In Willan v. Willan,\(f\) however, the court ordered an application of that sort to stand over, at the same time directing that a petition should be presented stating the particular circumstances and the dates.

2. Examination \textit{viva voce}. Witnesses are usually examined before masters orally. It is only in special cases and upon rare occasions that the other method is resorted to.

Where the witness is examined \textit{viva voce}, the questions are not put from written interrogatories previously prepared, but are such as suggest themselves at the time. The witness is first examined by the party calling him, and then cross-examined by the opposite party, if he pleases. The master may also put such questions as he thinks proper. The answers, but not the questions, are taken down by the master.\(g\)

The master is not at liberty to examine a witness \textit{viva voce}, after he has issued his summons on preparing his report; and in a case where he had done so, the depositions thus taken were, on motion ordered to be suppressed.\(h\)

\textbf{Oath to witness.} Whether the witness is examined upon interrogatories, or \textit{viva voce}, previous to entering upon the examination, the master is to administer to him an oath in the following form: "you do solemnly swear, [or, if a quaker, "you do solemnly, sincerely, and truly declare and affirm"] that you will true answers make to such interrog-

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\(c\) Hough v. Williams, id. 151. 2
\(d\) 2 Smith, 113. See ante, p. 495.
\(e\) Cooper, 311. 19 Ves. 590, S. C.
\(f\) See 3 Smith, 139.
\(g\) Trotter v. Trotter, 5 Sim. 383.
atoories [or questions,] as shall be put to you touching the matters in reference in a certain cause depending in the court of chancery of the state of New York, wherein A. B. is complainant, and C. D. is defendant, and therein will speak the truth, the whole truth, and nothing but the truth, so help you God.” If the witness swears by the uplifted hand, the oath commences, “You swear by the ever-living God, that,” &c. &c.

Caption of depositions. Before commencing the examination, the master prepares a caption or heading to the depositions, in this form:

[Title of cause.]

“Depositions of witnesses produced, sworn, and examined in a certain cause depending and at issue in the court of chancery of the state of New York, wherein A. B. is complainant, and C. D. defendant, before J. S., one of the masters of this court, on the ... day of ..., at the town of ..., in the county of ..., taken under a decree, [or order,] of the said court, bearing date the ... day of ..., on the part of the complainant, [or defendant.]

Signature of witness. When the examination is completed, it is to be signed by the witness, upon the right hand side.

Jurat. The master is then to add his jurat, in the same form as that used by examiners.

Demurrer by witness. If an improper interrogatory or question, or one which he deems such, is put to the witness, he may object to answering it by demurrer, in the same manner and for the same reasons as upon examinations before examiners.\\n
Depositions, where kept. We have seen that depositions taken before examiners are to be filed in the register’s or clerk’s office;[l] but depositions of witnesses examined before masters are usually kept by them;m who will furnish copies to the parties when requested.

State of Facts.

Nature of.] A state of facts is a statement in writing made by a party prosecuting or resisting any inquiry before a master, of the facts and circumstances upon which he relies, either in support of his own cause or in contradiction or defeasance of that of his adversary. It is,

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(k) See ante, p. 289.
(l) Ante, p. 289.
(m) Parkinson v. Ingram, 3 Ves. 607.
in effect, the *pleading* of the party before the master; and is governed by nearly the same rules and principles as pleadings in the court. Yet not being signed, nor in general prepared by counsel, those rules are not also so strictly observed.\(^{(n)}\)

*In what cases proper.* We have already seen that an examination of witnesses should be preceded by a state of facts.\(^{(o)}\) But this is not the only proceeding in which a state of facts is proper. It is the general form by which the prosecution or defence of every reference to a master is commenced.\(^{(p)}\) Thus, it is used upon references under decrees for an account \(^{(q)}\) So, if the decree directs an inquiry respecting the maintenance of infants, and what is proper to be allowed for that purpose, and to consider of a proper person to act as guardian, a state of facts should be laid before the master, pointing out the situation, age, and fortune of the infant, and the name of some fit person to act as his guardian, what sum of money has been expended, and in what manner, and to and from what period the maintenance is claimed.\(^{(r)}\) And if the master is directed to inquire what real estate the testator died seised of, a state of facts to answer these inquiries must be prepared and laid before the master.\(^{(s)}\) So, in the case of the marriage of an infant ward of the court, proposals for a settlement by the other party are to be submitted to the master.\(^{(t)}\)

*Form of.* A state of facts is entitled in the cause, and contains a detail of the facts and circumstances intended to be relied upon by the party. When the party carrying in the state of facts makes any claim upon the fund in court, it is usual to conclude the statement with the particulars of the claim, in the manner of a prayer for relief in the bill, as follows: “And the said A. B. therefore claims,” \&c. In such a case the proceeding is called “a state of facts and claim.”

When the object of the party is to charge another with the receipt of money, \&c. the state of facts concludes with a charge in the following form: “And the said A. B. therefore charges,” \&c. In this case the proceeding is called “a state of facts and charge.”\(^{(u)}\) A charge is not always preceded by a state of facts. If the matter appears from any admissions in any account, or examination, or proceeding in the mas-

\(^{(n)}\) 2 Dan. 850. \(^{(o)}\) Ante, p. 493. \(^{(p)}\) 2 Dan. 850. \(^{(q)}\) 1 Newl. 584. \(^{(r)}\) Id. 596. \(^{(s)}\) Id. 597. \(^{(t)}\) Id. ib. \(^{(u)}\) 2 Dan. 850.
ter's office, and requires no other proof in support of it, it is usual to make a "charge" only. (v)

Swearing to. The 107th rule directs that every state of facts brought in before a master shall be verified by oath as true, either positively or upon information and belief.

Amending. A state of facts may be amended, at any time, before the examination of witnesses has commenced. (w)

Summons upon leaving. When a state of facts is prepared, it is carried into the master's office, and a warrant, or summons, "on leaving" must be taken out and served upon the other parties. If they have a counter state of facts to leave, they must proceed in the same manner. (x)

Scandal and impertinence in. If a state of facts contains scandalous or impertinent matter, the party may have it expunged in the manner pointed out in the 106th rule. (y)

Further state of facts. A further state of facts may be carried in, if necessary; upon leaving which, a warrant "on leaving" should be taken and served, as when an original state of facts is left. (z)

Counter state of facts. Where another party affirms the facts to be different from what is alleged by the party carrying in the state of facts, the party so affirming must bring in a counter state of facts. A counter state of facts is not necessary, however, where one party merely negatives the facts as alleged by the other. (a)

Taking accounts.

The 107th rule directs all parties accounting before a master to 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 may direct.

Notwithstanding this rule is positive, in directing the parties to bring in their accounts in the form of debtor and creditor, it is not always necessary to call upon them to do so. If sufficient appears from the admissions of the party to be charged, either in his answer or in the schedules to it, or in any proceeding in the cause, to enable the account

(v) 2 Dan. 850.
(w) Id. 851.
(x) Id. ib.
(y) See also Erakine v. Garthborne, 16 Ves. 114.
(z) 2 Dan. 851.
(e) Id. 870.

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against him to be properly made out, the party conducting the proceeding may immediately bring in his charge, without calling for any account under the 107th rule. (b)

Account. Where a party is required to bring in his account before the master, under the above rule, he must bring in his whole account and for the whole period for which he is accountable. It must also be verified by the usual affidavit that the account, including both debts and credits, is correct; and that the party accounting does not know of any error or omission therein, to the prejudice of any of the other parties. (c)

The following is the form of an account, as given in Browne's Chancery Practice, in the case of an executor directed to account for the personal estate and effects of the testator received by him:

[Title of cause.] The account of the defendant T. L. of the personal estate and effects of J. H. deceased, the testator in the pleadings in this cause named, come to the hands of, and received by, the said defendant as executor of the said testator, and of the disbursements and payments made by the said executor thereout.

<table>
<thead>
<tr>
<th>Dr.</th>
<th>Cr.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1843.</td>
<td>1843.</td>
</tr>
<tr>
<td>Cash found in the</td>
<td>Cash paid to Mr.</td>
</tr>
<tr>
<td>testator's dwelling</td>
<td>M., the undertaker;</td>
</tr>
<tr>
<td>house at the time</td>
<td>being the amount of his</td>
</tr>
<tr>
<td>of his death, $150</td>
<td>bill furnished for</td>
</tr>
<tr>
<td>&amp;c. &amp;c.</td>
<td>funeral expenses, $44 00</td>
</tr>
<tr>
<td></td>
<td>&amp;c. &amp;c.</td>
</tr>
</tbody>
</table>

The account on the debit side, stating the property with which the executor is chargeable, and on the credit side, claiming credit for whatever sums the executor has a right to set off in discharge thereof. The accounts, in regard to the rents and profits of the real estate, (if any,) are to be framed in a similar manner, in a separate account. (d)

On the debit side of this account must be set forth every sum come to the hands of the defendant, and the persons from whom, and times when such sums were severally received; and on the other side, every sum paid, laid out, and expended by the defendant, and the persons to whom, purposes for which, and times when, such respective sum or sums were expended. And he must produce before the master proper receipts

(3) See 9 Dan. 878. (d) Browne's Ch. Pr. 817.
(c) Story v. Brown, 4 Paige, 112.
and vouchers for all the payments exceeding twenty dollars; so that
the complainant, on taking copies thereof out of the master's office, may
be able to investigate and ascertain the accuracy of such accounts.(e)

If the party does not bring in his account within a time to be fixed
by the master, upon the return of the first summons, he may be proceed-
ed against in the same way as a party not putting in his examina-
tion.(f)

The account being drawn up and sworn to is left in the master's
office.

Examin ing party upon interrogatories. If either of the parties is not
satisfied with the account so brought in, he may exhibit interrogatories
to be settled by the master, for the examination of the accounting party
touching such points wherein the accounts are deemed to be insufficient
or inaccurate. These interrogatories are prepared by the solicitor, and
having been fairly copied, are left at the master's office to be settled by
him. Having been settled, the master signs a certificate of having al-
lowed them.(g)

Exceptions do not lie to a master's certificate of having settled in-
terrogatories.(h)

A reasonable time is allowed for the accounting party to put in his
examination to these interrogatories; which, in ordinary cases is, in
fact, little more than a further schedule or list of his receipts and dis-
bursements.(i)

It has been decided that a party examined in this manner in relation
to his accounts, cannot give testimony in his own favor, any further
than his answers are fairly responsive to the interrogatories of the ad-
verse party.(k)

For the method of compelling an examination to interrogatories set-
tled by the master, see ante, p. 491.

Surcharge. The disclosures obtained by means of the examination of
the accounting party upon interrogatories, may be made the ground of a
surcharge; which is the statement of items omitted in the debit side of
the account rendered by him.(l)

Mr. Bennett observes, that the practice of rendering an account in
the form of debtor and creditor may be very convenient where the suit
is an amicable one; where the estate to be administered is small or

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(e) Id. 818. 9 R. S. 92, § 55.
(f) See ante, p. 491.
(g) Bennett's Mast. 82. Browne's
Ch. Pr. 818.
(h) Browne, 810.
(i) Bennett, 83.
(k) Benson v. Le Roy, 1 Paige, 129.
(l) 1 Hoff. Ch. Pr. 595, 597.
simple in its nature; or where there is no reason to think but that the account so rendered is perfectly fair and correct; but as the litigation of one item may render the examination by interrogatories and the consequent charge against the executor, and his discharge thereto, necessary; and as it may be very doubtful whether, in many cases, it may not be a saving of time and expense to proceed by charge and discharge in the first instance, he proceeds to point out the practice upon the latter mode of proceeding.\(m\)

That practice seems to be briefly as follows:

Charge. If, on comparing the examination with the interrogatories, it is found to be sufficient, the charge against the accounting party is preferred. This is usually taken from the schedule to the defendant's answer, and the examination put in by him to the interrogatories embracing his further receipts. It is in truth a copy of the debit side of his account. Having been copied, it is brought into the master's office, and the usual summonses on leaving, and to proceed, having been obtained, the solicitor in support of his charge reads from the answer the different sums and particulars thereof as stated by the defendant; and then the items, &c., from the subsequent examination. This being done, the charge is considered as established, and marked by the master, "allowed."\(n\)

If the charge includes sums not admitted to have been received by the accounting party, in his account, they must be substantiated either by evidence, or by admissions in the examination of such party, or in his answer or the schedules thereto.\(o\)

If the affidavit contains an account of the receipts of both the real and personal property, two separate charges should be brought in; the one including the receipt of the personal, and the other, of the real estate.\(p\)

If the defendant has set forth in a schedule to his answer to the bill, or by his examination in answer to interrogatories, his receipts and payments, a charge may be carried in against him for such receipts, and the charge may be proved by such answer or examination.\(q\)

Further charge. A party conducting an account before a master is not limited to one charge. If, after his charge is allowed, he discovers other items with which the accounting party is chargeable, he may either amend his charge or carry in a further charge; and this he may do as often as necessary.\(r\) Thus, where it appears that the party has re-

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\(m\) Bennett, 83.
\(n\) Bennett, 84.
\(o\) 9 Smith, 105. 2 Dan. Pr. 879.
\(p\) 9 Smith, 106.
\(q\) Id. Ib.
\(r\) Napier v. Staples, 1 Molloy, 296, 231.
ceived something subsequent to his last examination, it is usual to carry in a further charge.(a)

Swearing to charge. The 107th rule requires a charge to be sworn to, either positively or upon information and belief.

Discharge. When the charge has been allowed, the accounting party must carry in his discharge.

When to be brought in. If the accounting party does not bring in his discharge within a reasonable time after the charge has been allowed, the party conducting the account must take out and serve upon him a summons, underwritten, "at which time the said A. B. is to bring in his discharge," &c. This summons is peremptory, and if it is not obeyed, or the accounting party does not appear and crave further time, the master may proceed, if otherwise in a situation to do so, to make a report, without the discharge; charging the defendant with the whole amount of the charge as allowed.(t)

Form of. The discharge contains a statement of payments and disbursements by the accounting party, or other matters by which he claims to discharge himself from the debt attempted to be made out against him, on the other side of the account.

A discharge, as well as any other matter before the master, may be the subject of an examination for impertinence, if it contain impertinent matter.(u)

Swearing to. A discharge must be verified by oath as true, in the same manner as a charge.(v)

Proceeding upon. The accounting party is bound to use all due diligence in obtaining and attending summonses to vouch his discharge; otherwise the party interested in the account, may take out summonses to compel his attendance for that purpose.(w) And if, upon the return of the summonses, the party does not attend and proceed, or account, to the master's satisfaction, for his not proceeding, the master will disallow the discharge, or such part of it as the party has omitted to support.(x) The master, however, will, if he sees the party anxious, and that he does his best to support his discharge, afford him every indulgence.(y)

How substantiated. Upon the return of the summonses to bring in the discharge, all the parties interested in the account are entitled to attend the master. At this time the discharge, being brought in, is first examined, with the affidavit, answer, or examination, and the accounting par-

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(a) 2 Dan. 800. (w) Bennett's Mast. 85.
(t) 2 Smith, 110. (x) 2 Dan. 881.
(u) Price v. Shaw, 2 Cox, 184. (y) 2 Smith, 110.
(v) Rule 107.
ty then proceeds to vouch his payments by producing receipts, &c. for the same. He must not only be prepared to vouch his payments, but must establish the propriety of their having been made, if the same is disputed.\(^{(x)}\)

The vouchers, when produced, are marked by the master with the initials of his name, as a token of his inspection or allowance of them.

The ordinary course of proceeding upon discharges, in the master’s office, is by affidavit; and though, in strictness, in cases where infants are concerned, all evidence should be upon examination by interrogatories, yet, if the solicitor for the infant acquiesces in the reception of affidavits, the infant will be bound by it.\(^{(a)}\) In *Young v. Reynolds*,\(^{(b)}\) an order appears to have been made to restrain the defendant, who was an executor, from issuing a commission to examine witnesses in aid of his account. And he was ordered to verify, by affidavit, the several vouchers on which he sought credit.

By the English practice, although, strictly speaking, every payment insisted upon in the discharge, where it amounts to forty shillings and upwards, must be established by a proper voucher, sums under forty shillings may be substantiated by the oath of the accounting party.\(^{(c)}\) But it is not sufficient for the party to swear that he believes he paid the money. He must peremptorily swear to the fact.\(^{(d)}\) And he must mention to whom the sums were paid, and for what, and at what time.\(^{(e)}\)

But the whole of the items established by the oath of the accounting party must not exceed $500.\(^{(f)}\) And the defendant cannot, by way of charge, charge another person in this way.\(^{(g)}\)

It is intimated by Chancellor Kent, in *Remsen v. Remsen*, above referred to, that twenty dollars would be considered in this state a reasonable substitute for the forty shillings sterling limited by the English practice.

The revised statutes contain a provision that on the settlement of an account of an executor or administrator, he may be allowed any item of expenditure not exceeding twenty dollars, for which no voucher is produced, if such item be supported by his own oath positively to the fact of payment, specifying when and to whom such payment was made.

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But such allowances shall not, in the whole, exceed five hundred dollars, for payments in behalf of any one estate.(i)

Although it is the general rule that every item in a discharge, of forty shillings and upwards, must be supported by a proper voucher, there are cases in which a party has been allowed to discharge himself, by other means than the ordinary vouchers. Thus, where the evidence in support of a charge consists of entries in books kept by the party himself, the party has a right to make use of entries in the same books, in support of his discharge.(k) And so, if a paper is produced by one of the parties, from which he takes his charge, the same paper may be read by the other party by way of discharge.(l) Thus, where an account furnished by a party before any suit instituted, is produced to charge him with the items on the debit side, he is entitled to resort to the credit side in support of his discharge.(m)

So where a man, by his answer or examination, admits that he has received certain sums, which sums he had paid, &c.—the discharge following in the same sentence—that will be sufficient to discharge him.(n) It is necessary, in order to entitle a party charged by his own answer, to read such answer in support of his discharge, that the discharge should be by the same sentence with the charge. If it occurs in another part of the answer, it cannot be made use of.(o) And it has been held that a party charging himself in a schedule to his answer, cannot discharge himself by another schedule to the same answer, stating his disbursements.(p) Neither can he discharge himself in this way by affidavit.(q) And it must appear that the receipt and payment constituting the charge and discharge, formed but one transaction and occurred on the same day—as where the answer stated that "upon a particular day the defendant received a sum of money and paid it over"—but if he says that upon a particular day he received a sum of money, and upon a subsequent day he paid it over, that cannot be used in his discharge, for it is a different transaction.(r)

So a party charged with one sum of money cannot discharge himself by distinct independent items on the other side of the account.(s)

Where the account is of long standing, the court will sometimes per-

(i) 2 R. S. 92, § 55.
(n) Carter v. Lord Colrain, Barnardist. 126.
(o) Boardman v. Jackson, 2 B. & B. 182.
(p) Ridgeway v. Darwin, 7 Ves. 404.
(r) Robinson v. Scotney, 19 Ves. 562.
(s) Boardman v. Jackson, supra.
(t) Thompson v. Lambe, 7 Ves. 587.
(u) Ridgeway v. Darwin, supra.
(v) Robinson v. Scotney, supra.
mit the accounting party to discharge himself, upon oath, of all such matters as he cannot prove by vouchers, by reason of their loss.\(^{(f)}\)

But although, in some instances, the court has declared upon the hearing of the cause, that in the circumstances under which the bill has been filed, it would apply a different rule of proof from that which is ordinarily applied, it is only when such declaration forms part of the order of the court directing the account, or upon an order made under special circumstances, that the master will be authorized to allow a party to discharge himself by his own oath, from the sums proved to have come to his hands.\(^{(u)}\)

The necessity for producing the proper vouchers in support of the discharge, is not removed by the circumstance of the defendant’s answer, in which the items are sworn to, not having been replied to; although, in other cases, an answer which has not been replied to, is to be taken as true. The master must, nevertheless, require the vouchers to be produced.\(^{(v)}\)

There are many cases in which the court decreeing an account, directs it to be taken with the admission of certain documents or testimony not having the character of legal evidence.\(^{(w)}\) But it is not for the master to decide as to the propriety of departing from the ordinary course of proceeding. He cannot do so without the order of the court; and such an order will not always be made until the difficulty of proceeding in the ordinary mode has become apparent, upon an attempt to pursue it in the master’s office.\(^{(x)}\)

The court will not allow any thing to be placed to account under the name of general expenses, but the party must name the particular items.\(^{(y)}\)

Should any item occur which cannot, at the moment, be satisfactorily explained, or the voucher for it produced, it is marked as a queried item, for further inquiry. And should there be any such item remaining when the others are disposed of, a summons is obtained by the complainant’s solicitor and served, underwritten, “to proceed on the queried items in the defendant’s discharge,” on the attendance upon which, such explanation as may be given, and the evidence adduced in support of the queried item, is discussed and read.\(^{(z)}\) If the defendant does not

\(^{(f)}\) Peyton v. Green, 1 Cha. Rep. 146.
\(^{(w)}\) Dines v. Scott, 1 Tur. & Russ. 268.
\(^{(y)}\) Anon. 1 Eq. Ca. Abr. 11.
\(^{(z)}\) Davenport v. Davenport, 1 Sim. 515.
\(^{(}z\) Bennett’s Mast. 83.
attend and support the queried items, or crave further time, the whole of such items may be disallowed by the master; or he may direct a further warrant to be taken out to give the party an opportunity of setting himself right before he proceeds to disallow the payment. (a)

The charge and discharge, when completed, form schedules to the master's report, and are the source from whence he ascertains the balance. (b)

*Just allowances.* Decrees directing accounts to be taken by a master, usually contain a declaration that "the master is to make unto the parties all just allowances:" (c) or such allowances as shall be just. Under this direction, the master is authorized to allow the parties such disbursements as may appear to have been fairly and properly made by them. It is a settled rule, that whatever a trustee or personal representative has expended in the proper execution of his trust, may be allowed him in passing his accounts. Thus, where the decree, in a suit by residuary legatees, directed an account to be taken of the personal estate of a testator, and of his debts and funeral expenses; and the personal estate was ordered to be applied in payment of the debts and funeral expenses in a course of administration, and the master allowed payments in discharge of legacies, it was held that the payment of legacies in such an account, was the subject of a just allowance, as the complainant could be entitled to nothing until the legacies were paid. (d)

So where a trustee, in the fair execution of his trust, has expended money by reasonably and properly taking opinions and procuring directions necessary to the due execution of his trust, he is entitled not only to his costs, but to his charges and expenses, under the head of just allowances. (e) So also is the next friend of an infant; for, as the infant himself cannot incur charges and expenses, if they cannot be claimed as just allowances, and the next friend is to be at the whole expense of the infant, beyond his costs, persons will deliberate before they accept the office. (f)

The expenses of a sale may also be allowed, under the head of just allowances. (g)

But an executor or trustee will not be allowed for loss of time, but

(e) 2 Smith, 110. (e) Fears v. Young, 10 Ves. 184.
(b) Id. 111. (f) Id. ib.
(c) Seaton on Decrees, 42. (g) Crump v. Baker, 18 Ves. 285.
(d) Nightingale v. Lawson, 1 Cox, See also Graham v. Graham, 1 Ves. 289.
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only for his expenses. (h) And an agent named executor, is not entitled to charge a commission on business done subsequently to the testator's death. (i) The same rule has been extended to solicitors and attorneys, who, in the character of executors and trustees, are not allowed any professional charge or remuneration for the loss of time or other emoluments, but only such charges and expenses actually paid by them out of pocket, as the master may find to have been properly incurred and paid. (k)

But an executor or trustee who requires the assistance of a solicitor, in the execution of his trust, will be allowed the amount of what he has properly paid to such solicitor, in respect to his bill of costs. He will not, however, be allowed, without question, whatever sum he thinks proper to pay to his solicitor. The master will hand the solicitor's bill over to the proper officer to be taxed and moderated. (l)

Trustees, also, will be allowed sums paid to such accountants, agents, or receivers as the due execution of their office rendered it necessary for them to employ. (m)

Where a claim for a specific allowance has been made by the answer, but not noticed in the decree, the master will not be justified in making such an allowance, under the head of just allowances. (n)

Allowing interest.] On a reference to take or state an account, the master shall be at liberty to allow interest as shall be just and equitable, without any special directions for that purpose; unless a contrary direction is contained in the order of reference. (o)

Making rests. In taking an account, the master does not, in general, strike any balance until the whole charge and discharge have been gone through; and he is not at liberty to make rests in the account, unless directed so to do by the decree. (p) It frequently happens, however, that upon further directions he is ordered to make yearly or half yearly, or other rests; the object of which direction is to enable the court to see what balances he has, from time to time, retained in his hands; in order that it may judge whether he ought to be charged with interest on his balances, or not. (q) Where such a direction occurs in a decree,

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therefore, the course for the master to pursue is to strike a balance at each rest which the decree requires him to make, by deducting the amount of the discharge from the amount of the charge up to that period.(r)

Computing interest.

The decree frequently contains a direction to the master to compute interest upon debts, legacies, &c. In ordinary suits for the administration of assets, the direction is that the master shall compute interest on such of the testator’s, (or intestate’s,) debts as carry interest, after the rate the same respectively carry interest; and upon his legacies, from the time and after the rate directed by the testator’s will; and where no time of payment is directed, from the end of one year after the testator’s death.(s)

The 134th rule directs that if a bill to foreclose a mortgage be taken as confessed, or the right of the complainant, as stated in the bill, is admitted by the answer, he may have an order of course referring it to a master to compute the amount due to the complainant, and to such of the defendants as are prior incumbrancers of the mortgaged premises.

We have already seen in what cases the master is to allow interest upon taking accounts.(t)

With respect to a debt due on a bond, the rule is to calculate interest up to the amount of the penalty of the bond; (u) beyond which the master cannot go; (v) unless the creditor claims upon two securities for the same sum, one of which is a bond with a penalty, and the other a mortgage. In such a case the master may calculate interest beyond the penalty of the bond.(w)

As to debts upon simple contract, and other debts which do not carry interest upon the face of them, equity, in giving interest, follows the law; and the court will allow interest to be computed in the administration of assets, upon all debts on which interest is given by courts of law.(x)

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(r) 2 Dan. 891. (s) Id. ib.
(v) Tew v. Earl of Winterton, 3 Bro. 239. (w) Buddam v. Ryley, 1 Bro. C. C.
C. C. 499. Knight v. Maclean, id. 496. 239. Parker v. Hutchinson, 3 Ves. 125.
(x) Lowndes v. Collens, 17 id. 29.
The balance due upon a stated account between the parties will carry interest.\(^{(y)}\)

As a general rule, a charge of debts on real estate does not entitle simple contract creditors to interest.\(^{(x)}\)

In calculating interest under a decree, the master usually calculates it up to the date of his report. But it generally forms part of the decree upon further directions, that the master shall compute subsequent interest on the debts mentioned in his report on which he has computed interest.\(^{(a)}\)

The court never directs interest to be computed on debts not previously carrying interest.\(^{(b)}\) And in computing subsequent interest, although it was formerly held that interest, when computed by the master, became principal and would carry interest, the rule now is not to compute interest upon interest reported to be due, even in the case of a mortgage; though the practice formerly was to consider the interest as principal from the date of the master's report;\(^{(c)}\) the ground of which practice was that the party came for the favor of the court; he was ordered to pay a given sum on a certain day, and if he did not, he was put under the terms of paying what would indemnify the other party completely.\(^{(d)}\)

When the master is ordered to compute interest with rests, the object of the court is to charge the party with compound interest. The proper course is to add the interest to the principal, at the time of the rest, and to compute interest upon the aggregate sum.\(^{(e)}\)

**Inquiries.**

Inquiries by the master are directed either to persons or to facts; though sometimes they are directed to matters of law. But it is, in general, in those cases only where the law comes in as a matter of fact, as in the case of an inquiry into the law of a foreign country, that the master is ever directed to inquire into the law; it not being the habit of the court to refer abstract questions of law to the opinion of the mas-

\(^{(y)}\) Barwell v. Parker, 2 Ves. 363.

\(^{(z)}\) Id. ib. Earl of Bath v. Earl of Bradford, 2 Ves. 588.

\(^{(a)}\) Seaton on Decrees, 58.

\(^{(b)}\) Creuze v. Hunter, 9 Ves. jun. 165.

\(^{(c)}\) Turner v. Turner, 1 Jac. & W. 47.

\(^{(d)}\) Parkyns v. Boynton, 1 Bro. C. C. 574. In foreclosure suits the master is always directed, in the decree for sale, to pay the complainant out of the proceeds the amount reported due, with interest thereon from the date of the report. See form of decree, Rales (ed. 1839.) p. 158.

\(^{(e)}\) Raphael v. Boehm, 11 Ves. 97, 103.
ers. Sometimes, however, questions of law are so mixed up with the fact to be ascertained that it is impossible to decide upon the one without giving an opinion as to the others. In such cases the master is bound to give his opinion upon the law as well as upon the matter of fact referred to him, as, for instance, in the case of a reference to a master to inquire whether a good title can be made to land, &c.\(f\)

**As to heirs, next of kin, and persons of a class.** The most usual cases in which inquiries as to persons are directed to be made, are those in which it is necessary to ascertain the heir at law or next of kin of a deceased person. The same sort of inquiry is also frequently directed for the purpose of ascertaining the individuals forming a particular class, such as grand-children, or cousins of a person deceased, or the persons entitled to a share of prize-money.\(g\)

A similar inquiry is also necessary where the master is directed to take an account of the debts due by a particular individual; such account involving, necessarily, an inquiry who the creditors are, as well as into the amount of their claims.

Almost every decree, directing inquiries of this nature, contains a direction that the master should cause an advertisement to be published for the heirs at law, next of kin, or creditors to come in and make out their kindred, or prove their debts, by a day to be appointed; in default of which they are to be excluded from the benefit of the decree.\(h\)

This advertisement is drawn up and signed by the master, and published in such papers as may be directed by the decree or by the master,\(i\) and it is usual to have a copy of it inserted in one or more of the newspapers published near the place where the testator resided.\(k\)

Although the time limited by this peremptory advertisement shall have expired, yet no objection can be offered to the reception of a charge or claim, by the master, if it is left before the summons, on preparing his report, is issued.\(l\) After that time, although such charge or claim cannot be received by the master, the court will let in creditors, or next of kin, at any time while there is a fund in court;\(m\) and they have even been let in after a deficient fund has been apportioned, upon payment of costs of the application, and re-apportionment.\(n\)

The newspapers in which these advertisements have appeared, should

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\(f\) 2 Dan. 855.
\(g\) Id. ib. Good v. Blowitt, 19 Ves. 366.
\(h\) Seaton on Decrees, 51, 72.
\(i\) Bennett's Mast. 49.
\(j\) Id. 50.
\(m\) Lashley v. Hogg, 11 Ves. 602.
\(n\) Angell v. Haddon, 1 Mad. Rep. 599.
be preserved by the solicitor, to produce and leave with the master, should he require it.

When a decree directs inquiries as to next of kin, creditors, &c., with directions that the master shall fix a day, &c., after which all persons will be excluded from the benefit of the decree, it is not usual for the master, in his report, to notice any creditors except those who come in under the decree. He merely states the claims which have been proved; taking no notice of the possible claims of others who, whether entitled or not, did not come in. But parties not coming in are not precluded from filing a new bill against those who have partaken of the distribution, to compel them to refund. They are only precluded from taking the benefit of the decree under which the distribution has been made. Such new bill, however, must be filed against all who have partaken in the distribution, in order that they may contribute in proportion to what they have received.

But although a party making a distribution under a decree will be protected in what he has done, and the court will compel parties claiming a share in the distribution by a new suit, to admit the demand, ascertained under its authority in the old suit, to be a just demand, to the extent allowed by the court in the administration of such assets, such parties will not be bound by any account of the assets taken under a decree made in a suit instituted by a single creditor, not on behalf of himself and others.

This rule, however, is confined to cases in which the first suit was instituted by a single creditor, for the payment of his own demand alone, and is not applicable to cases in which the original decree was made in a suit instituted by a creditor, on behalf of himself and others, for a general administration of assets.

Persons having notice of the former suit, cannot file a new bill.

A creditor, or other person desirous of coming in before the master to prove his debt or establish his claim, after a report has been made, must present a petition stating the reason of his not having come in within the time limited by the advertisement, and praying to be at liberty now, to establish his claim. This petition must be supported by the affidavit of the claimant.

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(o) Good v. Blewitt, 19 Ves. 336. (p) Id. ib.
But see David v. Frowd, 1 My. & Kean, 200. (r) Mist. Pl. 135, 139.
(p) David v. Frowd, supra. (s) Supra.
(t) Sawyer v. Birchmore, supra. (u) 2 Smith, 246.
In the case of Drever v. Maudesley, where a person who claimed to be a creditor but had omitted to come in under the decree, resided out of the jurisdiction, and petitioned to have his claim referred to the master, the court granted the application upon his giving security for the costs.

Contribution to costs.] Where suits are instituted by creditors or next of kin, or other persons of a class, on behalf of themselves and other persons of the same class, it is usual for the decree to direct that persons coming in to prove their debts or to establish their claims, shall contribute to the expenses of the suit. In such a case the complainant is bound to claim the contribution from the party as soon as he has established his right before the master; otherwise, he will be considered as having waived it.

It seems, however, that in practice, the direction for contribution, is seldom, if ever, acted upon.

Inquiries as to legacies and annuities.] The course of proceeding by advertisement, requiring persons having claims, to come in under the decree is resorted to only where it is unknown who all the parties are. When all the persons who can claim are ascertained, or are capable of being ascertained without such a proceeding, it need not be resorted to. Accordingly, when the master is ordered to take an account of the legacies or annuities given by a will, no advertisement for the legatees to come in is necessary; because the legacies or annuities will appear by the will; unless the legacy is given to persons constituting a class; in which case it may be necessary to ascertain by advertising, who the persons constituting that class are.

A list of the legacies or annuities, in the form of a state of facts of legacies &c., and a copy of the will, is generally required by the master; upon which the usual summons on leaving and to proceed, must be obtained and served. If any of the legatees or annuities have been paid, it is necessary that their receipts should be produced, to authorize the master to report that they have been paid.

Inquiries as to titles.] References to a master to inquire as to the title to property in question in the cause, are principally made in suits for the specific performance of contracts for the sale or purchase of real estate; and as they are in the nature of a preliminary inquiry, they may

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(e) 5 Russ. 11.
(w) 2 Dan. 863. Shortly v. Selby; 5 Mad. 447.
(x) See Bennett v. Jessop, Jao. 243.
(y) 2 Dan. 869.
(z) Bennett's Off. Mast. 50.
(a) Id. ib.
(b) Lochmere v. Brazier, 1 Russ. 76, 90.
be made either by decree or by order, upon motion. (b) Inquiries of this nature, however, are not confined to suits for specific performance, but may occur incidentally in suits having other objects.

Upon an inquiry as to title, it is not necessary to carry in a state of facts, but the master proceeds upon the abstract. (c) If the decree or order of reference was obtained by the vendor, he must take his abstract to the master's office, at the same time that he leaves the order or decree. If it was obtained by the vendee and an abstract has been already delivered, he must, in like manner, carry such abstract into the master's office. If no abstract has been delivered, an application may, if necessary, be made to the court, by motion, that the vendor's solicitor may deliver one to the purchaser's solicitor. (d)

Upon leaving the abstract in the master's office, the usual summons on leaving and afterwards to proceed, must be taken out and served. (e)

When the abstract is brought in, the solicitor of the vendee should carefully compare the abstract with the title deeds, a production of which, if necessary, may be compelled in the manner already pointed out. (f)

If the vendee omits to call for the production of the title deeds, it will be taken for granted he is satisfied that the abstract is correct. (g)

On litigated questions of title, written objections to the abstract are brought in by the party objecting, and the master is either attended by counsel on both sides, or the written opinions of counsel upon the abstract, are produced to him according to circumstances. (h) The master may also, in cases of difficulty, direct the abstract to be laid before a conveyancer, for his opinion. (i)

The master may receive affidavits, or examine witnesses or parties, either upon interrogatories or viva voce, in the manner already pointed out. (k)

If the master is satisfied with the title, as shown by the vendor, he reports accordingly. If he is not satisfied with the title, he must state the points in which the title is defective. (l)

Where the title is clear, but there are terms, or incumbrances to be got in, the master should report in favor of the title. (m) Before he does so, however, he ought to be satisfied that the terms or incumbrances can be got in. If he is not satisfied upon this point, he should re-

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(b) 2 Dan. 634, 871.  
(c) Bennett's Off. Mast. 153.  
(d) 1 Tur. Ch. Pr. 417.  
(e) Id. ib.  
(f) Ante, p. 480, 481, 483.  
(g) Poole v. Shergold, 1 Cox. 160.  
(h) Bennett's Off. Mast. 154.  
(i) 1 Tur. Ch. Pr. 418. Flower v. Walker, 1 Russ. 408.  
(k) Ante, p. 484 et seq.  
(l) Green v. Monks, 2 Molloy, 225.  
(m) Bennett, 153.
port that a good title cannot be made unless the terms, &c. can be got in. (n)

Where the title is reported defective, the purchaser cannot insist upon being discharged if the title is capable of being made good within a reasonable time. (o) Otherwise, when it appears, he will have to wait a long time. (p)

If any new fact appears after the master has reported in favor of a title, by which the title is affected, the court will refer it back to the master, upon motion, even after the report has been confirmed. (q) So if the master reports in favor of the title, but, upon exceptions, the court thinks the evidence insufficient, it will, upon the application of the vendor, refer it back to the master to review his report, in order to enable the vendor to produce further evidence. (r) And even after the master's report has been overruled, the vendor may, upon an early application, obtain a reference back for the purpose of showing that the title is valid upon another ground not before taken. (s)

So where it appears, at the hearing of exceptions to a report against a title, that a vendor can clear up the objections, the court has sometimes sent the title back to the master to review his report. (t)

After exceptions are taken to the report that a good title can be made, and are overruled, other objections to the title cannot be made. But if exceptions are allowed and a new abstract of title is delivered, further objections may, of course, be brought in. (u)

Claims.

Upon a reference as to title, the master is not only to report whether the title is good, but if he reports in favor of it, he must also state at what time it was first shown that a good title could be made. (v) A direction to this effect is usually embraced in the order of reference. (w)

To enable a creditor to come in under a decree, to prove a claim which is not stated or not referred to in the pleadings or proofs in the cause, he should present the particulars of his claim to the master, accompanied by his affidavit in support thereof. In this affidavit the claimant must swear, either positively or according to his information and belief, that the amount claimed is justly due, as set forth in the

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(n) 9 Dan. 573.
(o) Coffin v. Cooper, 14 Ves. 205.
(q) Jendwine v. Alcock, 1 Mad. 597.
(r) Andrew v. Andrew, 3 Sim. 390.
(u) 1 Suld. V. & P. 219.
(v) Brooke v. —— 4 Mad. 219.
(x) Seaton on Decrees, 209.
(y) Harding v. Beckford, id. ib.

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particular of his claim; and that neither the claimant, nor any person by his order, or, to his knowledge or belief, for his use, hath received the amount thus claimed, or any part thereof, or any security or satisfaction whatsoever for the same, or any part thereof. (x)

This is equivalent to the English practice of filing a state of facts.

The object of this affidavit, is not to prove the claim; which if contested by any person having a right to contest the same, must be supported by legal proof. (y) It is to guard against fictitious claims which the parties presenting the same do not themselves believe to be founded in justice; although they may be able to produce documentary or other evidence in support of their claims sufficient to show a prima facie case of indebtedness. (z)

Claim by complainant.] A complainant in a creditor’s suit will be required to prove his debt before the master, under the decree. (a) So under a decree directing an account of the estate of the complainant’s testator, and of his debts, &c., and that the creditors come in before the master and prove their debts, the complainant may come in and prove his debt, and be examined respecting it. (b)

The claim, or state of facts, being left, the usual summons must be taken out and served upon the opposite party.

Examination of claimant.] If the claim is disputed, it must be investigated before the master. For which purpose the 105th rule gives him authority to examine the claimant either upon written interrogatories, or viva voce, or in both modes, as the nature of the case may seem to him to require; the examination being taken down at the time by the master, or by his clerk in his presence, and preserved.

Upon a reference to ascertain the right to the surplus moneys upon a mortgage sale, the master may examine the claimants upon oath, touching their respective claims. (c)

If the claimant is examined upon interrogatories, they are to be prepared and settled in the same manner as upon the examination of a party. (d)

Evidence.] If it should be found necessary to examine witnesses either in support of or against the claim, they also may be examined either upon written interrogatories, or by the master, viva voce, at his discretion: (e) or under a commission. (f)

It seems, however, that in supporting charges in the master’s office,

(x) Morris v. Mowatt, 4 Paige, 145.
(z) Morris v. Mowatt, supra.
(a) Seaton on Decrees, 55.
(b) Newman v. Norris, 1 Dicke. 259.
(c) Hubert v. McKey, 8 Paige, 652.
(d) See ante, p. 485.
(e) See Rule 105.
(f) 2 Smith, 276.
the strict rules of evidence are, by mutual understanding, frequently dispensed with; and that bonds, deeds, notes, and other securities are almost invariably proved by affidavit; recourse being had to the examination of witnesses only in very contested cases, or where fraud is suspected.(g)

Defence to claim.] Where a person not a party to the suit carries in a claim, the party representing the estate upon which the claim is made, may make any defence which he could have made to a bill filed by the claimant, or to an action at law brought to establish such claim. Therefore the statute of limitations may be set up in bar of the claim; provided the claim was within the operation of the statute previous to the decree.(h) So also if it is objected that a person is not a creditor for a valuable consideration, that question may be entered into in the master's office.(i)

Allowance of claim.] Where the master is satisfied that the claim is properly made out, he marks the claim, or state of facts as "allowed," and it will then form an item in his report.(k)

When the creditor has procured his claim to be allowed, he does not usually interfere with the other proceedings in the suit; but he should ascertain that his claim is included in the report, although he is not allowed to attend the summons to settle it.(l)

Excepting to report.] If the master disallows the claim of the claimant, or the latter has any other ground for dissatisfaction with his decision, he may except to so much of the report as relates to his claim.(m)

In a creditor's suit, if a master disallows the claim of the complainant, and exceptions are taken to the report, the court will not, pending the exceptions, take the conduct of the cause from the complainant.(n)

The right to except to the master's report upon a claim applies only to those cases where the master has taken the claim into consideration, and disallowed it. Where he refuses to entertain the claim at all, the proper course appears to be to apply to the court by motion or petition.(e)

Claim to surplus moneys on a mortgage sale.] The 136th rule provides that any person claiming the surplus moneys arising upon a master's sale of mortgaged premises, or any part of such surplus moneys,

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(g) 2 Smith, 278. 2 Dan. 865. (h) 2 Dan. 866. Shewen v. Vander-  he st. 1 Russ. & My. 347.
(i) Peacock v. Monk, 1 Ves. 127, 131.
(k) Bennett's Off. Mast. 54.
(l) 2 Smith, 278.
(m) 1 Turner's Ch. Pr. 366. And see Gregg v. Taylor, 4 Russ. 279.
(n) Jendewine v. Agate, 5 Russ. 383.
may, either in his own name or by his solicitor, give to the master, at any time before the filing of his report of sale, a written notice of such claim, stating therein the nature and extent of his claim, and the place of residence of himself or of his solicitor.

That rule also authorizes a notice of such claim upon the surplus moneys to be filed by the claimant with the register, assistant register or clerk, where the report is filed, and the surplus moneys paid by the master.

On the coming in and confirmation of the report of sale, any party to the suit, or any person not a party, who had a lien on the premises at the time of the sale, on filing with such register, &c. a notice of his claim upon such surplus moneys, or some part thereof, and the nature and extent of his claim, may have an order of course, referring it to a master, to ascertain and report the amount due to him, or to any other person, which is a lien on such surplus moneys, and the priorities of the several liens thereon.(p)

Every party who appeared in the cause, and every person who shall have delivered such notice of his claim to the master, or to the register, &c., previous to the entry of the order of reference, shall be entitled to service of a summons to attend the master on such reference, and to the usual notice of subsequent proceedings. But if such claimant has not appeared or made his claim by a solicitor, the summons or notice may be served by putting it into the post office directed to the claimant at his place of residence, as stated in the notice of his claim.(q)

It has been decided, that upon a reference under this rule, the party prosecuting the reference must produce before the master, a certificate of the register or clerk with whom the report is filed, and the surplus moneys deposited, showing that no notice of claim to such surplus was annexed to the report of sale, and that no claim to the same has been filed previous to the entry of the order of reference; or, if claims have been filed, stating the names of the claimants and of their solicitors if any, and their places of residence.(r) And before the master proceeds to make his report as to such surplus moneys, he should ascertain by the proper certificate, and other evidence, that all claimants and other proper parties have been notified or summoned to attend before him on such reference. And the fact that such certificate and evidence was produced before him, should be stated in the report.(s)

(p) Rule 136. (r) Hubert v. McKay, 8 Paige, 651.
(q) Idem. (s) Id. ib.
An incumbrancer who has neglected to file a notice of his claim upon the surplus moneys, may go before the master pending the reference as to such surplus, and file his claim with him, duly verified; and he will then be entitled to be heard upon the reference, as to the validity of such claim, upon such equitable terms as to costs, as the master shall direct. (t)

Parties, and other claimants upon a reference as to surplus moneys, must verify their claims in the same manner as creditors coming in under a decree are required to do; and the master may examine the claimants upon oath, touching their respective claims. (u)

Costs of claimant. A party to the suit, if a creditor, is allowed the costs of carrying in and supporting his charge before the master; but a creditor who is not a party to the suit, bears the expense of carrying in his own charge. And, under special circumstances, the court even refused to allow such a creditor the expense of proving his charge. (v)

It seems that this rule only applies to cases where there is likely to be a surplus of the fund in which other parties are interested. Where the fund is insolvent and is therefore wholly divisible among the creditors, they will be allowed the costs of proving their debt. (w) And in Harvey v. Harvey, (x) it was held that where the proof made by the creditor is beneficial to the estate, as where he saves by it the expense of a suit, and has incurred considerable extraordinary costs, he ought to be allowed the same.

The 136th rule contains a provision, that any person making a claim to the surplus moneys, upon a sale of mortgaged premises, and who shall fail to establish his claim on the reference before the master, may be charged with such costs as the other parties have been subjected to by reason of such claim. And the parties succeeding on such reference, may be allowed such costs as the court may deem reasonable; but no costs unnecessarily incurred on such reference, or previous thereto, by any of the parties, shall be allowed on taxation, or paid out of such surplus.

Sales of Property.

By whom conducted.] A sale of premises under a decree must be made by the master himself, or under his immediate direction. (y) He

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(t) Hulbert v. McKay, 9 Paige, 651. 2 Dan. Pr. 869. Seaton on Decree, 56.
(u) Id. ib. See ante, p. 900.
(v) Aboel v. Sornech, 10 Vns. 359. (e) Mad. & Geld. 91.
may, however, employ an auctioneer merely to conduct the sale, in his presence.

Masters' sales are usually conducted by the solicitor for the complainant; and he is, in all questions which may arise between the vendor and purchaser, to be considered as the agent of all the parties to the suit. (a)

It has been decided by the chancellor, that where a master who has neglected to file security for the faithful discharge of the duties of his office, sells property under a decree, and the report of the sale is confirmed by the court, the objection that the master had not given security, cannot be raised in a collateral suit, so as to affect the title of the purchaser at such sale. (b)

**Time and place of sale.** Where the property to be sold is in the city of New-York, it must be sold at public vendue, at the Merchants' Exchange, between twelve o'clock at noon and three in the afternoon; unless otherwise specially directed in the decree or order of sale. (c)

When lands in any other part of the state are directed to be sold by a master, the sale must be at public vendue, between the hours of nine o'clock in the morning and the setting of the sun. (d)

**Notice of sale.** The master to whom it is referred to sell property, must draw up a notice of the time and place of sale, containing a description of the property to be sold. There is no law or rule of the court rendering it absolutely necessary that the title of the cause should be inserted in this notice. But it is proper to insert such title in the notice, by stating the names of the first complainant and of the first defendant at length, and adding the words "and others" where there are several complainants or defendants; for the purpose of attracting the attention of those who may be interested, to such notice. (e)

The notice of sale by a master, of lands lying in any of the cities of this state in which a daily paper is printed, except where a different notice is required by law, or by the order of the court, must be published in one or more of the daily papers, of that city for three weeks immediately previous to the time of sale, at least twice in each week. (f)

When lands it any other part of the state are directed to be sold at auction, notice of the sale must be given for the same time and in the same manner as is required by law on sales of real estate by sheriffs on execution, and by masters and commissioners in partition. (g)

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(a) Dalby v. Pullen, 1 Russ. & My. 296.
(b) Nicholl v. Nicholl, 8 Paige, 349.
(c) S. R. S. 369, § 36. Rule 139.
(d) Ray v. Oliver, 6 Paige, 489.
(e) Rule 139.
(f) Idem.
The provisions of the statute respecting sheriffs' sales are these:

The time and place of holding the sale shall be publicly advertised, previously, for six weeks successively, as follows: 1. A written or printed notice thereof shall be fastened up in three public places in the town where such real estate shall be sold, and if such sale be in a town different from that in which the premises are situated, then such notice shall also be fastened up in three public places of the town in which the premises are situated:

2. A copy of such notice shall be printed once in each week in a newspaper of such county if there be one:

3. If there be no newspaper printed in such county, and the premises to be sold are not occupied by any person against whom the execution is issued, or by some person holding the same as tenant or purchaser under such person, then such notice shall be published in the state paper once in each week. (g)

In every such notice the real estate to be sold shall be described with common certainty, by setting forth the name of the township or tract, and the number of the lot, if there be any; and if not, by some other appropriate description. (h)

The master must not, in his description of the property, add any particulars which may unduly enhance the value thereof, or mislead the purchaser. (i)

Conditions of sale.] Before the time of sale, the solicitor of the complainant or party conducting the cause prepares a statement of the conditions of the sale. This is usually annexed to the notice of sale, and therefore need not describe the nature and situation of the property; but it should specify the terms and conditions of the sale, time of payment of the purchase money, whether there is to be any deduction for taxes and assessments, &c.

Mode of conducting sale.] When the land to be sold consists of several distinct lots or parcels which can be sold separately without diminishing the value thereof on such sale, the master must sell the same in separate lots or parcels, unless otherwise specially directed by the court. But if he is satisfied the property will produce a greater price if sold together than it will in separate lots or parcels, he may sell it together; unless otherwise directed in the order of sale. (k)

Although a residuary legatee or tenant for life, or the owner of a reversionary interest, may become the purchaser at a sale under the order

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(g) 2 R. S. 368, § 34.
(h) Id. 369, § 35.
(i) Veeer v. Fonda, 3 Paige, 97.
(k) Rule 138.
of the court, (l) it is necessary, if he be a party to the record, that he should have a previous order to warrant his being admitted as a bidder at the sale; and the court will not permit a party having such an order to conduct the sale. (m)

The 135th rule directs the decree or order for the sale of mortgaged premises to be so drawn as to authorize the complainant, or any other party to become a purchaser on the sale.

The premises being struck off to the highest bidder, the purchaser is to sign an acknowledgment, which is written under the conditions of sale, to the effect that he has purchased the premises on those conditions, for the sum bid by him, and agreeing to conform to such conditions.

If the master’s conduct is grossly improper and oppressive, upon a sale by him, it seems he will be ordered to pay the costs of setting aside his report of sale and the subsequent proceedings thereon. (n) Thus where, by an order for the resale of mortgaged premises, the master was directed to put up the premises at a particular sum, and resell the same, if that amount or a larger sum was bid therefor, and at the sale the premises were struck off to a purchaser, for the sum specified; and thereupon the master, acting under the direction of the complainant’s solicitor, and without any previous intimation to that effect, insisted upon the immediate payment of the bid in specie, although the purchaser offered to pay the same in good current bank bills or in good drafts on Albany, or to pay the amount in specie as soon as it could be obtained from the banks where it could be found; and the master immediately put up the property again, upon the terms that specie should be paid down, and no person purchasing on these terms, he reported that the terms upon which the resale was directed had not been complied with; it was held that the conduct of the master was improper and unjustifiable, and that the purchaser was entitled to a deed of the premises upon paying the amount of his bid; and the report of the master was set aside, and he was directed to execute to the purchaser a deed upon such resale. (o)

Completing purchase.] In ordinary sales by auction, or by private agreement, the contract is complete when the agreement is signed; but a different rule prevails in sales by a master. In such cases the purchaser is not considered as entitled to the benefit of his contract till the master’s report of the purchaser’s bidding is absolutely confirmed. (p)

(u) Domville v. Barrington, 2 Young & Col. 724.

(n) Baring v. Moore, 5 Paige, 48.
(o) Id. ib.
(p) 1 Suld. V. & P. 58.
In order to obtain the benefit of his contract, therefore, the purchaser must by the practice of the court in England, first procure, at his own expense a report from the master of his being the highest bidder for the lot he has purchased.\(^{(q)}\) It is not the practice here, however, for the purchaser to procure and file the master's report of sale. This is always done by the complainant's solicitor. And it is to be observed that in foreclosure suits the deed is given to the purchaser, and the money paid and distributed, or paid out, by the master, before the report of sale is made. In \textit{partition suits} the report is made, and confirmed by the special order of the court, before the deed can be delivered.

\textit{Order to confirm report.} After the master's report has been filed, the complainant's solicitor enters an order of course that the sale may be confirmed; unless cause is shown against it within eight days; and if no exceptions are filed and served within that time, the order will become absolute, of course, without notice or further order \(^{(r)}\) unless there is an application, in the meantime, to set aside the sale. And the former owner of the equity of redemption cannot prevent the confirmation of the report by tendering, or offering to pay, the amount of the decree with interest and costs. Until the report is confirmed, the court will not interfere to compel a delivery of the possession of the premises to the purchaser; whether such purchaser be the mortgagee himself or a stranger to the suit. And until such confirmation of the report, any person interested in the sale may apply to the court for a resale.\(^{(rr)}\)

\textit{Duty of purchaser.} It is a settled maxim of equity, that persons purchasing under a decree of the court are bound to see that the sale is made according to the decree.\(^{(s)}\) It is also the business of the purchaser to see that all the persons who are necessary to convey are before the court; for if he takes a title which a decree in an imperfect suit does not protect, he must abide the consequences.\(^{(t)}\)

But a purchaser is not bound to see to the application of the purchase money. Neither is he affected by irregularities or defects in the decree by which the application of the money may not have been properly secured.\(^{(u)}\)

\textit{Possession, Interest, and Profits.}

The purchaser is entitled to the profits of the estate from the time fixed upon for completing the contract; whether he does or does not take

\begin{align*}
\text{(q)} & \quad 1 \text{ Sug. V. & P. 59.} \\
\text{(r)} & \quad \text{Rule 110.} \\
\text{(rr)} & \quad \text{Brown v. Frost, in Chancery, April 4, 1843.} \\
\text{(s)} & \quad \text{Colecough v. Sterum, 3 Bligh, 181, 186.} \\
\text{(t)} & \quad \text{Id. ib. And see 2 Bligh, 169; 1 Sch. & Lef. 386.} \\
\text{(u)} & \quad \text{Curtis v. Price, 19 Ves. 89.}
\end{align*}
possession of the estate. And as, from that time, the money belongs to
the vendor, the purchaser will be compelled to pay interest for it, if it
be not paid at the day.(v)

The rule of the court in the case of the purchase of a fee simple es-
tate, is to give the purchaser the profits from the quarter day preceding
the payment of the purchase money.(w)

Where the conditions of sale provide that interest shall be paid from
a certain day, if the purchase be not then completed, the purchaser cannot
relieve himself from payment of interest by alleging that the delay
in completing the contract was caused by the vendor. But it is other-
wise where there is no stipulation. Where there is no stipulation as to
interest the general rule of the court, in England, is that the purchaser,
when he completes his contract after the time mentioned in the particu-
lars of sale, shall be considered as in possession from that time, and shall
from thence pay interest at four per cent, taking the rents and profits.
If, however, such interest is much more in amount than the rents and
profits, and it is clearly made out that the delay in completing the con-
tact was occasioned by the vendor, then to give effect to the general
rule would be to enable the vendor to profit by his own wrong. The
court therefore gives the vendor no interest, but leaves him in possession
of the interim rents and profits.(x)

In this state, if a purchaser is charged with interest, it is at the rate of
seven per cent.

A purchaser is not entitled to the rents for a period beyond the quar-
ter-day preceding the payment of his money, merely because he has been
ready to complete his purchase and has had his money lying dead at his
banker's; for he might have moved to pay the money into court without
prejudice, &c. when it would have been laid out. And this, if done by
special application, would not be an acceptance of the title.(y)

If the purchaser gets into possession of the estate without the sanction
of the court, he will be compelled to pay the money into court, although
he entered with the permission of the parties in the cause. The court
only can give such permission.(z)

A purchaser of a reversionary interest will be ordered to pay interest
on his purchase money from the time of the purchase.(a)

If a resale is directed, the purchaser is entitled to the rents and profits

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(v) 2 Sug. V. & P. 1.
(w) Anson v. Towgood, 1 Jac. & W. 637.
(x) Eadale v. Stephenson, 1 Sim. & Stu. 133.
(y) Barker v. Harper, Coop. 32. 9 Smith, 177.
(z) 1 Sugd. V. & P. 62.
(a) Truslue v. Lord Clinton, 2 Sim. 350.
from the quarter-day previous to the resale, and not from that preceding the original sale. (b)

Paying off incumbrances. If the estate is subject to an incumbrance, which appears upon the report, the purchaser should, after giving notice of his intention, apply to the court for leave to pay off the charge, and to pay the residue of the purchase money into the bank. But where the incumbrance on the estate does not appear on the report, and any of the parties refuse or are incompetent to consent, a purchaser cannot apply any part of his purchase money in discharge of the incumbrance; though, perhaps, if the parties are all competent to consent, and do consent, it may be done. (c)

Deed. The 135th rule requires the decree for the sale of mortgaged premises—unless the court specially orders otherwise—to direct that after such sale, the master who makes the same shall execute a deed to the purchaser of the premises. And the 111th rule provides, that where a master is directed to sell real estate under a decree, he may give the requisite notice of sale previous to the enrolment of the decree; but to protect the title of the purchaser, the party for whose benefit the sale is made shall cause the decree to be enrolled, and produce a certificate thereof, before any conveyance shall be executed by the master. (d)

If the mortgage has not been recorded, and has been duly acknowledged or proved, it must be recorded, at length, in the county where the lands lie, before the master executes his deed. If it is not in a situation to be recorded, it must be filed with the register or clerk. (e)

Enforcing Delivery of Possession.

A writ of assistance is, in ordinary cases, the first and only process for giving possession of land, under an adjudication of this court. (f) And this will be granted upon the sale being confirmed, and proof that the purchaser has received a deed of conveyance from the master, which has been shown to the party in possession, accompanied by a demand of possession, which has been refused. (g)

Where mortgaged premises are sold under a decree of foreclosure, the purchaser is entitled to the assistance of the court in obtaining the possession, as against parties to the suit, or those who have come into possession under them subsequent to the filing of the notice of lis pendens. (h)

In foreclosure suits, the decree directs that the purchaser be let into

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(b) 9 Smith, 175. 9 Dan. 913. (f) Valentine v. Teller, Hopk. 429.
(c) 1 Sugd. V. & P. 61. (g) Id. ib.
(d) And see Minthorne’s ex’rs v. (h) Frelinghuysen v. Colden, 4 Paige, Tompkin’s ex’rs, 2 Paige, 102. 904. 3 R. S. 191, § 188. (orig. § 189.
(e) Rule 137.
the possession, &c.(i) And the 135th rule requires the decree for the sale of mortgaged premises to direct that the purchaser at the master's sale be let into possession of the premises on production of the master's deed, and a certified copy of the order confirming the report of the sale after the same has become absolute.

But the court has no jurisdiction, by a summary proceeding, to determine the rights of third persons claiming titles to premises, who have party recovered the possession by legal and adverse proceedings against a to the suit, under a claim of right which accrued previous to the filing of the bill of foreclosure.(k) Nor will a writ of assistance be granted against persons who were in possession of the premises at the time of the commencement of the suit, and who were not made parties thereto, to turn them out of such possession. The power of the court to give possession to the purchaser at a master's sale, by a summary proceeding, only extends to those persons who are parties to the suit in which the sale is directed, or those who have come into possession under, or with the assent of, those who are parties, subsequent to the commencement of the suit.(kk)

Discharging purchaser. If, after the confirmation of the report, it should appear that the purchaser is unable to perform his contract, a motion should be made to discharge him from his bidding, and that the estate may be re-sold with the approbation of the master.(l) An order may be made upon this motion, with the purchaser's consent.(m) But if he does not consent, notice of it should be served on the purchaser; and the motion should be supported by an affidavit of the facts making it necessary.(n)

If it is discovered that the purchaser was insane at the time of the sale, he may be discharged from his purchase. And the court, in such a case, will direct a re-sale.(o)

If the purchaser is responsible, he will not be permitted to baffle the court; and therefore, instead of discharging him from his bidding, the court will, if required, make an order that he shall, within a given time, pay the money into court and be let into possession.(p) Upon hearing the motion for this order, the court will, if the purchaser appears and asks for it, and has not precluded himself from objecting to the title,

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(i) See Rule 135. And see the form, Williams, 2 Anst. 344. Deaver v. Reynolds, 1 Bland, 50.
(ii) Freelinghuysen v. Colden, supra.
1 Suld. V. and P. 60. Cunningham v.
(p) 1 Newl. 335.
direct a reference to the master to inquire whether a good title can be made.\textsuperscript{(q)}

With respect to the kind of title which a purchaser has a right to insist upon, it has been decided by the chancellor, that where real estate is sold by a master as and for a good title, the purchaser is only entitled to such a title as a purchaser of the premises at a private sale would be bound to receive from his vendor.\textsuperscript{(r)} It is a fatal objection to the title derived under a decree in partition, that the complainant was a \textit{fema covert}, and that her husband was not joined with her as a party to the suit.\textsuperscript{(s)} And where it appeared, from the affidavits on the part of the purchaser, to be a matter of doubt whether the complainant was not a married woman—a marriage in fact having been solemnized between her and a man who claimed to he her husband—the chancellor refused to compel the purchaser to take the title, until the complainant should have established the fact, upon a reference, that the alleged marriage was illegal and void.\textsuperscript{(t)}

A purchaser may also be discharged upon his own application, whenever he shows a good reason for being released. Irregularity in the proceedings which renders the title defective has been held a good cause for discharging the purchaser. Thus, where a decree is had in a partition suit, wherein an infant, among others, has been made a defendant, but no guardian \textit{ad litem} has been appointed, nor order for appearance entered, nor bill taken as confessed against him, a purchaser under the decree will be discharged from his bid; even though this defendant may have since attained his majority, and offers to release his interest; the decree being so far irregular as to be incapable of enrolment.\textsuperscript{(u)}

So where the purchaser buys the property under a mistake as to the condition of the property. Thus where, by the terms of the master's sale, the property was to be sold free of incumbrances and all taxes and assessments were to be paid out of the purchase money, provided bills thereof were produced to the master before the completion of the sale, and it afterwards appeared that an assessment to a large amount against the property for the opening and macadamizing the avenue through the same had not in fact been confirmed by the corporation of the city at the time of the sale, although the work had been contracted for and completed more than three years before, it was held that purchasers at the sale who had bid off the property under the belief that such assessment had been confirmed, and that they would hold their lots discharged of the ex-

\textsuperscript{(q)} 1 Newl. 336. \hspace{1cm} \textsuperscript{(r)} 1 Id. ib.  
\textsuperscript{(s)} Spring v. Sanford, 7 Paige, 550. \hspace{1cm} \textsuperscript{(t)} Id. ib.  
\textsuperscript{(s)} Kohler v. Kohler, 2 Edw. 69. \hspace{1cm} \textsuperscript{(u)} Id. ib.
pense of opening such avenue, were not bound to take the property subject to the assessment for that improvement.\(v\)

Neither will the court compel the purchaser to complete his purchase when he will not obtain such an interest in the premises, and in the buildings thereon, as he had a right to suppose, from the terms of the sale, he was buying.\(w\) And where a master sells property, with buildings thereon, as and for a good title, if the corporation of the city or village in which the premises are situated has a right to take the land for a street, at some future time, without paying for the buildings, of which fact the purchaser was ignorant at the time of the sale, the court will not compel him to complete his purchase; although the probability of the exercise of such right, by the corporation, is very remote.\(x\)

Nor will the court compel a purchaser to take the title where, by the fault of the parties, the completion of the sale has been delayed so long that he cannot have the benefit of his purchase, substantially, as if the sale had been completed at the time contemplated by the terms of sale.\(y\) If an account to be taken in a suit to be instituted, is necessary to complete the title, the purchaser, if he desires it, must be discharged.\(z\)

So, if a contract is unreasonable, the court will relieve the purchaser as well as the seller.\(a\) But, it seems that the circumstance that the price given is much beyond the value of the land, will not be, of itself, a sufficient ground to release a purchaser from his contract—even upon the terms of forfeiting a deposit—unless there are equitable circumstances.\(b\) Where, however, the purchaser has, by mistake, given an unreasonable price for an estate, the court will, in a proper case, wholly rescind the contract.\(c\)

So, when difficulties arise, to delay the completion of a sale, and during the interval of making out the title, ordinary delapidations take place, that is a case for compensation; but if a destruction of ornamental timber occurs, that is a ground for the purchaser to apply to be discharged.\(d\)

But where the object of the purchase is not defeated, and the purchaser is not injured by the contract being enforced, he cannot be permitted to abandon it.\(e\) A purchaser claiming to be discharged from his

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\(a\) Post v. Leest, 8 Paige. 337.
\(w\) Seaman v. Hicks, 8 Paige, 655.
\(x\) Id. ib.
\(y\) Jackson v. Edwards, 7 Paige, 386.
\(z\) Magennis v. Fallon, 2 Molloy, 561.
\(b\) 1 Sugd. V. & P. 71. See Sewell v. Johnson, Banb. 76.
\(c\) Id. 73, and Moshehead v. Frederick, there cited.
\(d\) Magennis v. Fallon, 2 Molloy, 585.
\(e\) Weems v. Brewer, 2 Harris & Gill. 390.
contract should make out a fair and plain case of relief; and it is not
every defect in the subject sold, or variation from the description, that
will avail him. If he gets substantially what he bargains for, he must
take a compensation for the deficiency.(f)

So, if a person interfere in a sale without authority, and bid, although
he does it to prevent the property from being sold at an under value, the
court will not release him.(g)

Whenever a purchaser is discharged upon his own application, he is
usually allowed his costs and interest.(h)

Reference as to compensation. Although the purchaser may be satis-
fied with the title, yet he may be entitled to compensation. If the
property sold, or any part of it, has been falsely represented, but not to
such an extent as to vitiate the sale, or, if before possession, any deterio-
ration has taken place in the value of the property, the purchaser is en-
titled to compensation.(i) Compensation may be claimed for the defi-
ciency in the quantity between the particulars of sale and the actual
number of acres; or in respect of the buildings on the premises not
being accurately described, or for deterioration since the purchase.(k)

By the English practice, upon the application of the purchaser, an
order will be granted directing a reference to inquire what compen-
sation is proper to be allowed. The purchaser, thereupon, lays a state of
facts before the master, supported by evidence. If affidavits are objec-
ted to, he must support his facts by the examination of witnesses. If
the master reports that the purchaser is entitled to compensation, the
court, on confirming the report, will authorize the purchaser to deduct
the amount of compensation and of the costs of the reference, &c. and
of the application, from the amount of his purchase money, and direct
him to pay the residue within a given time.(l)

If the master reports against the purchaser’s right to compensation,
the solicitor for the vendor, after the confirmation of the report, should
move that the purchaser pay his purchase money within a specified
time.(m)

Order to pay in purchase money. It seems to be the settled prac-
tice of the court, in England, that before an order can be made to com-

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(gill) 517. (h) Pleasants v. Roberts, 2 Molloy, 507.

(i) 2 Smith’s Pr. 190. Magania v. Fallon, 2 Molloy, 585.

(k) Id. ib. (l) Id. 191.

(m) Id. ib.
plaintiff must deliver to the purchaser, an abstract of the title, and procure the master's report that a good title can be made.(n)

The order for payment of the purchase money being made, must be served personally upon the purchaser; and if not complied with, may be enforced by moving that he may pay in the money within a limited time, or that he stand committed.(o)

The court may also direct a re-sale of the estate, and compel the purchaser to make good any deficiency in the price obtained at such re-sale.(p)

Substitution of another purchaser.] If a person is desirous of being substituted for the purchaser, the court, upon the purchaser's consent, and being satisfied by affidavit that there is no underhand bargain, and upon the substituted purchaser paying the purchase money into court, will order such substitution.(q) Accordingly, a purchaser at a master's sale may make a valid transfer of his bid to a third person before the execution of the master's deed for the premises. And the court, upon the application of such assignee, may direct the execution of a conveyance immediately to him, by the master; subject to the equitable rights or liens of other persons, as against the original purchaser, which had become vested previous to the assignment of the bid.(r)

So where the original purchaser had entered into a contract of sale of the premises with another, and had died, and his heir at law was absent, the court ordered the conveyance to be executed to the substituted purchaser, and the money to be brought into court.(s) And where the purchaser under a decree, died before a conveyance was made, having devised the property in question, and all his real estate to trustees, the court authorized a conveyance to such trustees; the heir at law of the purchaser being an infant.(t)

To obtain liberty for one person to be substituted for another, as the purchaser, a notice of motion must be served on such purchaser or his solicitor, and on the solicitors of all the parties. The motion is "that upon C. D. paying into court . . . . , the amount of the purchase money, he may be substituted, as the purchaser, for A. B.; and that A. B. may thereupon be discharged." The order is made on the purchaser's consent, and on an affidavit of service of motion.(u)

(a) 2 Suld. V. & P. 60, n. 1. 2 Dan. 919.
(b) Lasdow v. Elderton, 14 Ves. 519.
(p) 2 Smith, 186, 188.
(q) 1 Suld. V. & P. 60. 2 Dan. 920.
(r) 2 Smith, 181.
(s) Proctor v. Farnam, 5 Paige, 614.
(u) 2 Smith, 181.
Opening bidders and re-sale.] In England it is almost a matter of course to open the bidders on a master's sale, before the confirmation of his report, upon the offer of a reasonable advance on the amount bid, and the payment of the costs and expenses of the purchaser.

And the mere advance of price is sufficient to open the bidders; and they may be opened more than once. (v)

But the English practice, upon this subject, has not been adopted in this state; and the chancellor observes, in the case of Duncan v. Dodd, (w) that it is not desirable that it should be introduced here. In a case in the court of errors, (x) Mr. Justice Nelson also takes the same ground. After observing that in England the mere advance offered would be sufficient, before the confirmation of the report, to open the bidders, he remarks that such is not our practice, and that the reasons for the difference are sound and conclusive.

It was accordingly decided in Duncan v. Dodd, above referred to, that the bidders at a master's sale will not be opened except in very special cases; and then it will not be done unless the purchaser is fully and liberally indemnified for all damages, costs, and expenses to which he has been subjected. In that case the premises were struck off for $2025, no conveyance having been executed, and the petitioner offering an advance of 50 per cent. on the purchase, for the benefit of infant defendants. The chancellor ordered a re-sale upon sufficient security to the satisfaction of the master, that the premises should actually produce an advance of $50 per cent. upon a re-sale, or a deposit with the master of the advance offered. And this, upon the ground that the property sold, was the sole dependence of two infant children, and had been sacrificed either through the misapprehension or negligence of their mother and step-father. The chancellor expressly stating that "if the defendants were adults, and the property had been sacrificed by their own negligence or inattention, he would not disturb the sale."

The effect of opening the bidders, is to discharge the purchaser from his purchase entirely; and if he has paid the deposit, or any part of the purchase money, into court, he will be entitled to have it paid to him. If he is the purchaser of more lots than one, and the bidders are ordered to be opened as to some of the lots which were first purchased, the purchaser will be allowed to have the bidders opened and to be

(w) 2 Paige, 100.
(x) Collier v. Whipple, 13 Wend. 294.
See also Gordon v. Sims, 2 McCord's Ch. Rep. 158.
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discharged from his purchase as to all the lots purchased by him. (y) But the purchaser, in order to entitle himself to such an indulgence, should appear upon the motion to open the biddings, and produce an affidavit that he had bid for the subsequent lots in consequence of his having been declared the best bidder for the first lot. (z)

A master’s sale, on a mortgage foreclosure, will also be opened, and a re-sale ordered where judgment creditors are prevented from attending and bidding at the sale in consequence of an impression received from the master that the sale will not take place on the day appointed; although there is no collusion between the master and the purchaser; provided the judgment creditors offer to make an advance, at the re-sale, upon the former bid, to an amount sufficient to cover their demands. (a) Fraud or misconduct in the purchaser, or fraudulent negligence in any other person connected with the sale, as the agent of the mortgagor, or of persons interested as judgment creditors, and also surprise created by the conduct of the purchaser, will induce the court to open the biddings. (b)

So, where a memorandum not authorized by the master, was read at a sale, describing the dimensions of the dwelling house sold, and which turned out to be incorrect by several feet, the sale was vacated. (c) And in the case of Gordon v. Sims, (d) a sale was set aside because the land was knocked off to the purchaser prematurely, by a mistake of the auctioneer, who did not hear a higher bid.

A re-sale may also be ordered, on the application of other parties where the purchaser neglects to comply with the terms of sale within a reasonable time. (e)

Where some of the purchasers at a master’s sale bid upon the supposition that a large assessment, amounting to more than one third of the value of the property, was to be paid out of the proceeds of the sale, and other persons who bid at the sale knew that the assessment was not confirmed, and bid accordingly, it was held that the purchasers were not entitled to hold their purchases and to have the unconfirmed assessments paid out of the amount bid, unless the persons interested in the proceeds of

(a) Fielder v. Fielder, cited 1 Sim. & Stu. 386.
(c) Collier v. Whipple, 13 Wend. 224.
(b) Id. 327. Williamson v. Dale, 3 John. Ch. Rep. 996. White v. Wilson,
(d) Supra.
(e) Jackson v. Edwards, 7 Paige, 357.
(d) Laight v. Pell, 1 Edw. 577. See also Gordon v. Sims, 2 McCord’s Ch.
Rep. 159.
the sale, consented thereto; but as the property had been purchased under a mistake, that there must be a re-sale.\(^{(f)}\)

Where property has been bid in by trustees, for themselves, under peculiar circumstances, the court will, at the instance of creditors, order it to be put up to sale again, at the price bid by the trustees.\(^{(g)}\)

It has been decided in Maryland, that if it is shown, either before or after a sale has been ratified, that there has been any injurious mistake, misrepresentation, or fraud, the biddings will be opened, the reported sale rejected, or the order of ratification rescinded, and the property again sent into the market and resold.\(^{(h)}\) So where the master had written instructions, from the complainant's solicitor, not to sell the premises for a less sum than $2600, the amount of the debt and costs, but, through ignorance of his duty, the premises were sold for $1000 less, to purchasers who were informed of the instructions, at the time of the sale, and before they paid their bid, the court ordered a resale of the property.\(^{(i)}\) And the purchasers in that case having taken possession and made improvements, after being informed by the master that the facts would be submitted to the court—without waiting for the confirmation of the report of sale—it was held that they were not entitled to indemnity therefor.

So where the property has been sacrificed by the mistake or neglect of the master to comply with the legal requirements on the sale; or by his having improperly put up for sale several lots together which should have been sold separately, the parties injured are entitled to a resale, or to such other relief as can be given without doing injustice to a bona fide purchaser of the premises, at the sale.\(^{(k)}\)

And where the complainant himself became the purchaser, at a price much below the real value of the premises, it appearing that the solicitors of a prior incumbrancer were misled, by the complainant's solicitor, with respect to the time of sale, though unintentionally, the court held it a proper exercise of discretion to authorize a resale of the premises.\(^{(l)}\) So in the case of Wharton v. Thatcher, referred to by the chancellor in the case last cited, where the property was bid in by the complainant at a great under value, in consequence of the horse of the person who was sent to bid in the property for the protection of a defendant's rights, having given out, from the heat of the day, the court allowed the sale.

\(^{(f)}\) Post v. Leet, 8 Paige, 337.  
\(^{(h)}\) Anderson v. Foulke, 9 Harris & Gill, 346.  
\(^{(i)}\) Requa v. Rea, 2 Paige, 339.  
\(^{(k)}\) American Ins. Co. v. Oakley, 9 Paige. 259.  
\(^{(l)}\) Greear v. Emery, In Chan'y, Feb. 16, 1841.
to be opened upon terms; the complainant having insisted upon holding on upon his speculation, at the expense of the adverse party, who was not in fault.

And if a master sells at an improper time, or in such a manner as to prevent a fair competition, or if from any other cause it would be inequitable to permit the sale to stand, a resale will be ordered, upon such terms and conditions as may be just; so as to protect the rights of the purchaser, as well as of the parties interested in the sale. (m)

The court has even gone so far as to allow a decree, obtained by default, to be opened, after enrolment, and after a sale had been made by a master, under the same, in a case where the complainant himself became the purchaser, and had not parted with his interest therein to a bona fide purchaser, or mortgagee: to enable the defendant to make a defence upon the merits. (n)

So a resale will be ordered where mortgaged premises have been sold greatly below their value, and bought in by the mortgagee, if the mortgagor, or those standing in his place, have been misled by the mortgagee, or even by a third person, in reference to the foreclosure of the mortgage, and in consequence thereof do not attend the sale. (o)

But it seems that mere inadequacy of price, unattended by other circumstances, is not enough to induce the court to open a sale; (p) unless the inadequacy is so great as to be evidence of fraud or unfairness in the sale. (q) So, where property is regularly advertised and fairly sold by a master, a sale will not be set aside, and a resale directed, for the benefit of parties interested in the proceeds of the sale, to protect them against the consequences of their own negligence, where they are adults and were competent to protect their own rights on the sale. (r)

Mode of applying for resale. If the master sells at an improper time, or in such a manner as to prevent a fair competition, or if, for any other cause, it would be inequitable to permit the sale to stand, the proper remedy is by a summary application to the court in which the decree was made, for a resale of the premises. And an original bill to impeach or set aside the proceedings upon the sale cannot be sustained, in a case where there was nothing to prevent an application in the original suit for a resale. (s)

(m) Brown v. Frost, In Chan'y, April 4, 1843.
(o) Tripp v. Cook, 26 Wend. 142.
(q) Am. Ins. Co. v. Oakley, supra.
(r) Id. ib.
(s) Brown v. Frost, In Chan'y, April 4, 1843.
Notice of the motion for a resale must be given to every party who has appeared in the cause, and who has an interest in the question; as well as to the purchaser at the first sale.(t)

Time for applying for resale, &c. As a general rule, the proper time for opening the biddings is before the master's report of the sale has been confirmed absolutely, unless under particular circumstances.(u) But very special circumstances may perhaps induce the court to open the biddings, after confirmation of the report.(v)

Who may apply. It has been held that a defendant who is personally liable for the deficiency upon a sale of mortgaged premises, but who has no interest in the premises, cannot apply for a resale, if he has been discharged from liability for the deficiency, to the extent of the full value of the premises over and above the amount bid at the former sale.(w)

Proceedings on resale. If a resale is ordered, the proceedings thereon will be the same as those upon the original sale.(x)

Settlement of Deeds.

When a conveyance, or other deed, is ordered to be executed, it usually forms part of the order directing it that it shall be settled by the master, in case the parties differ about the same.

The party entitled to prepare the conveyance brings a draft of it into the master's office, and serves a summons upon the solicitors of the opposite parties. If the opposite party, after inspecting the draft, does not signify his dissent, or deliver a statement in writing, of his proposed alterations, within eight days, or such further time as the master may have appointed for that purpose, the master may then proceed to settle the conveyance according to the practice of the court. This he must also do where a statement of proposed alterations has been delivered and the party bringing in the draft refuses to accede to them.(y)

When the master has settled the draft of the conveyance, he causes it to be engrossed and signs a certificate of allowance in this form, in the margin of the last page: "A. v. B. I approve of, and allow this indenture, being the same mentioned in my report dated the . . . . . day of . . . . . ."

He then signs a report or certificate of his having approved

(t) Robinson v. Meigs, In Chan'y, Jan. 4, 1843.
(y) Id. 194. 2 Smith, 197. (z) Ryder v. Gower, 6 Bro. P. C. 306.
and allowed the engrossment; which must be filed in the usual man-
er. (z) No order to confirm this report or certificate is necessary. (a)

If the parties are dissatisfied with the master’s decision, they may
bring the question before the court in the form of exceptions to his
report. (b)

Appointment of New Trustees.

When it is referred to a master to appoint new trustees, in the place
of trustees who are dead, or decline to act, &c., the party obtaining the
reference, leaves in the master’s office a state of facts and proposal,
stating the nature of the property, the interest of the parties, &c., and
proposing the persons who are to be the new trustees. (c)

In support of this state of facts an affidavit of the eligibility of the
persons proposed is necessary, and it seems that sometimes the master
requires the production of the acceptance, in writing, of the trust by the
persons named. (d)

If the proposal is satisfactory to the master, he makes his report ap-
pointing the new trustees. This report is settled by summonses, and filed,
but need not be confirmed. (e) It may be excepted to in the same man-
ner as other reports of a similar nature; but upon hearing the excep-
tions, the court will not enter into the comparative merits of the several
persons who have been proposed by the different parties. (f)

It frequently happens that the order directing the appointment of new
trustees, directs a conveyance of the trust estates to such new trustees,
to be executed, and orders the master to settle such conveyance. When-
ever this is the case, after the master has made his report of the appoint-
ment of the new trustees, the proper conveyances for vesting the estate
in them are prepared and brought into the master’s office, and settled in
the manner already pointed out. (g)

When trustees have a power to appoint new trustees, the court will
not, on their application, direct an appointment without a reference. (h)
References as to infants, and for the sale of their estate, for the appoint-
ment of receivers, &c., being usually directed upon interlocutory ap-
lications, will not be considered in this place.

(z) 1 Turn. Pr. 493.
(a) Id. ib. 2 Smith, 195.
(b) Wakeman v. Duchess of Rutland, 3 Ves. 304. Lloyd v. Griffith, 3 Atk.
954.
(c) 2 Dan. 491.
(d) 2 Smith, 395.
(e) Id. 326.
(f) Attorney Gen. v. Dyson, 2 Sim. & Stu. 928.
(g) Ante, p. 541.
(h) — v. Robarts, 1 Jac. & W. 251. See Webb v. Earl Shaftesbury, 7
Ves. 480.
Scandal and Impertinence.

If any of the proceedings in the master's office contain scandalous or impertinent matter, it may be expunged in the manner directed by the 106th rule.

The nature of scandal and impertinence has already been shown in the sections relating to the matter of a bill, and to exceptions to an answer, for scandal and impertinence.(i)

Formerly a master could not look into any proceeding before him for the purpose of ascertaining whether it was scandalous or impertinent, without an order of the court directing him to do so. But now, it is provided by the 106th rule, that if a party wishes to complain of any matter introduced into any state of facts, affidavit, or other proceedings before the master, on the ground that it is scandalous or impertinent, he may file exceptions thereto with the master, and without any order of reference, he may take out a summons for the master to examine the matter upon such exceptions, and the master shall have authority to expunge any such matter which he shall find to be scandalous or impertinent.

The exceptions should be filed before any step is taken by the party, upon the proceeding; for example, to an examination, before it is proceeded upon.(k)

The court will not permit a reference of depositions for impertinence, apart from scandal.(l)

If the master disallows the exceptions, his decision thereon is final as to the exceptions which are disallowed. But this will not preclude the party from insisting upon the impertinence, at the hearing of the cause, or upon any subsequent proceeding founded on the master's report upon the reference, or upon the taxation of the general costs of the cause, or of the reference.(m)

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(i) See ante p. 41, 903.  
(k) Pyncent v. Pyncent, 2 Atk. 557.  
(l) Johnson v. Ure, 2 Sim. & Sta. 578.  
(m) Rule 106.  
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SECTION IV.

MASTER'S REPORT.

Its nature and uses.] The manner in which the master presents his opinion, and the result of his inquiries to the court, is either by a certificate or by a report. A certificate is a simple notification of a fact, or of an opinion, or a conclusion, or a representation to the court of any particular proceeding; as that the master has taxed a bill of costs at such a sum; or that a party has made default; or that a pleading is insufficient or scandalous; or that papers have been deposited. (n)

It was held in Chennell v. Martin, (o) that there is no distinction between a master's report and a master's certificate; and that they are convertible terms. Mr. Daniell, however, observes that there is undoubtedly a practical distinction between some reports or certificates of masters with regard to the right to take exceptions to them, without previous objections having been carried in; and that the terms, "master's certificate" and "master's report," appear to have been opposed to each other for the purpose of marking the distinction. (p) And he continues: "Thus the term report has been applied to those reports or certificates that are made by the master, upon a reference to him by decree or decratal order upon which it is intended to ground a further decree, (and to which no exception can be taken, unless a previous objection has been previously carried in to the draft report;) whilst the term certificate has been more commonly applied to those reports or certificates which are intended merely as the foundation for some future interlocutory order or process, and are not intended as the ground of a decree or decratal order." (q)

Different kinds of reports.] Reports are either separate, special, or general. (r)

Separate report.] A separate report is that which only embraces one distinct object of the reference. Where the inquiries are numerous,

(n) 2 Smith. 146.  
(o) 4 Sim. 340.  
(p) 9 Dan. 634.  
(q) Id. ib.  
(r) Bennett's Off. Mast. 18.
and it is of importance that a part of the decree should be satisfied before the whole of the proceedings are sufficiently matured to enable the master to make a general report, he will report separately on any particular inquiry.

Formerly the master was not at liberty, unless authorized by the decree to make a separate report.\(a\)

Now, however, the 108th rule provides, that in all matters referred to a master, he shall be at liberty, upon the application of any party interested, to make a separate report or reports, from time to time, as he shall deem expedient; the costs thereof to be in the discretion of the court; and where the master shall make a separate reports of debts or legacies, he shall be at liberty to make such certificate as he thinks fit with respect to the state of the assets; and any person interested shall thereupon be at liberty to apply to the court as he shall be advised.

But a separate report is never allowed, except for the purpose of expediting the general proceedings.\(b\)

Where the decree, among other things, directs the master to appoint a trustee or receiver, his certificate of the appointment is in the nature of a separate report.\(c\)

When a party to the suit objects to a separate report, he may file his exceptions to it, in the same manner as to a general report. And he is not obliged to apply to the court for leave to except.\(d\)

The form, manner of preparing, objecting and excepting to, and confirming separate reports, are nearly the same as upon general reports. The only difference being that where it is intended to act upon them, the cause is not set down for hearing, as it is upon a general report, but a petition must be presented to the court praying such directions as arise out of the separate report.\(e\)

**Special reports** Special reports contain special circumstances found by the master, as a guide to the court, for some further direction or decision upon those facts.\(f\)

The master has no authority to make such a report, unless he is directed by the decree so to do.\(g\)

But if the conclusion which he is required to draw is a question of law, and not a mere legal presumption of a fact, he is permitted, in the exercise of a sound discretion, and without an order for that purpose, to

\(a\) 2 Smith, 143.
\(c\) Harris v. Kemble, 4 Russ. 474.
\(d\) Draper v. Maudealey, 7 Sim. 240.
\(e\) 2 Dan. 335.
\(f\) Bennett's Off. Mast. 19.
\(g\) Bennett's Off. Mast. 19.
make a special report submitting the legal question to the decision of
the court. (x) In such special report, he should not report the evi-
dence; but he must draw all the conclusions of fact, as in a special ver-
dict—leaving the question of law alone for the decision of the court. (a)

The master is only permitted to make a special report where, by the
order of reference, some equity is reserved, so that the case must be
brought before the court for further directions upon the coming in of
the report; but where all the consequential directions are contained in
the decree or order of reference, the master must decide the questions
of law as well as of fact which arise on the reference; so that the de-
cree may be executed on the confirmation of the master's report in the
register's office, or otherwise. (aa)

General report. A general report embraces the conclusions which
the master has come to upon all the matters referred to him by the de-
cree or order of reference.

Method of settling. The master having obtained all the information
necessary to enable him to make his general report, he prepares the
draft thereof and delivers copies to such of the parties as apply for the
same. He must assign a time and place for the parties to bring in ob-
jections, and for settling the draft of the report, and must issue his sum-
mons for that purpose. (b)

This summons should be underwritten, "To bring in objections and
to settle the master's general report in this cause."

No summons to see the draft of the report, and take copies thereof, is
necessary. (c)

Objections. On the return of the summons, or on such other day as
may then be assigned by the master for that purpose, if objections are
filed by either party, he may proceed to hear the parties on such ob-
jections. (d)

Although, in strictness, the objections ought to be taken in the pe-
riod between the service and return of the summons, yet upon a proper
case of excuse being submitted to him, the master will allow further
time for bringing in the objections. (e) But they must be brought in
before he makes his report; otherwise, the court will not afterwards al-
low the party to except to the report, unless under very special circum-

(x) Matter of Hemiop. 3 Paige, 305.
(a) Id. ib. See Lee v. Willock, 6. Ves. 605. Duchess of Marlborough v.
Wheat, 1 Atk. 451.
(aa) Matter of Hemiop, supra.
(b) Rule 109.
(c) Rule 109.
(d) Idem.
(e) 1 Turn. Ch. Pr. 630.
PROCEEDINGS SUBSEQUENT TO THE DECREES.

stances. (f) Yet an apparent variation from this general rule occurs in the cases of two or three kinds of certificates granted by the master, as the certificates of sufficiency or insufficiency, or of scandal or impertinence in any pleading, or other matter before the court, or the certificate allowing interrogatories. In these instances exceptions may be filed without the necessity of objections being previously taken. (g)

In the case of a reference to state an account, the objections to the report are taken and argued after the draft of the report is prepared. In such cases, objections may be taken by a party who has not previously appeared before the master; but he cannot introduce any new matter in advance, to support such objections. (h)

The leaving objections is not mere form, but to enable the master to reconsider his opinion. (i) They ought to be filed in all cases where the findings in a report, whether under an interlocutory order or otherwise, are complained of, to bring the points exactly before the master. (k)

Objections may state that some evidence has been misunderstood, some fact not found, or improperly found, or that some irregularity or error is apparent on the face of the draft of the report. And, in important cases, they should be carefully settled by counsel. (l) But they need not be signed by counsel.

Objections are so much the ground work of the exceptions which are ultimately to be filed against the master's report, that if they go beyond, or assign matter, not comprised in these objections, they will be deemed irregular as to that part of the exceptions, and overruled. (m)

If a person interested in the report, though not a party to the suit, is dissatisfied with it, he must leave objections to the draft, as a preliminary step to putting himself in a situation to take exceptions. Thus, creditors and other persons coming in under decrees, and who have had their claims allowed, must, if they mean to except to the report, carry in their objections to the draft, in the same manner as parties to the record. (n) So also, persons who have carried in claims as creditors or next of kin, under decrees, but have had their claims disallowed, ought if they intend to dispute the master's finding, to be prepared with objections to the draft report, in order to gain a right to except to it. (o)

If, after considering the objections, the master retains his original

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(g) Stackpoole v. Stackpoole, 9 Mol.
Pennington v. Lord Manchester 1 Id. 555. Loy. 378.
(g) 9 Smith's Pr. 150.
(h) Byington v. Wood, 1 Paige, 145.
(i) Bowker v. Nickson, supra.
(k) Bennett's Off. Mast. 21.
(l) Id. ib.
(m) 9 Dan. 943.
(n) See Walker v. Wingfield; and Ker v. Clobery, cited, id. 944.
opinion, he signs the report as it stands. If he changes his opinion, he alters the draft of his report accordingly; after which, according to the English practice, a fresh summons must be observed, in order, to afford the other party an opportunity of carrying in fresh objections to the altered draft. (p)

To those reports to which exceptions cannot be taken, objections are not required to be brought in. (g)

Where objections are filed, if the party does not proceed upon them before the master with due diligence, the master ought to overrule them, noting that he does so because the party would not appear to support them. And he should proceed as if no objections were taken to his report. (r)

Form of general report. The master's report is divided into two parts, the body, and the schedule or schedules. The body is a short epitome of the proceedings laid before the master, with his opinion and finding thereon. It only contains the results of the accounts or statements, and refers to the schedules for detailed particulars.

The report commences with the title of the cause, and is addressed to the chancellor. It refers to the order of reference, by its date, and should recite the substance of the directions contained in it. But it should not recite the whole order.

Great care is necessary, in preparing a report, to dispose of all the matters which have been referred, either by findings of the master upon each section of the decree, or by pointing out what matters of reference have been waived. (s) If a separate report has been made, it will be necessary in the general report, shortly to allude to the date and particulars of it; so that the court may see that all the inquiries directed by the decree have been, in some way, disposed of by the master. (t)

The court will not, in any way, interfere to express an opinion how the master shall frame his report; although it may be a case of considerable difficulty, and the master be anxious to obtain such opinion. (u)

Where it is referred to a master to examine and report as to particular facts, or as to any other matter, it is his duty to draw the conclusions from the evidence before him, and to report such conclusions only; and it is irregular and improper to set forth the evidence, in his report, with-

out the special direction of the court. And where the master incorporates the testimony into his report without the special direction of the court, although it is done upon the solicitation of counsel, he will not be allowed for it on the taxation of his costs. But though the master cannot detail the evidence upon which he proceeds in making his report, yet he generally refers to it, either in the body of his report, or in a schedule annexed to it.

Sometimes orders direct the master to report the testimony; sometimes to report it if either party require him to do so. In these cases the testimony should be annexed, certified by him, but not embodied in the report. But either party may apply to the master for certified copies of the testimony to be used upon the argument of exceptions to the report.

Even when the evidence is such that it is impossible to arrive at any degree of certainty upon it, yet if it is sufficient to afford a reasonable ground of presumption upon it, one way or the other, the master is bound to find in favor of such presumption. He is not bound, however, to state the inferences of law arising from the facts before him; and where facts are so clearly stated, in a report, as necessarily to involve a particular consequence, it is for the court to act on the facts so reported. And it would not be proper ground of exception that the master had omitted to point out the consequences.

The master is not warranted in reporting his opinion upon a question of intention; the court alone taking cognizance of that question.

Upon a reference as to title, a report generally, that a good title cannot be made out, is irregular. The master should state the precise points in which the title is defective.

The schedules, when there are any, must be annexed to the report and filed with it.

In what time to be settled, and filed. If no objections are made to the draft, the master must sign his report and file it in the proper office within ten days after the time assigned, for bringing in objections. If objections are brought in, he must settle and sign the report, and cause it to be filed, within twenty days after the argument on such objections is closed.

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(a) Matter of Heming, 3 Paige, 305. (a) Bick v. Motly, 2 My. & Keen, 319.
Lee v. Willock, 6 Ves. 605. 3 Bro. C. C. 100.
(w) Id. ib. (x) Green v. Monks, 2 Molloy, 395.
(x) 1 Hoff. Pr. 545. (y) Smith v. Smith, 9 Diak. 789.
(y) Id. ib. (z) Rule 109.
(z) Fenner v. Agutter, 1 My. & Keen, 120.
Confirming report. After the report is filed, either party may have an order of course to confirm the same, unless cause to the contrary be shown in eight days. If no exceptions are filed and served within that time, the order will become absolute, of course, without notice, or further order. Or either party may file exceptions and have an order of course to confirm the report, so far as the same is not excepted to, and with the like effect. (f)

What reports require confirmation. Those reports only require confirmation which come within the description of "reports strictly so called," i.e. those upon which it is intended to found a decree or decretal order. If it be merely a report, which comes more properly under the head of a "certificate" made upon, or in consequence of, an interlocutory application by motion, which is intended as a foundation for issuing the process of the court, or for another interlocutory order, it requires no confirmation. (g)

Therefore, all reports of mere calculation, and of matters of opinion, which do not require any further order from the court to give effect to or sanction them, need not be confirmed. Of this class are certificates of papers being deposited—of a party being in default for non-production of papers, or for not putting in his examination; certificates of the allowance of interrogatories—of the necessity of a commission to take an examination, or the depositions of witnesses; certificates of the sufficiency or insufficiency of any pleading or other matter—certificates of scandal or impertinence—certificates of costs; reports approving proposals for a receiver or consignee, or reports on passing their accounts; reports computing subsequent interest, or apportioning a fund between parties, upon principles and in the proportion declared by the court; reports appointing trustees, or approving the conveyance. None of which certificates or reports require any confirmation by the court, but are complete as soon as they are filed. (h) Though they are liable to exceptions, if either party is dissatisfied with the master's determination. (i)

A master's certificate as to the insufficiency of an examination of a party on interrogatories, also, does not require an order of confirmation. (k)

Where it has been referred to a master to make a separate report of a creditor's claim, the creditor may enter an order to confirm the report. (l)

(f) Rule 110.
(g) 2 Dan. 944.
(h) 2 Smith, 399.
(i) 2 Dan. 945.
(k) Case v. Abeel, 1 Paige, 630.
If, for any reason, a party is desirous of enlarging the time for confirming the report absolutely, he should make a special application to the court, by motion. (k)

Excepting to report. With respect to the time of excepting, we have already seen that the 110th rule requires exceptions to be filed and served within eight days after the master's report is filed, and the order of confirmation nisi entered and notice thereof given. And the court is, in general, very strict in requiring exceptions to be filed before the report is made absolute; and will even order exceptions filed, afterwards to be taken off the file. (l) But there are cases in which, under particular circumstances, it will relax from its rule, and permit exceptions to be filed after the report has been absolutely confirmed. (m) The cases, however, where this has been done, are very rare, and the granting or refusing liberty to except after the report has been confirmed, is entirely discretionary in the court. (n)

Exceptions cannot be taken before the report has been filed. (o)

Form of exceptions. The form of exceptions to a master's report is in all cases nearly the same. The form of exceptions to an answer, for insufficiency or impertinence, has been already mentioned, (p) and the same rules are generally applicable to all exceptions to reports. (q)

When the exceptions are taken, after objections have been carried in to the draft of the report, and disallowed, the exceptions should be in conformity with the objections; and though different in form, they must be substantially the same. (r)

Formerly, the method of excepting to a master's report, upon a reference as to title, was generally, "for that the master had certified that the complainant could make a good title, whereas he ought to have certified that he could not make a good title." But the present course is to state the ground of objection to the title, in the exceptions. (s) Such course, however, has only been adopted for convenience, and if there is any substantial objection to the title, which is not stated in the exception, the party is not precluded from arguing it. (t)

In a late case, (u) the chancellor held that an exception to a master's

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(k) Hand's Pr. 169.
(l) Sterling v. Thompson, Coop. 271.
(n) See Earl of Bath v. Earl of Bradford, 2 Ves. 587.
(o) 2 Smith, 339.
(p) See ante, p. 181, 262.
(q) 3 Dan. 957.
(r) 2 Smith, 151.
(s) 2 Dan. 957.
report as to the manner of computing interest, instead of merely stating that the master has not adopted the usual or legal mode, should indicate in what manner the interest should be computed; so that if the exception is allowed, the master will know in what manner to correct his report.

Where one general exception is taken to a report, including several distinct matters, and the report appears right in any one instance, the exception will be overruled.(v)

Exceptions are in the nature of special demurrers, and the party objecting must point out the error; otherwise the part not excepted to will be taken as admitted.(w)

Exceptions must be signed by counsel.

What reports may be excepted to. All reports, whether made pursuant to a decree, or a decreal or interlocutory order, which involve a question either of law or of fact, upon which the court may be called upon to give a legal decision, must be objected to by exceptions.(x)

Thus, all reports requiring to be confirmed by orders nisi and absolute, (excepting the report allowing the highest bidder at a sale to be the purchaser,) may be excepted to. So may certificates relating to any pleading, either of sufficiency or insufficiency; as to scandal or impertinence, or of the allowance of interrogatories; or a report approving a conveyance.(y)

Those certificates or reports which are more properly designated certificates, and which do not require any confirmation, may be excepted to without any previous objections being carried in to the draft of the report.(z) But those reports or certificates which are more properly designated as reports, and which do require confirmation, cannot be excepted to without previous objections being carried in to the draft report.(a) Nor can a report of sale be excepted to, in any case. The proper course is to move, on petition or affidavit, and notice to the opposite party, to set aside a sale, or for a re-sale.

In what cases, and upon what grounds, exceptions lie. Where a party objects to the principle on which an account is taken by the master, he should except to the report; and if he neglects to do so, the court will

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(c) Hodges v. Solomons, 1 Cox, 244.  
Gampertx v. Best, 1 Young & Col. 119.  
Green v. Weaver, 1 Sim. 404.  
Candler v. Pettit, 1 id. 427.

(v) Wilkes v. Rogers, 6 John. 566.

(z) 2 Smith, 336.  
(y) Id. ib.  
(z) 2 Dan. Pr. 959. See ante, p. 550, as to what reports require confirmation.  
(a) Id. ib.
not send back the report to be reviewed, even if it appears that the
master has proceeded on an erroneous principle.\(b\)

But where the master, by his report, states all the facts correctly, but
is mistaken as to the legal consequences of those facts, it is not necessa-
ry to except to the report; as the question decided by the master may
be opened upon further directions, without exceptions.\(c\) So, where
facts are so clearly stated in a report as necessarily to involve a partic-
ular consequence, it is for the court to act upon the facts so reported;
and it is not a proper ground of exception, that the master has omitted
to point out the consequence.\(d\) It has also been held, that in case of
a report under a reference for the master to inquire and certify his opini-
on, exceptions are not to be taken to the report, but it is to be brought
before the court, on the report, to determine.\(e\)

Neither will an exception lie to a master’s report, for inserting there-
in irrelevant matter;\(f\) nor because it was not filed in time—the remedy
in that case being by an application to set it aside for irregularity.\(g\)
Neither can exceptions be taken to a master’s report, approving of new
trustees. Nor will the court interfere with the report of the master,
where there is no complaint that the persons approved of by him are
unfit.\(h\) Neither can a report as to the appointment of a receiver be
excepted to.

Where a party produces and examines a witness before the master on
a reference, but neglects to inquire as to a particular item in the account
which the witness alone could explain, he cannot afterwards except to
the report of the master as incorrect, in respect to such item.\(i\)

It has been already stated to be the general rule, that exceptions can-
not be taken to a report, unless objections have been previously carried
in to the draft.\(j\)

Who may except. All parties to the suit, who are interested in the
matter in question, may except to the report.\(l\) And where there are
several sets of parties, appearing by different solicitors, they may, if
they are not disposed to join, each take exceptions, although their
grounds of exception are the same.\(m\)

Creditors, also, who have established their claims before the master,
are permitted to except to the report, although not parties to the suit. (n)
And so are creditors who have preferred their claims, which have been
rejected by the master. (o) It is necessary, however, before they do so,
that they should obtain the permission of the court; which they may do
upon motion, of course. (p)

Persons claiming as next of kin, whose claims have been disallowed
by the master, may also except. (q) So may a purchaser under a decree
for sale in the master's office. (r)

But although creditors, next of kin, and purchasers may obtain an or-
der of course, for liberty to except to the master's report, the case is
otherwise as respects persons who, whether parties to the suit or claim-
ants under the decree, have omitted to carry in objections to the draft.
Such persons, if they wish for the indulgence of the court, must obtain
it by means of a special application, supported by affidavit, accounting
for their omission in not complying with the rules of the court. (s)

And persons who are not parties to the suit, but who have obtained
leave to attend the proceedings in the master's office, cannot except to
the report unless they present their petition, stating their objections and
praying for leave to except. (t)

Argument of exceptions. Exceptions to a master's report are to be
argued in the manner already pointed out with respect to exceptions to
a master's report on exceptions. (u)

It may be added, however, that the counsel of all parties interested in
the report are allowed to be heard in support of the report, and against
the allowance of the exceptions; but only the exceptant's counsel can
be heard in support of the exceptions. (v)

Upon the hearing, affidavits made subsequent to the report cannot be
read. (w) Nor can any evidence be read which was not used before the
master and entered in his report as having been read. (x) And this rule
also precludes the reading of any parts of the defendant's answer which
were not read in the master's office. (y)

If a master improperly rejects evidence offered to him, it should form
a specific subject of exception to his report.

(n) Wilson v. Wilson, 2 Molloy, 328.
(w) See ante, p. 199.
(o) 2 Dan. 943, 953.
(v) 2 Smith, 344.
(p) 2 Smith, 339.
(x) Davis v. Davis, 9 Atk. 21.
(w) Davis v. Davis, 9 Atk. 21.
953.
(y) Hedges v. Cardonnell, 9 Atk. 408.
(r) Ker v. Cloberry, cited id.
(s) 2 Dan. 953. See Vallence v. Weldon, 1 Dick, 290; S. C. Amb. 128.
(t) Taylor v. D'Egville, 7 Sim. 445.
Upon the argument of exceptions, it is not competent to the court to make an order which is not quite consistent with the original decree. From the time of making the decree all the other proceedings should be consistent with it; and if, upon argument of exceptions, it appears that the justice of the case cannot be got at without an alteration of the decree it must be reheard. (x)

Sometimes, upon the argument of exceptions, the court will think proper, before it comes to a decision upon the subject matter of the exception, to send it back to the master to supply some defect in his report, (a) or to inquire into some facts which may be necessary to enable the court to come to a proper conclusion. In such cases the court usually adjourns the consideration of the exceptions, or of the particular exception in question, until after the master shall have made the supplemental report. (b) So, also, when the subject matter of the exception is a fact depending upon conflicting evidence, the court will frequently, before it decides upon the exception, direct an issue at law to try the disputed fact—reserving the decision upon the exception till after the trial. (c)

Overruling exceptions. If the exceptions are overruled, it has all the effect of confirming the report absolutely; and if the cause has been set down to be heard upon further directions, to come on at the same time with the hearing of the exceptions, the court proceeds at once to hear the cause upon further directions. (d) If the exceptions, or any of them are allowed, but it is not necessary to refer the report back to the master to be reviewed, the hearing of the cause upon further directions may be proceeded with in the same manner as if the exceptions had been overruled. (e)

Allowance of exceptions. If the allowance of the exceptions, or any of them, renders it necessary to refer it back to the master, an order is made referring it back to him to review his report; and the reservation of further directions and of the costs of the suit is continued until after the master shall have made his report. (f)

But upon the allowance of an exception to a report as to the amount of damages sustained, the court can modify the report, and settle the amount, without referring it back to the master. (g)

(x) Per Lord Eldon, in Brown v. De Tastet, Jac. 293. And see East India Co. v. Keighley, 4 Mad. 16.
(a) See Ex parte Charter, 2 Cox, 169.
(b) 2 Dan. 960.
(c) Wilson v. Matcalfe, 3 Mad. 45.
See also Gregg v. Taylor, 4 Russ. 279.
(d) 3 Smith, 346.
(e) Id. ib.
(f) Id. ib.
(g) Taylor v. Reed, 4 Paige, 561.
 Exceptions may be allowed in part and overruled in part, and the master may be directed to review his report as to the part relating to the exceptions allowed. (a)

It is competent to the court, on the hearing of the exceptions, at the same time it allows an exception taken by the defendant, and directs the master to review his report generally, to order the defendant to pay a sum of money into court, if it is satisfied that ultimately that sum will be found due from the defendant. (f)

If exceptions taken to the report of a good title are overruled, other objections to the title cannot be made; but if exceptions are allowed, and if a new abstract of title is delivered, further objections may be brought in. (k) Where the report is in favor of the title, the court, on allowing exceptions to it, will give the vendor a reasonable time within which to move the objections; although the exceptions and further directions were set down to come on together. (f)

Reviewing report.] Although the usual method of correcting a master's report, is by taking exceptions to it, there are many cases in which the court will direct the master to review his report, without requiring exceptions to be taken; or if they are taken, will direct it to be reviewed upon other grounds than those covered by the exceptions. (m) And sometimes the court will direct a master to review his report, in order to afford a party an opportunity for carrying in objections to the draft, as a foundation for exceptions. (n)

A reference back to the master, to review a report which has not been excepted to, may be made upon the hearing for further directions; and is frequently so made when the court is not satisfied with the master's finding; as where the master has not found sufficient facts for the court to found its judgment upon. (o)

Where the report is the result of an order made upon petition, or is upon the taxation of costs, the court will, if the objections to the report are not apparent upon the face of it, entertain a petition to refer it to the master to review his report. (p)

In some cases, also, the court will direct a review of the master's report, upon application by motion. Thus, where there has been some omission or error in the report which would prevent the matter from

(a) Knight v. Maclean, cited 9 Smith, 346.
(b) Brown v. De Tastet, 4 Russ. 196.
(k) Brook v. ——, 4 Mad. 213.
(m) 2 Dan. 901.
(n) Vallenence v. Weldon, 1 Dick. 390.
(o) Turner v. Turner, 1 Dick. 312.
(p) 2 Dan. 901.
being properly raised by exceptions, the court has ordered the master to review his report. (g)

And even where exceptions to the report have been heard and disposed of, the court has, at the instance of a vendor, directed the master to review his report, in order to give him an opportunity of completing his title. (r) And a report as to title has been referred back to be reviewed, upon application by motion, even after the confirmation thereof. (s)

In general, however, the court is very cautious in admitting applications to review a master's report after it has been confirmed; and it is only in cases of fraud, surprise, or mistake, that it will be permitted. (t) Even then it will not be allowed, unless a very strong case is made. (u) And it seems that it cannot be allowed after a decree on further directions. (v)

Amending report.] The proper course for supplying deficiencies or correcting errors in a report which has been confirmed is by bill of review. Yet errors apparent in the schedules have been corrected, even after enrolment, on a summary application. (w) Thus, where, in taking an account, a mistake was made in casting up the schedules, which was not discovered until after the decree was enrolled, Lord Eldon, upon an application to correct the error, said that all errors apparent on the face of the schedules might be corrected, even after enrolment, but that there could be no correction except of such apparent errors. (x)

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(g) Anon., 3 Mad. 246.
(r) Andrew v. Andrew, 3 Sim. 390.
(s) Jeudwine v. Alecock, 1 Mad. 597.
(t) Drought v. Redford, 1 Moll. 573.
(u) Turner v. Turner, 1 Jac. & W. 39.
(v) Turner v. Turner, 1 Swanst. 154.
(x) Id. 136.
CHAP IV.

FURTHER DIRECTIONS.

Sect. 1. How reserved.

2. When the cause may be heard upon.
3. Hearing upon.
4. What may be ordered upon.

SECTION I.

FURTHER DIRECTIONS HOW RESERVED.

The consideration of further directions is only reserved in decrees and decretal orders. In other orders the direction is "to the end that upon the coming in and confirmation of said master's report, such further order may be made in the premises as shall be just."

SECTION II.

WHEN CAUSE MAY BE HEARD UPON FURTHER DIRECTIONS.

When a decree is interlocutory, and the consideration of further directions has been reserved until after the trial of an issue, &c. or until the coming in of the master's report, it is necessary, in order that a complete termination may be put to the suit, that it should again be set down to be heard for further directions; which process must be repeated as often as any further directions are reserved by the last decree pronounced. (b)

A cause cannot be set down on further directions, except upon a

(b) 2 Dan. 964. Seaton on Decrees, 36.
master's general report, made in pursuance of a decree or decretal order. If the master has made a separate report, in pursuance of a decree or decretal order, or any report not in pursuance of a decree or decretal order, the party cannot bring the same before the court on further directions, but must apply for consequential directions by petition.\(^{(c)}\) In *Van Kamp v. Bell,*\(^{(d)}\) it was held that a cause cannot be set down for further directions upon a separate report, but that the order must be sought by a petition.

It is only where further directions are reserved by a decree or order that it is necessary to set the cause down for hearing for such further directions. Where a decretal order is made upon motion, the court will proceed upon the report on motion.\(^{(e)}\)

Where the consideration of further directions has been reserved by a decree till after the coming in of the master's report, the court will not allow a cause to be set down for further directions before the report has been made; even though it is found that the reference to the master has become useless.\(^{(f)}\) The proper course in such a case, is to obtain a variation of the decree by rehearing.\(^{(g)}\)

Where the master states in his report, that he cannot take the account which the court has directed, this is considered the subject of further directions, rather than of exceptions to the report.\(^{(h)}\)

With regard to the effect of reserving further directions, it may be observed that, in general, after the reservation of further directions, the court refuses to interfere in a summary way;\(^{(i)}\) unless the decree has given the parties leave to apply to the court as they may be advised; which, however, is very seldom done where the decree reserves the consideration of further directions.\(^{(k)}\)

Yet, it seems, that after such a reservation, the court will entertain summary applications for collateral matters, such as the appointment of a receiver,\(^{(j)}\) or to dismiss a bill by consent.\(^{(m)}\)

If, by a decree or decretal order, the consideration of further directions, and of the costs of the suit, has been reserved, as soon as the master's report has been absolutely confirmed, the complainant may set down his cause for further directions and for costs.\(^{(n)}\) If, after the service of the order *nisi* to confirm the report and before the same has been

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\(^{(c)}\) 2 Smith, 369.  
\(^{(d)}\) 3 Mad. 430.  
\(^{(e)}\) Brooke v. Clarke, 1 Swanst. 550.  
\(^{(f)}\) Dixon v. Olmisch, 1 Ves. jun. 153.  
\(^{(g)}\) Id. ib.  
\(^{(h)}\) Lupton v. White, 15 Ves. 439, 436.  
\(^{(i)}\) Cooke v. Gwyn, 3 Atk. 689.  
\(^{(k)}\) 2 Dan. 964.  
\(^{(j)}\) Cooke v. Gwyn, supra.  
\(^{(l)}\) 2 Smith's Pr. 301.
made absolute, exceptions have been taken by either party, the complainant may apply, by a petition of course, that the cause may be set down for further directions and costs, and may come on to be heard together with the exceptions. (o)

Although the complainant has excepted to the report, yet he is entitled to set his cause down for further directions. (p)

SECTION III.

HEARING UPON FURTHER DIRECTIONS.

The course of proceedings upon the hearing of a cause on further directions, is much the same as that pursued upon the original hearing; except that the pleadings are not opened, nor are any proofs read, but those which were read before the master. (g) The further directions are opened by the complainant's counsel, who reads or states the effect of the ordering part of the decree, and so much of the report as is necessary to enable the court to decide the questions before it. (r)

If default is made by any party in appearing, upon the production of an affidavit of service, an absolute order will be pronounced, and not an order nisi as upon the original hearing. (s)

If exceptions have been taken to the master's report, and have been set down at the same time with the further directions, they must be heard and disposed of before the cause is heard upon the further directions. (t)

As the court, upon the hearing of further directions, will not enter on any matter extraneous to the decree, or receive any evidence beyond the report, wherever such matter arises, it is necessary to present a petition, to come on to be heard together with the further directions. (u)

Thus, if any new facts have occurred since the original decree, which have altered the situation of the parties, or have affected their rights in the subject matter, and which have not been brought before the court by a supplemental suit, these facts may be stated in a petition; which
may be ordered to be heard at the same time with the cause for further directions.\(^{(v)}\) In such cases, if the facts which form the ground of the application are not admitted by the parties interested, or if all or any of the parties interested are not competent to make an admission, they must be verified by affidavit.\(^{(w)}\)

A creditor whose claim has been admitted by the master, has a right to appear upon the hearing of the cause for further directions to protect his own interest. And he may do so without presenting a petition for liberty to appear, provided he desires to take advantage of nothing but what appears in the report.\(^{(x)}\)

Upon the hearing on further directions, if the party has not excepted to the master's report, he is concluded by the findings therein; but if all the circumstances appear upon the face of the report, a question decided by the master may be opened on further directions without any exceptions having been taken.\(^{(y)}\) So, if the master has exceeded his authority, and a party has omitted to take exceptions, he is not concluded by the confirmation of the report.\(^{(z)}\)

A party cannot, on the hearing for further directions, object to evidence which has been entered in the decree as read, on the ground that the witness is interested, or on any other ground; the question being concluded by the decree. Neither can a party object, upon such hearing, to any evidence which the master has received, and noticed as the basis of his report. If a party desires to exclude such evidence from being entered in the report, he must take exceptions.\(^{(a)}\)

If the interest of a party in the fund in court, or any part of it, which is to be disposed of on further directions, has been sold or assigned, the purchaser or assignee may apply by a special petition, to come on with the further directions, that the money may be paid over to him. This petition need only be served on the vendor or assignor of the share.\(^{(b)}\) Sometimes a petition of this nature is presented before the hearing on further directions; and the order then is that the money shall not be paid out without notice to the petitioner.\(^{(c)}\)

\(^{(v)}\) 2 Dan. 974.  
\(^{(w)}\) Id. 975.  
\(^{(x)}\) Young v. Everest, 1 Russ. & My. 426.  
\(^{(y)}\) Adams v. Claxton, 6 Ves. 230.  
\(^{(z)}\) Lewis v. Loxham, 1 Mer. 179.  
\(^{(a)}\) 2 Smith, 370.  
\(^{(b)}\) Id. ib.  
\(^{(c)}\) Id. ib.
SECTION IV.

WHAT MAY BE ORDERED UPON FURTHER DIRECTIONS.

At the hearing upon further directions, the court will make such further order in the cause as, upon reading the master's report, appears to be consistent with the justice of the case, as it stands upon the decree and report; unless it is dissatisfied with the manner in which the master has executed the duties imposed upon him by the decree; in which case it will send it back to him to review his report, or such part of it as the court sees reason to be dissatisfied with.(d)

Where a question has been raised upon the pleadings, but no direction or reservation of it has been made by the decree, the court will not take it into consideration upon further directions.(e)

In general, a decree cannot be altered on further directions; but it must be re-heard.(f)

The court may decree interest on a debt, under the reservation of further directions, although the question was not expressly reserved by the original decree.(g)

And not only will the computation of simple interest be so directed, but where the court finds large sums of money in the hands of an agent, receiver, trustee, or personal representative, it will direct the master to ascertain the balances from time to time in the hands of an accounting party, and to compute interest on them.(h) The court has even gone the length, on further directions, of charging an accounting party with interest on the balances in his hands, not only where there was no reservation of the question of interest by the original decree, but even where the original bill did not pray that they might be so charged.(i)

But after the usual decree for an account against an administrator,

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(d) 2 Dan. 966. See also Magee v. Mahon, 1 Molloy, 147. 
(e) Id. ib. Le Grand v. Whitehead, 1 Russ. 309.
(g) Goodyere v. Lake, Amb. 594. 43. Wilson v. Metcalfe, 1 Russ. 530.
the complainant, on the cause coming on for further directions, cannot obtain by petition, on facts disclosed by affidavits, a reference to the master to make inquiries as to the balances in his hands from time to time, with a view to charge him with interest.\(^k\)

After a direction of a trial at law, however, reservation of general objections will be taken to include costs, interest, and every thing.\(^l\)

And not only will the court, in cases where, upon the decree, and the report under it, a proper ground appears for giving interest, direct it to be computed, on further directions, though the question of interest has not been reserved by the original decree; but it will, if the report makes a new case against the defendant for charging him with sums which, but for his wilful default, he might have received, make an order for so charging him, on further directions; even where it was prayed by the bill and refused at the hearing from deficiency of proof.\(^m\)

So, although a receiver has been refused upon the hearing of the cause, yet if upon the report a new state of facts appears, e. g. a balance in the hands of the defendant, the court will entertain a renewed application for a receiver, upon the hearing on further directions.\(^n\)

But the court will not make any order upon further directions which will have the effect of varying or impugning the original decree; even though a new state of circumstances appears by the master's report, showing that if the facts, as they are stated upon the report, had been before the court at the time when it pronounced the decree, it would not have given the directions contained in the original decree.\(^o\) Thus, when costs have, at the hearing, been ordered to be taxed as between solicitor and client, the court will, at the hearing, upon further directions, direct the subsequent costs to be taxed upon the same principle. It will not, however, consider itself bound by a previous direction to tax costs as between solicitor and client, made upon petition and by consent, where, upon further directions, it appears that there is no case to warrant such a mode of taxation.\(^p\)

As no variation can be made in the original decree, upon the hearing for further directions, neither will the court entertain an objection to it, upon a ground which might have been made at the original hearing.\(^q\)

\(^{(k)}\) Parnell v. Price, 14 Ves. 562. \(^{(l)}\) Champ v. Mood, 9 Ves. 470. \(^{(m)}\) Franklin v. Beamish, 2 Molloy, 383. \(^{(n)}\) Attorney Gen. v. Mayor of Galway, 1 Molloy, 95. 

\(^{(o)}\) Wilson v. Metcalfe, 1 Russ. 530. \(^{(p)}\) Trezevant v. Frazer, cited 2 Dan. 971. 

\(^{(q)}\) Pritchard v. Draper, 1 Russ. & My. 191.
BOOK III.

Interlocutory Applications and other Incidental Proceedings in a Cause.

Having in the two previous Books treated of the most usual and ordinary proceedings in a cause, from its commencement to a decree, and of the proceedings subsequent to the decree, whether for the purpose of enforcing, or correcting or reversing it, we propose in the present Book to direct the reader's attention to some of the various applications and incidental proceedings occurring from time to time in the progress of a cause, and which have not already been noticed.

And first, of Interlocutory Applications.

An interlocutory application is a request made to the court for its aid in a matter arising in the course of the cause. It may either relate to the process of the court, or to the protection of the property in litigation pendente lite, or to any other matter upon which the interference of the court is required, at any time.

Applications of this nature are made either orally, or in writing. In the former case they are called motions; in the latter, petitions.
CHAPTER I.

MOTIONS.

2. Motions of Course.
3. Special Motions.
4. What may be effected by.

SECTION I.

NATURE AND KINDS OF MOTIONS.

A motion is an application made *ores tenus* for an order of the court. A motion may be made by or on behalf of any of the parties to the record; provided such party is not in contempt. But an individual who is not a party to the record, cannot, in general, be allowed to apply by motion. A person, however, who is *quasi* a party to the record—such as a creditor coming in under a decree, or a purchaser under a decree of the court—may apply to the court by motion.\(^{(a)}\)

Motions are either of course, or special.

SECTION II.

MOTIONS OF COURSE.

A motion of course is where, by a standing rule, or the known course of the court, the object of it is granted upon asking for it, and without hearing both sides. No notice of such a motion is necessary; as the

\(^{(a)}\) 3 Dan. 248.
court will not hear any defence to it. (b) But if the order entered upon a motion of course is to the prejudice of the opposite party, or obtained upon a false suggestion, he may move to set it aside. (c)

Motions of course by our practice are those upon which the orders are entered by the register or clerk, at the request of the party, and without any actual application having been made to the court.

Motions of this class will be more particularly noticed when we come to speak of Orders.

SECTION III.

SPECIAL MOTIONS.

Nature of. A special motion is one which it is not a matter of course to grant, but which requires some ground to be laid for it, either by a previous order, or by the pleadings in the cause, or by affidavits.

Special motions are made either ex parte, or upon notice to the opposite party.

Ex parte applications. Ex parte applications are made for a great variety of purposes; among which are the following: for an order that an absent defendant appear; that the complainant's bill be taken as confessed; for a ne exeat; to show cause why an injunction should not issue; to enjoin time to produce witnesses; for an order to stay proceedings; for time to answer, except, or reply; for appointment of a guardian ad litem; for an order to compel payment of costs. (d) To which may be added, for leave to file a supplemental bill, &c.

And where an order is made by which a particular act is to be done, unless the other party shall, within a certain time, show cause to the contrary, (which order is generally termed an order nisi,) the party obtaining the order, must, after the expiration of the time limited by it, if no cause is shown, move for another order to confirm the previous order nisi absolute. The motion in this case requires no notice; but it must be supported by an affidavit to prove the due service of the order nisi. (e)

After the bill has been taken as confessed, against the defendant, for

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(b) Prac. Reg. 345; 1 Newl. 199. (d) See Rules 25, 28, 30, 32, 66, 114,
(c) Id. ib. 1 Newl. 507. Eyles v. 125, 146, 171.
Ward, Mos. 255. (e) 3 Dan. 253.
want of appearance, an application for the appointment of a receiver, or for an injunction or _ex exact_ against the defendant, may be made _ex parte_ and without notice.(f)

And the 16th rule provides that no service of notices or papers in the ordinary proceedings in a cause, shall be necessary to be made on a defendant who has not appeared therein.

The object of _ex parte_ motions is, usually, to prevent the performance of some act which, if performed, might cause irreparable injury. It is, therefore, sometimes desirable that the party to be affected by the motion, should not have any previous intimation thereof. Where there is no danger that the object of the motion would be defeated if notice were given, an _ex parte_ application will not be permitted.(g)

Some of the _ex parte_ applications mentioned above, may, by the rules, be made to masters, or other officers of the court. Whenever they are required to be made to the court, they must be made on a regular motion day, or at a regular term of the court; unless, in a case of emergency, the court consents to hear them in vacation.(h)

In hearing motions, whether at a regular or special term, the court always gives preference to _ex parte_ applications.

_Ex parte_ applications must be supported by the affidavit of the party applying for them, and by such collateral affidavits or papers as may be necessary to make out a sufficient case for the interference of the court.(i)

_Special motions upon notice._ When an application to the court is not of course, nor such as can be made _ex parte_, written notice of such application must be served upon the opposite party.

Therefore, where a reference to make preliminary inquiries, preparatory to the hearing of a cause is necessary or proper in a case in which the sales do not authorize the entry of a common order, if such entry is not assented to by all the parties interested therein, a special application must be made to the court, upon due notice to all such parties as have appeared in the suit.(k)

_When to be made._ The first and third Tuesdays of every month, during the vacations, are assigned for hearing motions and petitions before the chancellor at the capitol in the city of Albany; except between the May and August terms, when they are to be heard at the chancellor's dwelling house at Saratoga Springs. The second and fourth Tuesdays are assigned for hearing motions, &c. before the vice chancellors,

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(f) Austin _v._ Figuera, 7 Paige, 56.  
(g) 3 Dan. 252.  
(h) Rule 4.  
(i) 3 Dan. 252.  
(k) Corning _v._ Baxter, 6 Paige, 178.
at their places of residence respectively, or at such other places as they may appoint: except that in the first circuit such special terms are to be held at the city hall in the city of New-York; and in the third circuit, at the capitol in the city of Albany.\(^{(l)}\)

The business noticed for any regular day may be continued from day to day, until it is completed, or adjourned over to some subsequent day.\(^{(m)}\)

When notice of an application has been given for any motion day, if the chancellor or vice chancellor is unable to attend, on that day, the case will stand over, of course, until the next regular motion day, or a stated or special term of the court (if one intervenes); when it may be brought on without further notice.\(^{(n)}\)

Motions may be also made on Monday of every week during the regular terms; when they will have a preference over calendar causes. But they cannot be heard on any other days in term, without special order. And among contested motions and petitions, those have the preference where the applicant has not had an opportunity to make the application on any of the regular days in the preceding vacation.\(^{(o)}\)

In all cases the motion must be made on the day for which it is noticed, if the party has an opportunity to be heard on that day; unless the court shall otherwise direct.\(^{(p)}\)

It has been decided by this court that notice of a special motion may be given for any other day in term, as well as for Monday, provided there is a sufficient excuse for not giving the notice for the first motion day in term; but the court will only hear motions on the regular motion days in term, unless by special direction.\(^{(q)}\)

\textit{Notice of motion—when necessary.} Notice of every application to the court must be given to the opposite party, in case he has appeared, where the motion relates to any matter pending in court, or where a final order is sought; orders for time, and those of a like nature, alone excepted; otherwise the applicant will only be entitled to an order \textit{nisi prius}.\(^{(r)}\) Therefore, a motion for an order which may have the effect of delaying the cause, must be made on notice.\(^{(s)}\) So an injunction affecting the rights of a party who has appeared, upon a supplemental bill, will not be granted upon an \textit{ex parte} application. Regular notice of

\(^{(l)}\) Rule 3.
\(^{(m)}\) Idem.
\(^{(n)}\) Rule 4.
\(^{(o)}\) Rule 5.
\(^{(p)}\) Idem.
\(^{(q)}\) McCotter v. Grant, 16 Feb'y, 1830. M. S.
\(^{(r)}\) Isnard v. Cazeaux, 1 Paige, 39.
\(^{(s)}\) Hart v. Small, 4 Paige, 551.
\(^{(e)}\) Brien v. Brien, 1 Hogan, 399.
he application must be given to such party. (t) And a defendant who has appeared, is entitled to notice of the subsequent proceedings, although he is in contempt, and the bill has been taken pro confesso against him, for want of an answer. (u)

Notice of motion—form of. The notice of motion must be properly entitled in the cause, addressed to the solicitor of the opposite party, or to the party himself, if personal service is intended, and be dated, and signed by the solicitor of the party moving.

It must state the day and place, and the hour of the day at which the motion will be made. Or, it may state, if preferred, that the motion will be made "at the opening of the court on that day." This is perhaps the safer course. Whichever method of stating the hour is adopted, such statement should be followed by the words "or as soon thereafter as counsel can be heard."

A notice of motion must state clearly the terms of the order asked for; and every thing which the party would have, should be expressed; as the court will not, ordinarily, extend the order beyond the notice. (v)

For this reason, it is usual to add a prayer for general relief—"and for such further, or for such other order or relief, as the court may think proper to grant"—so that if the court should think the party entitled to some relief, but not to precisely the specific relief asked for, he may have such order as the court will grant.

Thus, costs are never given to the party moving unless asked for by the notice of motion. (w)

Several objects may be included in the same notice of motion—such as the appointment of a receiver, for an injunction, and the payment of money into court; (x) or for the appointment of a receiver and payment of money into court, and the production of papers. (y)

The notice of motion is attached to the papers upon which the application is to be made, if any papers are to be used which the party has it in his power to serve, and specifies that the motion will be founded thereon. If it is founded on pleadings or other papers on file, the notice should mention that fact—specifying such papers particularly.

If it is intended to read any affidavits which have been already filed in the cause, such intention ought, in strictness, to be mentioned in the

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notice of motion; otherwise the other party would have no intimation that such affidavits were to be read. But a separate notice of the intention of the mover to read them, duly served, is sufficient.(z)

Time of notices. The time of all notices, unless otherwise expressly provided, is to be deemed and taken to be one day exclusive and one day inclusive. But if the time expires on Sunday, the whole of the succeeding day is to be included.(a) But it has been decided that in notices of motion, the whole of the day on which the notice was served is included in the computation, and the day upon which the motion is to be made is excluded.(b) Thus, a four days notice of motion for Tuesday is good, if served at any time on the preceding Friday.(c)

Service of notice—time of. All notices of special motions must be notices of at least eight days, if the solicitor of the adverse party resides over one hundred miles from the place where the court is held; if over fifty and not exceeding one hundred miles, six days notice must be given; and in all other cases four days.(d)

But where the service is on an agent, or by putting the papers in the post office for want of an agent, it must be double the time of service which would be requisite if the service was on the solicitor in person. And if the solicitor resides more than one hundred miles from the agent or office where service is made, the time of service must not be less than sixteen days.(e)

If the party upon whom a notice is served appears and opposes the motion, on the ground that the notice was short, upon which the motion is denied, he will not be allowed costs for opposing the motion—the same having been refused upon an objection merely technical.

Mode of serving notice. Where a party other than a solicitor of the court prosecutes or defends in person, the service of notice may be on him personally, or at his residence or place of business, if he is absent, or by putting the same into the post office directed to him at his place of residence.(f)

Where a solicitor, who is a party to the suit, prosecutes or defends in propria persona, the notice may be served on his agent.(g) But where a solicitor or other officer of the court neglects to appear in the cause, he is not entitled to the service of notices and papers upon him or his agent.(h)

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(z) 3 Dan. 257. (a) Rule 192. (b) Rule 15.
(a) Rule 192. (a) Rule 192. (c) Champlin v. Fonda, 4 John. Ch. 69.
(b) Vandenburgh v. Van Rensselaer, 6 Paige, 147. (f) Rule 10.
(c) See note to 99d Rule. (g) Wells v. Cruget, 5 Paige, 164. (h) Rep. 69.
Where a party appears by a solicitor, the notice should be served personally upon him, if he resides in the same county and within forty miles of the solicitor giving the notice, or upon a partner or clerk in his office if he is absent.

When the solicitors for the respective parties do not reside in the same county and within forty miles of each other, the notice may be served upon an agent. If the suit or proceeding is before a vice chancellor, the service must be on the agent residing in the circuit where the same is pending; but if before the chancellor, the service may be on the agent residing either at Albany, New-York, or Utica. (i)

If the solicitor does not reside at the place where service is made, and has no agent there, service of the notice may be made by putting it into the post office at that place, directed to such solicitor at his place of residence. (k)

And in all cases where the solicitors for the adverse parties do not reside in the same city or town, notice may be served by putting it into the post office at the place where the solicitor who is to make the service resides, properly enclosed and directed to the opposite solicitor at his place of residence, and paying the postage thereon; which will be equivalent to a service upon an agent. (l)

The 7th section of the act of May, 1840, concerning costs and fees in courts of law, &c. (m) directs, that in all cases where, by the rules and practice of the court, solicitors are required to appoint agents, the registers and clerks shall be such agents. In Freeland v. Nott, (n) the chancellor considers the object of this section to have been to relieve solicitors from the necessity of appointing agents at all the various registers' and clerks' offices; but without depriving them of the right to select their own agents at those places where their principal business is done, if they think proper to do so. But that the language of the section is imperative, as it now stands, that where agents are required to be appointed, the register, &c., shall be such agents; and that the service of papers upon the register, &c. was therefore a good service upon the agent of the other party. But the chancellor was of opinion that there was nothing in the act which necessarily prevents the solicitor from appointing his own agent at the same place also, if he thinks proper to do so. And he decided, that where the solicitor has appointed an agent other than the officer who is designated by the statute, papers might be served upon either.

(i) Rule 14.
(k) Idem.
(l) Rule 14 as amended June 3, 1840.
(m) Laws of 1840, p. 331.
(n) 8 Paige, 431.
In case of the absence of the opposite solicitor, or his agent, from his office, the notice may be served by leaving the same with his clerk or law partner, in such office, or with a person having charge thereof; and if no person is found in the office, by leaving the same, between the hours of six in the morning and nine in the evening, in a suitable and conspicuous place in such office. Or if the office is not open, then the notice may be left at the residence of the solicitor or agent, with some person of suitable age and discretion.\(o\)

All notices of motion for any process of contempt or commitment, must be served personally upon the party to be affected by it, unless an order has been previously obtained for substituted service.\(p\)

Serving papers in connection with notice. A copy of the papers upon which a special motion is founded must be served upon the adverse party, together with the notice of motion.\(q\) But if the papers to be used are already in the possession of the party, or are on file or of record in the court, they may be referred to in the notice, and copies need not be served.\(r\) This is to be understood as follows: Papers on file or of record must be served with the notice, unless they were filed by, or have previously been served upon, the party on whom the notice is served. For instance if, a party reads affidavits in opposition to a motion, and files them, and afterwards makes a motion, on notice, and wishes to use those affidavits, he must serve copies of them.

Affidavit of service of notice. After the notice of motion has been served, the party serving the same should make an affidavit of the service, to be used when the motion is made, in case the party served should fail to appear. This affidavit should state the time and manner of the service, and should be attached to the original papers and draft of the notice of which copies were served, and should refer thereto.

Admission of service. But a simpler method of proving service than by affidavit, is to take an admission signed by the opposite solicitor, or his agent of service of copies of the affidavits, notice, and other papers, dated a sufficient number of days before the time the motion is to be made, or an admission of due service without a date.

Hearing of motions.] The times for hearing motions, as fixed by the court, we have already mentioned.\(s\) It is the practice of the court,

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\(o\) Rule 15.  \(p\) 3 Dan. 257. Mullens v. Williamson, 380.  \(q\) Rule 80. Isnard v. Cazeaux, 1

whenever there are any *ex parte* motions, to give them the preference
over such as are opposed.

The course of proceeding at the hearing, with respect to litigated
motions, is, for the counsel who makes the motion, to read the notice of
motion, with the affidavit or admission of service, and the other papers
upon which the motion is founded. After which, if there are any pa-
pers to be used upon the other side, they are read by the counsel for the
opposing party. The counsel for the moving party then makes his ob-
servations upon the motion; after which, the counsel in opposition to
the motion are heard. The counsel for the moving party has then the
right to reply; which closes the argument. The court then either de-
cides the application or takes the papers for further consideration.

There is an exception, however, to the general rule as to the right to
reply. In injunction cases, upon an order to dissolve, *nisi*, the complain-
ant shows cause upon the merits confessed in the answer. Then no re-
ply is allowed; the motion for the order *nisi* being considered as the
application to which the complainant answers, by showing cause upon
the merits. After this, the defendant's counsel is allowed to argue
against the cause shown by the complainant; and this is considered as
the reply.(	extit{f})

It is not customary to hear two counsel on the opening of a motion.
Where two are employed on the same side, one only opens and the other
replies to the opposing counsel.

Instead of an oral argument, the question upon a special motion may
be *submitted* to the court by a stipulation, in writing, signed by par-
ties or their solicitors, or counsel, and delivered to the register, &c. with
the necessary copies and papers. And if the necessary copies and pa-
pers are not furnished, the submission is not to be entered.(	extit{u})

On special motions and petitions as well as in calendar causes, the
register, &c. must mark the papers and note them in his minutes, as on
a hearing.(	extit{v})

The solicitor who prepares papers to make or oppose a motion, should
be careful that they are not scandalous or impertinent; as the court may,
upon the mere examination of an affidavit, or other paper, order scan-
dalous or impertinent matter contained therein, to be expunged, without
directing a reference to a master, and may charge the proper party with
the costs.(	extit{w}) A party who makes an affidavit to oppose a motion, is

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*(t) 3 Dan. 269.*

*(u) Idem.*

*(v) Rule 97.*

*(w) Powell v. Kane, 5 Paige, 265.*
only authorized to state the facts, and it is scandalous and impertinent
to draw inferences or state arguments therein, reflecting upon the charac-
ter or impeaching the motives of the adverse party or his solici-
tor. (x)

Where original papers are used in opposition to a motion which is
denied, the party using such papers, must file them, so that the adverse
party may obtain copies thereof. (y) And if the opposing party has pa-
pers to read in opposition, and the application is decided in his favor,
on the papers of the adverse party, upon the opening of the case, if he
wishes to have the benefit of his papers in opposition to the application,
upon an appeal from the decision, or wishes to be allowed for them on
the taxation of costs, he should have such papers entered in the minutes
of the court below, and marked as read. (z)

Costs of motion.] In deciding upon a motion, the court usually ex-
tends its order to the costs of it; that is, if it denies the motion, it fre-
cently denies it with costs; though it will not give costs on granting
it, unless the costs have been specifically mentioned in the notice of the
motion. (a) And where costs are asked for by the notice, the motion is
made at the peril of paying costs, if the party is unsuccessful. (aa)

The 199th rule directs that when a motion is granted or denied with
costs, the court shall allow a gross sum, not exceeding the probable
amount of the taxable costs, and not more than twenty dollars in any
case; which amount shall be inserted in the order as the costs to be
paid upon granting or denying such application, unless the court, at the
time of the decision, shall direct the full amount of the taxable costs to
be paid, or taxable costs not exceeding a certain sum, to be specified in
the order.

When costs are directed to be paid, but the court omits to specify the
gross sum which is to be specified in the order, or to give any further
directions as to what costs are to be allowed, the register or clerk
must insert in the order a gross sum of ten dollars where the order was
taken by default, and fifteen dollars if the motion was argued or op-
posed. (b)

If a party who is not interested in the result of a motion is served
with the notice, he will be entitled to the costs of appearing. (c)

(e) Powell v. Kane, 5 Paige, 205.  (aa) Mann v. King, supra. 3 Dan.
(y) Bloodgood v. Clark, 4 Paige, 574.  256, n. (k)
(z) Id. ib.  (b) Rule 109.
(a) See Ante, p. 570. Little v. John-
son, 1 Molloy, 234. Magrath v. Veitch, 377.
(b) Rule 109.
(c) Heneage v. Aikin, 1 Jac. & W.
1 Hogan. 443. S. C. 1 Molloy, 234.
Mann v. King, 18 Ves. 297.
Generally, a party making a successful motion is entitled to his costs; but not for an unsuccessful motion. (d) Yet in some cases, though a party succeeds in his motion, he will be ordered to pay the costs of it. Thus where he applies for an order which is for his own benefit, he will, in general, be ordered to pay all the other parties their costs occasioned by the application. Where a party obtains a general decree for costs in the cause, he is entitled to have taxed the costs of a successful interlocutory motion, if no direction as to costs was given at the time; unless such application was granted as a mere matter of favor, or to relieve the party from the consequence of his own default. (e) But a party who makes an unsuccessful motion is not entitled to the costs thereof. The party opposing the same, however, is entitled to his costs as costs in the cause, unless a different direction is given at the time. (f)

And if a party has good ground for opposing a motion, he may be entitled to the costs of opposing it, notwithstanding the motion is granted. (g) Therefore, where a party moves for more than he is entitled to, he may be ordered to pay costs of opposing the motion, although the same is granted in part; inasmuch as he has compelled his adversary to come into court and resist his motion. (h)

Where the solicitor of a party makes a useless application to the court to correct a mere technical irregularity which cannot injure or materially delay his client, he will not be allowed the costs of such application, as against the adverse party. Neither will he be allowed costs for opposing a motion, by the adverse party to correct an irregularity, which motion is rendered necessary by reason of his refusal, upon a proper application, to waive the irregularity. (i)

If the papers upon which a special motion is made or opposed are unnecessarily prolix or voluminous, costs will be refused to the party using such papers, although he might otherwise have been entitled to costs against the adverse party. (k)

If a party attends for the purpose of opposing a motion in pursuance of the notice, he is entitled to costs of opposing in case the other party does not appear and bring on the motion. But he cannot move for costs until all the business before the court is disposed of, and the court is ready to adjourn. Then, upon reading the notice of motion served upon

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(d) Halst. Dig. 176.
(e) Stafford v. Bryan, 2 Paige, 45.
(f) Id. ib. Rogers v. Rogers, 2 Paige, 458.
(g) Lowe v. Firkins, McCle. 10.
(h) North American Coal Co. v. Dyett, 2 Edw. 115.
(k) Kane v. Van Vranken, 5 Paige, 62.
him, and showing that the service was made in due season—i.e. that the notice was not what is technically called "a short notice"—the court will allow him to take an order for costs.

It has been mentioned that a party appearing to oppose a motion, on the ground of short notice, will not be allowed costs, although the motion is denied; if it is denied because of that objection. (kk)

SECTION IV.

WHAT MAY BE EFFECTED BY MOTIONS.

The court will not, upon motion, make an order which will decide the principal point of the case; except upon the consent of all the parties affected by it; which consent must be expressed by their counsel in court, and cannot be inferred from their not attending in pursuance of the notice of motion. (l)

Although the defendant makes admissions which would entitle the complainant to a decree, he cannot, for that reason, move for the payment of money into court. (m)

In suits for the specific performance of an agreement, if the contract is admitted, and the only question is on the title of the seller, the court will before the hearing, upon motion, direct a reference to a master to inquire into the title. (n) And this reference, has even been directed before answer. (o) But it seems that the court will not, on motion before the hearing, decide upon the validity of any other objection which may be raised by the answer to a bill for specific performance, besides defect of title; the consideration of any other objection being matter to be reserved till the hearing of the cause. (p)

If, in a suit for a specific performance, the master reports against the title of the vendor, it is not necessary to set down the cause, in order that the bill may be dismissed with costs. The court will make such an order upon motion. (q)
INTERLOCUTORY APPLICATIONS, &c. [Book III.

On the foreclosure of a mortgage, if the mortgagor or a person who has come into possession under him, pending the suit, refuses to deliver up possession to the purchaser under the decree, the court, on motion for that purpose, will order the possession to be delivered to the purchaser, though the delivery of possession is not made a part of the decree. (r)

Where a decree of divorce directs an allowance for the maintenance of children, until the further order of the court, an application to vary the allowance should be by motion or petition and not by a new bill filed. (a)

Bills for discovery merely, in aid of the defence to a suit at law, are not brought to a hearing, but are disposed of on motion, after the answer is deemed sufficient. (t)

As to the right of a party in contempt to make a motion, see post, Book V., Chap. VIII, Section 5, relative to the effect of being in contempt.

CHAP. II.

PETITIONS.

Petitions are applications in writing for an order of the court, stating the circumstances upon which they are founded; and are resorted to whenever the nature of the application to the court requires a fuller statement than can be conveniently made in a notice of motion.

Petitions must be addressed "To the chancellor of the state of New-York," without the addition of his name, or any other title or designation. (a)

Petitions may be presented either in a cause, or in a matter over which the court has jurisdiction under some act of the legislature or other special authority. With respect to applications made in a cause, there does not appear to be any very distinct line of demarcation between the cases in which they should be made by motion and those in which they should

(a) King v. Clark, 3 Paige, 76.
(a) Rule 10.
(c) Peck v. Peck, Hoph. 584.
be made by petition; the practice being generally regulated by the circumstances of each case. (b) But where the application is upon some collateral matter which has reference to a suit in court, a party may be relieved upon petition. (c)

Although it is competent to the court to order money in court to be paid out, upon motion, Lord Eldon, it is said, would not allow it to be done except upon petition. (d) In like manner all applications for orders, which partake more of the nature of decrees or of decretal orders than of interlocutory proceedings, such, for instance, as applications for the appointment of guardians, and for the allowance of maintenance for infants, should be made by petition. And so, in general, must all applications to the court, upon matters arising out of decrees or decretal orders, except those relating to the process of the court, or for enforcing the performance of them, which are usually made upon motion. (e)

Where an order to stay proceedings in a cause pending in this court is proper, the party must apply to the court by petition. (f) And maintenance will be allowed to an infant, out of the capital of his estate, upon petition without bill. (g) But a receiver of the rents and profits of an infant's estate will not be appointed upon petition, where there is no bill depending in the court. (h)

In general, a petition cannot be presented in a cause until the bill is filed. The case of a complainant applying to sue in forma pauperis, appears to form an exception to this rule. (i)

The 141st rule directs, that on presenting a petition to the court, in the form prescribed by law, by a person wishing to prosecute in forma pauperis, an order may be entered referring it to a master to inquire and report whether it is proper that the petitioner should be allowed to prosecute in that manner. And if the master is satisfied that the petitioner is entitled to prosecute as a poor person, he must report the names of suitable persons to be assigned as his solicitor and counsel.

A petition may be presented by any person, whether a party to a suit, or not.

Where a petition in a cause is presented, it must be entitled in the cause in which it is presented. When it is presented in some collateral

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(b) 3 Dan. 944.
(c) Codwise v. Gelston, 10 John. 508.
(d) See Lord Shipbrooks v. Lord Hinchinbrook, 13 Ves. 394.
(e) 3 Dan. 215.
(h) Anon. 1 Atk. 499. Ex parte Whinfield, 2 Atk. 315.
matter, or there is no suit pending, it is entitled "In the matter of A. B." &c.

The petition then states by whom it is presented, and the particulars of the case, and concludes with praying the court to make the order required.

Brevity and form are the two things chiefly to be observed in drawing petitions. (k) To which may be added, care to avoid scandal or impertinence; for which a petition, as well as any other proceeding, may be referred.

Petitions are to be signed and sworn to by the petitioner, and signed by his solicitor and counsel. They are to be verified in the same manner as bills. (l) And the substance of the oath administered to the petitioner must be stated in the jurors. (m) Where the petitioner is a person who has been found by the inquisition of a jury to be a lunatic, the officer before whom the petition is sworn to, should state in the jurors, that he has examined the petitioner for the purpose of ascertaining the state of his mind, and that he was apparently of sound mind, and capable of understanding the nature and contents of the petition. (n)

A petition must be fairly and legibly written, entitled, and endorsed, and the folios numbered and marked, in the manner directed by the 95th rule.

And in case there is any person who has a right to be heard in opposition to a petition, a copy of it must be served upon him, with notice of the time and place of presenting the same. This service must be made in the same manner, and the same length of time before presenting the petition, as a notice of motion is required to be served. (o)

Petitions are to be heard at the same times, and in the same manner, as special motions. (p)

If, upon the hearing, the petitioner does not appear, the petition will be dismissed with costs, upon the production of a copy of the petition with the notice of presenting the same, and on showing that the notice was not short—i.e. that the notice of motion was served a sufficient length of time previous to the motion day. The reason of this requisition is, that the court never gives costs of appearing to oppose a motion or petition on the ground of short notice, and never grants a motion without proof of due service, although it is not opposed.

On the other hand, if no one appears in opposition to the petition, an

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(l) See ante, p. 44. Rule 18.  
(m) Rule 18.  
(n) Matter of Christie, 5 Paige, 248.  
(o) See ante, p. 508.  
(p) See ante, p. 572.
order conformable to the prayer thereof will be made on producing an affidavit of service of the petition and notice, upon all the parties interested; provided the case justifies the order.\(^{(q)}\)

Every party who is served with a petition is considered entitled to his costs of appearing to oppose it, whether he is interested in the matter or not.\(^{(r)}\) Therefore care should be taken to serve those only who are interested.

If the party having an objection to the form of a petition has also a case upon the merits, he should be prepared with his affidavits in opposition to the petition, upon the merits, in case the objection to the form should be overruled; as the court will not permit the petition to stand over, in order that he may file affidavits; except upon the terms of his paying the costs of the petition standing over.\(^{(s)}\)

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### Chap III.

**Orders.**

**Sect. 1. Kinds of Orders.**

2. **Drawing, Settling, and Entering.**
3. **Form of.**
4. **Construction and Effect.**
5. **Service of.**
6. **Orders Nisi.**
7. **How Enforced.**
8. **Opening, Modifying, and Discharging.**

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**SECTION I.**

**Kinds of Orders.**

Orders are either common, or special, or by consent.

Common orders: Orders to which a party, by the rules and prac-

\(^{(q)}\) 1 Smith, 78. 2 Dan. 969. 458. Henage v. Aikin, 1 Jac. & W. 377. 3 Dan. 969.
\(^{(r)}\) Tar. & Russ. 405, nota. And see
\(^{(s)}\) Ex parte Bellott, 2 Mad. 261.
tice of the court, is entitled of course, without showing special cause, are denominated common orders.\(a\) A common order is made without notice to the adverse party.

Several of the general rules of the court specify orders which may be entered of course, for various purposes, during the progress of a cause, and which are therefore common orders.\(b\) In addition to which it has been decided by the court, that where only part of the money secured by a mortgage is due, and the bill is taken as confessed, the reference to ascertain whether the premises can be sold in parcels is a common order.\(c\) So is an order to examine a complainant as to any payments received by him where the defendant is absent, concealed, or non-resident.\(d\) The order in a partition suit to take the bill as confessed as against an absent or unknown defendant or owner, is also an order of course; and it may be entered in the office of the register, or clerk, upon filing the affidavits of publication, and of the neglect of the absentee, &c. to appear and answer within the time allowed by the order of publication.\(e\)

But an order for leave to examine a complainant in his own favor can only be obtained upon a special application.\(f\)

Where a party is entitled to an order of course on application to the register, he cannot charge the adverse party with the extra expense of a special application to the court.\(g\)

The method of drawing and entering common orders will be stated in the next section.

**Special orders.** All orders made on special application to the court are denominated special orders.\(h\)

And this rule applies to orders made by the court ex parte, as well as to such as are made upon notice to the adverse party.

A special order entered under the direction of the court, although in violation of one of its standing rules, cannot be disregarded by the parties, or the officers of the court, so long as it remains in force.\(i\)

The method of drawing and entering special orders, will be mentioned in the next section.

**Orders by consent.** Orders by consent of parties or their solicitors

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\(a\) Rule 24.
\(b\) See Rules 92, 22, 24, 25, 28, 29, 30, 43, 44, 45, 48, 49, 51, 52, 53, 57, 58, 59, 61, 68, 73, 77, 110, 134, 136, 177, 178.
\(c\) Everitt v. Huffman, 1 Paige, 648.
\(d\) Southwick, v. Van Bussum, 1 Stradwell v. Palmer, 5 id. 166.
\(e\) Christy v. Christy, 6 Paige, 170.
\(f\) Southwick v. Van Bussum, supra.
\(g\) Chapman v. Munson, 3 Paige, 247.
\(h\) Rule 46.
\(i\) Osgood v. Joslin, 3 Paige, 195.
may be entered in the manner hereafter stated. They cannot be modified or varied in an essential part without the assent of both parties; (k) unless there is fraud or collusion between the solicitors or counsel of the parties. (l) But if a party to an order by consent takes proceedings which are inconsistent with the execution of it, he will be considered as having waived the right to insist upon the rule above mentioned. (m)

SECTION II.

DRAWING, SETTLING, AND ENTERING ORDERS.

1. Common orders.] All common orders may be entered with the register, assistant register, or proper clerk, in the common rule book kept in his office, at the instance of the party or his solicitors, and at the peril of the party taking the same. And the day on which an order is made must be noted in the entry thereof. (n)

If the solicitor prefers it, he may draw the order himself, and send it to the register or clerk to be entered; if not, the register or clerk will himself draw up the order, on being requested to do so.

Where a party is entitled to enter two or more common orders in a suit at the same time, or on the same day, they must be entered together as one order. And the party will only be allowed, on the taxation of costs, for the expense of entering one order. (o)

2. Orders by consent.] Orders by consent may be entered in the same manner as common orders. They must be founded, however, upon the written consent of the parties, or their solicitors or counsel; which consent must be filed with the register, or clerk, at the time of entering the order. (p)

3. Special orders.] All orders made by the special directions of the court must be entered in the record of the minutes of the court, as has been usual heretofore. (q)

If the order is not drawn up by either of the parties, or his solicitor, it is the duty of the register or clerk to draw it up.

(m) Bernal v. Donegal, 3 Dow P. C. (q) Idem.
146.
Neither party can have any benefit from a decision of the court, until the order thereon, is drawn up and perfected.\(^{(r)}\)

Special orders, if not drawn up by the register or clerk, are usually drawn by the party obtaining them.

Where an order is special in its provisions, the party entitled to draw up the same should submit a copy thereof to the adverse party, that he may propose amendments thereto if he shall think proper. The draft, and the amendments proposed, if any, are then to be delivered to the register, that the order may be settled by him and entered. And where the register cannot understand the decision of the court so as to be able to settle the order in conformity therewith, he is then, and in that case only, to apply to the court to settle the order.\(^{(s)}\)

If the party entitled to draw up the order on a decision of the court, neglects to do so for twenty-four hours after the decision is pronounced, any other party interested in the entry of the order, may apply to the register or clerk at the place where the decision was made, to draw up and enter the order in conformity with the decision of the court.\(^{(t)}\)

Where a party is relieved against an order or decree regularly obtained against him, upon certain specified terms and conditions, it is the duty of the party thus relieved, to draw up and enter the order granting such relief without any unreasonable delay. If he neglects to do so, the adverse party upon filing an affidavit showing such neglect, and that the terms upon which the relief was granted have not been complied with, may proceed to carry into effect the original order or decree, without entering an order upon the application to be relieved against it.\(^{(u)}\)

Where several applications in a cause are decided at the same time, if the party who draws up the order on such decisions, neglects to state therein a part of the directions given by the court, the adverse party, instead of entering a separate order, should propose amendments to the first order as drawn up; or he should apply to have such order corrected, so as to embrace all the directions given by the court on such applications.\(^{(v)}\)

Orders for injunctions, as well as all other special orders, must be entered with the register before the process issues.\(^{(w)}\) The cases in which orders for injunctions may be entered upon the certificates of vice-chancellors or injunction masters are specified in the 30th rule, and in the

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\(^{(r)}\) Whitney v. Belden, 4 Paige, 140.  
\(^{(s)}\) Earl of Fingal v. Blake, 9 Molloy, 60.  
\(^{(t)}\) Id. ib.  
\(^{(u)}\) Id. ib.  
\(^{(v)}\) Hoffman v. Tredwell, 5 Paige, 82.  
\(^{(w)}\) Hunt v. Wallis, 6 Paige, 371.  
order of the 24th of March, 1840, relative to the assistant vice chancellor of the first circuit.

If the party obtaining an injunction neglects to enter the order therefor at the proper time, a subsequent entry of it before motion will cure the defect; but the party will be charged with the costs.(x)

Entering nunc pro tunc.] It is a common occurrence to apply to the court to enter an order nunc pro tunc; which is a motion of course where the party entitled to the order comes recently; but after a length of time there ought to be notice of the motion.(y) And liberty has been given to re-draw up an order which was lost before it was entered, and to enter it nunc pro tunc, though to charge interest; it appearing by the minute-book of the register to have been drawn up.(z)

Place of entering orders.] All orders made by either of the vice chancellors, must of course be entered in the office of the clerk of his circuit.

Orders made by the chancellor, unless otherwise specially directed, may be entered either with the register or assistant register, as may be most convenient; but the caption of an order must always state truly the place where the court was held when the same was made.(a)

Whenever the chancellor holds a term of a vice chancellor's court, the orders made by him are to be entered with the clerk of the vice chancellor.(b) And the order of the chancellor, upon an application for re-taxation of costs in a cause pending before a vice chancellor, may, when necessary, be transmitted to, and entered with, the clerk of such vice chancellor.(c)

Where a suit is pending before a vice chancellor, an application for an extra allowance to a master for taking an account, must be made to such vice chancellor; and an order for such allowance must be entered with the clerk.(d)

Orders in causes heard before the assistant vice chancellor of the first circuit, are to be drawn and entered as follows:

1. In suits brought in the first circuit, orders have the caption—"Present—L. H. S., Assistant Vice Chancellor of the 1st circuit;" and are entered with the clerk of that circuit.

2. When he holds a special term for any vice chancellor, out of the

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(b) Ames v. Blunt, 2 Paige, 94.
(c) Lloyd v. Brewer, 5 Paige, 87.
(d) Woodruff v. Straw, 4 Paige, 467.
first circuit, orders in causes pending in the circuit where the court is held, will have the caption—"Present—L. H. S., Assistant Vice Chancellor of the first circuit, sitting for the vice chancellor of the . . . . circuit."

3. In causes pending before the chancellor and in causes specially referred to the assistant vice chancellor, when heard before him, the orders must have the caption—"Present—L. H. S., Assistant Vice Chancellor of the 1st circuit;" and if the cause was pending before the chancellor, the orders should recite, in the commencement thereof, that the cause was noticed for hearing before the assistant vice chancellor, at a special term, &c., pursuant to the provisions of the statute, &c. If the cause was referred directly to the assistant vice chancellor to hear, that fact should be recited in the orders.

In the 2d and 3d classes of cases above mentioned, the orders and decrees will be entered in the minutes of the clerk of the circuit in which the cause is heard. (e)

The 125th rule does not authorize a vice chancellor or master to grant a chamber order giving the defendant further time to demur. To obtain such an order, the application must be made to the court, and the order must be entered with the register or clerk. (f)

See also ante, p. 340, as to the manner of drawing up, settling and entering decrees.

SECTION III.

FORM OF ORDERS.

The form of the caption of orders and decrees (except those made by the assistant vice chancellor of the first circuit,) is given in rule 10. The captions of orders and decrees made by the assistant vice chancellor are varied according to the particular circumstance and place in which the court is held. The forms are specified in the last section. (g)

The caption must always state truly the place where the court was held when the order was made. (h)

And where it is material to either party, the caption should be made.

(e) Laws of 1840, ch. 214, § 2, 3, p. 263. 
(f) Burrall v. Rainetouex, 2 Paige, 321.
(g) Ante, p. 585.
(h) Rule 99.
INTERLOCUTORY APPLICATIONS, &c. 587

to correspond with the true time of the entry of the order. Where the party who is entitled to draw up an order enters it as of the time the decision of the court was pronounced, he cannot afterwards object that it was not actually entered at that time.

The caption of an order is followed by the title of the suit in which it is entered. The complainant's name must in all cases be placed first, whichever party may draw up the order.

The order for the revival of a cause upon petition, should be entitled as in the original cause at the time of the abatement; but all subsequent orders and proceedings must be entitled in the cause as revived.

Care should be taken that no mistake occur in the names of the parties. For where, in the title of an order to dismiss a bill for want of prosecution, the complainant was called by a wrong Christian name, the court refused to direct a replication filed after the order was drawn up and served, to be taken off the file.

The title of the cause is succeeded by a brief recital of the papers upon which it is founded, and of the names of the counsel for the respective parties who appeared in support of, or in opposition to, the application.

The 123d rule provides that orders granted on petitions, or relating thereto, shall refer to such petitions by the names and descriptions of the petitioners, and the date of the petitions, if they are dated, without reciting or setting forth the substance or tenor thereof unnecessarily.

And in drawing orders made upon motion, brevity should be studied, so far as may be consistent with a statement expressing the grounds upon which the order is made, and showing that its entry is regular.

The order concludes with the ordering part; which contains the directions of the court upon the matter of the application.

SECTION IV.

CONSTRUCTION AND EFFECT OF ORDERS.

Comming time upon.] All orders to take effect nisi, &c., unless otherwise specially directed, shall be rules of eight days. And the

(ii) Id. ib.
(iii) Rule 95.

(m) Rogers v. Paterson, 4 Paige, 450.
(n) Verlander v. Codd, 1 Sim. & Sta. 94. Tur. & Russ. 94, S. C.
time on all rules, orders, &c. where a time is given or stated, shall, unless otherwise expressly provided, be deemed and taken to be one day inclusive and one day exclusive. But if the time expires on Sunday, the whole of the succeeding day is to be included. (o)

Where a proceeding in a cause is required to be had within a limited time—as within a certain number of days after the entry of an order—the whole of the first day is to be excluded in the computation of time. (p)

But where an order was made by the court directing a party to deposit a paper in his possession with the master forthwith, it was held that the order must be complied with immediately, or within a reasonable time after notice of the order; and that the party was not entitled to twenty-four hours, after service of the order to comply therewith. (q) Instanter, when used in an order, means twenty-four hours.

In Cresswell v. Harris, (r) it was held that where an order allowed the complainant a month's time to amend his bill, a lunar month was meant. But the revised statutes contain a provision that whenever the word "month" is used, it shall be construed to mean a calendar and not a lunar month, unless otherwise expressed. (s)

When to take effect.] Neither party can have any benefit from a decision of the court, until the order thereon is drawn up and perfected. (t)

The manner of drawing up, settling and entering orders has been already stated; (u) and if the party obtaining the order neglects to have it entered within twenty-four hours, we have seen that any other party may draw it up and have it entered. (v)

There are a large number of orders which, either from their nature or by the express direction of the court, take effect only from the time of service thereof. Orders to deliver possession, to produce books, to show cause upon contempt, for time to answer, &c., are of this class.

Effect of, generally.] An irregular order made by the court and entered as a special order, although made ex parte, is not void, but remains in force until it is set aside by the court, or is waived by stipulation. (w) So a special order entered under the direction of the court, although in violation of one of its standing rules, cannot be disregarded by the parties, or the officers of the court, so long as it remains in

(o) Rule 199.
(p) Vandenberg v. Van Rensselaer, 6 Paige, 147.
(q) The People v. Brower, 4 Paige, 463.
(r) 8 Sim. & Stu. 476.
(s) 1 R. S. 306, § 4.
(v) Ante, p. 593.
(w) Ante, p. 584.
(x) Hunt v. Wallis, 6 Paige, 371.
force. And a common order entered contrary to such special order, and treating it as a nullity, is itself irregular. But if the court afterwards sets aside the special order, leaving the common order in full force, the latter will be made regular by relation, as of the time when it was entered.

As to a common order irregularly obtained, even if a party has a right to treat it as a nullity, he is not bound to do so, but he may apply to the court to discharge the same, and in the meantime may suspend proceedings which are inconsistent with such order.

An order to stay proceedings on the part of the complainant, until security for costs is filed, only operates upon him, but does not prevent the defendant from taking any steps to terminate the suit in the meantime, or to resist an application of which previous notice has been given by his adversary.

A chamber order made by a vice chancellor or an injunction master, giving further time to answer, and not entered in the minutes as an order of the court, is a mere nullity if not authorized by the 125th rule; and an application to set it aside is not necessary. A vice chancellor has no power to make a chamber order in a suit before him, except where he is authorized by a general rule. But an order made by the vice chancellor before whom the suit is pending, will be deemed as made in court, and not as a chamber order, where it is drawn up and entered with the clerk as an order of the court.

Where an order is improper, or has been obtained through inadvertence or mistake, the party injured should apply to open the motion, or to vacate the order. And where a defendant neglects to appear and oppose a motion for an order directing him to deliver certain articles to a master, he cannot afterwards resist a motion for an attachment against him for his non-compliance with the order, by showing that such order ought not to have been made.

It is a general rule, that every irregularity in an order is waived by the party’s taking a step which recognizes the order, or by his delaying to move to set it aside. But there is a distinction between orders which are merely irregular and such as are altogether erroneous, and in which there is a substantial defect, not merely one of form.

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(y) Studwell v. Palmer, supra.
(z) Osgood v. Joaill, supra.
(a) Price v. Beville, 6 Paige, 44.
(b) Hunt v. Wallis, id. 371.
(c) Id. ib.
(e) Levi v. Ward, 1 Sim. & Stu. 334.
SECTION V.

SERVICE OF ORDERS.

After an order is drawn up, settled and entered, it is then to be served, when service is necessary.

It is a general rule, that all orders which are to have the effect of requiring or limiting any act of the opposite party to be done within a specified time, or to bring him into contempt for disobedience, must be served, or actual notice thereof given. Thus, if a party in whose favor an interlocutory order or decree is made, wishes to limit his adversary's right of appeal, he must serve a copy of the order or decree as entered, or give to him a written notice of the entry thereof.\(^{(g)}\)

As respects *special* orders, the question as to the necessity of service, frequently depends upon the form of the order. Thus, where the court directs a party to do an act within so many days after the *service* of the order, a copy must be served. But where the act is directed to be done within so many days after the date, or of the *entering* of the order, the court intends the party shall take notice of the order without service or express notice thereof.

With respect to the *manner* of the service, it is to be observed, that all orders which do not seek to bring the party into contempt, may be served upon the solicitor of such party, if he has appeared by a solicitor.\(^{(h)}\) But where the object is to bring a party into contempt, the order must be served personally; which is done by delivering a copy of the order to such party, and at the same time showing him a certified copy thereof.\(^{(i)}\) It is absolutely necessary that the certified copy should be shown at the time of service, unless the production of it is expressly waived.\(^{(k)}\)

It has been decided by the chancellor recently, that in order to bring a party into contempt for disobeying an order of the court, for the payment of interlocutory costs, &c. it is necessary that the order should be served upon the party himself, and a demand of payment made of

\(^{(g)}\) Tyler v. Simmons, 6 Paige, 127.  
\(^{(h)}\) 9 R. S. 180, § 83, (orig. § 77.)  
\(^{(k)}\) Wallis v. Glynn, 12 Ves. 380.  
And see Stafford v. Brown, 4 Paige, 369.  
\(^{(i)}\) Newl. Pr. 224.  
Coop. 289, S. C.
him; and that it is not sufficient to serve the order upon, and demand the costs of, his solicitor. (l) And where an order was made for the payment of a sum of money by two solicitors, who were in copartnership, service of the order upon one, leaving a copy at the place where the copartnership business was carried on, was held not to be sufficient to ground a proceeding for a contempt. (m)

A personal service will be dispensed with, however, where the party cannot be found. (n) In such, and in some other cases, service upon his solicitor will be substituted for personal service. (o) And where an order is served upon the solicitor, if knowledge of such service is brought home to the party, he will be in contempt by not obeying the order, in the same manner as if it had been served upon him personally. (p)

In the case of Stafford v. Brown, (q) it was held that the order for the defendant to answer in forty days, or be attached, should be served on his solicitor if he has appeared by a solicitor; and that it is not necessary it should be served on the defendant personally.

Where notice of an order to produce witnesses has been served upon the agent of the solicitor for the opposite party, each party has double the usual time to produce his witnesses. And if the adverse party wishes to shorten the time, he must obtain an order himself, and serve notice thereof upon the opposite solicitor, either personally, or by leaving the same at his office. (r)

Orders are to be served, when service is necessary, in the same manner as notices of motion. (s) Upon the copy served is usually endorsed a notice signed by the solicitor of the party obtaining the order, that it is "a copy of an order entered in this cause in the office of the registrar (or clerk) of this court." But this is not necessary; nor is the charge for such a notice taxable. (t)

(m) Young v. Goodson, 2 Russ. 255. (r) James v. Berry, 1 Paige, 647.
(n) Jackson v. ———, 2 Ves. jun. 417. (s) See ante, p. 571.
(o) 1 Newl. 245. (t) Rogers v. Rogers, 2 Paige, 458,
(p) People v. Brower, 4 Paige, 405. 404.
SECTION VI.

ORDERS NISI.

Orders nisi are granted upon an application to the court, without either service or notice. In certain cases, a party presenting a petition, affidavit, or certificate, may have an order nisi that the prayer of his petition or motion be granted, unless cause to the contrary be shown within the time limited by the rules, or fixed by the court for that purpose. A copy of this order is to be served on the adverse party; and if he does not appear, to show cause, at the time appointed, the order nisi will be made absolute, on proving due service of a copy thereof.

It is provided by the 114th rule, that where a party is entitled to an order to stay proceedings, or for temporary relief until he has time to give regular notice of a motion, or of presenting a petition for a re-hearing, or for any other purpose, he may make an ex parte application to the court for an order that the adverse party show cause why the motion or the prayer of the petition should not be granted; and to stay the proceedings, or for other temporary relief, in the meantime. And the adverse party must be served with a copy of the order and of the petition, affidavit, or certificate on which it is founded, the same length of time before the day for showing cause as is required in the ordinary case of special motions, (see Rule 89;) unless the court shall specially direct a shorter notice to be given.

And the 122d rule directs that all orders to take effect nisi, &c. shall be orders of eight days, unless otherwise specially directed.

On filing a master's report, also, an order nisi may be entered to confirm the same, unless cause to the contrary be shown in eight days.(u)

In computing the time upon orders nisi, the whole of the first day is to be excluded.(v)

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(u) Rule 110. A report of sale will be confirmed of course, at the expiration of the eight days from the entering of the order nisi, if no exceptions are filed; unless there is an application in the meantime to set aside the sale. And the confirmation of the report cannot be prevented by a tender, or offer to pay the amount of the decree, with interest and costs. Brown v. Frost, in Chan'y, April 4, 1843.

(v) Vandenburg v. Van Rensselaer, 6 Paige, 147.
The order nisi having been served in the regular way, and no cause being shown against making that order absolute, it may be made absolute on the day appointed for showing cause, upon affidavit of service of the order nisi. But the party who is the object of the order has the whole of the day fixed by the order nisi, during the sitting of the court, to show cause. (w) Unless an affidavit of the service of the order nisi is filed, and a motion is made, the order will not become absolute, at the expiration of the eight days, except it is expressly so ordered, although no cause is shown. (x) The case of a master's report, however, is an exception; as it will become absolute of course in eight days after the entry of the order nisi, if no exceptions are filed and served within that time, without notice or further order. (y)

A motion to make the order nisi absolute, may be made after the day given to show cause; but in such a case the party must produce not only an affidavit of service of the order, but also a certificate from the register that no cause has been shown to the contrary. (z)

SECTION VII.

ORDERS, HOW ENFORCED.

Orders are, in general, enforced by process of contempt. The 171st rule directs, that where a party is ordered to pay the costs of any interlocutory proceedings, and no time of payment is specified in the order, he shall pay them within twenty days after the filing of the taxed bill and affidavit, and service of a copy of the order and of such taxed bill; or if a gross sum is specified in the order, within twenty days after service of a certified copy of the order. And if he neglects or refuses to pay such costs within the time prescribed as aforesaid, or specified in the order, the adverse party, on affidavit of the personal service of such copies and a demand of payment, and that such costs have not been paid, may have an ex parte order to commit such delinquent party to prison.

The chancellor has decided that to authorize the issuing of a precept under the above rule, to commit a party to prison for the non-payment of interlocutory costs, &c., a personal demand must have been made up-

(w) 1 Nlew. Pr. 245.  (y) Rule 110.
(z) Id. 948.  (z) 1 Newl. 248.
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on the party himself; and that a demand of his solicitor is not sufficient.\(a\)

It is necessary that the person serving an order for the payment of money should be duly authorized to demand and receive the money. Therefore, if the order is served by any person other than the party who is entitled to receive the money, or his solicitor, such person should be furnished with a power of attorney from such party, or his solicitor, to demand and receive the money; which should be shown to the party on whom the order is served, at the time the demand is made.\(b\) It seems, however, that although it is necessary, in order to found process of contumacy, for disobedience of an order to pay money, that there should be proof made to the court of a demand made by a person authorized to receive it;\(c\) general evidence of such authority will suffice; and that the practice of the court does not require formal evidence of that due execution of the power of attorney.\(d\)

The 123d rule authorizes any decree or decretal order directing the payment of money, or affecting the title to property, if founded on petition where no bill is filed, to be enrolled in the same manner as other decrees, at the request of any party interested.

And when a decretal order is thus enrolled, of course it is to be enforced in the same manner as decrees.\(e\)

Although an order which has been made must be obeyed, yet on an application against a person guilty of a breach of it, the court will give to him the benefit of the fact that the order ought not to have been made.\(f\)

Where it is intended to enforce an order against a person not a party to the record, he must be personally served with the order directing him to pay in the money or do the act which he is ordered to perform, and then upon an affidavit of personal service of that order, and that the act has not been performed, or upon production of the register's certificate, that the money is not paid in, an order may be obtained, upon notice of motion, (which notice must also be personally served) that the money may be paid in, or the act required, done within a limited time, or that the person may stand committed.\(g\) This order is usually called the order nisi. It cannot be obtained, however, unless there has been a

\(a\) Lorton v. Seamen, 9 Paige, 609.
\(b\) 9 Dan. 705. And see Anon., 14 Ves. 207.
\(c\) Wilkins v. Stevens, 19 Ves. 117.
\(d\) Sangar v. Gardiner, C. P. Cooper's Rep. 265.
\(e\) See ante, p. 440.
\(f\) Drewry v. Thacker, Swans. 546.
\(g\) 3 Dan. 271.
previous order limiting a time for payment; (k) except in the case of a balance due to a solicitor upon taxation of his bill.(l)

The order nisi having been obtained and served personally, the party prosecuting the contempt may apply by motion ex parte that the contemnor may stand committed, upon producing an affidavit of personal service of the order nisi, and that the act required to be done has not been performed, or the register's certificate that the money has not been paid in.(m)

SECTION VIII.

OPENING, MODIFYING, AND DISCHARGING ORDERS.

Orders may be opened, varied, and discharged upon application to the court, and for good cause shown, such as mistake, surprise, irregularity, &c.(n) Indeed, it is a general rule that every order made in the progress of a cause, may be rescinded or modified, upon a proper case being made out.(m) And where an order is improper, or has been obtained through inadvertence or mistake, the proper course is for the party injured to apply to open the motion or vacate the order.(n) In Innard v. Cazeaux,(o) where an order had been obtained on an ex parte application, giving leave to the complainant to prosecute in forma pauperis, the same was vacated with costs. So, orders have been set aside because previous similar motions for the same orders had been refused, with costs, and those costs were not paid.(p)

But where the defendant has obtained an order to dissolve an injunction, by the default of the adverse party, after due notice of the application, the court will not vacate such order merely to enable the complainant to interpose a technical objection which does not go to the merits of the application.(q) Neither will the court vacate an order and cause it to be re-entered as of a more recent date, for the purpose of en-

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(a) Parkins v. Morris, 9 Dick. 699.
(i) See Stocken v. Dawson, 7 Sim. 547.
(k) 3 Dan. 272.
(m) Ashe v. Moore, 2 Mer. 383.
(n) Hubie v. Elgarian, 3 Paige, 353.
(o) 1 Paige, 39.
(p) Killing v. Killing, Mad. & Gehl. 68.
(q) Champlin v. Mayor of New-York, 3 Paige, 573.
abling a party to appeal therefrom, after the time for appealing has expired.(r)

Nor will the court open an order to take the bill as confessed, in a foreclosure suit, or in any other case in which the defendant has an interest to delay the proceedings, on a mere affidavit of merits; although the default is excused. But the sworn answer which the defendant intends to put in must be produced; or he must state in his affidavit or petition to open the default, the nature of his defence and his belief in the truth of the matters constituting such defence.(s) The affidavit of the solicitor showing a meritorious defence, and the nature of it, is not sufficient unless he is himself acquainted with the facts; and even then a sufficient excuse must be shown for not producing the affidavit or sworn answer to the defendant.(t)

An order or decree by consent cannot be modified or varied in an essential point, without the assent of both parties.(u)

Orders of course, when actually entered, cannot be vacated except on special cause shown. Thus, in *Cowen v. Bull*,(v) it was held that a party who had entered an order that the defendant appear, or that an attachment issue against him, could not enter a common order vacating that order, and requiring the defendant to appear, or that the bill be taken as confessed.

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 *(r) Townsend v. Townsend, 2 Paige, 413.*
 *(t) Id. ib.*
 *(s) Hunt v. Wallia, 6 Paige, 371.*
 *(u) Leitch v. Cumpston, 4 Paige, 476.*
 *(v) In chancery 18 Jan. 1830. Ex rel. Wells v. Cruger, 5 id. 164.*
 *(w) J. Rhudes, Esq.*
CHAP. IV.

AFFIDAVITS.

Sect. 1. NATURE AND USES.
2. BY WHOM TO BE MADE.
3. FORM AND REQUISITES.
4. BEFORE WHOM TO BE SWORN.
5. FILING AND MARKING.

SECTION I.

NATURE AND USES.

An affidavit is an oath in writing, sworn to before some person who has authority to administer an oath.

Affidavits are generally resorted to in support of, and in opposition to, motions and petitions, or for certifying the service of process, notices, &c. They may also be used in support of the bill or of the defendant's answer. Notwithstanding an answer from the defendant on oath is waived by the bill, the defendant has a right to put in his answer on oath for the purpose of moving for the dissolution of an injunction, or the discharge of a ne exeat. (a) But where an answer on oath is waived, it will not be a matter of course to dissolve the injunction or discharge the ne exeat on the oath of the defendant; provided the material facts on which the injunction or ne exeat rest are verified by the affidavit of a credible and disinterested witness annexed to, and filed with, the bill. (b) But where the whole equity of the bill is denied by the sworn answer of the defendant, and no affidavit of a disinterested witness is annexed to the bill, the injunction will be dissolved on bill and answer. (c)

(a) Rule 36. See Dougrey v. Topping, 4 Paige, 94.
(b) Rule 37.
(c) Manchester v. Day, 6 Paige, 297.
Where the complainant waives an answer on oath, and relies upon
the affidavits of third persons annexed to his bill, to sustain an in-
junction, in opposition to the defendant's answer on oath denying the equity
of the bill, the defendant, on an application to dissolve the injunction,
may also read the affidavits of third persons in support of his answer.(d)

But where a preliminary injunction is granted absolutely, in the first in-
stance, and the defendant applies to have it dissolved on the ground that
the whole equity of the bill is denied by the answer, he cannot be allow-
ed to read affidavits in support of his answer, except where the answer
itself is not conclusive, under the last clause of the 37th rule.(e) Where,
however, the complainant is directed to give notice of his application for
an injunction, or where defendant is required to show cause why a
preliminary injunction should not be granted, the defendant may intro-
duce affidavits to show that the injunction should not be granted. And
he may use such affidavits in a case of that kind, although he has put in
his answer denying the whole equity of the bill, or has neglected to an-
swer the bill fully, so that his answer is liable to exceptions for insuffi-
ciency.(f)

If an answer on oath has not been waived as to one of the defendants,
the complainant, upon an application to dissolve the injunction, will not
be permitted to read the affidavits annexed to the bill, for the purpose
of contradicting the positive answer of that defendant on oath.(g)

On a motion for a receiver, the answer of a defendant, if a material
co-defendant has not answered, is regarded merely as an affidavit, and
the complainant may read affidavits against it.(h)

A motion for a commission to examine a witness abroad, in aid of an
action at law, must be supported by an affidavit stating the name of the
witness, and the points to which he is to be examined.(i)

By one of the English orders of 1828, (Ord. lxxv.) all affidavits which
have been previously made and read in court, upon any proceeding in
a cause or matter, may be used before the master. The converse of this
rule however, has not been adopted, and affidavits used before the mas-
ter can only be read in court upon exceptions or appeals from the mas-
ter’s determination, and not to found any new order or process of the
court.(k)

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(d) Haight v. Case, 4 Paige, 593.  
Brown v. Haff, 5 id. 235.  
(e) Village of Seneca Falls v. Mat-
thews, 9 Paige, 504.  
(f) Id. ib.  
(g) Haight v. Case, 4 Paige, 595.  
(h) Kerahaw v. Mathews, 1 Russ. 381.  
(i) Mendizabel v. Machado, 2 Sim. & Stu. 483.  
(k) 3 Dan. 249.
SECTION II.

BY WHOM TO BE MADE.

Affidavits may be made by the parties in the suit during the progress thereof; but they can only be read on motions, &c. They are inadmissible as evidence at the hearing.(l)

The general rule is, that an affidavit should be made by the person who has a personal knowledge of the facts; unless a good reason is shown for its being made by some other person.(m) But upon sufficient cause shown, a substituted affidavit by another person will be allowed, as where the party is sick or absent, and where the suit is conducted by an agent or attorney in fact.(n)

An affidavit to set aside proceedings for irregularity should be made either by the party or his solicitor. The affidavit of the counsel is not sufficient, unless a good reason is shown for not producing the affidavit of the party or his solicitor.(o)

In fact, whenever the affidavit relates to the proceedings in the cause, the affidavit should, in general, be made either by the solicitor, or by his clerk who has had the principal management of the cause.

But upon an application to open an order taking the bill as confessed, in a foreclosure suit, the affidavit of the solicitor, showing a meritorious defence, and the nature thereof, is not sufficient, unless he is himself acquainted with the facts; and even then a sufficient excuse must be shown for not producing the affidavit or sworn answer of the defendant.(p)

An affidavit by the solicitor of a defendant in an original suit, that "he expects and verily believes the answer to a cross-bill for discovery may furnish a material defence," is sufficient, without requiring an affidavit by the party himself.(q)

On an application for a writ of ne exeat by a wife against her husband, pending a suit for alimony, &c., her affidavit is admissible; the proceedings being ex parte, and the wife considered in that respect as independent of her husband.(r)

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(l) 1 Litt. 44.  
(m) See Barry v. Cane, 3 Mad. Rep. 473 & n.  
(q) Lowe v. Furkins, 1 McCle. 10.  
(r) Denton v. Denton, 1 Paige, 441.
SECTION III.
FORM AND REQUISITES.

**Title.**] An affidavit must be correctly entitled in the cause or matter in which it is made; for an affidavit made in one cause cannot be read for the purpose of obtaining an order in another.\(^{(x)}\) It will be sufficient, however, if it was correctly entitled when it was sworn, although the title of the cause may have been altered by subsequent amendment.\(^{(t)}\) But a writ of \textit{ne exeat} cannot be obtained upon an affidavit sworn to before the bill is filed; for no indictment for perjury could be preferred on such an affidavit, as there was not, when it was sworn, any cause or proceeding depending in court respecting the subject of the affidavit.\(^{(w)}\)

Although, in ordinary cases, the court will disregard the misentitling of a paper, which could not have misled the opposite party, it is otherwise as respects affidavits; because the misentitling of an affidavit will exempt the deponent from the punishment of perjury, although his oath is false.\(^{(v)}\)

In proceedings as for a contempt, against a party to the suit, to compel the appearance or answer of a defendant, or to enforce the performance of a decree or order, the affidavits, as well after as before the order for an attachment, should be entitled in the original cause.\(^{(w)}\) In proceedings as for contempts, against witnesses or others who are not parties to the suit, the affidavits previous to the order for the attachment should be entitled in the original cause; and all subsequent affidavits should be entitled in the name of the people on the relation of the party prosecuting the attachment.\(^{(x)}\)

In prosecutions for criminal contempts, all affidavits subsequent to the order for an attachment, or to show cause, should be entitled in the name of the people.\(^{(y)}\)

In entitling affidavits, the complainant’s name must always be placed first.\(^{(x)}\)

Where there are several defendants, and there is but one suit pending

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\(^{(x)}\) Lumbroso v. White, 1 Dick. 150.  
\(^{(t)}\) Hawes v. Bamford, 9 Sim. 653.  
\(^{(w)}\) Hughes v. Ryan, 1 Beat. 397.  
\(^{(v)}\) Anon. Mad. & Geld. 276.  
\(^{(y)}\) Hawley v. Donnelly, 8 Paige, 415.  
\(^{(x)}\) Stafford v. Brown, 4 Paige, 360.
between the complainant and the defendant first named therein with others, it is sufficient, in the entitling of an affidavit, to entitle it in the name of the complainant against the first defendant, and others, without setting forth the names of all the defendants at length.\(^{(a)}\)

**Venue.** After the title, follows the venue; which states the county in which the affidavit is sworn to, thus: "Saratoga county, ss., or City and county of New York, ss.: This is an essential part of an affidavit.

**Names, \&c. of deponents.** In all affidavits, the true place of residence, description, and addition of the deponent must be inserted.\(^{(b)}\)

This rule, however, does not apply to affidavits by parties in the cause who may describe themselves in the affidavit, as the above named complainant, or defendant, without specifying any residence or addition, or other description. And even where a complainant so described himself in an affidavit, and it appeared upon inspecting the office copy of the bill that no addition had been given to him in the bill, the affidavit was considered sufficient.\(^{(c)}\)

In the case last referred to, there were several complainants, and the person making the affidavit described himself as "the above named complainant," and it was objected that he ought to have called himself "one of the above complainants," but the objection was overruled.

An affidavit of several persons, by the manner of wording it, may be made either *joint and several* or *joint or several*; and great care and exactness ought to be observed in drawing them.\(^{(d)}\)

Where the affidavit is made by one person only, it begins thus: "A. B. of ——[deponent's residence,] merchant, [or other proper addition,] being duly sworn, deposes and says, that," \&c. proceeding with the substance of the affidavit. When made by more than one person, the form is, "A. B. of . . . , and C. D. of . . . , being duly sworn, severally depose and say; and first, this deponent A. B. for himself says that," \&c. "and this deponent C. D. for himself says that," \&c.; and if there be any facts to which both of them can swear, then, "and these deponents A. B. and C. D. severally say that," \&c.

**Substance of.** An affidavit must be true in substance, with all necessary circumstances of time and place, manner, and other material incidents. It must also be sufficient to sustain the case made by the motion or petition of which it is the groundwork.\(^{(e)}\)

\(^{(a)}\) White v. Hess, 8 Paige, 514.
\(^{(c)}\) Crockett v. Bishton, 2 Mad. 446.
\(^{(d)}\) Harr. Pr. (Newl. ed.) 339.
\(^{(e)}\) Hinde, 451.
ter positively, and all material circumstances attending it, that the court may judge whether the deponent’s conclusion be just or not. (f)

Where the deponent swears to words spoken, the addition of, “or to that effect,” is a proper precaution. (g)

It is to be observed, particularly, that every affidavit of service of writs, or of orders, upon which process of contempt is to be founded, must truly and fully prove good service; and that if the complainant’s name, the court, the return of the writ, or any thing material be omitted, no attachment can be thereupon regularly issued; for until a due service be shown, no contempt appears to the court. (h)

An affidavit by the defendant that he has a good defence, without stating the nature and substance of it, is not sufficient. (i) In fact, it is not the practice of the court to receive a general affidavit of merits.

The party must state, upon oath, what such merits are, to enable the court to see whether they are not merely imaginary; and in order that the deponent may be liable to punishment for perjury if his affidavit is false. (k)

An affidavit must be pertinent and material, without needless tautology and impertinent matter, or other prolixities. (l) Scandalous and impertinent matters should be carefully avoided; and if any such is inserted, exceptions may be taken to the affidavit in the same manner as exceptions to an answer for insufficiency, (m) and may be submitted to in like manner and within the same time. If not submitted to, such exceptions must be referred in the same manner, or they will be considered as abandoned. (n)

But a reference is not the only method of getting rid of scandalous or impertinent matter in an affidavit. It has been decided by the chancellor, that the object of the reference of exceptions, under the 53d rule, was for the relief of the court; and that it is perfectly competent for the court, if it chooses, to do so, upon the mere examination of an affidavit read before it on a motion, to order scandalous or impertinent matter contained therein, to be expunged, without a reference to a master. (o)

A party who makes an affidavit to oppose a motion, is only authorized to state the facts; and it is scandalous and impertinent to draw infer-

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(f) 1 New. Abr. 86.
(g) Ayliffe v. Murray, 2 Atk. 60.
(h) Hinde, 453.
(i) Sea Ins. Co. v. Stebbins, 8 Paige, 563.
(l) Mesch v. Chappell, id. 135.
(l) Id. ib.
(m) See ante, p. 309.
(n) Rule 63.
(o) Powell v. Kane, 5 Paige, 965.
ences or state arguments in the affidavit, reflecting on the character, or impeaching the motives, of the adverse party or his solicitor. (p)

The court will not refer an affidavit for impertinence merely, where it is not also scandalous, after such affidavit has been answered. (q)

The solicitor who draws an affidavit containing scandalous or impertinent matter is personally liable for the costs of expunging it, and ought to be charged therewith in the first instance, although his client is also liable to the adverse party for such costs. And if the solicitor is compelled to pay them, he has no legal or equitable claim upon his client to refund the amount. (r) Accordingly, where a whole petition was recited in an affidavit of service, the costs were ordered to be paid out of the solicitor's own pocket. (s)

The above remarks apply only to scandal or impertinence in affidavits used before the court. Where scandalous or impertinent matter occurs in an affidavit used before a master, the method of getting it expunged is pointed out in the 106th rule, and has been alluded to, ante, p. 543.

Affidavits ought to be fairly and legibly written, in one hand, without blots or interlineations of any words of substance; otherwise the officer administering the oath may refuse to swear them, or the register, &c. may refuse to file them. (t) Where, however, small blots or interlineations happen, the officer usually marks them, in the margin, with his initials. (u)

Conclusion.] After the substance of the affidavit has been stated, the affidavit usually concludes with a denial of any further knowledge on the subject, thus: "And further this deponent saith not." This formality, however, is not essential to its validity.

Signature.] The person swearing to an affidavit must subscribe his name, at the foot thereof, on the right side.

Oath and Jurat.] The oath administered to the deponent, by the officer is as follows: "You swear that the contents of this affidavit by you subscribed are true. So help you God." If the deponent is a Quaker, the words are, "You solemnly, sincerely, and truly declare and affirm," &c.—omitting the words "so help you God."

(p) Powell v. Kane, 5 Paige, 265.  (q) Ex parte Smith, 1 Atk. 139.
The oath having been administered, the officer certifies that fact in a jurat, written upon the left side of the paper, in this form:

Sworn to [or affirmed] before me  
this ...... day of ......, 1843.  
J. K., Master in Ch'y.

If the affidavit is made by two or more persons, the form of the jurat is: "The above named deponents, A. B. and C. D., were severally sworn this ...... day of ......, 1843, before me."(v)

Where an affidavit is sworn to by a person who has been found by the inquisition of a jury to be a lunatic, the officer before whom the same is sworn should state in the jurat, that he has examined the deponent for the purpose of ascertaining the state of his mind, and that he was apparently of sound mind, and capable of understanding the nature and contents of the affidavit.(w)

If the deponent is blind, the officer should certify, in the jurat, that the affidavit was carefully and correctly read over to him, in the presence of such officer, before he swore to the same.(x)

Any irregularity in the form of the affidavit or of the jurat, will be a ground for the court refusing to hear it read.(y)

SECTION IV.

BEFORE WHOM TO BE SWORN.

Affidavits to be read in this court may be sworn to before either of the following officers: a judge of any court of record, any circuit judge, supreme court commissioner, commissioner of deeds; clerks of any court of record, a master or examiner in chancery, the register or assistant register, or any commissioner appointed by the court of chancery for that purpose.(z) The act of May 7th, 1840,(a) however abolishes the

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(v) See 2 Arch. Pz. 330.
Matter of Cross, in Chany, March 1, 1842.
(y) Hinde, 462.
(z) 2 R. S. 284, §§ 50, 51, (original, §§ 49, 50.) method of administering the oath to ill-
(a) Laws of 1840, p. 187.
office of commissioner of deeds, and confers their powers and duties upon justices of the peace. But the act does not affect such commissioners as were in office at the time the act passed. They may continue to take affidavits until the expirition of their terms of office.

It has been decided that under the section of the statute above referred to, an affidavit may be sworn to before a state senator; he being ex officio a judge of the court for the correction of errors, which is a court of record. (b)

An affidavit cannot be sworn to before the solicitor of either of the parties in the cause. (c)

But the rule is confined to the solicitor on record. An affidavit may be sworn to before an officer who is counsel for one of the parties, or is a partner of the solicitor in the cause. (d) The provision of the revised statutes prohibiting a master from acting as such in a cause in which he is counsel, does not extend to the mere taking of an affidavit. (e)

It is to be observed that whenever an affidavit is sworn to before a local officer, it must be sworn to within the district for which the officer was appointed. The chancellor, vice chancellors, judges of the supreme court, and circuit judges, may administer an oath in any part of the state; so may masters and examiners, the register and assistant register in chancery, and the clerks of the supreme court, commissioners appointed by this court, and supreme court commissioners. Justices of the peace, judges and clerks of courts of common pleas and other local courts, and commissioners of deeds, can only administer oaths within the county or city for which they were appointed.

None of the officers authorized by the statute to take affidavits within this state can take them in another state.

The revised statutes prescribe the method of taking and authenticating affidavits in other states and counties, so that they may be read in this court, as follows: 1. The affidavit must be certified by some judge of a court having a seal, to have been subscribed and taken before him, specifying the time and place where taken: 2. The genuineness of the signature of such judge, the existence of the court, and the fact that such judge is a member thereof, must be certified by the clerk of the court, under the seal thereof. (f)

The chancellor has decided that where nothing appears to show that

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(b) Craig v. Briggs, 4 Paige, 548.
(c) See Matter of Cross, in Chan’y Paige, 530.
(d) The People v. Spalding, 2 Paige, 326.
(e) Id. ib. McLaren v. Charrier, 5
(f) 2 R. S. 396, § 33, (orig. § 25.)
an affidavit was taken out of the jurisdiction of the officer before whom it was sworn, it will be presumed to have been taken within the limits of his jurisdiction. (g) An affidavit taken before a commissioner of deeds de facto, for a city, who is exercising such office under color of an appointment by the governor and senate, may be read in a suit in this court; and the court will not inquire collaterally into the legality of such appointment. (A)

SECTION V.

FILING AND MARKING AFFIDAVITS.

All affidavits which have been used in court must be filed in the office of the register or clerk at the place where the order or decree founded thereon is entered. On entering common orders which require an affidavit to justify their entry, the affidavit must be previously filed. And upon entering decrees, or special orders, the successful party files the affidavits used by him; which are also to be marked by the register or clerk, as having been read; but the affidavits on the other side need not be filed or marked. Nor need affidavits used before a master be filed.

Where a party opposing a motion or petition has affidavits to read in opposition, and the application is decided in his favor, upon the opening of the case, on the papers of the adverse party, if he desires to have the benefit of his affidavits, upon appeal, he should have them entered in the minutes of the court below, and marked as read. (i)

(g) Parker v. Baker, 8 Paige, 428. (i) Bloodgood v. Clark, 4 Paige, 574.

(A) Id. ib.
CHAP. V.

INJUNCTIONS.

2. Different Kinds of.
3. In what cases Granted, and against Whom.
4. Form of.
5. How Obtained and Issued.
7. Service of.
8. Effect of.
10. Dissolving.
11. Reviving, and Continuing.
12. Discharging for Irregularity.

SECTION I.

NATURE AND USES OF INJUNCTIONS.

A writ of injunction may be described as a judicial process whereby a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ.\(^{(a)}\) The object of this process, which is extensively used in equity proceedings, is generally preventive and protective, rather than restorative; though it is by no means confined to the former.\(^{(b)}\) It seeks to prevent a meditated wrong, more often than to redress an injury already done. It is not

\(^{(a)}\) Gilb. For. Rom. 192, 194. Eden on Injunc. 290. Mr. Jeremy defines an injunction to be a writ framed according to the circumstances of the case, commanding an act which this court regards as essential to justice; or restraining an act which it esteems contrary to equity and good conscience. Jer. Equity Jurisprudence, 307.

confined to cases falling within the exercise of the concurrent jurisdiction of the court; but it equally applies to cases belonging to its exclusive and auxiliary jurisdiction.\(c\)

The most common kind of injunctions is that which operates as a restraint upon the party in the exercise of his real or supposed rights; and this is sometimes called the remedial writ of injunction. The other sort commanding an act to be done, is sometimes called the judicial writ, because it issues after a decree, and is in the nature of an execution to enforce the same; as for instance it may contain a direction to the party defendant to yield up, to quiet, or continue, the possession of lands or other property constituting the subject matter of the decree, in favor of the other party.\(d\)

**SECTION II.**

**DIFFERENT KINDS OF INJUNCTIONS.**

Injunctions are either **provisional, general, or perpetual.**\(e\)

1. **Provisional injunctions.** Provisional injunctions are such as are to continue until the coming in of the defendant's answer; or until the hearing of the cause; or until the master has made his report.\(f\) Injunctions of this nature are either **preliminary, or temporary.**

   **Preliminary injunctions.** In many cases where the complainant's bill asks for a perpetual injunction, it may be necessary to stay the proceedings of the defendant during the pendency of the suit. For this purpose a preliminary injunction may be issued; but the bill should contain a formal prayer for it.\(g\)

   The **final** injunction, in many cases, is a matter of strict right, and granted as a necessary consequence of the decree made in the cause. On the contrary, a preliminary injunction before answer, rests in the discretion of the court; and ought not to be granted unless the injury is pressing, and the delay dangerous.\(h\) There are many cases in which

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\(c\) Jer. Eq. Juriap. 808.

\(d\) 2 Story's Eq. Juriap. 155.

\(e\) In England, injunctions are again divided into common or special. Here, the writ is always special—the common injunction being unknown to our practice.

\(f\) 3 Dan. 275.

\(g\) Walker v. Devereux, 4 Paige, 239.

\(h\) New-York Printing Co. v. Fitch, 1 Paige, 97. Preliminary injunctions are allowed in order to prevent immediate injury; not remote and contingent damage. City of Rochester v. Currie, 1 Clarke, 836.
a complainant would be entitled to a perpetual injunction at the hearing, where it would be improper to grant him a preliminary injunction. Thus, it will not be granted to restrain a party from running a steamboat and landing passengers at the dock of another.(i) So, on filing a bill against the president and directors of an incorporated company, charging them with a fraudulent abuse of their trust, in the election of directors, a preliminary injunction will not be issued before the coming in of the answers, to restrain the new directors, whose election was colorable in law, from the exercise of their powers; there not being an impending mischief irreparable in case of delay.(k) And for the same reason the court will not grant a preliminary injunction to stay the defendant from selling the complainant's farm upon execution, where the bill alleges that the judgment is not a legal lien on the premises; as a notice of the pendency of the suit, filed in the clerk's office, is all that is necessary to make any decree which may be obtained in the cause, binding upon the purchaser under the execution.(l)

And the rule is laid down by the chancellor, that a preliminary injunction ought not to be granted before answer, unless it is necessary to protect some interest or right of the complainant which may be injured, impaired or endangered by the proceedings of the defendant in the meantime; as it frequently turns out when the answer comes in, or at the hearing that the sole object of obtaining the preliminary injunction was to embarrass the defendant's proceedings, and thus compel a compromise.(m)

But where by the delay the injury might be irreparable, a preliminary injunction will be granted; as, for example, where hydraulic works are erected by different persons on both banks of a private stream, and the owner of the mill on either side attempts to deprive the other of the use of an equal share of the water of which he has been in the quiet enjoyment and thus destroy his mills.(n)

So a preliminary injunction may be allowed in order to prevent intrusions upon property dedicated to the public; as for instance, to restrain the erection of a building upon a public square or street;(o) or to restrain a nuisance, if the right is clear, the consequent danger immediate, and the mischief irreparable; but not when the right is doubtful and the danger remote and contingent.(p)

(m) Id. ib.  
(4) Ogden v. Kip, 6 John. Ch. Rep. 160. See also Walker v. Devereux, su-  
(n) Arthur v. Case, 1 Paige, 447.  
(p) Id. ib.  
Temporary injunctions. Temporary injunctions are granted where necessary, to prevent irreparable injury before regular notice of the application for a general injunction can be given. In such cases, it being a rule that no injunction affecting the rights of a party who has appeared can be granted without giving him a right to be heard, the court will grant an order to show cause why a general injunction should not issue, and allow such temporary injunction in the meantime, to prevent the anticipated injury. But the temporary injunction will fall, of course, if the order to show cause is not made absolute.\(^{(q)}\)

Temporary injunctions may also be granted, where the case is urgent, immediately on filing the bill, to continue until an answer is filed.\(^{(r)}\)

In *Tonson v. Walker*,\(^{(s)}\) probability of right was held sufficient for a temporary injunction.

*Continuing provisional injunctions.* A provisional injunction is frequently ordered by the court to be continued until the hearing. Thus, where the defendant, in his answer to an injunction bill, admits the equity of the bill, but sets up new matter of defence on which he relies, the injunction will be continued to the hearing.\(^{(t)}\) And if an answer on oath is waived by the bill, the injunction will not be dissolved of course, upon defendant's answer on oath; provided the material facts in the bill are verified by the affidavit of some person besides the complainant, annexed to and filed with the bill; but the court, in its discretion may retain the injunction till the hearing.\(^{(u)}\) So, an injunction will not be dissolved of course, upon the coming in of an answer, in which the complainant's case is denied. The statement of the defendant must be at least credible. Any evasion in not responding to the material charges in the bill, or an extreme improbability in the statement of the defendant, will induce the court to retain the injunction.\(^{(v)}\)

And whenever, on a motion to dissolve an injunction, it appears from the answer, that the complainant was entitled to an injunction, at the time of obtaining it, but there still remains a dispute between the parties, the injunction is usually continued until the final hearing, or further order.\(^{(w)}\)

Nor is it necessary for a party who seeks to continue an injunction to the hearing, to show an indefeasible right to the decree prayed by the


\(^{(t)}\) 3 Swam. 676. \(^{(w)}\) Moore *v. Hylton*, Dev. Eq. Rep. 499.

bill. Where, therefore, assignees of a bankrupt sought a specific performance of an agreement for a lease, against a party who was herself a lessee, and restrained from assigning without the consent of the lessor in writing thereto obtained, the court continued the injunction to restrain proceedings at law; there being a probability of obtaining the consent of the lessor to the assignment.\(x\)

An injunction may also be continued as a suitable auxiliary to the appointment of a receiver.\(y\)

But an injunction is never continued to the hearing as a matter of course.\(z\) It was in one case contended, before Lord Hardwick, that if there is such a doubt that the court may, at the hearing, decree either the one way or the other, it is a reason for continuing the injunction till the hearing. His lordship, however, overruled this argument without any hesitation.\(a\) The true principle seems to be, that the court will or will not continue the injunction, according to the character of the doubt, viz. if the preponderance of doubt be against the probability of a decree being made against the defendant, the court will not continue the injunction; and the contrary if the doubt preponderate in favor of the complainant's probability of obtaining a decree.\(b\)

There are many cases in which the court will only continue the injunction upon the condition of the complainant paying a certain sum of money into court; as, for instance, when there has been a verdict at law;\(c\) or an award for a sum of money;\(d\) or where the defendant has sworn by his answer that a sum of money is due to him.\(e\) Money will not be ordered to be paid into court, however, where there is matter sufficient for a total relief confessed in the answer.\(f\) And in general the practice is confined to cases where the money has either been found due by verdict or award, or is sworn to be so by the answer.\(g\)

Our revised statutes contain provisions that no injunction shall issue to stay proceedings at law, in any personal action, after judgment, unless a sum of money equal to the amount of the judgment, including costs, or a bond for the amount, shall be first deposited by the complainant. And such money may be paid, on the order of the court, to the complainant in the action at law, upon his giving security to refund the

\(x\) Powell v. Lloyd, 1 Young & Jer. 497.

\(y\) Chase v. Manhardt, 1 Bland, 336.

\(z\) 3 Dan. 891.

\(a\) Potter v. Chapman, Ambl. 99.

\(b\) Drewry on Inj. 363.


\(d\) Prac. Reg. 242.

\(e\) Id. 238. Harr. ed. Newl. 549.

\(f\) Toth. 37.

\(g\) Eden on Inj. 113.
same whenever directed to do so. (h) Whenever the monies so brought into court are paid to the plaintiff in the action at law, if the final decree of this court is against the complainant, the chancellor may order any bond given by such plaintiff at law to be cancelled; and shall continue the injunction to stay the collection of the judgment at law, or shall compel the plaintiff therein to cause the judgment to be satisfied and discharged of record. (i)

Under these statutory provisions it has been decided, that when an injunction is obtained to stay proceedings at law after judgment, and the amount of the judgment has been brought into court, and subsequently taken out by the defendant, upon giving security to refund in case the complainant succeeds in the suit, the injunction will be continued to the hearing, although the equity of the bill is denied in the answer. (k) It seems, also, that the injunction may be continued to the hearing when the amount of the judgment is brought into court, although the defendant neglects to take out the money, upon the usual security to refund it, if it should afterwards appear that he was not entitled to the same. (l)

When the injunction is continued, the cause in this court ought to be prosecuted to a hearing. If it be not, and the court is satisfied that there is any intentional delay on the part of the complainant, the injunction will be dissolved. (m) The general course, however, is, to move, at the proper time, that the bill may be dismissed for want of prosecution. (n)

2. General injunctions.] A general injunction is the process ordinarily employed in a cause. It continues in force "until the further order of the court;" whereas the provisional injunction, as we have stated, (o) only operates until the coming in of the defendant's answer; or until the hearing of the cause; or until the master has made his report. A general injunction may be either granted on the filing of the bill, or substituted in the place of the provisional injunction, upon the falling of the latter. (p) Or it may be granted at the final hearing—whether there has been a previous injunction or not—in cases where a perpetual injunction is not proper.

A general injunction afflicting the rights of a party who has appeared, cannot be granted without giving him an opportunity to be heard on such application. He must therefore have notice of the application, and be served with an order to show cause; and if necessary, a tempo-

(h) 2 R. S. 189, § 147, 148, (orig. § 141, 142.)
(i) Id. 190, § 149, (orig. § 143.)
(k) Manchester v. Dey, 6 Paige, 295.
(l) Id. lb.
(m) Harr. ed. Newl. 549.
(n) 3 Dan. 394.
(o) Ante, p. 603.
(p) See Bloomfield v. Snowden, 9 Paige, 855.
rary injunction may be issued in the mean time, as we have before stated.(q)

3. **Perpetual injunctions.** Perpetual injunctions are such as form part of the decree made at the hearing, upon the merits, whereby the defendant is perpetually inhibited from the assertion of a right, or perpetually restrained from the commission of an act which would be contrary to equity and good conscience.(r)

The following are some of the instances in which perpetual injunctions will be allowed: to prevent the record of a forged deed from being used as evidence of title; (s) to restrain proceedings on a satisfied judgment; (t) or a void judgment; (u) or upon a bond and mortgage given by an infant; (v) or upon a judgment on a bond obtained by fraud; (w) to restrain the continuance of a mill-dam which is injurious to health; (x) to quiet the possession of real estate if the complainant has the title, although there has been no previous trial at law.(y) And where one has the grant of a ferry, bridge, or road, with the exclusive right of taking toll, and another ferry, bridge, or road, is made, so near as to create a competition injurious to the complainant’s franchise, a perpetual injunction to restrain the defendant will be granted.(x)

An injunction will also be made perpetual, by the decree, where the defendant is in possession of some instrument conferring a legal right which it is contrary to equity that he should be permitted to exercise to the detriment of the complainant. Therefore, where the complainant gave to the defendant three promissory notes for a particular purpose, on his undertaking to make no improper use of them, but afterwards the defendant, contrary to his promise, put the notes in suit against the complainant, the court at the hearing directed that a perpetual injunction should issue, and that it should extend to restrain the endorsing and further negotiation of the notes.(a)

And the practice of extending injunctions at the hearing, so as to render them perpetual, is not confined to cases in which the parties are in a position to annoy the complainant by proceedings which he may have a legal right to institute, but it is applied to prevent a continuance or repetition

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(r) Gibb. For. Ram. 194, 195.
(t) Brinkerhoff v. Lansing, id. 69.
(u) Caruthers v. Hartsfeld, 3 Yerg. 366.
(v) Clark v. Ferguson, 3 Deassu. 482.
(w) Krason v. Krason, 1 Bibb, 194.
(y) Trustees of Louisville v. Gray, 1 Litt. 147.
of acts for which the party has no legal authority whatever. Thus injunctions to restrain waste, or the infringement of a patent, may be made perpetual at the hearing. So also may injunctions to restrain the piracy of a publication; (b) or to restrain the use by one tradesman of the trade marks of another. (c)

But to support a decree for a perpetual injunction, there must be nothing like a doubt in the case. (d)

It is to be observed, that in order to entitle a complainant to a decree for a perpetual injunction at the hearing, it is not absolutely necessary that he should have previously obtained one upon an interlocutory application; and that though he may have failed, upon the answer of the defendant, to obtain or support his injunction, he is at liberty to claim it at the hearing. (e) And the case will be the same though he may not have made any application for an interlocutory injunction. (f) This principle, however, does not apply to those cases in which the court only grants injunctions at the hearing of the cause, as in the case of bills to restrain the setting up of outstanding terms, and others of that description.

If an injunction has been obtained upon an interlocutory application, and it is intended to continue it at the hearing, care must be taken to introduce a direction to that effect in the decree; otherwise, it will not be supported. (g)

With respect to the cases in which the court will decree perpetual injunctions, at the hearing of the cause, it may be mentioned that if a decree has been made for the performance of trusts, the defendant will be perpetually enjoined from setting up a legal estate, in order to overturn it. (h) A perpetual injunction will also be decreed where the same question has been frequently litigated in the same manner, or where it is likely to be contested in a multiplicity of suits. This is the foundation for a bill of peace, where it is necessary to quiet the rights, after repeated ejectments; for such a proceeding, unless prevented, would become oppressive to the opposite party. (i) So where there is one gene-

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(c) Millington v. Fox, 3 My. & Craig, 338.
(d) Whittingham v. Wooler, 2 Swanst. 428, n. See also Baily v. Taylor, 1 Russ. & My. 73.
(e) Baily v. Tayler, 1 Russ. & My. 76.
(g) Sexton on Decrees, 300.
reral right to be established against a great number of persons; for as the difficulties would be insuperable if each of the parties should attempt to determine their particular rights by separate and distinct actions, the court will put the whole in peace by a perpetual injunction.\(^{(k)}\)

It is to be observed, that an injunction is never made perpetual but upon the hearing of the cause.\(^{(l)}\) When, however, it is once made perpetual, it seems to be so far final, as to remain in force notwithstanding the death of the party; for if it were necessary to revive upon every abatement, that would be, in effect, a perpetual suit.\(^{(m)}\)

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**SECTION III.**

**IN WHAT CASES GRANTED, AND AGAINST WHOM.**

It is not intended to go into a comprehensive examination of the subject of injunctions, with reference to the various purposes to which the process may be applied. To do so would require not a chapter merely, but a treatise. It may be useful, however, to state a few of the general principles which govern the court in granting or refusing an injunction—a process which has been termed "the right arm of the court of chancery."

The various cases in which the court will interere by injunction are almost as numerous as the matters which fall within the equitable jurisdiction of a court of chancery; for it may be stated generally, that whenever a complainant is entitled to equitable relief, if that relief consists in restraining the commission or continuance of some act of the defendant, the court will enjoin him by means of this prohibitory writ.\(^{(n)}\)

**Bill to be first filed.** No injunction can be issued in any case, until the bill has been filed.\(^{(o)}\)

**Must be prayed for.** The bill must expressly pray an injunction;\(^{(p)}\) and that as well in the prayer of process as in the prayer for relief.\(^{(q)}\) It cannot be granted under a prayer for general relief.\(^{(r)}\) unless the ne-


\(^{(l)}\) For. Rom. 194.


\(^{(n)}\) 3 Dan. 301.

\(^{(o)}\) 2 R. S. 179, § 77, (orig. § 71.)


\(^{(q)}\) Wood v. Beadell, 3 Sim. 273.

\(^{(r)}\) Savory v. Dyer, supra.
cessity for it grows out of the proceedings, and not from the original situation of the parties.\(^{(s)}\)

**Upon petitions.** The provision of the statute requiring the bill to be filed before the injunction can issue, is not to be understood as limiting the right to the process to such suits as are commenced by bill. The provision of the statute above referred to, \((2\ R.\ &\ S.,\ \S\ 179,\ \S\ 77,)\) is to be construed in connection with the section immediately preceding, relative to the subpena. Those provisions relate only to cases where the court obtains jurisdiction of the cause by a proceeding by bill.\(^{(t)}\) There are many cases in which this court enforces its orders and decrees by injunction, where the proceeding is founded on a petition only, and without any bill filed. The filing of the petition in these cases, which is a substitute for a bill, is a substantial compliance with the requirement of the statute.\(^{(u)}\)

In the case of a woman being an infant ward of chancery, an injunction to restrain her from marrying, and to restrain the party proposing marriage from marrying her, has been granted on petition.\(^{(v)}\) An injunction has also been granted on petition without bill filed, on the application of the committee of a lunatic, to restrain waste by the tenants of the lunatic’s estate.\(^{(w)}\) It has also been granted in like manner in other cases of waste, such as working coal mines,\(^{(x)}\) and for an injury in the nature of waste, such as pirating a literary work.\(^{(y)}\) So where a person had taken some old houses in the city of London, and had stowed such quantities of sugar in them that two had actually fallen down, and he was proceeding to introduce more, the court granted an injunction on petition and affidavits verifying the facts.\(^{(z)}\) So the committee of a lunatic’s estate may obtain an injunction on petition, to stay an action by an auctioneer against the solicitor in the lunacy, on his demand, for business done for the purpose of carrying into effect the directions of the court in the lunacy.\(^{(a)}\)

Where, however, a bill was dismissed by a vice chancellor and an appeal was entered from his decree, but after the entering of the decree, and before the appeal, the subject matter of the suit was sold, the

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\(^{(e)}\) Wright v. Atkyns, 1 Ves. & B. 314. Lube’s Eq. Pl. 54. 108.

\(^{(e)}\) Matter of Creagh, 1 Ball & B. 316. \(^{(s)}\) Id. ib. Farlon v. Wilson, 11

\(^{(t)}\) Matter of Hemipt, 9 Page, 316. \(^{(u)}\) Smith v. Clark, Dick. 455.

\(^{(w)}\) Price, 95. Jacob, 546. \(^{(y)}\) Nichola v. Kearley, Dick. 645.

\(^{(x)}\) Bloomfield v. \(^{(z)}\) Mayor, &c. of London v. Bolt, 5 Snowden, 2 Page, 357. Ves. 129.

\(^{(a)}\) Smith v. Smith, 3 Atk. 304. \(^{(a)}\) Matter of Weaver, 2 Myln & C. 441.
chancellor refused to grant an injunction against the purchaser, who was not a party to the suit, on petition.\(^{(b)}\)

**On amended bill.** Although an injunction is not applied for upon an original bill, yet if the bill is afterwards amended, an injunction will be granted as of course, upon the defendant taking an order for time to answer the amended bill.\(^{(c)}\)

An injunction was prayed for in the prayer of the bill, but was omitted in the prayer of process, and on that account a motion for an injunction was refused: but leave was given to amend. The bill was accordingly amended, and on the motion being renewed, it was objected that the application should not be repeated until the time for answering the amended bill had expired; but the objection was overruled.\(^{(d)}\)

**On a supplemental bill.** Where a bill was dismissed by a vice chancellor and an appeal was entered from his decree, but the subject matter of the suit was sold intermediate the entering the decree and the appeal, the chancellor refused to grant an injunction against the purchaser, who was not a party to the suit, on petition; but permission was given to file a supplemental bill before the chancellor, and to move for an injunction thereon against the purchaser.\(^{(e)}\) It is not the practice to allow an injunction affecting the rights of a party who has appeared, on an *ex parte* application to the court upon a supplemental bill; but regular notice of such application should be given to such party.\(^{(f)}\)

**What oath to bill necessary.** Every bill or petition upon which an injunction is asked for must be duly verified, in the manner already pointed out.\(^{(g)}\) It may be stated, in addition, that the complainant is not entitled to an injunction, *ex parte*, upon a bill verified by his own oath only, where the facts upon which the injunction rests are not within his own knowledge. In such a case he should state the facts in his bill as upon his information and belief, and annex the affidavit of the person from whom he obtained the information, or some other person who can swear positively to the truth of the material allegations in the bill.\(^{(h)}\)

But the case of a creditor’s bill, where an injunction is sought for against the judgment debtor alone, is an exception to the general rule.

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\(^{(b)}\) Bloomfield v. Snowden, 2 Paige, 355.

\(^{(c)}\) Statham v. Hughes, 2 Sim. & Stu. 383.

\(^{(d)}\) Wood v. Beadell, 3 Sim. 273.

\(^{(e)}\) Bloomfield v. Snowden, 2 Paige, 355.

\(^{(f)}\) Id. ib.

\(^{(g)}\) Ante, p. 43.

Therefore in a creditor’s bill against the judgment debtor only, it is sufficient to sustain an application for an injunction, if the bill is sworn to by the complainant; although he does not swear positively to the recovery of the judgment and the return of the execution unsatisfied, but merely swears to his belief of those facts, founded upon the information of his attorney.\(^{(i)}\) And the court has frequently decided, with respect to creditors’ bills, that where the complainants reside at a distance from their debtors, and have entrusted the collection of their debts to attorneys or agents residing near such debtors, which attorneys or agents have conducted the proceedings at law, the verification of the bill by the attorney or agent is sufficient.\(^{(k)}\)

To restrain trespasses, &c.] An injunction will lie to restrain trespasses, in order to quiet the possession, or where there is danger of irreparable mischief, or the value of the inheritance is put in jeopardy.\(^{(l)}\) But the court does not in general interfere to prevent a mere trespass, unless the complainant has been in the previous undisturbed enjoyment of the property, under claim of right, or where from the irresponsibility of the defendants, or otherwise, the complainant could not obtain relief at law.\(^{(m)}\)

A second injunction, when refused.] After an injunction has been granted, a second one will not be allowed while the first is in force; unless it has been withdrawn by some agreement between the parties, and satisfactory reasons are shown for a renewal of it.\(^{(n)}\) So where an injunction has been refused, or has been dissolved by the court, it is irregular to apply to an injunction master, or to a vice chancellor acting as an injunction master, for a new injunction, upon a bill containing the same grounds for an injunction; and if such injunction is granted, it will be set aside with costs, as being a violation of the statute on the subject of injunctions.\(^{(o)}\)

Not granted where right of party is doubtful.] Where the right of the complainant is doubtful, the court will not grant an injunction to prevent an illegal interference with the same, until the right is established at law.\(^{(p)}\)

Nor while plea or demurrer is pending.] If the defendant, before the

\(^{(i)}\) Hammeraley v. Wyckoff, 8 Paige, 79.  
\(^{(k)}\) Hart v. Mayor, &c. of Albany, 3 Paige, 913.  
\(^{(o)}\) Cummins v. Fennett, 8 Paige 79.  
\(^{(p)}\) Hart v. Mayor, &c. of Albany, 3 Paige, 213.
time for answering be out, puts in a plea or demurrer, or both, an injunction cannot be granted while they are pending.\((q)\)

**To stay proceedings in this court.** An injunction will not be issued upon a new bill filed, either by parties or privies to a former suit, to restrain proceedings under a decree in such suit.\((r)\) And the rule is the same where the new bill is filed by a stranger to the original suit.\((s)\)

The proper course is to apply to the court by petition, for an order, in the original suit.\((t)\)

**Against what persons.** It is a general rule, that an injunction will not be granted against persons who are not parties to the suit.\((u)\)

But this rule is subject to some exceptions. Thus, wherever this court has power to make an order, in consequence of having jurisdiction over the subject matter of the suit or proceeding, and which a person is bound to obey in consequence of his being actually or constructively a party to the suit, it may enforce obedience to such order by the process of injunction.\((v)\) Accordingly, if the court, having full cognizance of the matter, has by its decree, taken it into its own hands, it will interfere by its injunction, to prevent injury to the property, either by the parties litigant or others, although there is no injunction prayed by the bill. Instances of this occur in cases of foreclosure; in which, if after a decree to account, the mortgagor attempts to cut timber, the court will enjoin him, although there was no prayer for an injunction in the bill.\((w)\)

Upon the same principle, if there has been a decree for the administration of assets, the court will restrain a creditor who is not a party to the suit, from proceeding at law against the testator's or intestate's estate, for his own individual debt. This it does, because it considers the decree it has made in the nature of a judgment for all the creditors.;\((x)\) and having taken the fund into its own hands, it will administer it equitably, and not permit the executor to be pursued at law.\((y)\) And this power is not confined to the executor or administrator only, but the injunction will also be granted on the application of the heir.\((z)\) or of

\(\text{(q) Eden on Inj. 88.}\)
\(\text{(r) Dyckman v. Kernochan, 2 Paige, 96.}\)
\(\text{(s) Smith v. American Life Ins. & Trust Co., 1 Clarke, 207.}\)
\(\text{(t) Lane v. Clark, 1 Clarke, 309.}\)
\(\text{(u) Newton v. Douglass, cited 1 Hoff. Pr. 99, n. (2).}\)
\(\text{(v) Dyckman v. Kernochan, supra.}\)
\(\text{(w) Fellows v. Fellows, 4 John. Ch. Rep. 25.}\)
\(\text{(x) Waller v. Harris, 7 Paige, 167.}\)
\(\text{(y) Drewry on Inj. 346.}\)

\(\text{Princeps, 2 Anst. 981. See also Bloomfield v. Snowden, 9 Paige, 255.}\)
\(\text{(e) Matter of Hemiup, 9 Paige, 319.}\)
\(\text{(w) Wright v. Atkyns, 1 Ves. & B. 313, 314.}\)
\(\text{(x) Martin v. Martin, 1 Ves. 211.}\)
\(\text{Bank of England v. Morice, For. 217.}\)
\(\text{2 Bro. P. C. 405.}\)
\(\text{(y) 3 Dan. 298.}\)
\(\text{(e) Martin v. Martin, supra.}\)
another creditor, (a) or of a common legatee, or even, as it seems, of a residuary legatee. (b) There is no instance, however, in which a creditor at law has ever been stopped, unless there was a decree under which he could come in; for until there is such a decree, the creditor ought not to be deprived of the benefit of a prior judgment. (c) But when the decree has been made, from that moment it must be preferred, if it precedes the judgment in point of time; and all the creditors must be paid according to their priorities as they then stand. (d)

SECTION IV.

FORM OF INJUNCTION.

A writ of injunction is in the name of the people, directed to the defendants and to their counsellors, attorneys, solicitors and agents; reciting the filing of the bill and the allegation therein that the defendants are combining and confederating to injure the complainant, and that the actings and doings of the defendants in the premises are contrary to equity and good conscience. Then follows the enjoining or prohibitory clause, specifying the particular acts to be abstained from, under the penalty of ten thousand dollars. The teste then follows. The writ must be tested in the name of the chancellor, on the day it is issued. Or if the chancellor is a party, or interested in the suit, it must be tested in the name of the vice chancellor before whom the suit is pending. (e) It must be signed by the complainant's solicitor and by the register or clerk who issues it.

It may be, and usually is, prepared by the solicitor; but it must be signed and sealed by the register or clerk before being issued.

A writ of injunction ought be sufficiently explicit on its face to apprise the party upon whom it is served as to what he is restrained from doing; without the necessity of his resorting to the complainant's bill to ascertain what the injunction means. (f)

(a) Dyer v. Kearley, 2 Mar. 482, n.  (b) Laran v. Bowen, 1 Sch. & Lef.
(c) 2 Swanst. 646. And see Jac. 122.  (d) Rule 19.
(c) 3 Dan. 998. Rush v. Miga. 4 Ves.  (e) Sullivan v. Judah, 4 Paige, 444.
(d) 12 Ves. 637. And see Perry v. Philips, 10 Ves.  (f) Moat v. Holbein, 3 Edw. 188.
It should be clear and explicit in its terms, and should not deprive the defendant of any right which the case made by the bill does not require he should be restrained from exercising. (g)

SECTION V.

How Obtained and Issued.

What officers may grant injunctions.] Injunctions may be allowed by the chancellor and vice chancellors, and in certain cases by a master appointed for that purpose, in each circuit, and who is styled an injunction master. The chancellor, however, is not in the habit of hearing ex parte applications for this writ, at chambers, unless there is some good reason for not presenting the bill to a vice chancellor or injunction master.

If the suit is before the chancellor, the writ may be allowed by a vice chancellor or the injunction master of the first or third circuits. If it is before a vice chancellor, the order for it may be entered on the certificate of any of the vice chancellors; and if the vice chancellor of the circuit where the suit is brought resides more than twenty miles from the office of the clerk of such circuit, or is absent from his usual place of residence, the order may be entered on the certificate of the injunction master in such circuit. (h) In the first circuit it may be entered on the certificate of the injunction master, whether the vice chancellor is present or absent. (i)

By an order of the 24th of March, 1840, the assistant vice chancellor of the first circuit is designated as the injunction master of that circuit; and he is authorized to execute every power and duty which the former injunction master, as such, was authorized to execute according to the rules and practice of the court.

No injunction to suspend the general and ordinary business of a bank or other monied corporation, or of any banking association; or to compel a defendant to refrain from doing any other act, where the injunction will necessarily produce great and irreparable injury to the defen-

(g) Laurie v. Laurie, 9 Paige, 334.  (i) Idem.
(h) Rule 30.
dant if the claim of the complainant is not sustained, can be allowed by
an injunction master; but application must be made to the chancellor
or to the vice chancellor having jurisdiction of the case. (k) If the
suit is before the chancellor, such application must be made directly
to him.

Second application.] The statute contains a provision that if an
application for an injunction be made to the chancellor, or a vice chancel-
or, or master authorized to grant it, and the injunction be refused, in
whole or in part, or be granted conditionally, or on terms, no subse-
quent application for the same purpose, and in relation to the same mat-
er, shall be made to any other master. And if any order is made upon
such subsequent application it shall be absolutely void, and shall be re-
voled by such master, or the chancellor, or vice chancellor of the cir-
cuit in which such master resides, upon due proof of the facts. (l) And
the person making such subsequent application may be punished by fine
and imprisonment. (m)

It has been decided that this statutory prohibition is not limited to a
second application in the same suit, but extends to a second application
made to a vice chancellor, or to an injunction master, although such
application is founded upon a new bill; if the grounds of the applica-
tion are substantially the same. (n)

Security.] In every case where no special provision is made by law
to security, except where the injunction is to stay proceedings in an
ordinary suit at law, or is against the judgment debtor who is made a
defendant in a creditor's bill, the vice chancellor or master who allows
an injunction out of court, shall take from the complainant or his agent
a bond to the party enjoined, either with or without sureties in the dis-
cretion of the officer, in such sum as may be deemed sufficient, and not
less than $500, conditioned to pay such party all damages he may sus-
tain by reason of such injunction if the court shall decide that the com-
plainant was not entitled to the same. (o) The rule points out the
method of ascertaining such damages.

If the officer neglects to take a bond on allowing an injunction, in a
proper case, the party may make a special application to the court for
relief. (p)

(k) Rule 31.
Magee, 9 id. 116.)
(m) Id. ib. § 37, (orig. § 34.)
(n) Cannons v. Bennett, 8 Paige, supra.
(p) Cayuga Bridge Co. v. Magee, 79; and Bedell v. Wright, there cited.
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It has been decided by the chancellor that where the surety in a bond of this nature is a material witness for the complainant, he may be discharged by order of the court, and his bond be given up and cancelled, upon the complainant's giving new security to be approved of by a master, upon due notice to the defendant of the time and place of the approval of the new sureties. (g)

Methods of applying for. An injunction may be applied for ex parte, upon notice, or upon an order to show cause.

Ex parte applications. The application is always ex parte if made before the defendant has appeared in the cause. (r) But no ex parte order can be granted, either on a supplemental bill or otherwise, after the defendant has appeared in the original suit. (s)

Applications upon notice. After the defendant has appeared, he is entitled to notice of every application for an injunction against him; (t) unless the threatened danger is imminent, and notice to him would be prejudicial. (u) In that case an order to show cause should be obtained, in the manner hereafter stated.

The time of the notice is the same as that required upon all special motions. (v)

The 32d rule directs that an order for an injunction to suspend the general and ordinary business of a bank or other monied corporation, upon the bill or petition of any person other than the attorney general, or a bank commissioner, shall not in any case be granted by a vice chancellor without due notice of the application, to the proper officers of the corporation; unless the complainant shall give to the corporation a bond in the penalty of at least $10,000, conditioned to pay all damages which the corporation may sustain by reason of the injunction if it shall afterwards appear to have been unnecessarily or improperly issued.

An application for an injunction may be opposed upon the merits as contained in the bill, but nothing extrinsic will be allowed. (w) The court will confine itself to the facts stated in the bill, and to the answer, if any, to those facts. (x)

Where the complainant gives notice to the defendant of an applica-

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(g) Pomeroy v. Avery, in Chan. May 17th, 1842.
(r) See Rule 16.
tion to the court for a preliminary injunction, whether a temporary injunction is or is not allowed in the mean time, the defendant may introduce affidavits in opposition to the application for the injunction.\(^{(y)}\)

**Applications upon orders to show cause.** If the vice chancellor or master to whom application for an injunction is made, thinks the defendants, or any of them, should be heard on the question, before the injunction is granted, he may refuse to allow the same ex parte, and instead thereof may direct an order to be entered requiring the defendant to show cause before the court on a regular motion day, or some day in term, why the injunction should not be granted. He may also direct on which of the defendants the bill and order to show cause shall be served, and the time and manner of such service.\(^{(x)}\)

Where the facts upon which an injunction rests are not within the complainant's own knowledge, he should state the facts in his bill as upon his information and belief, and annex the affidavit of the person from whom he obtained the information, or of some other person who can swear positively to the truth of the material allegations in the bill. Where such affidavits cannot be procured, the complainant, upon showing a sufficient excuse in the bill, will be entitled to an order to show cause why an injunction should not be granted. And upon a bill thus framed and verified by the complainant's oath as to his information and belief, the injunction master may allow a temporary injunction, when necessary, until the time for showing cause arrives.\(^{(a)}\)

So if a temporary injunction is necessary, to prevent irreparable injury before regular notice of the application can be given for a general injunction, the court will grant an order to show cause, and allow such temporary injunction in the mean time.\(^{(b)}\)

If the order to show cause is not directed to be entered by the vice chancellor or master, under the 32d rule, application must be made to the court for it, ex parte. And the defendant must be served with a copy of the order and of the papers on which it is founded, (if they have not already been served,) the same length of time before the day for showing cause as in the case of special motions; unless the court directs a shorter notice.\(^{(c)}\)

The defendant, whether a temporary injunction is or is not allowed

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\(^{(y)}\) Village of Seneca Falls v. Matthews, 9 Paige, 504.

\(^{(x)}\) Rule 32.

\(^{(a)}\) Campbell v. Morrison, 7 Paige, 157.

\(^{(b)}\) Bloomfield v. Snowden, 2 id. 355.

\(^{(c)}\) Rule 114.
in the meantime, may, at the time of showing cause, introduce affidavits in opposition to the application for an injunction.\(d\)

**Methods of allowing.** If the writ is allowed by the chancellor, or a vice chancellor in a case before him, the bill is endorsed, "Let an injunction issue pursuant to the prayer of the within bill;" or as modified by the court: which endorsement is signed by him.

In other cases, the allowance is in the form of a certificate endorsed upon the bill as follows: "I certify that I have perused the within bill, and am of opinion that an injunction should be issued, pursuant to the prayer thereof.

C. H., Injunction Master."

"March... 1843.

When the injunction is allowed by an injunction master, or by a vice chancellor acting as injunction master, the certificate of allowance, in cases where by the 31st rule, security is required to be taken, should contain the additional clause—"on the complainant's filing a bond [either with or without sureties, as the master, &c. may direct] in the penal sum of.... dollars."\(e\)

An injunction allowed by the vice chancellor before whom the bill is filed, the order for which is entered on his file with the clerk, will be presumed to have been allowed by him in his character of judge of the court, in case the injunction would have been irregular if allowed by him in the character of an injunction master merely.\(f\) And where an injunction is allowed by the vice chancellor before whom the cause is pending, the certificate or file should be so drawn as to enable the clerk to ascertain whether the order is to be entered as a special order made by the court, or as an order made upon the certificate of the vice chancellor in the character of injunction master.\(g\)

**Order for.** Every injunction must have an order of the court to warrant it, in whatever manner it may have been allowed. And the order should be entered before the writ is sealed and issued.

**Issuing writ.** If, on presenting the bill, with the allowance or certificate endorsed thereon, to the register or clerk, the proceedings appear to be regular, he will, after having entered the order, sign, seal, and issue the injunction. But if he discovers that the statute relative to injunctions, has not been complied with, by the master allowing the same, he should not issue the process without the special directions of the court.\(h\)

Whenever an injunction has issued irregularly, the defendant is en-

\(d\) Village of Seneca Falls v. Matthews, 9 Paige, 504.
\(e\) See Rule 31.
\(f\) Melick v. Drake, 6 Paige, 470.
\(g\) Id. ib.
\(h\) Jenkins v. Wilde, 9 Paige, 394.

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titled to have the order discharged; but any act of his founded upon it, is a waiver of the irregularity. It has accordingly been determined that a defect in the injunction will be cured by the defendant putting in his answer and moving to dissolve.

SECTION VI.

TO STAY PROCEEDINGS AT LAW.

1. Where cause is not at issue.] When an injunction bill is filed to stay proceedings in a suit at law, the complainant must state in his bill the situation of such suit, and whether an issue is joined, or a verdict or judgment obtained. If the bill does not state the situation of the suit at law, no injunction to stay proceedings therein can be granted. If no issue has been joined or judgment obtained in such suit, and the bill is not a mere bill of discovery, or to aid the defence in the suit at law, the vice chancellor or master on whose certificate the injunction is granted, must direct a provision to be inserted therein, that the defendant be at liberty to proceed to judgment at law, without prejudice to the equitable rights of the complainant, notwithstanding the injunction. But upon application to the court and sufficient cause shown, the complainant may have an absolute injunction to stay all proceedings, or all proceedings after issue joined.

Where the complainant's bill prays relief as well as discovery, the injunction master must direct the insertion of the provision required by the second clause of the 33d rule, except in those cases where the only relief prayed for is such as will be necessary to aid the complainant in his defence to the suit at law.

2. Where the cause is at issue, and before trial.] It is provided by statute that no injunction shall be issued to stay the trial of any personal action at issue in a court of law, until the complainant shall execute a bond with one or more sufficient sureties, to the plaintiff at law, in such sum as the chancellor or master shall direct, conditioned for the

(1) Travers v. Lord Stafford, 2 Ves. 20, 32. Eden on Inj. 88.
(1) Rule 23.

(m) Teller v. Van Deusen, 3 Paige, 33. (n) Rule 33.
(o) Idem.
(p) Melick v. Drake, 6 Paige, 470.
payment of all moneys which may be recovered by such plaintiff, or the collection of which may be stayed by such injunction, in such action at law, for debt or damages and for costs therein; and also for the payment of such costs as may be awarded in the suit in chancery. (q)

3. After verdict. No injunction can be issued to stay proceedings, after verdict, unless a sum of money equal to the amount of the verdict and costs, shall be deposited in this court, or a bond for the payment thereof be given. (r)

4. After judgment. After judgment, no injunction can issue to stay proceedings at law, unless 1. A sum of money equal to the full amount of the judgment, including costs, shall be first deposited, or a bond be given in lieu thereof; and 2. Unless the applicant, in addition to such deposit, shall also execute a bond, with one or more sureties, to the plaintiff in the judgment, in such sum as the chancellor or officer allowing the injunction, shall direct, conditioned for the payment of all such damages and costs as may be awarded to such plaintiff by the court, at the final hearing of the cause. (s)

In the case of *Dickey v. Craig*, (t) the chancellor decided that a proceeding by a scire facias by the executors of a deceased plaintiff, to revive a judgment abated by his death, is a proceeding in the same suit or action in which the judgment was recovered; and that to obtain an injunction to stay the executors from proceeding on such scire facias, the complainant must deposit the amount of the judgment, or give security for the payment thereof, according to the 146th and 152d sections of the statute.

A complainant who obtains an injunction to restrain a sheriff from paying over the amount of a levy, must also make the deposit, or give the bond required by the statute. (u)

But an injunction to restrain the plaintiff in a suit at law from proceeding upon his execution against a third person who is the defendant in that suit, to sell the property of the person obtaining the injunction, is not an injunction to stay the proceedings in a personal action after judgment, within the intent and meaning of the sections of the statute, which require a deposit of the amount of the judgment, on the issuing of an injunction, and which authorize the plaintiff in the judgment to take the money out of court, upon giving security to refund. (v)

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(p) 2 R. S. 188, § 145, (orig. § 139.)  
(r) Id. 189, § 146, (orig. § 140.)  
(r) Id. ib. § 146, (orig. § 141.)  
(q) 5 Paige, 283.  
(u) Boker v. Curtis, 2 Edw. 111.  
(v) Hegeman v. Wilson, 8 Paige, 99.
Dispensing with deposit. The chancellor may dispense with the deposit of money, and, in lieu thereof, direct the execution of a bond, with sureties, conditioned to pay the amount so required to be deposited whenever ordered by the court; or if a bond is already required, in addition to such deposit, the court may direct the enlargement of the penalty and condition of such bond, as may be requisite. But whenever such deposit is dispensed with, the bond so substituted or enlarged must be executed by at least two sufficient sureties.\(\text{(w)}\)

It has been decided, that under this section, none but the court can dispense with the actual deposit of the debt and costs before the issuing of the injunction.\(\text{(x)}\)

Sufficiency of sureties. The sufficiency of the sureties in any bond executed under the 146th or 147th sections of the statute, is to be ascertained either by the certificate of a master, or by the affidavit of each surety, stating that he is a household resident within this state, and that he is worth a sum equal to the amount in which the bond shall have been required, over and above all debts and demands. And every such certificate and affidavit must be annexed to, or endorsed on, the bond.\(\text{(y)}\)

Acknowledgment of bond. Such bond must also be duly proved or acknowledged in the manner prescribed by law for the proof or acknowledgment of deeds of real estate.\(\text{(z)}\)

Paying over money deposited. Where money is deposited either under the 146th or 147th sections of the statute, the same may be paid, on the order of the court, to the plaintiff in the action at law, upon his executing a bond to the people of this state in a penalty double the amount so deposited, with such sureties as the court shall approve, conditioned to pay to the register or assistant register, such monies and interest, or any part thereof, according to any order or decree of this court.\(\text{(a)}\) And whenever such monies shall be thus paid over to the plaintiff at law, if the final decision in this court be against the party obtaining the injunction, the court may order any bond that may have been given by such plaintiff to be cancelled, and shall continue the injunction to stay the collection of the judgment, or shall compel the plaintiff therein to cause such judgment to be satisfied and discharged of record.\(\text{(b)}\)

Where an injunction is obtained to restrain the plaintiff in a suit at law, from proceeding upon his execution against a third person, who

\(\text{(w)}\) 2 R. S. 190, § 150, (orig. § 146.)  
\(\text{(x)}\) Rule 172.  
\(\text{(y)}\) Jenkins v. Wilde, 2 Paige, 394.  
\(\text{(z)}\) Id. 180, § 148. (orig. § 142.)  
\(\text{(a)}\) Id. ib., § 148, (orig. § 143.)
is the defendant in that suit, to sell the property of the complainant, in this court, the party against whom such injunction has been obtained, upon a deposit of the amount of his execution, is not entitled as a matter of right, to take the money out of court upon giving security to refund the same, if the complainant succeeds in his suit; as there is no privity between the complainant and him, and as he has no claim to the immediate possession of any part of the fund. (c)

5. To stay proceedings after verdict in ejectment.] After a verdict for the recovery of lands or of the possession thereof, the party applying for an injunction must execute a bond, to the plaintiff in the action at law, with one or more sureties, in such sum as the chancellor or officer allowing the writ shall direct, conditioned for the payment of all such damages and costs as shall be awarded in case of a decision against the party obtaining the injunction. (d) The damages to be paid upon the dissolution of such injunction, are to be ascertained by a reference to a master, and shall include not only the reasonable rents and profits of the land recovered by the verdict, but all waste committed thereon, after the granting of the injunction. (e)

6. To stay proceedings at law because of fraud.] Whenever an injunction is applied for to stay proceedings at law, after judgment or verdict, on the ground that such judgment or verdict was obtained by actual fraud, the court may dispense with the deposit of any moneys, or the execution of any bond. (f) This is the only case in which even the court can dispense entirely with security upon allowing an injunction after verdict or judgment. (g)

Bonds to be filed.] Whenever a bond is required to be executed pursuant to any of the above provisions of the statute, prior to the issuing of an injunction, the same, together with the certificate or affidavit of justification, and the certificate of proof or acknowledgment of execution required by the 172d rule, must be filed with the register, &c. before the sealing and delivery of the injunction. (h)

Bonds when to be prosecuted.] And whenever the condition of any such bond shall be broken, or the circumstances of the case require it, the court may direct its delivery to the person entitled to the benefit thereof for prosecution. (i)

Duty of master in allowing injunction.] The chancellor has deci-
ded that a master has no authority to allow an injunction to stay proceedings at law after judgment, except upon the terms prescribed by the statute; and if the injunction is issued without depositing the amount of the judgment, and giving the bond as required by the statute, it will be set aside for irregularity. (k) It is the duty of the master to ascertain from an examination of the bill, the situation of the suit at law; and if no issue has been joined, he should, in his certificate, direct a provision to be inserted in the injunction according to the 33d rule, permitting the party to proceed to judgment; unless it is a bill of discovery merely. (l)

If issue has been joined, in the suit at law, the master should take the bond and security as required by the 145th section of the statute, and direct that it be filed before the injunction issues. (m)

Where there has been a verdict in a personal action, the master should ascertain the amount of the debt or damages recovered, and of the probable costs, and should specify in his certificate the sum to be deposited. If the verdict was in a real or mixed action he should take from the complainant a bond and security, as required by the 150th section of the statute. (n)

And if a judgment has been obtained, he should not only direct the amount of the judgment to be deposited, but should also take a bond and security to answer the damages and costs, in case the injunction should be dissolved. (o)

Where the situation of the property levied on by execution as the property of the defendant therein, is such as to render it proper that a deposit of the amount of the execution should be made, or that security to the plaintiff in the suit at law should be given upon the granting of an injunction to a complainant who is not a party to that suit, the court or the officer who allows the injunction, should either require a deposit of the money, or the giving of a bond with sureties, as a condition precedent to the issuing of an injunction. (p)

(k) Jenkins v. Wilde, 4 Paige, 394.  (a) Id. ib.
(l) Id. ib.  (b) Id. ib.
(m) Id. ib.  (c) Hegeman v. Wilson, 8 Paige, 99.
SECTION VII.

SERVICE OF.

An injunction must be personally served upon the defendant, and upon his solicitors, attorneys, or agents, by delivering to and leaving with each of them a correct copy of the writ, and at the same time showing him the original writ under the seal of the court; (q) unless the court, under particular circumstances, dispenses with the personal service, and orders a substituted service to be made in some other manner. Service of the writ at the house which appeared to be the defendant's last place of abode has been ordered to be good service, though the house was apparently shut up. (r)

The person serving the writ, although obliged to produce it to the party served, is not obliged to deliver the writ to be compared with the copy served. (s)

In some cases service is dispensed with. Thus it has been repeatedly determined, that where a party is in court and hears the order for an injunction pronounced, he is as much bound as if he had been actually served with the writ. (t) And the practice has been extended, not only to a case where the party was in court during the motion, and retired before the order was actually pronounced, but to a case where the defendant's knowledge that the order had been pronounced proceeded solely from information. (u) In one case Lord Eldon observed, that if the party admitted that he believed the order was made, the principle was the same as if his belief was formed from information short of actual service; and that there would be authority enough to apply the practice, if the defendant would not swear that he did not believe the order was pronounced. (v)

It is irregular to serve the defendant with an injunction, without taking out and serving him with a subpoena to appear and answer. (w)

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(q) 1 T. R. Pr. 965. Eden on Inj. 93. 3 Dan. Pr. 280.
(s) Woodward v. King, 2 Ca. in Ch. 903. Woodward v. Earl of Lincoln, 3 Swans. 696.
(u) id. 94.
(w) Parker v. Williams, 4 Paige, 439.

But such irregularity will be waived by the defendant’s voluntarily appearing and answering the bill.\(^{(x)}\) It is too late, also, to move to dissolve the injunction, on that ground, after a subpœna has been served on the defendant.\(^{(y)}\)

The neglect of the complainant to serve the subpœna and injunction on some of the defendants named in the bill, is not a ground for dissolving the injunction as to the defendants on whom the service has been made.\(^{(x)}\)

Where a bill is filed against several joint plaintiffs in a suit at law, to stay the proceedings there, it will be sufficient to stay the proceedings if the injunction is served on the attorney, and on any of such joint plaintiffs; although it is not served on all. But the subpœna must be served on each defendant, unless he elects to appear voluntarily.\(^{(a)}\)

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**SECTION VIII.**

**EFFECT OF INJUNCTION.**

As long as an injunction is in operation, it must be obeyed; notwithstanding it may have been improperly or irregularly issued.\(^{(b)}\)

An injunction directed to several persons not defendants in the suit, where it appears upon the face of the writ that they are not defendants, is not obligatory upon such persons, except as a notice.\(^{(c)}\) An injunction thus directed is not authorized by the fiat of allowance, and when it appears upon the face of the process that such persons are not defendants, it is inoperative and useless, as to them.\(^{(d)}\)

An injunction to stay proceedings against the principal, will stay all proceedings against the special bail.\(^{(e)}\)

An injunction issued upon a creditor’s bill will not prevent the debtor from receiving and applying the proceeds of his subsequent earnings to the support of himself or his family, or to defray the expenses of the suit, or prevent him from complying with any order of this court made in any other cause, to assign and deliver his property and effects.


\(^{(y)}\) Seaborg v. Hoes, 5 Paige, 85. \(^{(c)}\) Sage v. Quay, 1 Clarke, 347.

\(^{(a)}\) Id. ib. \(^{(d)}\) Id. ib.

\(^{(b)}\) Most v. Holbein, 2 Edw. 188. 3. \(^{(e)}\) Webster v. Chew, 3 Har. & McH. 123.
to a receiver; or restrain him from making the necessary assignment to obtain his discharge under the insolvent laws, unless an express provision to that effect is contained in the injunction.\(^f\) Nor will such injunction prevent any other creditor from levying upon such property of the debtor as he may be able to find and to reach by execution previous to the entry of an order for a sequestration, or for the appointment of a receiver.\(^g\)

Nor will such injunction prevent the defendant from confessing a judgment in favor of another bona fide creditor; unless there is a special clause therein to that effect.\(^h\)

The injunction on an interpleading bill stays all proceedings.\(^i\)

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**SECTION IX.**

**Breach of injunction.**

*What is a sufficient service, or notice of, writ.?* This must depend in some measure upon the form of the injunction and the nature of the act prohibited.

An injunction operates from the time the order is made, and not merely from the time of its being sealed, or even from the time of its being drawn up.\(^k\) Therefore, where an injunction had been obtained to restrain waste, and before the order was drawn up, notice of its having been obtained, and of its purport, was served on the defendant, who nevertheless continued acts of waste, he was held guilty of a breach of the injunction.\(^l\)

To be guilty of a breach of the injunction, the party must have notice of it; but although, strictly speaking, he ought to be served with the writ itself under the seal of the court, in the manner already pointed out, circumstances will justify a committal without the actual service of the writ; as, where the matter is pressing, and there is not time to procure the writ, &c. In such cases the service of the writ will, by the English practice, be dispensed with, and service of a copy of the minutes

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\(^f\) Rule 195.
\(^g\) Idem. Lansing v. Easton, 7 Paige, 364.
\(^h\) Rule 195.
\(^i\) Warrington v. Wheatstone, Jac. 205.

\(^k\) Drewry on Inj. 398. See Rattray v. Bishop, 3 Mad. 920.
\(^l\) Vananduut v. Rose, 2 Jac. & W. 364. And see Kimpton v. Eve, 3 Ves. & B. 149.
of the order, or of a notice of their having been passed, will be sufficient. (m)

In some cases a committal may be ordered where neither the writ nor the minutes of the order have been served, nor any personal notice given. Thus if a defendant, by being in court at the hearing of the motion, is apprised that there is an order, he cannot avoid its consequences, by leaving the court before the order is actually pronounced. (n)

In Kempton v. Eve(o) it was held, that it was a breach of an injunction to proceed to a sale after personal service of a notice that an injunction against selling had been granted, where the party so proceeding admitted that he believed the order to have been made. And it is not necessary to constitute a breach of the injunction, that it should be actually served.

So if a party have, by himself or by his attorney, notice in any other way of the fact that an injunction has been granted, though it should not be regular notice, it is a breach of the injunction to disobey it. (p) But if the complainant is guilty of delay in getting the order drawn up and served, the court will not treat the defendant as in contempt, although he should have been present at the hearing of the motion. (q) The distinction seems to be that the defendant shall not escape the process, if he has heard the motion, merely by turning his back upon the court, so as not actually to hear the order pronounced; but that on the other hand, the order is not to be kept suspended over his head unenforced, for an indefinite length of time. (r)

Who may commit a breach.] An injunction to restrain proceedings at law is directed to the defendant, his counsellors, attorneys, solicitors and agents; and an injunction to restrain waste, &c. is usually directed to the party, his servants, workmen, and agents; consequently, if the counsellors, &c. of the party, in the first case, or his servants, workmen, or agents, in the second, having had notice of the injunction, do anything inhibited by it, they will be guilty of a contempt. (s)

It is, however, no breach of an injunction, for a person, not a party to the suit, and who has not acquired a right pendente lite from any one, as a party, to exercise a right which he had antecedently to the suit. (t)

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(m) 3 Dan. 370.
(n) Hearn v. Tenant, 14 Ves. 136.
(o) Skip v. Harewood, 3 Atk. 564.
(p) 2 Ves. & B. 349.
(q) Lawes v. Morgan, 5 Price, 518.
(s) James v. Downes, 18 Ves. 592.
(t) See Lord Eldon’s observations, Id. 594.
(u) 3 Dan. 370. See Lawes v. Morgan, 5 Price, 518.
(v) Bootle v. Stanley, 2 Eq. Abr. 528.
What acts will constitute a breach.] Where an injunction issued upon a creditor's bill, prohibits the defendant from transferring, assigning, delivering, or in any way interfering with, or disposing of, his property, or effects, any active interference with the property by the defendant or his agent, for the purpose of having the legal title to the same transferred to another, and thereby to deprive the complainant of the equitable lien he has acquired thereon by the filing of his bill is a breach of the injunction.\(^{(w)}\) Thus, where two defendants informed a creditor that they had property liable to be reached by execution, and consulted with each other, and agreed to procure an execution to be issued, for the purpose of having such property sold thereon, and employed an agent to procure the issuing of the execution, and took and delivered the property to the sheriff; it was held they had violated the injunction.\(^{(v)}\)

And it is to be observed that one may be guilty of a breach of an injunction by aiding and abetting those who are committing an act inconsistent with it, although he should not actually take part in such act.\(^{(u)}\) Thus, where the contest was between a college at Oxford and the poor people in the neighborhood, as to the right of cutting wood in a certain wood, and an injunction had been granted to restrain A. and his workmen and servants, &c. from cutting the wood, it was held a breach of the injunction in A. to be present and acting as a leader when a great number of the poor people drove away the servants of the college, and cut wood; although A. not only did not actually assist, but used words of counsel to the people, dissuading them from violence. The ground was, that remaining and acting as a leader, and not actually interfering to prevent the acts, he was inferentially aiding and assisting.\(^{(x)}\) And the jurisdiction seems to have been stretched still further in another case,\(^{(y)}\) from which we may collect that a contempt may be committed by assisting in the official act of a person acting under lawful authority. In that case it was held that a breach of an injunction to quiet possession was committed where the party enjoined had assisted a justice of the peace in making restitution on a forcible entry. It is not, however, a breach of an injunction staying execution at law, with leave to proceed to judgment, for the defendant to take out a \textit{scire facias quare executio non}; because that is only proceeding to judgment.\(^{(z)}\)

\(^{(w)}\) Lansing v. Easton, 7 Paige, 364.  
\(^{(v)}\) Id. 1b.  
\(^{(u)}\) Drewry on Inj. 399.  
\(^{(x)}\) St. John's College v. Carter, 8 Law Jour. 219.  
\(^{(y)}\) Woodward v. Earl of Lincoln, 3 Swanst. 636.  
\(^{(z)}\) Hankey v. Morris, 9 Eq. Abr. 598.
Where an injunction was granted against the attorney of the defendant to restrain him from proceeding at law, it was held a breach of the injunction for the defendant to proceed.\(^{(a)}\)

Although an injunction be erroneously or irregularly obtained, it is still an order of the court, and must be discharged before it can be disobeyed. If, therefore, the defendant or his attorney are guilty of a breach of the injunction, it is a contempt which the court will punish.\(^{(b)}\) By this, however, it is to be understood that although the injunction was erroneously granted, and for an insufficient cause, the officer by whom it was allowed acted within his powers or jurisdiction, under the rules of the court.\(^{(c)}\) Otherwise the injunction would have no validity whatever, it is presumed.

But where the defendant and his solicitor had been guilty of a breach of an injunction which was irregular, Lord Eldon refused to commit them, but ordered them to pay the costs occasioned by the breach of injunction, and of the motion to commit.\(^{(d)}\) In Sullivan v. Judah,\(^{(e)}\) this court also decided that it would take into consideration the fact that the injunction was erroneously granted, and without sufficient equity to sustain it, in determining the extent of the punishment to be imposed upon the party who has been guilty of a breach thereof.

In a recent case,\(^{(f)}\) the chancellor decided that where an injunction against a corporation is served upon its president, it is his duty to prevent the other officers of the corporation from doing anything as such officers, contrary to the order of the court; and that if he conceals from such officers the fact that an injunction has been served upon him, and allows them to go on and do acts in violation of it, it is a breach of the injunction on his part.

Where an injunction is to do a thing, and the party neglects or refuses, the course to compel him is to move that he shall do it by a particular day, or stand committed. But where the injunction operates strictly by way of restraint, the proper course is either to move that the defendant be committed for a breach thereof; or else to move that he be committed unless he show cause at a future day to the contrary.\(^{(g)}\)

The method of punishing a defendant, however, for a breach of an injunction will be reserved for consideration under the head of "Contempts."

SECTION X.

DISSOLVING INJUNCTIONS.

1. Motion to dissolve on bill.

If an injunction is granted on the certificate of a vice chancellor, or on an ex parte application to the court before answer, the defendant may move to dissolve the injunction on the matter of the bill only; and if he succeeds in such motion, the court, in its discretion, may allow him the costs of the application. (A)

This motion must be upon the like notice to the complainant as is required in other cases of special motions, by the 89th rule.

Wherever an injunction has been issued in a cause, a copy of the bill must be served on the defendant’s solicitor within six days after service of notice of defendant’s appearance if the respective solicitors live within twenty miles of each other, and within ten days if at a greater distance. If a copy of the bill is not delivered within the time prescribed, the defendant may, upon due notice to the complainant’s solicitor, apply to dissolve the injunction, with costs. (B)

It has been held that the service of a copy of the bill on the agent of the defendant’s solicitor within the time prescribed by this rule is sufficient, where the solicitors of the respective parties do not reside in the same county and within forty miles of each other; and it is not necessary that the copy of the bill should be served on the solicitor himself in such a case. (C)

If an ex parte injunction is granted, upon a bill which is not duly verified, so as to authorize the issuing of such injunction, it is a matter of course to dissolve the injunction, upon the matter of the bill only according to the provisions of the 34th rule. (D)

Where the complainant neglects to serve a subpoena upon a defendant against whom an injunction has been granted affecting his rights.

(B) Rule 35. Robinson v. Furgison, Hopk. 8.
(C) Sinclair v. Sandford, 7 Paige, 439.
such defendant may appear voluntarily and apply to dissolve the injunction, without waiting for the service of the subpoena. (m)

2. **Motion to dissolve upon bill and answer.**

*Within what time to be made.* Upon serving his answer the defendant may, upon notice to the complainant, move to dissolve the injunction.

By the 38th rule, exceptions to the answer will not prevent a dissolution of the injunction, unless they are filed and served within ten days after the answer is put in. If taken, the defendant may give a written consent that they be forthwith referred; and unless the complainant procures the master's report in favor of the exceptions within ten days after receiving such consent, they will not prevent a dissolution of the injunction. By the 39th rule, if exceptions are filed within the ten days, it will not be in order to move for the dissolution until the time for procuring the master's report has expired; unless a report against the validity of the exceptions is sooner obtained. (n)

A chamber order, under the 125th rule, allowing further time to except, does not extend the time within which exceptions must be filed to prevent a dissolution of the injunction. An extension of the time for that purpose, can only be obtained upon a special application to the court, upon notice. (o) And the court will not enlarge the time for procuring the master's report, in an injunction case except under special circumstances—such as the illness of the master, &c. (p)

The chancellor has decided that the defendant may give notice of an application to dissolve an injunction upon bill and answer, immediately after service of the answer, without waiting the ten days allowed to the complainant to except to the answer. But if exceptions are duly served within the time prescribed by the 38th rule, it will be a sufficient answer to the application. (q) But a party is not at liberty to give notice of an application to dissolve the injunction for a time, which is within the ten days allowed by the 38th rule for excepting. (r)

The provisions of the 39th rule are not applicable to the case of an answer, to which the complainant has no right to except for insufficien-

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(m) Waffle v. Vanderheyden, 8 Paige, 45.

(n) And see Parker v. Williams, 4 Paige, 439.

(o) Wakeman v. Gillespy, 5 Paige, 119.

(p) Davenport v. Whitmore, 8 Sim. 251.

(q) Satterlee v. Barry, 3 Paige, 149.

(r) Id. ib.
cy, (i. e., one to which the oath of the defendant has been waived.) If the whole equity of the bill is denied, exceptions for impertinence will not prevent the dissolution of the injunction.(s)

Whether necessary that all the answers be in.] It is a general rule, that the answers of all the defendants must be perfected before an injunction will be dissolved; provided all the defendants are implicated in the same charge, and the complainant has taken the requisite steps to compel their answers.(t) Thus, where the president of a bank is made a party defendant, as an individual, and the bank is also made a party, and the president and the bank are both implicated by the bill in the same charge, and the bank answers by its cashier, but the president does not answer, the injunction will not be dissolved upon the answer of the bank alone; nor until the answer of the president comes in; even though the injunction is issued against the bank alone, and denial of knowledge on his part would be sufficient to procure its dissolution.(u)

But to this rule there are exceptions. Thus, if the defendant on whom the gravamen of the charge rests, has fully answered, that may be sufficient.(v) So, it is not a valid objection to an application to dissolve an injunction, that the personal representatives of a deceased co-defendant who was jointly implicated in the fraud charged in the bill have not answered; unless they are charged with knowledge of the fraud of their testator or intestate.(w) And the rule is the same where the parties who have not answered are mere formal parties.(x)

It is settled, also, that if there has been negligence on the part of the complainant in serving the subpoena, or in procuring the appearance of a part of the defendants, those who have appeared and answered may have the injunction dissolved on their answers alone.(y)

Upon what grounds motion may be made.] A want of due diligence on the part of the complainant after obtaining an injunction is always a cause for dissolving it.(z)

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(s) Livingston v. Livingston, 4 Paige, 111.
(u) Vandervoort v. Williams, 1 Clarke, 377. Jones v. Magill, 1 Bland, 190. Id. 192, 194, 199. Cape Sable Company's case, 3 Bland, 606.
(w) Wakeman v. Gillespy, 5 Paige, 112.
(y) Seebor v. Hess, 5 Paige, 85.
(N. S.) 30.
An injunction will not be dissolved because of a defect or deficiency in the injunction bond; but further security will be required and time given to complete it.\(^{(a)}\)

And the neglect of the complainant to serve the subpoena and injunction on some of the defendants named in the bill, is not a ground for dissolving the injunction, as to the defendants on whom the service has been made.\(^{(b)}\)

Where a bill is filed to obtain a discovery of the defendant's title, and an injunction is granted upon that ground, it must, of course, be dissolved as soon as the discovery is obtained.\(^{(c)}\)

As to sufficiency and effect of answer.\(^{(d)}\) An injunction will not be dissolved on the coming in of the answer, unless the defendants positively deny all the equity of the bill. A denial from information and belief is not sufficient.\(^{(e)}\) Where the answer does not deny the facts charged in the bill, positively and fully, although the denial be as full as can be given by the party under the circumstances, the injunction will not be dissolved.\(^{(f)}\) And it seems that even where all the equity of the bill is denied by the answer, it is not a matter of course to dissolve the injunction; as the granting and continuing an injunction always rests in the sound discretion of the court, to be governed by the nature of the case.\(^{(g)}\) The statement of the defendant must be at least credible. Any evasion in not responding to the charges in the bill, or an extreme improbability in the statement of the defendant, will induce the court to retain the injunction.\(^{(h)}\) So if the defendant's answer is contradictory.\(^{(i)}\) And if the equity of the bill is not charged to be in the knowledge of the defendant, and the defendant merely denies all knowledge and belief of the facts alleged therein, the injunction will not be dissolved on the bill and answer alone.\(^{(i)}\)

So if the court can see in the facts disclosed in the answer, good reasons for retaining the injunction, it will be retained, notwithstanding a full denial of the equity of the bill.\(^{(j)}\) Nor will an injunction upon a creditor's bill claiming more than $100, and charging equitable assets to the amount of more than $100, be dissolved because the defendant in

\(^{(a)}\) Williams v. Hall, 1 Bland, 194.
\(^{(b)}\) Sebor v. Hess, \textit{supra}.
\(^{(c)}\) New-York v. Connecticut, 4 Dall. 3, n. 1.
\(^{(h)}\) Tong v. Oliver, 1 Bland, 199.
\(^{(i)}\) Rodgers v. Rodgers, 1 Paige, 426.
\(^{(j)}\) Bank of Monroe v. Schermerhorn, 1 Clarke, 303.
his answer swears that he has not equitable assets to the amount of $100.(f)

It is a general rule, however, that if the facts on which the complainant's equity rests are positively denied, the injunction must be dissolved.(m)

The answer is sufficient if it disprove the facts stated in the bill.(n) It need not invalidate, by full proof, the facts in the bill. The defendant need only show that the evidence of the complainant is entitled to no credit.(o)

An injunction against a corporation cannot be dissolved on bill and answer, unless the answer is duly verified by the oath of some of the corporators who are acquainted with the facts stated therein.(p)

A defendant may answer an injunction bill on oath, for the purpose of moving thereon for a dissolution of the injunction, although an oath is waived or is not necessary. But such answer will have no other or greater force, as evidence, than the bill.(q) It therefore makes no difference, on an application to dissolve the injunction on bill and answer, that the bill is supported by the oaths of several complainants.(r)

An injunction will not be dissolved, although the whole equity of the bill is denied by the answer, unless the answer is sworn to.(s) And where the complainant waives an answer on oath, if he annexes to, and files with his bill, affidavits of other persons verifying the facts stated therein, it is not a matter of course to dissolve the injunction on the oath of the defendant.(t)

Notwithstanding the waiver of an answer on oath, the answer must be sworn to if the defendant wishes to dissolve the injunction on the ground that the equity of the bill is fully denied.(u) If the answer is sworn to, however, and the whole equity of the bill is denied by it, if no-affidavit of a disinterested witness is annexed to the bill, the injunction will be dissolved; although security for debt and costs in the suit at law has been given, under the provisions of the revised statutes on that subject.(v)

Affidavits, &c. upon motion.] We have mentioned in what cases the complainant may annex affidavits to his bill to be used in opposition to the motion to dissolve.(w) It is also well settled, that on such a mo-

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(f) Sage v. Quay, 1 Clarke, 347.
(m) Gibson v. Tilton, 1 Bland, 355.
(o) North's ex'rs v. Parrow, 4 Rand. 1.
(r) Manchester v. Day, supra.
(s) Rule 37.
(t) Rule 37.
(u) Dougrey v. Topping, 4 Paige, 94.
(w) Ante, p. 47.
tion the defendant may read the affidavits of disinterested witnesses, or other evidence, in support of his answer, to rebut the affidavits annexed to the bill.(x)

But no affidavits can be received for the purpose of contradicting the answer.(y) Affidavits may be read, however, to substantiate written instruments alleged by the bill and neither admitted nor denied by the answer.(x) So if deeds or letters be stated in the bill, and the defendant says he does not know whether the statement is correct or not, they may be verified by affidavit.(a) But as to facts and circumstances which the defendants do not know of, if the benefit of them cannot be had from the defendants' consciences, it cannot be had at all, except so far as the complainant may be able to prove them at the trial.(b)

Where an injunction had been obtained against several defendants, co-partners, three of whom had answered but the fourth had not, the three who had answered moved to dissolve the injunction, but the court treated it as a joint injunction, and therefore held that the complainant was entitled to read affidavits against the answers.(c)

Cause against dissolving. It is no objection to an application to dissolve an injunction, that a replication has been filed. But if the testimony has been taken in the cause, the court will order the application to stand over until the hearing on the merits; unless special circumstances render delay improper.(d) Exceptions filed are no objection to the motion, unless they affect the answer in points relating to the grounds of the injunction.(e) Where exceptions to the answer of one of the defendants are submitted to, if the exceptions go to the merits, the injunction will not be dissolved. If the exceptions have not been submitted to, nor allowed, the court will look into them to see that they are not frivolous. And if frivolous, they will furnish no objection to the motion to dissolve.(f)

If the whole equity of the bill is denied by the answer, exceptions for impertinence will not prevent a dissolution of the injunction.(g)

It is always a good answer to an application to dissolve, that the

(b) Drewry on Inj. 494. Clapham v. White, 8 Ves. 35.
(c) Taggart v. Hawlett. 1 Mer. 499.
(d) Barret v. Tickell, Juc. 124, 199.
(e) Id. ib. Castellain v. Blumenthal,
(f) cited 3 Dan. Pr. 200.
(g) Noble v. Wilson, 1 Paige, 164.
(h) Livingston v. Livingston, 4 Paige,
(i) 111. But see Joseph v. Simpson. 10
(j) Price, 25.
(k) Naylor v. Wellington, 8 Sim.
(l) 396.
equity of the bill upon which the injunction rests is not denied by the defendant; although no exceptions have been filed.\(^{(a)}\)

**Hearing of motion.** Upon a motion to dissolve an injunction, the court confines itself exclusively to the consideration of the combination of facts set forth in the bill, out of which the equity of the injunction arises, and to the answer of the defendant to those facts. If it appears that the facts as stated in the bill, looking to it only, give rise to no equity, the injunction should be dissolved, whether the defendant has answered or not, or however imperfectly he may have answered.\(^{(i)}\) The facts set forth in the answer are alone to be regarded; not the opinions of the defendant.\(^{(k)}\)

If upon hearing the motion to dissolve the injunction, the court is of opinion that it was improperly granted, or that the case made by the complainant is contradicted, or not supported, it will order the injunction to be dissolved, either with or without costs, as the justice of the case may appear to require. But if the defendant does not succeed in satisfying the court that the injunction ought either to have been refused, or that it ought not to be continued, it will direct it to be continued until the hearing.\(^{(l)}\) And if, in the case of an injunction to restrain waste, or any thing of that description, the answer admits that the defendant has committed waste, or has threatened to commit it, the injunction will be continued till the hearing.\(^{(m)}\)

It frequently happens, however, that upon hearing the motion to dissolve the injunction, the court is not satisfied as to the right of the complainant to maintain his injunction. In such cases, if the doubt arises upon the facts of the case, it will direct an inquiry by the master, or an issue;\(^{(n)}\) or an action at law.\(^{(o)}\) But although the bill seeks merely an injunction, or an injunction with an account consequent upon it, and the result of a reference to a master, or of an issue or action at law, is unfavorable to the complainant’s right to the injunction, the defendant cannot, on that ground, move to dismiss the bill.\(^{(p)}\)

It is to be observed that although an injunction may be granted ex parte, and sustained upon a motion to dissolve it, yet if, at the hearing

\(^{(i)}\) Agar v. Regents Canal Co., Coop. Can. 4; 86. 9 Dan. Pr. 734, 5. 3 Id. 358.
\(^{(k)}\) Gill & John. 7.
\(^{(l)}\) Chase v. Manhardt, 1 Bland, 335.
\(^{(m)}\) Packington v. Packington, 1 Swanst. 550.
of the cause, there be no evidence against the defendant, the bill will be dismissed.\(^{(q)}\)

Renewing motion.] A motion to dissolve an injunction cannot be renewed, without the existence of some new ground.\(^{(r)}\)

When motion unnecessary.] If the bill in an interpleading suit is dismissed, it is not regularly necessary, although it is a very general practice, to apply for an order to discharge the injunction; for when the bill is dismissed, in strictness the injunction falls *ipso facto*.\(^{(s)}\) Indeed, as regards any bill praying an injunction, the better opinion seems to be that if the bill is dismissed, an injunction granted on such bill falls with it, without any express motion or order to dissolve being necessary.\(^{(t)}\)

And where an injunction is awarded until the coming in of the answer, it is of course at an end when the answer comes in; so that a motion to dissolve it is not necessary.\(^{(u)}\)

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SECTION XI.

REVIVING AND CONTINUING INJUNCTIONS.

Reviving.] After an injunction has been dissolved, if there be cause, it may be revived on motion.\(^{(v)}\) Thus, where a reference of the answer for insufficiency has been shown for cause against dissolving the injunction, and the complainant has been put upon terms of obtaining the master's report within a certain time, but having failed to do so the injunction is dissolved; if the master afterwards reports the answer insufficient, the complainant may move to revive the injunction.\(^{(w)}\) But after a reference for impertinence, such motion cannot be sustained.\(^{(x)}\)

The motion has also been refused where the master having reported in favor of the sufficiency of the answer, exceptions have been taken to his report.\(^{(y)}\) The court has also refused to revive an injunction which had been dissolved upon the coming in of an answer denying all the

\(^{(q)}\) Barfield v. Kelly, 4 Russ. 355.
\(^{(r)}\) Hoffmann v. Livingston, 1 John. Ch. Rep. 911.
\(^{(s)}\) Bleinherhasset v. Scanlan, 1 Hogan, 383.
\(^{(t)}\) Drew on Inj. 419. 1 C. P. Coop. Cas. 591.
\(^{(u)}\) Beal v. Gibson, 4 Hen. & Munn. 481.
\(^{(v)}\) Prac. Reg. 249.
\(^{(w)}\) Dansey v. Browne, 4 Mad. 237.
\(^{(x)}\) 3 Dan. 295. 2 id. 899.
\(^{(y)}\) Id. ib. Scott v. Mackintosh, 1 Ves. & B. 503.
circumstances of the bill, although an indictment had been found against
the defendant for perjury committed in that answer.(x)

And an injunction voluntarily dissolved by a complainant, or by his
agent or solicitor, cannot be renewed on petition, without some new and
special reasons, which did not exist when the injunction was originally
granted or dissolved.(a)

But where the dissolution of an injunction has been obtained by fraud,
it may be reinstated.(b)

A motion to reinstate an injunction, on additional evidence tendered
by the complainant, is in the nature of an original application.(c)

In the case of Tone v. Brace,(d) the vice chancellor of the eighth cir-
cuit decided that he had power to reinstate or renew an injunction, after
a dissolution, even though the order of dissolution had been affirmed by
the chancellor upon appeal, and an appeal had been taken from the
chancellor’s decision to the court of errors; but that this power would
not be exercised except in extreme cases, and upon new facts presented,
either by petition or supplemental bill. It was also decided, in that
case, that when an injunction has been dissolved, and subsequently
proofs have been partially taken, but no order has been entered to close
proofs, the injunction will not be revived merely because the proofs, so
far taken, falsify the answer; especially if the proofs only go to estab-
lish the original charges in the bill, fully denied by the answer; and
present not new facts, but merely additional testimony.

Continuing injunction.) It frequently happens that where an in-
junction has been obtained before the hearing, upon an interlocutory
application, it will be continued by the decree made at the hearing of the
cause.(e)

Injunctions are continued at the hearing either provisionally or per-
manently. They are frequently continued provisionally pending a refer-
cence to a master to make inquiries, or to take an account preparatory
to a final adjudication upon further directions.(f)

They are permanently continued or made perpetual by the decree in
those cases where the party enjoined is in possession of some instrument
conferring a legal right which it is contrary to equity that he should be
permitted to exercise, to the detriment of the complainant.(g) It is
more usual however, where a party is in possession of a security or

(x) Clapham v. White, 8 Ves. 35.
(b) Billingsea v. Gilbert, 1 Bland, 508.
(c) Gillian v. Allen, 1 Rand. 414.
(d) 1 Clarke, 503.
(e) Seaton on Decrees, 300.
(f) Old v. Old, id. ib.
(g) 3 Dan. Pr. 359.
other instrument which it is against conscience that he should use against the defendant, to direct it to be delivered up and cancelled. ([a])

See, further upon this subject, ante, p. 613, (sec. 2,) as to perpetual injunctions.

SECTION XII.

DISCHARGING INJUNCTION FOR IRREGULARITY.

It has been already observed that although an injunction be erroneously or irregularly obtained, as long as it is in force it must be obeyed; and that a party acting in contravention of it will be guilty of a contempt. ([i])

The proper course, whenever there is any irregularity in the injunction, is to apply for an order to discharge it. ([k]) So, were persons not parties to the bill, are injuriously affected by an injunction, if they apply in a proper manner, the court will grant them relief by discharging the injunction, so far as it affects their interest. ([l])

The application for this purpose should be made at once, upon the usual notice to the opposite party.

([a]) 3 Dan. 360.
([i]) Ante, p. 632.
([k]) Tradesman's Bank v. Merritt, 1 Paige, 309.
([l]) Robinson v. Lord Byron, 2 Dick. 703. Partington v. Booth, 3 Mer. 149.
CHAP. VI.

NE EXEATS.

Sect. 1. Their Nature and Uses.
2. When and how Applied for and Allowed.
3. In what Cases, and against whom, granted.
5. Service of, and Bonds upon.
6. Discharging.

SECTION I.

Their Nature and Uses.

The writ of ne exeat is a process issuing under the seal of the court, to prevent a person from leaving the state.

Though originally a prerogative writ, it has now become an ordinary process of courts of equity, and is as much a writ of right as any other process used in the administration of justice. (a)

It is resorted to for the purpose of obtaining equitable bail; (b) and its object and design is to hold a party amenable to justice, and to render him personally responsible for the performance of the orders and decrees of the court by preventing him from withdrawing himself from its jurisdiction. (c)

The writ is proper only for the purpose of detaining the person of the defendant to respond to the decree of the court. (d)

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(a) Gilbert v. Colt. Hopk. 496.
(c) Gleason v. Biaby, 1 Clarke, 551.
(d) Dunham v. Jackson, 1 id. 639.
De Rivasinoli v. Corsetti, 4 id. 264.
(d) Johnson v. Clendenin, 5 Gill & John.
463.
(d) Id. ib.
SECTION II.

WHEN AND HOW APPLIED FOR AND ALLOWED.

Must be upon bill filed.] A ne exeat cannot be applied for except upon a bill previously filed.\(e\) But when the application is against a solicitor in a cause in court, or where it is made by one defendant against another, or against the complainant, in a matter of account, no new bill is necessary.\(f\)

At what time.] The writ may be applied for at any stage of the suit.\(g\)

Need not be prayed for.] If the party, in the progress of the suit, threatens to leave the country, the writ may be applied for by petition, without its being prayed for in the bill, and without an amendment to insert such prayer.\(h\)

Subpœna need not be served.] Although the bill must be previously filed, it is not necessary that a subpœna should be served upon the party before, or simultaneously with, the service of a ne exeat. Thus, in the case of The Georgia Lumber Co. v. Bissell,\(i\) upon an application to discharge a defendant from arrest on a ne exeat, on the ground that no subpœna was served at the time he was arrested on the ne exeat, it appearing by affidavits on the part of the complainants that they took out a subpœna when the ne exeat was issued, and made a bona fide, but unavailing attempt to serve the same; the court held there was no irregularity which could entitle the defendant to have the writ set aside. The chancellor said that upon being arrested on the ne exeat, the defendant might, at once, have entered a voluntary appearance, and demanded a copy of the bill.

Under the same bill, a ne exeat, as well as an injunction, may be granted.\(k\)

\(e\) Ex parte Bruncker, 3 P. Wms. 312. Hughes v. Ryan, 1 Beat. 337.
\(g\) Dunham v. Jackson, 1 Paige, 629.
\(i\) 9 Paige, 235.
\(k\) Bryson v. Petty, 1 Bland, 182.
Notice of application, when necessary.] Previous to the defendant’s appearance in the cause, a writ of ne exeat may be applied for ex parte; but if the application is made after he has appeared, he must have notice of it. (l)

By whom allowed.] Ne exeat may be allowed by the same officers who are authorized to allow injunctions. (m) And the provisions of the statute prohibiting a second application for an injunction after a refusal of the first, (m) apply also to ne exeat.

The application for a ne exeat is founded either upon an affidavit or a petition.

Affidavit.] The affidavit on which a ne exeat is applied for must be entitled in the suit; and consequently it cannot be made before the bill is filed. (o) It must state positively the existence of a debt; except where it is matter of account, when an affidavit of actual indebtedness, with a belief of a balance being due, stating such facts and circumstances as the ground of the belief as to induce the court to think that belief is well founded, is sufficient. (p) And the affidavit should state that it appears from the accounts, referring to them with as much precision as practicable, that so much is due. (q) The reason why an affidavit as to belief of the amount due on matter of account is considered sufficient is, that it might be impossible to swear positively to a sum due at the foot of an unliquidated account. (r)

Except in the case of an account, the affidavit must be as positive as to the equitable debt as an affidavit of a legal debt is required to be, in order to hold to bail at law. (s)

If the claim is against an administrator, the party should also swear to his belief of assets come to the defendant’s hands. (t)

The affidavit should also show that the defendant intends going abroad. And it must be positive upon this point, or to his threats or declarations to that effect, or to facts evincing it, or circumstances amounting to it. (u)

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It will be sufficient if his declaration of such an intention is sworn to on information from members of his family. (v)

The affidavit, however, need not state that the defendant is going abroad for the purpose of avoiding the payment of the debt. If it can be collected, that it is the intention of the party to go abroad before the debt can be got out of his hands, it is a case in which, in the exercise of a sound discretion, the writ ought to issue. (w)

The affidavit as to the intent to go abroad may be made by a third person. (x) And if the information of the defendant's intention to leave the state come from those who would most probably have communicated to him the fact of the intended application for the writ, if there had been applied to for an affidavit on the subject, that will be considered a sufficient reason for not producing their affidavits, upon the application. (y)

The affidavit must also mention the facts on which the debt arises, and on which it is grounded. (z)

Though it is a general rule that the application for the writ must be supported by an affidavit of the debt, an affidavit will be dispensed with, if the debt appears from a master's report to be due, and such report has been confirmed. (a)

On an application for a writ of ne exeat by a wife against her husband, pending a suit for alimony, &c. her affidavit is admissible; the proceeding being ex parte, and the wife in that respect considered independent of her husband. (b)

The affidavit to obtain this writ may be made, also by the committee of a lunatic. (c)

Petition.] Whenever the writ is applied for, upon petition, the petition should contain the same facts as are required to be stated in an affidavit for that purpose.

Allowance.] If the officer to whom application for a ne exeat is made, upon perusing the affidavit or petition on which such application is founded, is of opinion that it is a proper case, for the writ to issue, he endorses upon the bill, affidavit, or petition, an allowance or certificate as follows:

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Allowance by the Chancellor or a Vice Chancellor.

"Let a writ of ne exeat issue in this cause against the defendant C. D.; and let such writ be marked in the sum of $1000; and let an order to that effect be entered."

Certificate by a Master.

"I certify, that I have perused the within affidavit, [or bill, or petition,] and am of opinion that a ne exeat should issue in this cause against the defendant C. D.; and that such writ should be marked in the sum of $1000."

Order for.] Upon this allowance, an order for the writ must be entered by the register or clerk, before it can be issued.

Marking writ.] When the writ is issued it should be marked by the officer allowing it, in the sum in which the defendant is to be held to bail; and this sum should only be sufficient to cover the complainant's demand.(d) If the writ is actually marked by the clerk, it will be presumed to have been so done in pursuance of the order of the court.(e)

The court or officer allowing the writ should mark it in a sum sufficient to cover not only the existing debt, but a reasonable amount of future interest; having regard to the probable duration of the suit. And the sheriff is not to double that sum, in taking a bond.(f)

SECTION III.

IN WHAT CASES, AND AGAINST WHOM, GRANTED.

The writ of ne exeat is a process that ought to be used with great caution. The court is only justified in issuing it where a bill has been filed stating the proper facts on which the discretion of the court is to be exercised, and where there is an affidavit verifying the facts stated in the bill.(g) It is proper only for the purpose of detaining the person of the party to respond to the decree of the court; and when the cause of ac-

(e) Id. ib.
(f) Gilbert v. Colt, Hopk. 500.
(g) Hughes v. Ryan, 1 Beat. 397. Unless the necessity for the writ arises after the commencement of the suit; in which case a foundation may be laid for it by petition. See ante, p. 548.
tion is such that the *person* of the defendant cannot be touched under the decree, by either execution or attachment, the writ will not be issued. *(h)*

If the party against whom a final decree is made intends to remove beyond the jurisdiction of the court before the decree can be enforced by execution, a *ne exeas* will be granted. *(i)*

In a suit by a vendor, for a specific performance, a *ne exeas* ought not to issue against the purchaser, unless the court deems it quite clear that there must be a decree for the specific performance of the contract. *(k)*

And the principle upon which the writ is issued in cases of this nature, is the difficulty of proceeding at law. *(l)*

The writ may be granted against foreigners, or in a suit between foreigners, and in respect to demands arising abroad. *(m)*

The writ, however, will not be issued against a *feme covert* administratrix. *(n)*

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**SECTION IV.**

**UPON WHAT DEMANDS.**

As a general rule, a *ne exeas* is allowed only upon an equitable demand. *(o)* But in the cases of, a bill filed for an account, or for alimony, it may granted, although the defendant might have been arrested at law; these being cases where the courts of chancery and law have a concurrent jurisdiction. *(p)* And the exception, with respect to these cases, is founded upon the difficulty of proceeding at law in such matters. *(q)*

The debt for which the writ issues must also be certain in its nature. A contingent demand will not be sufficient. *(r)* Therefore, the writ will

*(h) Gleason v. Bisby, Clarke, 551.*
*(i) Dunham v. Jackson, 1 Paige, 629.*
*(p) Rhoades v. Cousins, 6 Rand. 188.*
not be issued upon an undertaking for an indemnity; (s) nor in behalf of a surety in a bond, who has filed his bill to compel the principal to exonerate him by discharging the debt. (t)

Neither will the writ be granted in a suit for a specific performance, if the demand of the complainant is not a moneyed demand. (u)

And the debt must be due (v) or so far mature that present payment or performance can rightfully be demanded. (w) Therefore, the complainant is not entitled to a writ of *ne exeat* on a bill for the specific performance of a contract, previous to the time at which the contract is to be performed, and before any right of action has accrued thereon, either in law or in equity, against the defendant. (x) And to entitle the complainant to the writ, upon a bill for the specific performance of a contract of purchase by the vendee, he must show a debt actually due; and to this end, must show affirmatively that he is able to make a good title to the premises agreed to be sold. (y)

The act to abolish imprisonment for debt has not deprived this court of the power to issue a writ of *ne exeat* in cases of equitable cognizance, where such writ would have been allowed previous to the passage of that act. But such writ will not be granted upon a mere legal demand, upon which the complainant would have been entitled to equitable bail, in this court, before the passing of that act; although the defendant is about to remove from the state. (z)

A *ne exeat* may issue upon a bill filed by a wife against her husband, for alimony, previous to the decree. (a)

In the recent case of *Jenkins v. Parkinson*, (b) Lord Brougham held that where the equity of the bill was a matter of grave doubt, however specific the complainant's allegation of debt may be, he shall not, generally speaking, have this writ.

A *ne exeat* may, as before observed, be granted in respect to demands arising abroad. (c)

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(z) Beames, 51.
(s) Gibbes v. Merand, 2 Edw. 489.
(u) Cowdin v. Cram, 3 Id. 231.
(w) Rhodes v. Cousins, 6 Rand. 188.
(z) Id. 19.
(b) 2 My. & Keen, 5.
(c) Mitchell v. Bunch, 2 Paige, 606.
(d) Whitehead v. Partridge, 3 Swanst.
SECTION V.

SERVICE OF, AND BONDS UPON.

Writs of *ne exeat* are served by the sheriff of the proper county. Upon serving the writ he is to take a bond from the defendant to himself, of which the penalty is to be the amount marked upon the writ, conditioned that the defendant will not depart from or leave the state without the permission of the court.

The sheriff is the sole judge as to the sufficiency of the sureties offered by the party arrested. Indeed, whatever he does in executing this writ, is upon his own responsibility.\(^{(d)}\)

He is answerable for the sufficiency of such sureties. But where he has taken bail upon the writ, if the defendant leaves the state, the court will allow the sheriff a reasonable time to produce him; or in case the defendant cannot be produced, will allow a reasonable time to the sheriff to prosecute the bond and recover the amount which he is ordered to pay.\(^{(e)}\)

The obligations devolved upon sureties entering into a bond conditioned to obey such a writ, bear a close resemblance to the duties and responsibilities of bail at common law. They undertake that the defendant shall be responsible for the performance of the orders and decrees of the court.\(^{(f)}\) And where the defendant in the writ has been proceeded against, and committed to jail, for not complying with a final decree of the court in the cause, and afterward escapes from custody, his sureties in the bond are not liable.\(^{(g)}\)

A surety will not be discharged upon the principal putting in his answer, nor even upon such principal being committed to prison.\(^{(h)}\) But after a decree against a defendant for the same matter for which the *ne exeat* issued, the defendant being in contempt and in custody for not performing the decree, the sureties obtained their discharge.\(^{(i)}\)

If the defendant, on being arrested upon a *ne exeat*, fails to give such

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\(^{(e)}\) Brayton v. Smith, 6 Paige, 489.
\(^{(f)}\) Johnson v. Clendenin, 5 Gill & John. 463.
\(^{(g)}\) Id. ib.
\(^{(h)}\) Le Clea v. Trot. Pre. in Ch. 230.
\(^{(i)}\) Debasin v. Debasin, 1 Dick. 95.
bail's shall be satisfactory to the sheriff, he must be kept in custody, according to the command of the writ, and the sheriff must state that fact in his return to the ne exeat.

SECTION VI.

DISCHARGING NE EXEAT.

Upon giving security.] After the party is arrested upon a ne exeat he may apply to the court, by motion or petition, and on notice to the opposite party, for an order to discharge the writ.

And it is a matter of course to order the ne exeat to be discharged, upon the defendant's giving security to answer the complainant's bill, and to render himself amenable to the process of the court pending the litigation, and to such process as may be issued to compel a performance of the final decree. (k) This security, if not accepted by the complainant, is to be approved of by a vice chancellor or master, on notice to the complainant, so that he may be heard in relation to the sufficiency of the sureties offered. (l)

Or, where the defendant cannot procure such security as will satisfy the sheriff, or if he wishes to leave the state before the termination of the suit, he may apply to the court to discharge the ne exeat upon his giving proper security to answer and be amenable to process. And upon such application, the court will take such security as it may deem sufficient, and will discharge the sheriff from liability. (m)

Upon bill only.] If the ne exeat is granted on the certificate of a vice chancellor or master, or an ex parte application to the court before answer, the defendant, on due notice, may move the court to discharge the writ, on the matter of the bill only. (n)

For neglect to serve bill.] So if the complainant neglects to serve a copy of the bill upon the defendant within the time prescribed by the 35th rule, after notice of his appearance, the defendant, upon notice, may also move to discharge the ne exeat, with costs. (o)

Upon bill and answer.] If a ne exeat is prayed for in the bill, the de-

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(n) Rule 34.
(o) Rule 35.
fendant may put in his answer on oath, for the purpose of moving there-
on for a discharge of the *ne exeat*; although an answer on oath is not
required by law, or is waived by the bill.\(^{(p)}\)

The writ will not be discharged upon an answer denying the whole
equity of the bill, unless the answer is sworn to. And if an oath is
waived, it is not a matter of course to discharge the *ne exeat* on the oath
of the defendant; provided the complainant's bill is sworn to, and the
affidavit of other persons annexed thereto.\(^{(q)}\)

It seems that, upon a motion to discharge a *ne exeat* on bill and an-
swer, the defendant may read the affidavits of other persons in support
of his answer, to rebut the affidavits annexed to the bill. At least such
is the practice upon motions to dissolve injunctions.\(^{(r)}\)

Exceptions to an answer will not prevent a discharge of the *ne exeat*
except in the cases specified in the 38th and 39th rules.

*Causes for discharging.* The defendant may move to discharge the
writ, not only upon giving security, but for a want of equity appearing
upon the face of the bill—the insufficiency of the affidavit on which the
writ was granted—upon the facts set up in the defendant's answer, or in
affidavits—or for an irregularity of any kind in the granting or issuing
of the writ. And every thing going to show that the writ ought not to
have been issued, is a reason for discharging it.

In the case of *Leo v. Lambert*,\(^{(s)}\) a *ne exeat* was discharged with
costs where, upon the affidavit of the complainant and the answer of the
defendant, taken together, there was a strong *prima facie* case that
nothing was due from the defendant to the complainant. So, where a
defendant, in a bill for an account and payment of demands founded on
contract, has been discharged under the non-imprisonment act, a writ of
*ne exeat* against him will be discharged. And the writ will not be re-
tained on a simple affidavit that a certiorari has been allowed for the pur-
pose of reversing the discharge obtained under the insolvent act.\(^{(t)}\)
The court will not presume the insolvent discharge to be fraudulent, but
will consider it as having been regularly and fairly obtained, *prima
facie*.\(^{(u)}\)

The writ will also be discharged, if the sum in which it is marked is
paid, although a larger sum is reported due by the master.\(^{(v)}\)

The affidavit of the defendant denying his intention to go abroad will

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\(^{(p)}\) Rule 36.
\(^{(q)}\) Rule 37.
\(^{(r)}\) Haight v. Case, 4 Paige, 525.
\(^{(s)}\) Brown v. Hafl, 5 id. 235.
\(^{(t)}\) Ashworth v. Wrigley, 1 Paige, 301.
\(^{(u)}\) O'Connor v. Debraine, 3 Edw.
\(^{(v)}\) 3 Russ. 417.
\(^{(w)}\) Baker v. Jeffries, 2 Cox's Ca. 226.
not be regarded if the writ was granted upon facts or declarations as evidence of such intention, for that would baffle all jurisdiction.(w)

Nor will the affidavit of the defendant that no debt is due, or evidence of an admission by the complainant to that effect, avail against the complainant's oath upon this motion.(x)

But the writ will not be discharged because it appears to have issued for a sum greatly exceeding that for which it can be sustained. In such cases the amount for which it is marked will be reduced.(y) Nor will it be discharged, or the recognizances of the sureties be vacated, because the bill has been subsequently amended under the common order, if the amendments do not vary the substance of the complainant's case.(z)

Affidavits may be read both in support of, and against the motion to discharge the writ.(a) And the defendant may in his affidavit deny the allegation on which the writ was granted.(b)

The giving the usual security to a sheriff upon a ne exeat, does not preclude the defendant from applying, upon the bill only, or upon the coming in of the answer, to have the writ discharged and the bond to the sheriff given up and cancelled. But where the defendant, for his own convenience, applies to the court and gives the usual bond, without asking to reserve the right of applying to cancel the bond, the right to raise the question as to the propriety of holding him to bail originally, will be deemed to be waived.(c) Therefore, where L. had been arrested on a ne exeat, and had given the usual bail to the sheriff upon such arrest, and afterwards, by an agreement between him and the complainant, the writ was discharged, upon his executing the usual bond to answer the bill and abide the decree, it was held, that as L. had not in his agreement reserved the right of questioning the propriety of issuing the ne exeat, he was precluded from moving that the bond be given up and cancelled, on the ground that the writ was improvidently issued.(d)

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(x) Jones v. Alephain, 16 Ves. 470. (b) Cowdin v. Cram, 3 Edw. 231.
(a) S. C. 5 Russ. 189. (d) Id. ib.
CHAPTER VII.

RECEIVERS.

Sect. 1. In what cases appointed.
2. Who may be Receivers.
3. At what time, and how, to be appointed.

SECTION I.

In what cases appointed.

A receiver is a person appointed by the court to receive the rents and profits of land, or other property or things in question in this court pending the suit, where it does not appear reasonable that either party should do it. (a)

He is appointed for the benefit of the interested party who makes the application, and for any others who may choose to avail themselves of it, and who may have an interest in the property proposed to be put into the hands of a receiver. The immediate moving cause of the appointment is the preservation of the subject of litigation, or the rents and profits of it, from waste, loss, or destruction; so that there may be some harvest—some fruits to gather after the labors of the controversy are over. The ulterior objects of the appointment are those contemplated by the suit itself; they are the several kinds of relief which may be asked for and obtained by the complainant's bill. (b)

A receiver is an officer of the court; and he is considered as truly and properly the hand of the court. But his appointment does not involve the determination of any right, or affect the title of either party, in any manner whatever; not even so as to prevent the running of the statute of limitations. Yet an application for such an appointment can only be

(b) II. K. Chase's case, 1 Bland, 213.
made by those who have an acknowledged interest; or where there is
strong reason to believe that the party asking for a receiver will recover;
and where the property itself, or its rents and profits, are in danger of
being materially injured, or totally lost.(c)

The court has no jurisdiction to appoint a receiver unless a cause is
depending ;(d) except in the cases of idiots and lunatics, with respect to
whom the jurisdiction is a particular one.(e) A receiver will not be
appointed in the case of an infant, however, without a bill filed.(f)

To authorize the appointment of a receiver, the bill must lay a foun-
dation for it, by stating the facts which show its necessity or propri-
ety.(g) And to authorize an application for a receiver before the hear-
ing, the bill must contain a prayer for one.(h) But after a decree, the
court may appoint a receiver, although a receiver is no part of the re-
 lief prayed; and by motion, notwithstanding all matters are reserved
by the decree.(i) In a bill by an infant, likewise, the silence of the
prayer as to a receiver is no objection to the appointment of one.(k)

In the case of Trumbull v. Ogden,(l) the court refused to appoint a
receiver of property in the hands of one of the defendants, upon the
application of another defendant; and assigned as a reason for the re-
fiual, that there was no instance of a receiver having been appointed
upon the application of one defendant against another before hearing.

It is foreign to our purpose to state all the cases in which the court
will appoint a receiver; nor would it be a very easy matter to do so,
inasmuch as the exercise of the power of appointing this officer rests in
the sound discretion of the court.(m) A few of the most customary in-
stances, however, it may be well to mention in this place.

Creditors' suits.] Perhaps the most usual case of appointing a re-
ceiver in this state, is that of a creditor's suit.

Upon a bill filed by a creditor for the purpose of reaching the prop-
erty of the defendant after the return of an execution at law unsatisfied,
it is a matter of course to appoint a receiver of the defendant's property
if the equity of the bill is not denied upon the hearing of the applica-
tion.(n) And it is no objection to the application, in such a case, that

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(c) H. K. Chase's case, 1 Bland, 913. Eq. Pl. 74. Meredith v. Wise, 1 Mol-
Williamson v. Wilson, id. 491. loy. 29.
(d) Anon. 1 Atk. 489. Wyatt's Prac.
Reg. 356. (i) Id. ib. 1 New. Pr. 308.
(e) Ex parte Whitfield, 2 Atk. 315. (k) Simpson v. Gutteridge, 1 Tur. Ch.
(f) 1 New. Pr. 308. (l) Hallst. Dig. 178.
(h) Cooke v. Gwyn, 3 Atk. 689. (n) Bloodgood v. Clark, 4 Paige, 575.
the defendant has not yet answered the bill, or that he denies that he has any property; or that he has not property to the amount of $100. Where the defendant, in a creditor’s suit, is restrained by an injunction from collecting his debts and disposing of property which is liable to waste, it is the duty of the complainant to apply for the appointment of a receiver; and if he neglects to do so, the court will dissolve the injunction so far as to permit the defendant to collect the debts and dispose of the property himself.

Where a debtor in failing circumstances assigns his property to a person who is insolvent, in trust for his creditors, a receiver will be appointed, on the application of such creditors, to take charge of the property assigned. But the court will not appoint a receiver upon a creditor’s bill, where it appears from the bill that the defendant, previous to the return of the execution at law, had property which could have been levied on by such execution; as in such a case the complainant has no right to file a creditor’s bill.

A copy of the bill ought to be served before moving for a receiver in a creditor’s suit.

In mortgage cases. Receivers are also frequently appointed in mortgage cases. Thus the complainant in a foreclosure suit is entitled to a receiver of the rents and profits of the mortgaged premises pending the suit, where the premises will not, upon a sale thereof under the decree bring sufficient to pay the debt and costs; and where the party who is personally liable for the mortgage debt is irresponsible. But the appointment of a receiver will be dispensed with, if the defendant who is in possession of the premises, gives security to account for the rents and profits, as the court shall direct, in case there should be a deficiency upon the sale of the premises under the decree.

In the bill of complaint, or in the petition for the appointment of a receiver, in a case of this nature, the complainant must state that the premises are not of sufficient value to satisfy his debt and costs, and that the mortgagor or other person who is personally liable for the payment of the mortgage is irresponsible, or is unable to pay the expected deficiency. He must also show who is in possession of the mortgaged prem-

(p) Fitzhugh v. Everingham, 6 Paige, 29.
(r) Osborn v. Heyer, supra.
(s) Haggarty v. Pittman, 1 Paige 298.
(u) Hart v. Times, 3 Edw. 226.
(v) Bank of Ogdenburgh v. Arnold, 5 id. 88.
ises; as a receiver can only be appointed where the person in possession of the mortgaged premises, by himself or his tenants, is a party to the suit. Where a defendant in such a suit is in possession of the mortgaged premises by his tenant, who is not a party, the possession of the tenant will not be disturbed by the appointment of a receiver; but he may be ordered to attorn to the receiver, and to pay the rent to him.

If the bill contains sufficient grounds for the appointment of a receiver, and is sworn to, the complainant may move on the bill alone; and it is not necessary to present a petition.

In the case of Freiinghuysen v. Colden, where a person who was proved to be insolvent was in possession of mortgaged premises which were claimed by another, under a decree of foreclosure and sale to him; and the person so in possession filed a bill to redeem the premises, on the ground that he was not a party to the bill of foreclosure, the court directed a receiver to be appointed, to receive the rents and profits of the premises pending the litigation; unless the complainant should elect to deliver up the possession, or give security for the rents and profits, or pay into court the mortgage money admitted to be due.

A receiver will not be appointed, however, if the mortgage is impeached or questioned. Nor will one be appointed against a mortgagee in possession who swears that he has not been paid his debt, nor realized from the rents anything like the amount for which he holds the premises as security.

In Shotwell v. Smith, the vice chancellor of the first circuit stated that receivers in mortgage cases are allowed with great caution; and will be appointed only where there is a clear inadequacy of security, or the rents have been expressly pledged for the debt. And he laid down the rule, that on questions as to the appointment of receivers in such cases, the best criterion of adequacy or inadequacy of the security is the amount of its rental.

Upon a bill to redeem, where the complainant is in possession of the premises, which are an ample security for the amount admitted by him to be due, the court will not appoint a receiver of the rents and profits of the premises pending the litigation, if the solvency of the complainant is fully denied.

In partnership cases.] Upon a bill filed by one of the partners, to
close up a partnership concern, it is a matter of course to appoint a receiver, if the parties cannot agree among themselves as to the disposition and control of the property. (d) So it is, where either partner has a right to dissolve the partnership, and the articles of copartnership do not provide for the settlement of the concern. (e)

A receiver may be appointed, also, at the instance of a partner who alleges that the firm is insolvent and that his copartners are wasting the effects. (f) So where a dissolution has already taken place, or it is apparent that it will be decreed, on the ground of some breach of duty or contract, a receiver will be appointed. (g)

The same rules which prevail respecting the appointment of a receiver in a suit between partners, are applicable in a suit between the representatives of a deceased partner and the surviving partner. (h) Therefore, if the surviving partner wastes the funds of the partnership, this court will, on the application of the representatives of the deceased partner, appoint a receiver. (i)

It has been determined, however, that there is no ground for a receiver where the partner making the application has the property in his own possession, and the other does not object to such possession. (k) Nor will a receiver be appointed merely because partners quarrel. (l)

The principle upon which a court of equity interferes between partners by appointing a receiver, is merely with a view to the relief, by winding up and disposing of the concern, and dividing the produce, not to carry it on. (m) Therefore, as a general rule, a receiver will not be appointed of a subsisting and continuing partnership, unless it satisfactorily appears that the complainant will be entitled to have the partnership dissolved at the hearing. (n) But where it is necessary to preserve the good will of the business, the receiver may be directed to carry it on under the direction of the court, until a sale can be effected. (o)

And it may be a question whether the court will not restrain a partner, if he has acted improperly, from doing certain acts in future, although the partnership is not to be dissolved. (p) As in the ordinary course of

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(d) Martin v. Van Schaick, 4 Paige, 479.
(e) Law v. Ford, 2 id. 310.
(f) Williamson v. Wilson, 1 Bland, 483.
(g) Henn v. Walsh, 2 Edw. 199.
(h) Coll. on Part. 197.
(i) Higgins v. Adir. 1 Deans. 499.
(j) Smith v. Lowe, 1 Edw. 33.
(k) Henn v. Walsh, 2 Edw. 139.
(o) Martin v. Van Schaick, 4 Paige, 479.
(p) Goodman v. Whitcomb, supra.
trade, if any of the partners seek to exclude another from taking that part in the concern which he is entitled to take, the court will appoint a receiver; so, in the course of winding up the affairs, after the determination of the partnership, the court, if necessary, interposes on the same principle. (q)

Although an injunction against a partnership, granted ex parte, is still, outstanding, it does not necessarily follow that a receiver must be appointed. (r)

Executors and trustees.] Where a bill charges an executor or other trustee with a breach of trust, a receiver will be appointed. (s) But it is not a sufficient ground for the appointment of a receiver, that the trustee mixes the trust fund with his own. (t) The true principle which governs the discretion of the court is, that the fund must be in danger. (u) Therefore, if the executor is insolvent, a receiver may be appointed; (v) or if one executor turns over all the assets to his co-executor and leaves the estate, and the latter is intemperate and insolvent. (w) But the mere circumstance that an executor is in mean circumstances, is not sufficient. (x).

Corporations.] A receiver may be appointed to take charge of the property and effects of a corporation whenever a judgment at law or a decree in equity is obtained against it, and an execution has been returned unsatisfied in whole or in part; upon the petition of the person obtaining the judgment or decree, or of his representatives. (y)

And whenever corporations having banking powers, or the power to make loans on pledges or deposits, or authorized by law to make insurances shall become insolvent or unable to pay its debts, or have violated their charter, or any other statute binding upon them, the court may, upon the application of the attorney general, or of any creditor or stockholder, appoint one or more receivers thereof. (z)

And by the safety fund act and the act amending the same, an application for that purpose may be made by the bank commissioners, in the same manner as it may be made by the attorney general, or by a creditor. (a) And the bank commissioners have power to apply, not only in cases of insolvency or violation of charter, but also where the corpora-

(g) Wilson v. Greenwood, 1 Swanst. 481.
(r) Garretson v. Weaver, 3 Edw. 365.
(t) Orphan Asylum v. McCartee, Hopk. 499.
(u) Id. ib.
tion allows an amount of notes or bills to be loaned or put in circulation as money, exceeding twice its capital stock then paid in and actually possessed; or where its loans and discounts, at any time, exceed twice and a half of the amount of its capital stock so paid in and possessed; or where the corporation shall neglect to make any annual payment to the treasurer of the state (as required by the act,) for the space of three months after the time when the same ought to have been made, after being notified of such delinquency by the comptroller; or shall have lost one half of its capital stock paid in; or suspended the payment of its bills in specie for ninety days; or shall have refused to allow the officers of such corporation to be examined upon oath by the commissioners, in relation to the affairs and condition of the corporation. (b)

The court is also authorized, upon the voluntary dissolution of a corporation, to appoint one or more receivers of its estate and effects. (c)

In the case of Ogden v. Kip. (d) the court refused to appoint a receiver of a bank at the instance of one set of directors and stockholders, charging another set of directors with a fraudulent abuse of their trust in the election of directors, previous to the coming in of the answers; the new election being colorable at law, and there being no impending mischief irreparable in case of delay.

But where the holders of a majority of the stock of a corporation neglect to choose officers to take charge of the property of the corporation, a receiver will be appointed upon the application of the owners of a minority of the stock, to take possession of the effects of the corporation, and to preserve the same for the benefit of the stockholders generally. (e)

In other cases. (f) A receiver will be appointed where a fraud is shown in defendant, and the fund in danger of being wasted; and also where the defendant admits he is a trustee for the complainant; (f) or to receive the rents and profits of an estate for the benefit of an executory devisee, until the vesting of the estate. (g) And where lands are charged with the payment of an annual sum, a receiver may be appointed, as a means of enforcing payment. (h) Accordingly, if the tenant for life neglects to keep down the ordinary taxes, a temporary receiver will be appoint-

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(b) 1 R. S. (3d ed. 611,) § 98.
(c) 2 R. S. 468, § 85.
(f) Malone v. Malone, 1 Molloy, 27.
(h) Owings' Case, 1 Bland, 297. Herrop v. Hungerford, 1 Molloy, 96, note.
ed, to pay them, unless the tenant pays them within a limited time. But the court interposes with great caution in appointing a receiver of the rents and profits of land, against the legal title. It will do so, however, in a case of fraud, clearly proved, in obtaining a conveyance of it. 

A receiver has been appointed at the instance of one tenant in common against another. But a case of exclusion must be clearly made out. In the case of Tyson v. Fairclough, a motion by one tenant in common for a receiver on the ground that his co-tenant had given notice to the tenants to pay their rents to him only, and had advertised the estate for sale, was refused, because the conduct complained of did not amount to an exclusion.

A receiver has been appointed in a suit for the specific performance of an agreement to purchase an estate, against the purchaser, after an answer, upon the lien for the remainder of the purchase money, and where there has been a mixed possession, and his insolvency and intention are admitted. And the court will, before answer, on consent of all persons interested, appoint a receiver, where any of the trustees refuse to act. A receiver has also been appointed of a lunatic's estate, where no one acted as committee.

But a receiver will not be appointed at the instance of a party claiming as devisee under a will, the validity of which is to be determined by an issue; unless the claimant satisfies the court that there is a reasonable probability of his succeeding on the issue, and that the property will be endangered by being left in the possession of the heir at law. Nor will a receiver be appointed over the estate of a testator if his will has not been duly proved, or any steps taken in the proper court for that purpose. Nor will the court appoint a receiver on behalf of the heir, against the devisee in possession, merely on the ground that the will is disputed by him.

An adult complainant cannot obtain an order for the appointment of a receiver over his own estate. Nor can a receiver be appointed over a defendant's property to enforce his appearance in a cause.

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(2) Hugonin v. Baseley, 13 Ves. 105. (7) Sitwell v. Williams, 6 Mad. 49.
(m) Street v. Anderton, 4 Bro. C. C. 414. (a) Evelyn v. Evelyn, 2 Dick. 800.
(o) 2 Sim. & Stu. 149. (o) Hall v. Jenkinson, 2 Ves. & B. 225.
(9) Brodie v. Barry, 3 Mer. 605. (r) Ex parte Radcliffe, 1 Jac. & W. 639.
(r) Ex parte Warren. 10 Ves. 629. (s) Clark v. Dew, 1 Russ. & My. 103.
(t) Gore v. Gore, 1 Hogan, 327. (u) Knight v. Duplezias, 2 Ves. 360.
(v) Fiers v. Latouche, 1 Hogan, 310.
if he resides out of the jurisdiction; unless the complainant has a specific lien on the land, or there is danger of immediate loss of the property. (w)

SECTION II.

WHO MAY BE RECEIVERS.

The master, upon a reference to him to appoint a receiver, is to appoint such person as he considers most fit, without regard to the fact of his being recommended or proposed by the one or the other of the parties. (x)

A master in chancery is not eligible; (y) nor a solicitor in the cause or under a commission of lunacy; (z) nor the next friend of an infant complainant. (a) Neither, generally, is a trustee to let and manage the estate, whether he is a sole trustee or jointly with others. (b) The appointment of a trustee to be receiver is extremely rare, and only where he will act without emolument, unless no one else can be nominated, who will act with the same benefit to the estate. (c)

Upon a voluntary dissolution of a corporation, any of its officers or stockholders may be appointed receivers, if not otherwise disqualified. (d)

But upon proceedings against a bank, under the statute, for insolvency, an officer of the corporation is not a proper person to be appointed the receiver. (e)

Where the master has appointed a receiver, there must be some substantial objection to induce the court to over-turn the appointment. (f) The court will not disturb the master's decision merely because it may think he might have made a better selection among the several candidates proposed. (g) If either party is dissatisfied with the appointment

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(y) Ex parte Fletcher, 6 Ves. 427. (e) Attorney General v. Bank of Columbus, 1 Paige, 511.  And see Matter of the Eagle Iron Works, 8 Paige, 388.
(z) Ex parte Pincke, 2 Mer. 459. (f) Thomas v. Dawkin, 1 Ves. jun.
(a) Stone v. Wishaw, 2 Mad. 64.  (g) Matter of the Eagle Iron Works, supra.
(e) supra.  (g) supra.  Sutton v. Jones, supra.
made by the master, the proper course is to make a special application to the court for an order to set aside the report, or that the master review his decision. But the court will not set aside the appointment made by him unless the person selected is legally disqualified; or his situation is such as to induce a belief that the interests of the parties will not be properly attended to by him. (a)

SECTION III.

AT WHAT TIME, AND HOW, TO BE APPOINTED.

At what time. A receiver cannot be applied for previous to the service of the subpoena; (i) unless, perhaps, where the defendant is designedly beyond the jurisdiction, or keeps out of the way to avoid the service of process; (k) and even then it is said it cannot be done, save in the case of a rent chargé. (l) The ground for refusing the appointment of a receiver before a party has been served with process is, that the court has not jurisdiction to deprive a man who is not present to defend himself, of the possession of his estate. (m)

And in creditors' suits it is necessary to serve a copy of the bill on the defendant personally, or on his solicitor, before moving for a receiver. (n)

The rule is, not to appoint a receiver before answer, especially where one is not prayed for in the bill; unless it clearly appears that there is danger to the property or fund by the insolvency of the party having possession of it, or from some other cause. (o) But when justice requires it, and the merits appear by affidavit; (p) or when it appears that the complainant has an equitable claim to the property in controversy and that a receiver is necessary to preserve the same from loss, one will


(b) Quinn v. Gunn, 1 Hogan, 75. Malcolm v. Montgomery, id. 93. Maguire v. Allen, a Ball & Best. 75. Coward v. Chadwick, 2 Russ. 150, n.

(c) Austin v. Austin, 1 Hogan, 95. (k) Tansfield v. Irvine, 2 Russ. 151.


be appointed. (q) Suits against executors wasting the assets, (r) or in favor of infants entitled to real estates, and requiring the protection of the court; or between partners, (s) are instances of this kind.

In creditors’ suits also, it is a matter of course to appoint a receiver of the defendant’s property, before answer, if the equity of the bill is not denied upon the hearing of the application. (t) Indeed it is the duty of a complainant who has obtained an injunction upon such a bill, to apply to the court and have a receiver appointed without any unreasonable delay. (u)

But the court does not appoint a receiver over real estate, before the hearing, unless there is evidence of fraud in obtaining possession, or special circumstances to show a necessity to preserve the property pendente lite. (v) Nor is it proper to move for a receiver upon the effect of the evidence in the cause, before hearing. (w)

But even after hearing and re-hearing and where a receiver has been refused, a party may be entitled, on the cause coming on for further directions, and upon showing a new state of facts, to renew an application for a receiver. (x)

A receiver is not commonly granted at the hearing. There must, generally, be a special application for that purpose; (y) except in creditors’ suits where there is no defence, and no receiver has been previously appointed. In such cases the final decree always refers it to a master to appoint a receiver, and then proceeds to direct him how to apply the funds and estate which may come into his hands.

How to be applied for.] A motion for a receiver is made, generally, on the answer of the defendant, but may be made on affidavits before answer, when the complainant can clearly satisfy the court that he has an equitable claim to the property in controversy, and that a receiver is necessary to preserve the same from loss. (z)

In creditors’ suits, the complainant usually moves upon his bill. The motion may be made in other cases, upon the bill, and affidavits besides; and when this is done, the defendant may use his answer as an affida-

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(g) Bloodgood v. Clark, 4 Paige, 577.
(r) Id. ib.
(s) Osborn v. Heyer, 2 Paige, 343.
(w) Lloyd v. Passingham, 3 Mer. 697.
(x) Attorney Gen. v. Mayor &c. of Galway. 1 Mol. 95.
(y) Boylan v. Byrne, 1 Molloy, 29.
(z) Berges v. Palmer, id. ib.
(b) Willis v. Corlies, 2 Edw. 281.
vit. (a) And when the complainant uses affidavits, the defendant may also read depositions. (b)

Notice of motion. Notice of the motion for a receiver, when necessary, must be given to all necessary and interested parties. (c)

Ex parte application. As a general rule, an order for a receiver will not be granted ex parte, until the time for the defendant's appearance has expired and the bill has been taken as confessed against him; except where he has fraudulently withdrawn himself out of the jurisdiction of the court to avoid the service of process. (d) But in a case of emergency, where the property to which the receivership relates would be likely to perish before the defendant could have notice and be heard on the application, a receiver may be appointed ex parte. (e) So where irreparable injury would be sustained by the delay. (f) And where it is necessary to appoint a receiver of the property of an absentee, before the time for his appearance has expired, and during the running of an advertisement for appearance against him, to prevent such property from being wasted or removed beyond the jurisdiction of the court, such receiver may be appointed ex parte. (g)

Whenever it is proper to appoint a receiver ex parte, the particular circumstances which render such summary proceedings necessary, should be distinctly stated in the bill or petition on which the application is founded. (h)

The court will not appoint a receiver of a corporation against whom an execution has been returned unsatisfied, upon the ex parte application of the judgment creditor. But upon filing a petition duly verified, an order to show cause at a future day why the prayer of the petitioner should not be granted, may be entered. (i) Which order to show cause must be duly served upon the defendants within the time required for notices of special motions.

By whom appointed.—By court itself. On hearing the motion for a receiver, the court will either make the appointment itself in the first instance, or refer to a master to do so, or to inquire and report to the court a suitable person to be appointed by itself. The latter course was

(b) 361. 17. (e) Gibson v. Martin, supra.
(c) Edw. on Rec. 66. (f) People v. Norton, supra.
(d) 9 Brown's Ch. Pr. 833. Buxton v. (g) Sandford v. Sinclair, supra.
(e) Monkhouse, Coop. 41. (h) Verplank v. Mer. Ins. Co. 3 Paige,
(f) Sanford v. Sinclair, 8 Paige, 373. 438.
(g) S. C. 3 Edw. 393. Gibson v. Martin, 8 (i) Devoe v. Ithaca and Owego Rail Paige, 481. People v. Norton, 1 Paige,
(h) Road Co. 5 Paige, 691.
taken in the case of The Attorney General v. The Bank of Columbia. (k)

Reference to master. In creditors' suits it is usual to refer the matter to a master.

The 190th rule directs the manner in which a reference for this purpose is to be obtained, and the mode of the proceeding thereon.

To what master. The chancellor has decided that where the defendant gives to the complainant a written consent under the 191st rule, the reference ought to be to a master residing in the county where the defendant lives, or some master who is near to him, so as to relieve such defendant from all unnecessary expense. (l)

Summons. The first step to be taken by the complainant's solicitor, on obtaining a reference, is to procure from the register or clerk a certified copy of the order of reference, for the use of the master. He should then take out a summons; which, in case the defendant is to be examined before the master, should be underwritten—'And the personal attendance and examination of the defendant C. D. is required.' (m) This summons should be served in the manner already mentioned, ante, p. 473.

Examination of debtor. The order for the appointment of a receiver on a creditor's bill, where the defendant does not consent that his examination before the master shall be a substitute for an answer, as provided by the 191st rule, only authorizes the complainant to examine him on oath before the master in relation to the property which he is ordered to assign and deliver to the receiver. The object of the examination is not to obtain an answer to the bill, nor to elicit evidence to sustain the suit; but it is to procure and compel the delivery to the receiver of all the property and effects which the defendant has in his possession or under his control. And the rights of the complainant to examine the defendant before the master, as to such property, are the same where the defendant answers to the bill as where he suffers it to be taken as confessed; except where the defendant has given a stipulation under the rule. (n) Under the usual order of reference, the only objects of authorizing the examination of the defendant and of witnesses, are to ascertain the nature and value of the defendant's property, to enable the master to determine who would be a proper receiver thereof, and the amount of security to be given by the receiver; and to enable the complainant and the receiver to ascertain whether the order of the court is complied with

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(k) 1 Paige, 511.  
(l) Bank of Monroe v. Keeler, 9  
(m) Edw. on Rec. 67.  
(n) Browning v. Bessis, 3 Paige. 668.  
Paige, 269.
by the defendant in delivering over the whole of his property. It is therefore erroneous to direct the examination of the defendant, or of witnesses, to any other matters charged in the bill; except where such examination is intended as a substitute for an answer, in cases where the defendant has given a stipulation to that effect under the 191st rule. (o)

If illegal or improper questions are put to a defendant, upon such examination, he is not bound to answer them, but may appeal from the decision of the master, to the court. (p)

Where the complainant obtains an order for the appointment of a receiver of the property of a defendant who is a lunatic, and has put in an answer by his guardian ad litem; without any direction to the defendant to assign or deliver over his property, the complainant has no right to call and examine witnesses on the reference, after the receiver has been appointed, for the mere purpose of obtaining testimony to be afterwards used in the cause. (q)

Assignment and delivery of debtor's property.] Upon a reference under the one hundred and ninety-first rule, the defendant is bound to execute to the receiver a formal assignment of all his property, equitable interests, and choses in action, as directed by the order; although he denies on oath that he has any property; to enable the receiver to test the validity of any assignment or other disposition which the defendant may have previously made of his property or effects. (r)

Where the defendant, in his answer, admits he has certain property, but denies that he has any other, the direction in the order of reference, for the delivery of his property, must be general, and should not be confined to the property which he admits to belong to him and to be in his possession or under his control. (s)

A defendant will not be in contempt for neglecting to deliver over his property to the receiver if it is claimed to be in the possession of and to belong to a third person; unless the master has decided that it belongs to and is under the control of the defendant. (t)

If the complainant wishes to have an actual delivery of property which he supposes to belong to the defendant, but which the latter insists belongs to another person, he must apply to the master to decide what property is under the defendant's control and to make an order for its delivery by the defendant, before he can bring him into contempt. (a)

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(o) Copous v. Kaufman, 8 Paige, 585.
(p) Gihon v. Albert, 7 Paige, 278.
Fitzburgh v. Everingham, supra.
(g) Copous v. Kaufman, supra.

(r) Chipman v. Sabbaton, 7 Paige, 47.
(z) Browning v. Bettie, 8 id. 508.
(i) Cassleay v. Simons, 8 id. 273.
(s) Id. 1b. Parker v. Browning, id.
(a) Id. 399.
a decision to that effect, with which the defendant is dissatisfied, he must apply to the court to review the decision, or he will be compelled, by process of contempt, to comply with the master's directions.(v)

The fact that the defendant has neglected to execute an assignment of his property to the receiver, as directed by the order of the court, is no ground for the master's refusal to direct the defendant to deliver over his property.(w)

Where a receiver has been appointed and the defendant has been required to transfer his property to him, the fact that the defendant has applied for the benefit of the bankrupt act intermediate the filing of the bill and the requirement, will not excuse him from delivering his property to the receiver.(x)

In the case of several bills filed. By the one hundred and ninety-third rule it is provided, that where several bills are filed by different creditors against the same debtor, but one receiver shall be appointed; unless the first appointment has been obtained by fraud or collusion, or the receiver is an improper person to execute the trust. And by the 194th rule it is made the duty of the master to whom the appointment of a receiver is referred, in a creditor's suit, to ascertain, if practicable, by the oath of the defendant or otherwise, whether any other suit has been commenced against him. If so, the complainant therein shall have notice to attend before the master, and of all subsequent proceedings in relation to the said receivership; and he may except to the report, or apply to the court for further directions, &c. If another suit is commenced after the appointment of a receiver, the same person will be appointed receiver therein.

Proposal of names. In proceeding under a reference for the appointment of a receiver, the party who has obtained the order hands in to the master a written proposal, containing the names of the intended receiver and his sureties. If the person thus nominated be objectionable, however, another person may be nominated by any interested party, by a counter-proposal; and the master decides between them.(y) Under equal circumstances, that is, supposing the parties equally interested in the funds, and the persons proposed on both sides unobjectionable, the party who has obtained the order has, prima facie, a right to the preference.(z)

A stranger cannot propose a receiver.(a)

Security. If the sureties proposed are not satisfactory to the master, the party can present the names of other persons as sureties, in an amended

(e) Parker v. Browning, supra.  
(w) Eldred v. Hall, 9 Paige, 640.  
(y) Bennett's Mast. 95.  
(z) Smith on Rec. 8.  
(a) Attorney Gen. v. Day, 9 Mad. 946.
proposal, stating them to be in the place of those formerly proposed. (b)

When the master has approved of a person as receiver, he fixes the amount of the penalty of the bond to be given by such receiver and his sureties. (c) The bond is then drawn by the solicitor and executed by them.

The sureties of a receiver must be within the jurisdiction; (d) and must be real and substantial persons; (e) and capable of contracting, i.e. not infants, lunatics, idiots, married women, &c. (f)

The 191st rule requires the master appointing a receiver in a creditor's suit, to take from him the "requisite security." Where several bills are filed by different creditors against the same debtor, the person who is appointed the sole receiver in all the suits, is required by the 193d rule to "give security sufficient to cover the whole property and effects of the debtor which may come into his hands by virtue of his office." And by the 194th rule, where another suit is commenced against the debtor after the appointment of a receiver, the same person is to be appointed in the subsequent suit, and shall give "such further security as the master executing the last order shall direct." The additional security is intended of course, to cover any property belonging to the defendant discovered or acquired since the last appointment.

Master's report. The master having made the appointment, or selected a proper person to be recommended to the court for appointment, according to the terms of the order of reference, reports the fact to the court.

Where the court refers it to a master to report a proper person to be appointed a receiver, and to approve of the sureties to be given by him, the appointment is not complete until it is confirmed by the special order of the court. (g) But where the master is directed to appoint a receiver, and to take from him the requisite security, no order for the confirmation of the appointment is necessary. The receiver, upon filing the master's report of his appointment, and the bond taken by the master, may immediately enter upon the duties of his office. (h)

Where the master appoints a receiver, if either party is dissatisfied with the appointment, he cannot except to the master's report, (i) but

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(b) Edw. on Rec. 74.
(c) Id. 75.
(d) Cockburn v. Raphael, 2 Sim. & 8 Paige, 385.
(f) Smith on Rec. 16.
(h) ib.
(i) Thomas v. Dawkin, 3 Bro. C. C.
must make a special application to the court for an order that the master review his decision. (k) This application may be made either by petition or motion. If by petition, the petition should state the grounds of objection. Notice of the application must be served on all parties interested. (l)

In order to support an objection to the master's appointment of a receiver, however, a strong case of disqualification is necessary. (m) In fact it is the settled rule in this state, that the court will not set aside the appointment unless the person selected by the master is legally disqualified, or his situation is such as to induce a belief that the interests of the parties will not be properly attended to by him. (n)

If the court, however, should order the master to review his report, the parties will proceed by proposing a new person or persons, and issuing a summons as before. (o)

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CHAP. VIII.

ABATEMENT AND REVIVOR.

Sect. 1. ABATEMENT.
2. REVIVOR.

SECTION I.

ABATEMENT.

What is an abatement. The abatement of a suit in equity is merely an interruption to the suit, suspending its progress until new parties are brought before the court. (a)

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(a) Matter of the Eagle Iron Works, supra.
(m) Tharpe v. Tharpe, 19 Ves. 317.
(n) Matter of the Eagle Iron Works, 8 Paige, 388.
(o) Smith on Rec. 11.
(a) Hoxie v. Carr, 1 Sumner, 173.
Abatement is either of the suit or as to a party. A suit is said to abate, when in consequence of some event, there is no longer any person before the court, by or against whom the proceedings can be carried forward. Abatement as to a party is where the interest and title or liability of the party having ceased, it is no longer necessary to have such party before the court. In the former case the suit must be revived. But if, on the death of a party, the cause of action survives to or against some other of the parties, so that a perfect decree as to every part of the subject of litigation can be made between the surviving parties, the suit does not abate as to the survivors; but on motion of either party, the court will order the same to proceed between such survivors. A suit brought by or against two or more executors, trustees, or joint tenants, is a case of this kind; where, on the death of one, the whole right of action or ground of relief survives in favor of or against the other. It such cases, there is in fact no abatement as to the survivors.

When one or more of the complainants or defendants dies, and the cause of action does not survive, the suit abates only as to the person or persons so dying; and the surviving parties may proceed without reviving the suit. Where, upon the death of a defendant, the cause of action against him does not survive, but some third person becomes vested with his interest, or subject to his liabilities, the complainant may elect to proceed without reviving the suit against the representatives of the deceased defendant, provided a perfect decree can be made between the survivors without bringing such representatives before the court. In such a case the complainant must elect either to revive the suit against such representatives, or to proceed against the surviving defendants within such time as may be deemed reasonable by the court, or the defendants may revive the suit.

The order to proceed without reviving, after the death of a party, may be obtained on an affidavit showing the death of the party, and that the cause of action has survived.

The marriage of a female complainant, even after decree, abates the suit; and it must be revived either in favor of or against the husband, as she is no longer capable of prosecuting the suit in her own name; and the defendant may be injured by being compelled to continue a liti-
gation with one who would not be bound by the decision if adverse to her interest. (h) If her husband dies before revivor, however, a bill to revive is rendered unnecessary; as by his death her incapacity to prosecute is removed. But the subsequent proceedings should be in her marriage name. (i)

But the marriage of a female defendant *pendente lite* does not abate the suit. It is only necessary in that case to obtain an order that the suit proceed against her by her new name, in conjunction with that of her husband. (j)

If the suit is brought by the husband and wife for a claim of the latter and he dies, the suit does not abate; for she alone has the whole interest, and the whole advantage of the proceedings survives to her. (l)

In such a case the court will permit the wife, upon an *ex parte* application, to suggest the death of the husband, and will grant an order allowing her to continue the suit in her own name. (m)

If a suit be brought by husband and wife upon a promise made to them during coverture, and pending the suit the wife dies, there is no abatement, but the whole interest survives to the husband. (n)

The coming of age of an infant party does not abate the suit; nor does it render a supplemental bill necessary, unless his interest in the subject of the suit is changed by that event. (o)

It is the rule in England that bankruptcy or insolvency does not cause an abatement, but only renders the suit defective. (p)

**Effect of abatement.** Where the abatement is total, i.e. where it is caused by the death, bankruptcy, insolvency or marriage of the complainant, (being a female,) it is a general rule that the cause is completely suspended, and cannot be proceeded in till it has been revived, or the defect caused by the abatement cured by supplemental bill; and all orders made pending such abatement will be considered nugatory, and may be discharged. Thus, if pending a total abatement, process of contempt is issued, it will be irregular, and may be discharged on motion, with costs. And if a defendant is arrested on any process pending such abatement, he will be discharged from such arrest, with

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(h) Quackenbush v. Leonard, in Ch. Feb. 21, 1843.

(i) Witf. Eq. Pl. 47.


(k) Anon. 3 Atk. 796. Sted v. Cunningham, *supra*.


(m) Campbell v. Bowne, 5 Paige, 34.

costs.\(^{(q)}\) So, also, an order to dismiss a bill for want of prosecution obtained pending an abatement, will be irregular.\(^{(r)}\)

Yet, notwithstanding this general rule, there are some cases in which the court will entertain applications, although the suit is abated. Thus, proceedings may be had to preserve the property in dispute;\(^{(s)}\) or to set aside irregular proceedings in the master's office;\(^{(t)}\) to pay money out of court, where the right is clear,\(^{(u)}\) or upon consent of parties;\(^{(v)}\) or to punish a party for a breach of an injunction.\(^{(w)}\) An injunction is not dissolved, neither does it become inoperative, by the abatement of the suit in which it is issued. If the complainant dies, his representatives may apply to the court to punish a breach of the injunction whether committed before or after his death, as soon as they have taken steps to revive.\(^{(x)}\) But where the suit abates by the death of either of the parties pending an injunction, the defendant or his representatives may have an order that the complainant or his representatives revive the suit within a reasonable time or that the injunction be dissolved.\(^{(y)}\) In Leggett v. Dubois, just referred to, the court directed the complainant to revive within sixty days.

The court will also, pending an abatement, make an order for the delivery of deeds and writings brought into court, or it will send it to a master for inquiry to whom they belong.\(^{(z)}\) And depositions taken during an abatement may be read, provided the fact of the abatement was not known when the commission issued.\(^{(a)}\)

If a bill is retained, and an action directed against one of the defendants to try the right, and a material defendant dies before the trial, the trial may proceed without a revivor; unless the decree has directed the deceased defendant to attend it.\(^{(b)}\)

And although the suit has abated by the death of a party since the argument, yet the judgment of the court may be pronounced, notwithstanding.\(^{(c)}\) The rule is the same where the suit has abated by the death of a party after the entry of an appeal, and before the argument.

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\(^{(q)}\) 3 Dan. 923. See also 2 Paige, 365.
\(^{(r)}\) Canham v. Vincent, 8 Sim. 277.
\(^{(s)}\) Washington Ins. Co. v. Sloc, 2 Paige, 368.
\(^{(t)}\) Quackenbush v. Leonard, in Chan. Feb'y 1st, 1843.
\(^{(u)}\) Roundell v. Carrer, 6 Ves. 250.
\(^{(v)}\) Beard v. Earl Powis, 2 Ves. 399.
\(^{(w)}\) Hawley v. Bennett, 4 Paige, 163.
\(^{(x)}\) Id. ib.
\(^{(y)}\) Leggett v. Dubois, 2 Paige, 211. Hawley v. Bennett, 4 id. 103. White v.

Pitfugh, 1 Hen. & M. 1. 3 Dan. 925. This does not apply, however, to injunctions made perpetual by decree. See Askew v. Townsend, 2 Dick. 471.
\(^{(z)}\) Wharam v. Broughton, 1 Ves. 185.
\(^{(a)}\) Sinclair v. James, Dick. 277. Thompson v. Tink, id. 115.
\(^{(b)}\) Humphreys v. Hollis, Joc. 73.
in the appellate court, if the fact of his death was unknown. But the decree in the one case should be entered nunc pro tunc as of the time of the argument, and in the other as of a day previous to the death of the party, and after the entering of the appeal.

Where a suit abates after an appeal, but before the appellate court has become possessed of the cause, it must be revived in the court below, before any further proceedings can be had on the appeal. But if the abatement occurs after the appellate court has become possessed of the cause, that court may, upon petition, order the suit to stand revived in the name of the representatives of the deceased party. After the abatement of a suit by the death of one of the parties, the appellate court ought not, if such death is known, to proceed to the hearing of the cause on appeal, until the suit is revived; unless it is heard with the consent of those who have succeeded to the rights of the deceased party.

An enrolment of a decree may be made, and an order to do so nunc pro tunc may be obtained, notwithstanding an abatement. Where, however, the suit abates after a decree has been pronounced but before it is passed, there must be a revivor before it can be passed. The statute of limitations will run pending an abatement, in all cases except a decree to account.

It is to be observed, that although an abatement suspends proceedings in a cause, yet it does not put an end to them. Therefore, where process of contempt has been executed and a defendant is in custody upon it, and afterwards the suit abates, the defendant is not thereby entitled to his discharge out of custody, but he must move that the complainant may revive within a limited time, or that the bill may be dismissed and he may be discharged. A receiver also will not be discharged on an abatement of the suit, without a special order of the court. In Woods v. Creaghe, a motion was made that a receiver who had been appointed on process should be discharged, as the suit was abated by the death of a complainant. The court refused the motion; but made an

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(d) Vroom v. Ditmas, 5 Paige, 528. (m) 1 Hogan, 174.
Rogers v. Paterson, 4 id. 409. 619. Sheffield v. Buckingham, West,
(c) Campbell v. Masier, supra. Vroom (n) 1 P. Wms. 673; Ambl. 936, S. C.
(f) Quackenbush v. Leonard, in Chan. 21st (i) 3 Dan. 225.
Feb'y, 1843. (m) id. ib.
(g) Vroom v. Ditmas, 5 Paige, 528. (n) id. ib.
(h) Gartside v. Isherwood, 2 Dick.
order that the receiver be discharged unless the cause was revived within
ten days after service of the order on the surviving complainant.

We have already seen that this rule applies likewise to injunctions. (o)

Where an abatement is partial, e. g. where it is caused by the death
of a defendant, it prevents those proceedings only by which the interest
of the deceased defendant may be affected; for the death of a defendant
makes an abatement quoad himself alone. Therefore, if there be a de-
cree against trustees and their cestui que trust, to convey, and the cestui
que trust dies, the trustees may be compelled to convey, notwithstanding
his death. (p) So also, pending an abatement by the death of a de-
fendant, process of contempt may be issued and executed against the
other defendants. (q) And during an abatement the court will, at the
instance of a creditor, take the prosecution of a decree from the com-
plainant. (r)

If an original suit abates, by marriage, and is not revived until after
a cross-bill is filed, it loses its prior right to an answer. (s)

SECTION II.

REVIVOR.

When necessary.] It may be stated, in general terms, that whenever
a suit abates, there must be a revivor, before there can be any further
proceedings therein, except those already mentioned, (ante, p. 677, 678,)
and others of the like nature.

It has been held that where a decree is made in the court for the cor-
rection of errors, on appeal from this court, after the suit has abated, it
is necessary to revive the suit in this court before any proceedings can
be had to carry into effect the decree of the appellate court. (t)

Methods of revivor.] Suits may be revived either by a bill of revivor,
or by petition under the statute. Bills of revivor will be reserved for
consideration in a separate chapter. (u)

If the abatement occurs before a decree, a defendant wishing to revive

(p) Finch v. Lord Winchelsea, 1 Eq. Cas. Abr. 2.
(q) 3 Dan. 225.
(r) Id. ib. Cook v. Bolton, 5 Russ. 282.
(s) Smart v. Floyer, 1 Dick. 260.
(t) Rogers v. Patterson, 4 Paige, 409.
(u) Post, Vol. 2, Book IV. Ch. I.
must proceed by petition, under the statute, and cannot file a bill of revivor; but after decree he may adopt either method.(v)

By petition.] The revised statutes authorize the revival of suits, in certain cases, on a summary application to the court by petition, instead of filing a bill of revivor. These statutory provisions, it should be observed, are confined to suits which have abated by the death of a party, and do not apply to cases of abatement by the marriage of a female complainant. And they only extend to those cases where, by the former practice, the proceedings could be revived and continued by a simple bill of revivor.(w) They embrace partition suits as well as others.(x) The petition under the statute is a substitute for a bill of revivor ;(y) and contains the substance of what is required to be stated in such a bill.(a)

The party filing the same may always insert so much new matter as is requisite to show how and why he is entitled to revive the suit.(b)

If the parties against whom a suit is sought to be revived are beyond the jurisdiction of the court, or cannot be found, to be served with the order, a revivor cannot be obtained upon petition. A formal bill of revivor must be filed in such cases, and the like proceedings had to obtain the appearance of the defendants as are required in the case of absent, concealed or non-resident defendants.(c)

It seems that any thing which could be legally urged, by plea or otherwise, as a defence to a bill of revivor, constitutes a valid ground of objection to an order to revive under the statute.(d) If it appears that the complainant has no right to revive the suit, the defendant may avail himself of the objection at the hearing.(e)

When suit may be continued without a revivor. When the cause of action survives, a suit will not abate by the death of one or more of the parties; but upon satisfactory suggestion to the court of such death, the suit may proceed in favor of, or against, the surviving parties.(f) The cases intended to be embraced by this section, are those where the right of the deceased party vests in some or one of the survivors, so that a perfect decree may be made as to every part of the subject of litigation, without any alteration of the proceedings or bringing any new parties before the court. Such is the case of a suit brought by or against two

(v) 1 Hoff. Pr. 388.
(x) Wilkinson v. Parish, 3 id. 653.
(y) 2 Paige, 214. 3 id. 655. 4 id. 417.
(z) Rogers v. Paterson, 4 Paige, 417.
(c) Id. ib.
(e) Douglas v. Sherman, id. 358.
(f) 2 R. S. 184. § 113, (orig. § 107)
Leggett v. Dubois, 2 Paige, 211.
or more executors, trustees or joint tenants; where, on the death of one, the whole right of action or ground of relief survives in favor of, or against, the other. In such cases there is in fact no abatement as to the survivors; and upon a proper application by either party, an affidavit showing the fact of the death, and that the cause of action has survived, the court will order the suit to proceed. (g)

Where the cause of action against a deceased party does not survive but some third person becomes vested with his interest or subject to his liabilities, the complainant may elect to proceed without reviving the suit against the representatives of the deceased party, provided a perfect decree can be made between the survivors without bringing such representatives before the court. (h) In such cases the complainant must revive the suit against the representatives of the deceased party, or elect to proceed against the surviving defendants within such time as may be deemed reasonable by the court, or the defendants may revive the suit. (i)

Revival against representatives of a deceased defendant. Upon the death of a defendant, the court may, by order, direct the suit to stand revived against his representatives, upon the petition of the complainant. (k)

A copy of such order must be served upon such representatives, who have eighty days thereafter to appear and answer or disclaim. If they fail to do so within that time, the court, on due proof of the service of such order, may cause their appearance to be entered. In that event, the answer of the deceased party will be deemed the answer of such representatives. And if, in such case, no answer has been filed by the deceased party, the court may, in its discretion, order the bill to be taken as confessed against such representatives, or compel them to answer, by attachment or otherwise. (l)

If the deceased party has answered, and the complainant wishes to obtain a further answer from his representatives, the petition for revival must state the matters as to which a further answer is required, and a copy of the petition must be annexed to the copy of the order served on the representatives. In such case, if the representatives do not appear and put in such further answer, or disclaim, within eighty days after the service of the petition and order, the court upon due proof of

(g) Leggett v. Dubois, 2 Paige, 211.
(h) Id. ib. 2 R. S. 184, § 114.
(k) Id. ib. 2 R. S. 184, § 115.
(l) Id. ib. § 108.
(i) 2 R. S. 184, §§ 116, 117, 118.

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such service, may order the petition to be taken as confessed, or compel such further answer by attachment or otherwise.\(m\)

But as no decree or order affecting the rights of an infant can become absolute against him merely by a default, except in those cases where a statute has, in express terms, made the proceedings conclusive against him, or where it is evident that the legislature intended to preclude the rights of infants as well as adults, it has been decided than an order of revival cannot be entered against an infant representative of the deceased party, by default, under the above sections of the statute.\(n\) If the infant representative does not, within the time prescribed by the statute, procure a guardian ad litem to be appointed, and put in an answer to the petition, the complainant must proceed as in other cases, to have a proper guardian appointed to appear and protect his rights.\(o\)

On death of complainant—cause of action not surviving: When a complainant dies and the cause of action does not survive, his representatives may, on affidavit of his death, and on motion in open court, be made complainants in the suit.\(p\) The application under this section is not required to be made upon petition, but it is best to resort to a petition instead of applying by motion.

The proper course to be adopted by the heirs or personal representatives of a deceased complainant, to revive a suit under this section, is for them to apply to the court upon a petition or affidavit stating the death of the complainant, and showing that they in fact sustain the character in which they claim the right to revive. And if they claim the right to revive as executors, it should appear that they had taken probate of the will.\(q\) Due notice of the application should also be given to the solicitors of the other parties who have appeared in the cause and who do not join in the application, so as to give them an opportunity to be heard as to the right of the applicants to revive. The order of revival should also state the particular character in which they are permitted to revive and continue the suit; and the cause is to be entitled accordingly in all subsequent orders and proceedings therein.\(r\) Where a person claiming to be devisee of a deceased complainant who had filed a bill to redeem, obtained on an ex parte motion, an order to revive the suit in her favor, it was held that the defendant might, at the hearing object that the suit was not legally revived.\(s\)

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\(m\) 2 R. S. 184, §§ 119, 120, (orig. §§ 113, 114.)

\(n\) Wilkinson v. Parish, 3 Paige, 655.

\(o\) Id. ib.

\(p\) 2 R. S. 184, § 121, (orig. § 115.)

\(q\) Douglass v. Sherman, 2 Paige, 362.

\(r\) Id. ib.

\(s\) Id. 358.
The personal representatives of a deceased sole complainant may be substituted as complainants on motion or petition under the above section. But if the other parties in the cause who have appeared, do not join in the application, they must have due notice of it. (c)

Where a bill is filed for a partition of real estate, and for an account of the rents and profits received by the defendant, and the suit afterwards abates by the death of the complainant, the heir at law may apply, by petition, to revive the suit so far as relates to the partition of the estate and the rents and profits subsequent to the descent to the heir, without joining with the personal representatives of the original complainant who are entitled to the rents and profits which accrued before that time. (u)

Upon a revival by the representatives of a deceased complainant, they may be permitted, if necessary, to amend the bill. (v) But this provision relates only to such amendments as the deceased party might have made if living; and does not authorize the insertion of any matters by way of amendment which have arisen since the filing of the original bill. (w) Nor can the original pleadings and proceedings be altered or amended by inserting the names of the new complainants. (x)

The defendant may be compelled to answer the amended bill, and the cause will proceed to issue and a hearing; as in ordinary cases. (y)

By surviving complainant against representatives of deceased complainant. If the representatives of a deceased complainant do not cause themselves to be made complainants within eighty days after the death of the decedent, the surviving complainant may proceed to make them defendants in the suit, as in cases where the representatives of a deceased defendant are made parties. (z)

It has been held, that under this section a suit may be revived by a surviving complainant against the infant representatives of a deceased complainant, by petition and the service of an order. The petition must contain substantially the same facts which are required to be set forth in a bill of revivor, and must also state that eighty days have elapsed since the death of the deceased complainant, and that his representatives have not caused themselves to be made complainants; and a copy of the order must be served upon the parties against whom the revival is sought. (a) If the representatives of the deceased party neglect to ap-

(c) White v. Buloid, 2 Paige, 475.
(u) Hoffman v. Tredwell, 6 Paige, 385.
(v) 2 R. S. 184, § 121, (orig. § 115.)
(w) Douglass v. Sherman, 2 Paige, 353.
(x) Id. 383.
(y) 2 R. S. 185, § 199, (orig. § 116.)
(z) Id. ib. § 133, (orig. § 117.)
(a) Wilkinson v. Parish, 3 Paige, 653.
pear and answer the petition, or to disclaim, the order that the suit stands revived becomes absolute against them, by default in case they are adults; and a formal appearance may be entered for them. (b) But no decree or order of revival can be made against an infant, by default. If he neglects to appear and procure the appointment of a guardian, the same steps for the appointment of a guardian ad litem must be taken as in other cases where an infant neglects to appear. (c)

By defendant, against representatives of deceased complainant. If upon the death of a complainant there is no surviving complainant, or he neglects or refuses to proceed against the representatives of the deceased complainant, as defendants, the court upon the petition of the original defendant, may order such representatives to show cause at a certain day to be named in such order, why the suit should not stand revived in their names, or the bill be dismissed, as far as the interests of such representatives are concerned. If no such cause is then shown, the court upon proof of the reasonable service of a copy of the order upon such representatives, may order the revival of the suit in their names, or the dismissal of the bill with costs or otherwise. (d)

Under these sections, the representatives of the deceased complainant will not be permitted to elect either to have the suit stand revived in their names or to have the bill dismissed as to them; but after a decree by which the defendant has acquired an interest, he has a right to revive the suit upon a petition and order, if the complainant or his representatives neglect to revive. (e)

By defendant surviving. If a defendant dies and the cause of action does not survive, and the complainant neglects or refuses to procure an order for the revival of the suit, the court may order it to stand revived upon the petition of a surviving defendant, against the representatives of the deceased party. Such surviving defendant may proceed against such representatives in the same manner as a complainant, to compel them to appear, abide the answer of the deceased party, or answer, if an answer is required, or to have the bill or his petition taken as confessed against them. And the court may, in its discretion, stay the suit as against him until such proceedings shall have been had. (f)

In the case of Pumpelly v. Brinckerhoff, (g) the bill affected both

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(b) Wilkinson v. Parish, 3 Paige, 653. 
(c) Id. ib. 
(d) 2 R. S. 185, §§ 124, 135, (orig. §§ 120, 121.) 

(e) Rogers v. Paterson, 4 Paige, 409. 
(f) 2 R. S. 185, §§ 126, 127, (orig. § 121.) 
(g) In Chancery, Sept. 4, 1843. Ex rel. Curtis. See Julius Rhodes, Esq.
real and personal estate. M. R. a defendant, devised and bequeathed all her interest in the subject matter of the suit, to certain persons other than her heirs at law and next of kin, and then died. The complainants neglected to revive. The executrix, devisees, and legatees of M. R. applied by petition, under the above sections of the statute, for an order that the suit stand revived against them. The chancellor decided that so far as respected the real estate, it having been devised out of the time of descent under the statute, the suit could not be revived under those sections of the statute, but must be revived by bill of supplement and revivior. He therefore, under the general prayer in the petition, ordered the complainants to revive the suit within eighty days against the real and personal representatives of M. R. or that the bill be dismissed with costs.

By and against whom suits may be revived.] Upon a bill for an account and distribution of an estate, if one of the distributees dies pending the suit, it must be revived against his personal representatives, and not against his next of kin. (A)

Where, by the death of a party, his interest or title to the property in controversy is transmitted to the representative which the law gives or ascertains, the proceedings may be continued in favor of such representative by a bill of revivior or a petition under the statute. (B) Thus, if a suit abates after a decree affecting both real and personal property, it may be revived by the heirs or personal representatives, or by either. (K) Accordingly, if a bill is filed for a partition of real estate and for an account of the rents and profits, and the suit afterwards abates by the death of the complainant, his heir at law may revive the suit so far as relates to the partition of the estate, and the rents and profits subsequent to the descent to such heir; and the personal representatives may revive as to the rents and profits which accrued before that time. (L)

The executrix of a mortgagor, or of his grantee, having no interest in the premises, is not entitled to redeem, and cannot revive a suit for that purpose commenced by his testator in his lifetime. (M)

After a decree to account, either party may revive. (N)

(A) Jenkins v. Freyer, 4 Paige, 47.  (M) Douglass v. Sherman, 2 Paige, 358.
(K) Owing's case, 1 Bland, 409.  (n) Hoffman v. Tredwell, 6 Paige, 548.
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END OF VOLUME FIRST.