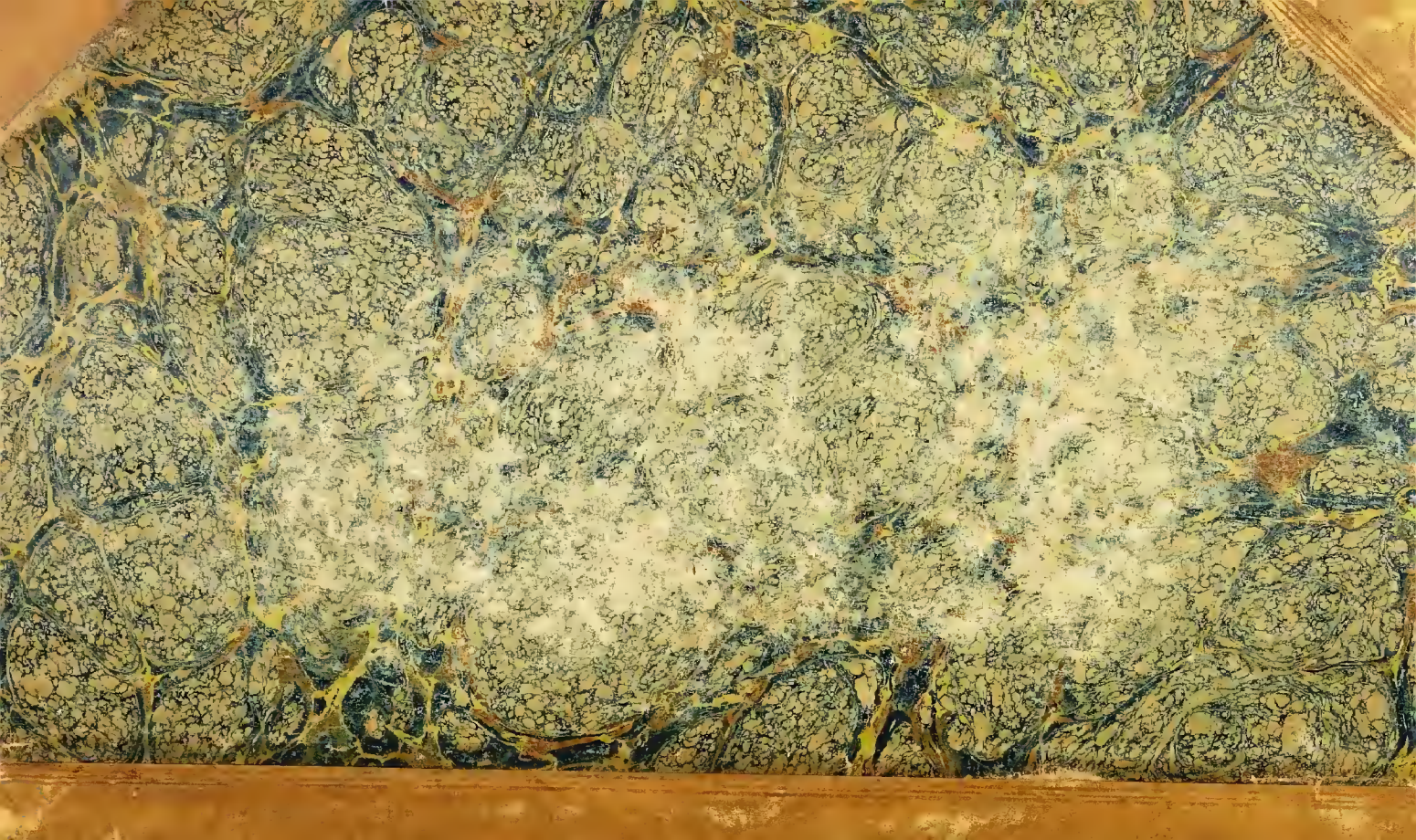

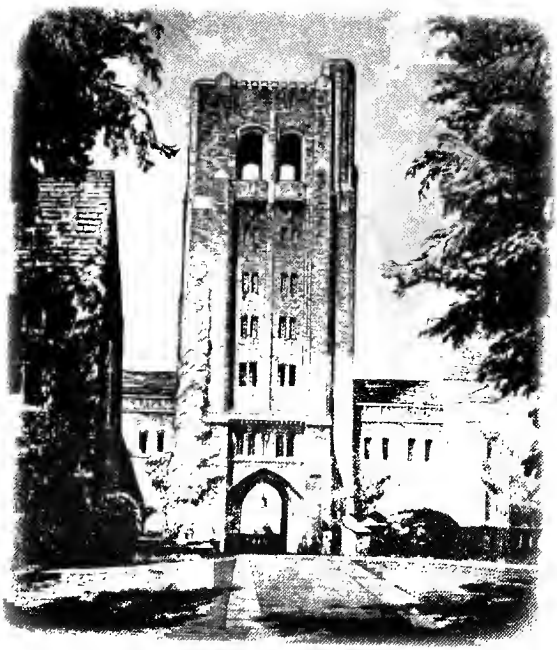

THE

PRACTICE

OF

THE COURT OF CHANCERY

FOR ONTARIO.

WITH

SOME OBSERVATIONS ON THE PLEADINGS IN THAT COURT.

COMPILED BY

WILLIAM LEGGO,

OF OSGOODE HALL, BARRISTER-AT-LAW, LATE MASTER AT HAMILTON.

IN TWO VOLUMES.

VOL. I.

HAMILTON AND TORONTO:
PUBLISHED FOR THE SUBSCRIBERS.
1876.

TO

The Honorable John Godfrey Spragge,

CHANCELLOR

OF

ONTARIO,

The following Work

IS

BY PERMISSION

MOST RESPECTFULLY DEDICATED

BY

The Author.

NOTICE.

As a very considerable portion of this work was in print some years ago, it has been found impossible to refer to a number of Orders, or to many cases decided in our Court.

It will be found to come down no further than 18 Grant, and 3 Cham. Rep., and refers to no Orders subsequent to No. 597.

The practice in the Master's office, and the chapter on Alimony, had so increased the size of the work that it was found necessary to omit several chapters which had been prepared,—among these may be mentioned a very full one on "Solicitors." This, however, will not materially affect the value of the work, as the rules in Equity as to Solicitors are almost identical with those in Common Law, which will be found fully dealt with in Archbold. The other subjects omitted were very special ones, which rarely come under the notice of the general practitioner.

Hamilton, May, 1876.

EXPLANATION

OF

ABBREVIATIONS USED IN REFERENCES TO ENGLISH, SCOTCH, IRISH & CANADIAN LAW BOOKS, &c.

A. (a.) B. (b.).....A. front, B. back of a leaf
A. An. Anon.....Anonymous
A. B.....Anonymous, at the end of Bendloe, Rep. 1661
Ab. Sh.....Abbot's Shipping
Abr. Ca. Eq.....Abridgment of Cases in Equity
A. C.....Appeal Court, Chancery
Acc. or Ag. or Agr. .....Accord or agrees
Act. .....Acton's Reports, Prize Causes
Act. Reg.....Acta Regia
Ad. Con. .....Addison's Contracts
Ad. Torts.....Addison on Torts
Ad. & E. .....Adolphus and Ellis's Reports, K.B.
Add. E. R.....Addams's Ecclesiastical Reports
Ad. E. .....Adams on Ejectment
Adm .....Admiralty
Al. .....Aleyn's Reports, K. B.
Al. & Nap.....Alcock and Napier, K. B., Ireland
Alc. Reg. C.....Alcock's Registry Cases, Ireland
Alison, Prac. .....Alison's Practice of the Criminal Law of Scotland.
Alison, Princ. .....Alison's Principles of ditto
Amb.....Ambler's Reports, Chancery
And.....Anderson's Reports, C. P.
Andr.....Andrew's Reports, K. B.
Annaly.....Reports, time Hardwicke, K. B.
Anst .....Anstruther's Reports, Exch
A. P. B. Ashurst, MSS. L.I.L....Ashurst, J., Paper Book (*a*)
Arch. B. L.....Archbold's Bankrupt Law
Arch. Cr. L. .....Archbold's Criminal Law
Arch. J. P.....Archbold's Justice of the Peace
Arch. P. by Ch.....Archbold's Practice, by Chitty
Arch. Sum.....Archbold's Summary of the Laws of England
Arkley.....Arkley's Justiciary Reports, Scotland
Arms. M. & O.....Armstrong, Macartney, & Ogle's Reports, N.P., Ire'd
A. S. or Act. of Sed. .....Act of Sederunt, Court of Session
Ass.....Assise (Book of)
Ast. Ent. .....Aston's Entries
Atk. .....Atkyn's Reports, Chancery

(*a*) These MSS. consist of the paper books of *Ashurst*, J., *Buller*, J., *Lawrence*, J., and *Dampier*, J., in an uninterrupted series from T. T. 9 Geo. III., to M. T. 56 Geo. III. They are in Lincoln's Inn Library, and are referred to in Selwyn's Nisi Prius as P. B. *Dampier*, MSS. L. I. L., preceded by the initial of the Judge.

Auth.	Authentica (*b*)
Ayl. Pan.	Ayliffe's Pandects
Ayl. Par.	Ayliffe's Parergon Juris
Bac. Abr.	Bacon's Abridgment
B. & A. or Barn. & Ald.	Barnewell and Alderson's Reports, K. B.
B. & Ad. or Barn. & Adol.	Barnewell and Adolphus's Reports, K. B.
B. & C. or Barn. & Cress.	Barnewall and Cresswell's Reports, K. B.
B. C. C.	Bail Court Cases, Lowndes and Maxwell
B. C. R.	Bail Court Reports, Saunders and Cole
B. & J.	Bankruptcy and Insolvency Cases, 1855
B. M.	Moore's Reports, Common Pleas
Balf.	Balfour's Practicks of the Law of Scotland
Ball & B.	Ball and Beatty's Reports, Chancery, Ireland
Banc. Sup.	Upper Bench
Bank I.	Bankton's Institutes of the Law of Scotland
Bar. & Arn.	Barron and Arnold's Election Cases
Bar. & Aust.	Barron and Austin's Election Cases
Barn. K. B.	Barnardiston's Reports, K. B.
Barn. C.	Barnardiston's Reports, Chancery
Barnes	Barnes's Notes, C. P.
Batt.	Batty's Reports, K. B., Ireland
Bayl. B.	Bayley on Bills
Beat.	Beatty's Chancery Reports, Ireland
Beav.	Beaven's Reports, Rolls Court
Beaw.	Beawes's Lez Mercatoria
Bel.	Bellewe's Reports, K. B.
Bel. App.	Bell's Cases on Appeal from Scotland
Bell Comm.	Bell (G. J.), Commentaries on the Law of Scotland
Bell Illust.	Bell (G. J.), Illustrations of Principles
Bell. Prin.	Bell (G. J.), Principles of the Law of Scotland
Bell C. (folio and 8vo.)	Bell (R.), Cases, Court of Session
Bell's C. C.	Bell's Crown Cases
Bell C. T.	Bell (R.), on Completing Titles, Scotland
Bell's Dict.	Bell, (R.), Dictionary of the Law of Scotland
Bell L.	Bell (R.), on Leases, Scotland
Bell Styles.	Bell (R.), System of the Forms of Deeds of Scotland
Bell T. D.	Bell, (R.), on the Testing of Deeds, Scotland
Benl. Bendl.	Benloe or Bendloe's Reports, K. B.
Benl. & Dal.	Benloe and Dalisen's Reports, C. P.
Bing.	Bingham's Reports, C. P.
Bing. N. C.	Bingham's New Cases, C. P.
B. Tr.	Bishop's Trial
Bl.	Blount
Bl. D. & Osb.	Blackham, Dundas & Osborne's Reports, N.P., Ire'd
Bl. R.	Mr. Justice Blackstone's Reports
Black., W.	Sir W. Blackstone's Reports, K. B.
Black., H.	Henry Blackstone's Reports, C.P.
Bla. Com.	Blackstone's Commentaries
Bli.	Bligh's Reports, House of Lords
Bli. N. S.	Bligh's Reports, New Series
B. N. C.	Brook's New Cases, K. B.
B. N. P.	Buller's Nisi Prius
B. P. B.	Paper Book of Buller (*c*)
B. & P. or Bos. & Pul.	Bosanquet and Puller's Reports, C.P.
Bo. R. Act.	Booth's Real Actions
B. R. H.	Cases *temp.* Hardwicke, K. B.

(*b*) This is a Summary of some of the Emperor's Novel Constitutions, which are inserted in the code under this title. It must not be confounded with the *Novellæ Constitutiones* promulgated by Justinian in the Greek language, and subsequently translated into the Latin, under the name of the *Authentica*. Example of citation, *Auth.* 9, 9, 20,—*Authentica*, Collation 9, title 9, novel 20.

(*c*) See *ante*, note (*a*) p. i.

Bos. & P. N. R. ..... Bosanquet and Puller's New Reports, C. P.
Bott ..... Bott's Poor Laws
Br ..... Alexander Bruce's Reports, Court of Session
Br. Bro ..... Brooke, Browne, Brownlow
Br. Brev. Jud. & Ent. ..... Brownlow Brevia Judicialia, &c.
Br. N. C. ..... Brooke's New Cases, K. B.
Brac. ..... Bracton de Legibus
Bridg ..... Bridgman's Reports, C. P.
Bridg. O. ..... Orlando Bridgman's Reports, C. P.
Bright. H. & W ..... Bright's Husband and Wife
Bro. Ab. ..... Brooke's Abridgment
Bro. Ent. ..... Brown's Entries
Bro. Stair ..... Brodie's Notes & Suppl. to Stair's Institutions, Sctl'd.
Bro. S. ..... Brown's Treatise on Law of Sale, Scotland
Bro. C. C. ..... Brown's Chancery Reports (Eden or Belt)
Bro. P. C. ..... Brown's Parliament Cases
Bro. Supp. ..... Brown's Suppl. Morrison's Dict. Court of Session
Bro. Syn. ..... Brown's Synopsis of Decisions, Court of Session
Bro. V. M. ..... Brown's Vade Mecum
B. & B. or Brod. & B. ..... Broderip and Bingham's Reports, C. P.
Broun ..... Broun's Justiciary Reports, Scotland
Brownl. Redv. or Ent. ..... Brownlow's Redivivus
Brownl ..... Brownlow and Gouldesborough's Reports, C. P.
B. or C. B. ..... Common Bench
B. R ..... King's Bench
B. & S. ..... Best & Smith's Reports, Q. B.
Buck ..... Buck's Reports in Bankruptcy
Bull. N. P. ..... Buller's Nisi Prius
Bulst ..... Bulstrode's Reports, K. B.
Bunb ..... Bunbury's Reports, Ex.
B. Just ..... Burn's Justice
B. Eccl. L. ..... Burn's Ecclesiastical Law
Burr. ..... Burrow's Reports, K. B.
Burr. S. C. ..... Burrow's Settlement Cases
Bynk ..... Bynkershoek
Byth. Pr. ..... Bythewood's Precedents

C. ..... Codex (Juris Civilis)
C. B ..... Common Bench Reports, or Manning, Granger, and Scott's Reports
C. B., N. S. ..... Common Bench Reports, New Series
C. C ..... Cases in Chancery or Crown Cases
C. C. A. ..... County Court Appeals
C. C. R. ..... Crown Cases Reserved
C. L. R. ..... Common Law Reports
C. & J. or Cromp. & J. ..... Crompton & Jervis's Reports, Ex.
C. & M. or Cromp. & M. ..... Crompton & Meeson's Reports, Ex.
C. M. & R. or Cromp. M. & R. ..... Crompton, Meeson, & Roscoe's Reports, Ex.
C. S. ..... Court of Session, Scotland
C. T. N. ..... Cases in the time of L. C. Northington
Ca. temp. F. ..... Cases *temp.* Finch
Ca. temp. Holt. ..... Cases in the time of Holt, C. J., K. B.
Ca. temp. H. ..... Cases time Hardwicke, K. B.
Cald. ..... Caldecott's Reports, K. B.
Ca. ..... Case, or Placita
Ca. t. K. ..... Cases time King, Chancery
Cai. ..... Caii, or Gaii Institutiones
Cal. ..... Callis
Calth. ..... Calthorpe's Reports, K. B.
Cam. Scacc ..... Camera Scaccarii, Exchequer Chamber
Camp. N. P. ..... Campbell's Reports, Nisi Prius

C. & K. or Car. & Kir .....Carrington and Kirwin Reports, N. P.
C. L. J., N. S.....Canada Law Journal, New Series
Car. & M.....Carrington and Marshman
Car. H. & A. .....Carrow, Hamerton, and Allen, Session Cases
C. & P. or Car. & P.....Carrington & Payne Reports, N. P.
Carp. P. C.....Carpmael's Patent Cases
Cart.....Carter's Reports, C. P.
Cary .....Carey's Reports, Chancery
Carth. .....Carthew's Reports, K. B.
Cas. t. Talb.....Cases time Talbot, Chancery
Cas. Pra. C. P.....Cases of Practice Common Pleas
Cas. B. R. .....Cases *temp.* Will. 3 (12 Mod.)
Cas. L. Eq.....Cases in Law and Equity (10 Mod.)
Cas. Six. Cir. .....Cases on the Six Circuits, Ireland
C. P .....Common Pleas
C. L. P. Act.....Common Law Procedure Act
C. Theod .....Codex Theodosiani
Ca. P. or Parl.....Cases in Parliament
Ca. C. L.....Cases in Crown Law
Ca. Pra. K. B.....Cases of Practice in King's Bench
Cawl.....Cawley
Ch. Cas.....Cases in Chancery
Ch. Cas. Ch.....Choice Cases in Chancery
Ch. Pre. .....Precedents in Chancery
Ch. R. .....Reports in Chancery
Cham. R.....Chamber Reports, Ontario
Chris. B. L .....Christian's Bankrupt Law
Ch. Burns' J.....Chitty's Burns' Justice
Ch. Pl.....Chitty on Pleading
Ch. Crim. L.....Chitty's Criminal Law
Ch. Bills.....Chitty on Bills
Chit. Con .....Chitty on Contracts
Chit. Rep.....Chitty's Reports, Bail Court
Chit. G. P.....Chitty's General Practice
Chit. Jun. B. .....Chitty, Jun., on Bills
Cl. & Fin.....Clark and Finnelly Reports, House of Lords
Cl. Ass.....Clerk's Assistant
Clay.....Clayton's Reports, York Assize
Clift.....Clift's Entries
Co .....Coke's Reports
C., Cod., or Cod. Jur. Civ.....Codex (Juris Civilis,) Justinian Codex
Co. Cop.....Coke's Copyholder
Co. Ent.....Coke's Entries
Co. Lit .....Coke on Littleton (1 Inst.)
Co. M. C .....Coke's Magna Charta (2 Inst.)
Co. P. C.....Coke's Pleas of the Crown (3 Inst.)
Co. on Courts .....Coke's 4 Inst.
Code Nap.....Code Napoleon
Code Civ., or C. C.....Code Civil Francais, or Code Napoleon
Code Comm.....Code de Commerce
Code P .....Code Penal
Code P. C.....Code de Procedure Civile
Col. C. C.....Collyer's Chancery Cases
Colles.....Colles's Cases in Parliament
Coll. Jurid.....Collectanea Juridica
Coll. Part.....Collyer on Partnership
Comb. .....Comberbach's Reports, K. B.
Com .....Comyn's Reports, K. B. and C. P.
Com .....Plowden's Commentaries
Com. Dig.....Comyn's Digest
Com. Law Rep. .....Common Law Reports

Con. & Law.....Connor and Lawson's Reports, Chancery, Ireland
Consist.....Consistory Reports, Haggard
Cont.....Contra
Cooper.....Cooper's Reports, Chancery
Co. Rep.....Coke's Reports, K. B.
Cooke B. L.....Cooke's Bankrupt Laws
Coop. t. Brough.....Cooper's Cases *temp.* Brougham
Coop.....Cooper (G.,) Chancery
Coo. & Al.....Cooke and Alcock's Reports, K. B., Ireland
Corb. & D.....Corbett and Daniell, Election Cases
Cot.....Cotton
Cowp.....Cowper's Reports, K. B.
Cox.....Cox's Reports, Chancery
Cox C. C.....Cox's Criminal Cases
Cr.....Craig, Jus Feudale, Scotland
Cr. & Ph.....Craig and Phillips, Chancery
Cr. & St.....Craigie and Stewart's Reports, House of Lords
Craw. & D.....Crawford and Dix's Circuit Cases, Ireland
Craw. & D. Ab. C.....Crawford and Dix's Abridged Cases, Ireland
Cro. (1, 2, 3).....Croke (Eliz. Jam. Cha.), K. B. and C. P.
Cro. *sometimes refers to* Keilwey's Reports, *published by Serj.* Croke.
Cromp.....Crompton on Courts
Cru.....Cruise's Digest
Cunn.....Cunningham's Reports, K. B.
Curt.....Curteis's Ecclesiastical Reports

D.....Dictum, Digest (Juris Civilis)
D. or Dig.....Justiniani Digestæ, sive Pandectæ (*d*)
D. or Dict.....Dictionary (Morison's) Court of Session
D. & L. or Dow. & L.....Dowling and Lowndes, Bail Court Reports
D. & R. or Dow. & Ry.....Dowling and Ryland's K. B. Reports
D. & M.....Davison and Merivale Q. B. Reports
D. N. S.....Dowling, New Series, Bail Court Reports
D. P. B.....Dampier, J., Paper Book (*e*)
Dal.....Dalison's Reports, C. P.
Dallas.....Dallas Styles, Scotland
Dalr.....Dalrymple's Decisions, Court of Session
Dalr. F. L.....Dalrymple's Feudal Law
Dalt.....Dalton's Justice or Sheriff
D'An.....D'Anvers's Abridgment
Dan.....Daniel's Reports, Ex. Eq.
Dan & Ll.....Danson and Lloyd, Mercantile Cases
Dav.....Davy's Reports, Ireland
Deac.....Deacon's Bankruptcy Cases
D. & C. or Deac. & Ch.....Deacon and Chitty, Bankruptcy Reports

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(*d*) The Digest or Pandects are divided into 50 Books; each Book is divided into Titles, and each Title into Laws, and the Laws generally into Parts or Paragraphs. The first paragraph is not numbered, and is usually quoted by the abbreviation *in pr.* (*in principio*). The last paragraph is sometimes quoted by the word *in fine*, or § *ult.*, (*paragraphus ultimus*). The Digest is variously quoted by the Letters D. or P., or II., or ff. ff, is supposed to be a corruption of the D. with a stroke through the middle, or perhaps of the Greek ∏.

The ancient mode of quotation was by mentioning the initial words of the Law and of the paragraph, with the initial words of the title. This made a reference to the General Index necessary, *e.g.*, *L. Profectitia*, § *si Pater*, *D. de jure dotium*, or in reversed order, *D. de jure dotium L. Profectitia*, § *si Pater*. Afterwards the quotation was *L. Profectitia* 5, § *si Pater* 6, *D. de jure dotium*; and latterly, *L.* 5, § 6, *D. de jure dotium*; or, more correctly, using the letters fr. instead of L., since the passages were not laws, but fragments or excerpts from the writings of the Jurisprudents, *fr.* 5, § 6, *D. de jure dotium*. The modern mode avoids all reference to the words. It is thus:—fr. 5, § 6, D. 23, 3; or in reversed order, D. 23, tit. 3, fr. 5, § 6; or shortly, D. 23, 3, 5, 6, *i.e.*, Digest, Book 23, tit. 3, law 5, paragraph 6.

(*e*) See *ante*, note (*a.*) p. i.

De G.....De Gex's Bankruptcy Reports
De G. F. & J .....De Gex, Fisher, and Jones's Reports, Chancery
De G. & J.....De Gex and Jones's Reports, Chancery
De G. J. & S.....De Gex, Jones, and Smith's Reports, Chancery
De G. M. & G.....De Gex, Macnaghten, and Gordon's Rep. Chancery
De G. & Sm.....De Gex and Smale's Reports, Chancery
Dea. & Sw.....Deane and Swabey's Reports, Probate and Divorce
Dears. C. C.....Dearsley's Crown Cases
Dears. & B. C. C .....Dearsley and Bell's Crown Cases
Deas. & And .....Deas and Anderson's Reports, Court of Session
Degge .....Degge's Parson's Companion
Den. Cr. C .....Denison's Crown Cases
Di. Dy .....Dyer's Reports, K. B.
Dick .....Dickins's Reports, Chancery
Dick. Just.....Dickinson's Justice
Dig .....Digest of Writs
Dig. LL.....Digest Law of Libels
Dirl .....Dirleton's Decisions, Court of Session
Doct. Pl..... .. ..Doctrina Placitandi
D. & S... .....Doctor and Student
Dod .....Dodson's Reports in Admiralty
Dom. Proc.....Domo Procerum ; House of Lords
Doug.....Douglas's Reports, K. B.
Dow .....Dow's Reports in Parliament
Dow & C.....Dow and Clark, House of Lords Cases
Dow. & R. M. C .....Dowling and Ryland's Magistrates' Case
Dow. & Ry. N. P .....Dowling and Ryland's Nisi Prius
Dowl. P. C .....Dowling's Practice Cases
Dr. & Wal .....Drury and Walsh, Chancery Reports, Ireland
Dr. & War.....Drury and Warren, Chancery Reports, Ireland
Draper .....Draper's Reports
Drew.....Drewry's Reports, Chancery
Drew. & Sm.....Drewry and Smale's Reports, Chancery
Drury .....Drury's Reports, Chancery, Ireland
Dub.....Dubitatur
Duff .....Duff on Conveyancing, Scotland
Dudg. Orig.....Dugdale's Origines
Dug. S .....Dugdale's Summons
Duke.....Duke's Charitable Uses
Dunlop or D .....Dunlop, Bell, and Murray's Reports, Court of Session
Durnf. & E.....Durnford and East, or Term Reports, K. B.
Durie .....Durie's Reports, Court of Session

E .....Easter Term
E. & A. Reps .....Error and Appeal Reports, Ontario
E. & A. or Ecc. & Ad.....Eccles, and Admiralty Reports
E. of Cov .....Earl of Coventry's Case
Eag. & Yo.....Eagle and Younge's Tithe Cases
East .....East's Reports, K. B.
East P. C.....East's Pleas of the Crown
Eden .....Eden's Rep. of Northington's Cases, Chancery
Edg .....Edgar's Reports, Court of Session
Edicta .....Edicts of Justinian
Edw. A. R .....Edward's Admiralty Reports
El. B. & S.....Ellis, Best, and Smith's Reports, Q. B.
El. & Bl .....Ellis and Blackburn, Reports, Q. B.
El. B. & E.....Ellis, Blackburn, and Ellis's Reports, Q. B.
El. & El .....Ellis and Ellis's Reports, Q. B.
Eq. Ca. Abr.....Equity Cases Abridged
Eq. Rep .....Equity Reports
Esp .....Espinasse's Rep. or Digest N. P.

Exch. Rep	Welsby, Hurlstone, and Gordon's Reports
Exp	Expired
F	Consuetudines Feudorum
F. or Fitz. (*f*)	Fitzherbert
F. B. C	Fonblanque's Bankruptcy Cases
F. & F	Foster and Finlayson's Reports, Nisi Prius
F. N. B	Fitz-Nat. Brevium
Fac. Coll. or F. C	Faculty Collection of Reports, Court of Session
Falc	Falconer's Reports, Court of Session
Falc. & Fitz	Falconer and Fitzherbert, Election Cases
Far	Farresley (7 Mod. Rep.)
Fearne	Fearne on Remainders
Ferg	Ferguson's Consistory Reports, Scotland
Ff. (*g*)	Pandectæ (Juris Civilis)
Fin	Finch's Reports, Chancery
Fitz-G	Fitz-Gibbon's Reports, K. B.
Fl	Fleta
Flan. & K	Flanagan and Kelly's Reports, Rolls, Ireland
Fol	Foley's Poor Laws
Fol. Dict	Kames and Woodhouselee, Dictionary, Court of Ses
Fonbl	Fonblanque on Equity
For	Forrest's Reports, Ex.
For. Pla	Brown's Formulæ
Forb	Forbes's Decisions, Court of Session
Forester	Cases time of Talbot, Chancery
Fort. de Laud	Fortescue de laudibus Angliæ Legum
Fortes	Fortescue's Reports, K. B.
Fost. Forst	Foster's Reports, Crown Law
Fount	Fountainhall's Decisions, Court of Session
Fox & S	Fox and Smith's Reports, K. B., Ireland
fr	Fragment or Excerpt, or Laws, in titles of Pandects.
Fra. M	Francis's Maxims
Fraser	Fraser on Personal and Domestic Relations, Scotland
Free. Chy	Freeman's Chancery Reports
Freem. K. B	Freeman's Reports, K. B.
G. & J	Glyn and Jameson, Bankruptcy Reports
Gaii	Gaii Institutionum Commentarii IV.
Gal. & Dav	Gale and Davison's Reports, K. B.
Gaz. B	Gazette of Bankruptcy
Gib. Cod	Gibson's Codex
Gif	Giffard's Reports, Chancery
Gilb. C. P	Gilbert's Common Pleas
—— Debt	——— Treatise on Debt
—— Dist	——— Distresses
—— Ex	——— Executions
—— Ev	——— Evidence
—— Exch	——— Exchequer
—— K. B	——— King's Bench
—— R	——— Reports
—— Rem	——— Remainders
—— Us	——— Uses
Gilb	——— Cases in Law and in Equity
Gilm	Gilmour's Reports, Court of Session

(*f*) Fitzherbert's Abridgment is commonly referred to by the older law writers by the title and number of the placita only, *e.g.*, coron. 30.

(*g*) This reference, which frequently occurs in Blackstone and other writers, applied to the *Pandects or Digests* of the civil law, is a corruption of the Greek letter π. *Vide* Calvini Lexicon Jurid. *voc.* Digestorum.

Gl .....Glossa, a Gloss or Interpretation
Glanv .....Glanville de Legibus
Glassc .....Glasscock's Reports in all the Courts, Ireland
Godb.....Godbolt's Reports, K. B.
Godol .....Godolphin
Golds .....Goldesborough's Reports, K. B.
Gosf.....Gosford's Reports, Court of Session
Gow's N. P. C.....Gow's Nisi Prius Cases
Grant. Rep.....Grant's Chancery Reports, Ontario
Gro. de J. B.....Grotius de Jure Belli
Gundry.....Gundry MSS. (*h*)
Gwm.....Gwillim's Tithe Cases
H. or Hil.....Hilary Term
H. & C.....Hurlstone and Coltman's Reports, Ex.
H. & N.....Hurlstone and Norman's Reports, Ex.
H. H. P. C.....Hale's Hist. Plac. Cor.
H. L. Rep., or Cas.....Clark and Finnelly's H. of Lords' Reps., New Series
H. P. C.....Hales's Pleas of the Crown
H. & W.....Harrison and Wollaston, K. B.
Ha. & Tw.....Hall and Twells, Chancery Reports
Had .....Earl of Haddington's Reports, Court of Session
Hag. Ec.....Haggard's Ecclesiastical Reports
Hag. Con.....————Consistory Reports
Hag. Adm.....————Admiralty Reports
Hailes.....Hailes's Decisions, Court of Session
Hale C. L.....Hale's Common Law
Hans .....Hansard's Entries
Hanm .....Hanmer's Lord Kenyon's Notes, K. B.
Harc .....Harcarse's Decisions, Court of Session
Hard.....Hardre's Reports, Ex.
Hare .....Hare's Reports, Chancery
Harr. Dig.....Harrison's Digest, all the Courts
Har. & R.....Harrison and Rutherfurd, C. P.
Hawk. P. C.....Hawkins's Pleas of the Crown
Hayes.....Hayes's Reports, Exch. Ireland
Hayes & J.....Hayes and Jones's Reports, Exch., Ireland
Hein .....Heineccius
Hem. & M.....Hemming and Miller, Chancery
Her.....Herne
Het .....Hetley's Reports, C. P.
Hob .....Hobart's Reports, K. B.
Hog. .....Hogan's Reports, Rolls, Ireland
Holt.....Holt's Reports, K. B.
Holt N. P .....Holt's Nisi Prius Reports
Home (Clk).....Clerk Home's Reports, Court of Session

Hop. & Ph.....Hopwood and Philbrick, Regis. C.
Hope .....Thomas Hope's Reports, Court of Session
Hope Min. Pr.....Sir Thomas Hope's Minor Practicks, Scotland
Hope Maj. Pr.....Sir Thomas Hope's Major Practick's, Scotland
Hov. Suppl.....Hovenden's Supplement to Vesey, Junr.
Hud. & B.....Hudson and Brooke's Reports, K. B., Ireland
Hugh .....Hughes's Entries
Hume Com.....Hume's Commentaries on Crimes, Scotland
Hume.....Hume's Decisions, Court of Session
Hunter .....Hunter's Law of Landlord and Tenant, Scotland
Hut. .....Hutton's Reports, C. P.

(*h*) These MSS. were purchased of Nathaniel Gundry, Esq., the only son of Mr. Justice Gundry, by whom the notes were taken, and will be found in Lincoln's Inn Library.

Imp. K. B.	Impey's Practice, K. B.
——C. P.	——Practice, C. P.
——Sh	——Sheriff
——Pl	——Pleader
In F.	*In fine.* At the end of a title, law, or paragraph.
In F. Pr.	*In fine principii*
In Pr.	*In principio.* In the beginning, and before the first paragraph of a law
Ins	Insurance.
1, 2, Inst.	(1, 2) Coke's Inst.
Inst., 1, 2, 3.	Justinian's Inst. lib. 1. tit. 2, sec. 3.
Inst. 1, 2, 31.	Justinian's Institutes, Lib. I., tit. 2, sec. 31 (*i*)
Ir. Law & Eq.	Irish Law and Equity Reports, Ireland.
Ir. Law & Ch.	Irish Law and Equity Reports, Ireland, New Series.
Iv. Ersk.	Ivory's Notes on Erskine's Institutes.
J. Ctus.	Jurisconsultus
J. & W. or Jac. & W.	Jacob and Walker's Reports, Chancery
Jac. or Jacob.	Jacob's Reports, Chancery
Jan. Angl.	Jani Anglorum
Jebb C. C.	Jebb's Crown Cases, Ireland
Jebb & B.	Jebb and Bourke's Reports, K. B., Ireland
Jebb & S.	Jebb and Syme's Reports, K. B., Ireland.
Jenk.	Jenkins's Reports, Ex.
John	Johnson's Reports, Chancery
John & H.	Johnson and Hemming's Reports, Chancery
Jon. 1, 2.	Jones', W. and T., Reports, K. B.
Jones T.	Jones' Reports, K. B.
Jones W.	Jones' Reports, K. B.
Jones	Jones' Reports, Exch., Ireland
Jones & C.	Jones and Carey's Reports, Exch., Ireland
Jo. & Lat.	Jones and Latouche's Reports, Chancery, Ireland
Jud.	Judgments
Jur.	The Jurist Reports in all the Courts
Jur. N. S.	Jurist, New Series
Jur. (Sc.)	Scottish Jurist, Court of Session
Jur. St.	Juridical Styles, Scotland
Just. Inst.	Justinian's Institutes
K. B.	King's Bench
K. C. R.	Rep. *temp.* King, C. Chancery
K. & G. R. C.	Keane and Grant's Registration Cases
Kames.	Kames's Decisions, Court of Session
Kames's Eluc.	Kames's Elucidations of the Law of Scotland
Kames's Rem. D.	Kames's Remarkable Decisions, Court of Session
Kames's S. D.	Kemes's Select Decisions, Court of Session
Kames's Tr.	Kames's Historical Law Tracts, Scotland
Kay	Kay's Reports, Chancery
Kay & J.	Kay and Johnson's Reports, Chancery
Keb.	Keble's Reports, K.B.
Keen	Keen's Reports, Rolls Court
Kel.	Sir John Kelyng's Reports, K. B.
Kel. 1, 2.	Wm. Kelynge's Rep., 2 parts, Chancery
Keilw. Kel.	Keilwey's Reports, K. B.
Ken.	Kennet

(*i*) The Institutes of Justinian are divided into four Books,—each Book is divided into Titles, and each Title into Paragraphs, of which the first, described by the letters *pr.*, or *princip.*, is not numbered. The old method of citing the Institutes was to give the commencing words of the paragraph and of the title; *e.g.*, § *si adversus, Inst. de Nuptiis.* Sometimes the number of the paragraph was introduced, *e.g.*, § 12 *Si adversus Inst. de Nuptiis.* The modern way is to give the number of the book, title, and paragraph, *Inst. I.*, 10, 12; *i.e.*, *Inst. Lib. I.* tit. 10, § 12.

Kent. Comm.	Kent's Commentaries on the Law of United States
Keny.	Kenyon's Notes, by Hanmer, K. B.
Kilk.	Lord Kilkerran's Decisions, Court of Session
Kit.	Kitchen
Kn.	Knapp's Reports, Privy Council
Kn. & O.	Knapp and Ombler, Election Cases
L. & C.	Leigh and Cave, Crown Cases
L. & G. *temp.* Plunk.	Lloyd and Goold, *temp.* Plunket, Chy., Ireland
L. C. G.	Local Court's Gazette, Ontario
L. I. L.	Lincoln's-Inn Library
L. C. J.	Lower Canada Jurist
L. J.	Law Journal, Reports in all the Courts
L. C. R.	Lower Canada Reports
L. Mag.	The Law Magazine
L. M. & P.	Lowndes, Maxwell, and Pollock's Rep., Bail Court
L. & M.	ditto ditto ditto
L. P. B.	Paper Book of Lawrence, J. (*k*.)
L. Rev.	The Law Review
L. T.	The Law Times, Reports in all the Courts
L. & Welsb.	Lloyd and Welsby's Commercial Reports
La.	Lane's Reports, Exchequer
Lamb.	Lambard
Lat.	Latch's Reports, K. B.
Law Rec.	Law Recorder, Reports in all the Courts, Ireland
Leg. O.	The Legal Observer
Ld. Ken.	Kenyon's Reports, K. B.
Ld. Raym.	Lord Raymond's Reports, K. B.
Leach	Leach's Crown Law
Lee & H.	Lee's Cases *temp.* Hardwicke, K. B.
Leon.	Leonard's Reports, K. B.
Lev.	Levinz's Reports, K. B.
Lew. C. C.	Lewin's Crown Cases
Lex. Merc. Red.	Lex Mercatoria, by Beawes
Ley	Ley's Reports, K. B.
Lib. Ass.	Liber Assisarum, Year Book, pt. 5
Lib. Int.	Liber Intrationum
Lib. Reg.	Register Book
Lib. Feud.	Liber Feudorum; usually printed at the end of the Corpus Juris Civilis (*l*)
Lib. Intr.	Old Book of Entries
Lib. Pl.	Liber Placitandi
Lil.	Lilly's Reports or Entries
Lil. Abr.	Lilly's Practical Register
Lind., or Lynd.	Lindewood, Provinciales
Lit.	Littleton's Reports, C. P.
Lit. with S.	Littleton, S. for Section
Llo. & Goo.	Lloyd and Goold, *temp.* Sugden, Chy., Ireland
Locc.	Loccenius
Lofft.	Lofft's Reports, K. B.
Long Quinto.	Year Book, pt. 10, K. B.
Longf. & T.	Longfield and Townsend's Reports, Exch., Ireland
Lud. E. C.	Luder's Election Cases
Lush.	Lushington's Admiralty Reports
Lut.	Lutwyche's Reports, C. P.
Lut. R. C.	Lutwyche's Registration Cases
M., or Mich.	Michaelmas Term.
M. D. & D.	Montagu, Deacon & De Gex's Reports, Bankruptcy
M. & M'A.	Montagu and M'Arthur's Reports, Bankruptcy

(*k*) See *ante*, note (*a*). p. i.

(*l*) This Treatise upon Feudal Law is usually found at the end of the *Corpus Juris Civilis*; and is sometimes referred to as *Consuetudiens Feudorum*. It is divided into two books, and these again are divided into titles, and it is thus cited, 1 *Feud.* 23, *i.e.*, Book 1, tit. 23.

M. & P. ..... Moore and Payne, C. P.
M. & Ayr. R. ..... Montagu and Ayrton's Reports, Bankruptcy
M. and Ayr. B. L. ..... Montagu and Ayrton's Bankrupt Law
M. & S., or Mau. and Sel. ..... Maule and Selwyn's Reports, K.B.
M. & W., or Mee and W. ..... Meeson and Welsby's Reports, Ex.
M'Cle. ..... M'Cleland's Reports, Ex.
M'Cle. & Yo. ..... M'Cleland and Younge's Reports, Ex.
M'F. R. ..... McFarlane's Reports, Jury Court, Scotland
Mac. & G. ..... Macnaghten and Gordon's Reports, Chancery
Mac. & H. ..... Macrae and Hertslet
Mac. P. C. ..... Macrory's Patent Cases
Mack. ..... Sir G. Mackenzie's Institution of the Law of Scotland
Mack. R. L. ..... Mackenzie's Roman Law
Mack. Crim. ..... Sir G. Mackenzie's Criminal law
Mack. Obs. ..... Sir G. Mackenzie's Observations on Acts of Parliament
Macl. & R. ..... Maclean and Robinson's Scotch Appeals
Macph. ..... Court of Session Cases, Third Series
Macq. H. L. Cas. ..... Macqueen's Scotch Appeal Cases
Mad. ..... Madox's Exchequer and Formulare
Madd. ..... Maddock's Reports, Chancery
Madd. Ch. ..... Maddock's Chancery Practice
Mal. ..... Malyne's Lex Mercatoria
Man. & G. ..... Manning and Granger's Reports, C. P.
Man. & R. ..... Manning and Rylands Reports, K. B.
Manw. ..... Manwood's Forest Laws
Mar. ..... March's Reports, K. B.
Marsh. ..... Marshall's Reports, C. P.
Marsh. In. ..... Marshall on Insurance
Mau. & Pol. Sh. ..... Maude and Pollock's Law of Shipping
Mer., or Meriv. ..... Merivale's Reports, Chancery
Middx. Sit. ..... Sittings for Middlesex at Nisi Prius
Milw. ..... Milward's Reports, Irish Ecclesiastical
Mitf. ..... Mitford's Pleadings
Mod. Ca. ..... Modern Cases
Mod. c. 1, & eq. 1. 2. ..... Modern Cases in Law and Equity (8 and 9 Mod. Rep.)
Mod. Ent. ..... Modern Entries
Mod. Int. 1, 2. ..... Modus Intrandi, 1, 2
Mod. Rep. ..... Modern Reports, K. B.
Mol. de J. M. ..... Molloy's de Jure Maritimo
Mol. ..... Molloy's Chancery Reports, Ireland
Mo. ..... Moore's Reports, K. B.
Mont. B. C. ..... Montagu's Reports, Bankruptcy
Mont. & B. ..... Montagu and Bligh's Reports, Bankruptcy
Mont. & Chit. ..... Montagu and Chitty's Reports, Bankruptcy.
Moo. C. C. ..... Moody's Crown Cases
Moo. & M. ..... Moody and Malkin's Reports, N. P.
Moo. P. C. C. ..... Moore's Privy Council Cases
Moo. Ind. Ap. ..... Moore's India Appeals
Moo. & R. ..... Moody and Robinson's Reports, N. P.
Moo. J. B. ..... J. B. Moore's Reports, C. P.
Moo. & P. ..... Moore and Payne's Reports, C. P.
Moo. & S. ..... Moore and Scott's Reports, C. P.
Moore (C. P.) ..... Moore's Common Pleas Reports
More, St. ..... Moore's Notes on Stair's Institutions, Scotland
M. or Morr. Dict. ..... Morrison's Dictionary of Decisions, Court of Session
Mos. ..... Moseley's Reports, Chancery
Murr. ..... Murray's Reports, Jury Court, Scotland

Myl. & Cr	Mylne and Craig's Reports, Chancery
Myl. & K	Mylne and Keene's Reports, Chancery
N. Benl	New Benloe, K. B. Reports
N. C	Bingham's New Cases
N.C., or No. Ca. Ecc. & M. Cts	Notes of Cases in the Ecclesiastical and Maritime Courts
N. L	Nelson's Lutwyche, Reports, C. P.
N. Nov	Novella (Juris Civilis) (*m*)
N. R	New Reports, by Bosanquet and Puller, C. P.
N. R	Not Reported
N. S	New Series
Nels	Nelson's Reports, Chancery
Nev. & M	Neville and Manning's Reports, K. B.
Nev. & P	Neville and Perry's Reports, K. B.
New Rep	New Reports in all the Courts
Nic. Ha. C	Nicholl, Hare, and Carrow, Railway Cases
No. N	Novæ Narrationes
Nol. Sett	Nolan's Settlement Cases
North	Northington's Reports, by Eden, Chancery
Noy	Noy's Reports, K. B.
O. Benl	Old Benloe, C. P.
Off. Br	Officina Brevium
Off. Ex	Office of Executors
Ord. Cla	Orders, Lord Clarendon's
Ord. Ch	Orders in Chancery
Orl. Bridgman	Orlando Bridgman's Reports, C. P.
Ought	Oughton's Ordo Judiciorum
Ow	Owen's Reports, K. B.
P. C	Pleas of the Crown
P. C. Act	Probate Court Act
P. & D., or Per. & Dav	Perry and Davison's Reports, K. B.
P. Pas	Easter Term
P. R. C. P	Practical Register in Common Pleas
P. W	Peere William's Reports, Chancery
Pal	Palmer's Reports, K. B.
Par	Parker's Reports, Ex.
Park, Ins	Park on Insurance
Pat. App. Cas	Paton's Appeal Cases, House of Lords
Pea	Peake's Reports, N. P.
Peak. Ad. Cas	Peake's Additional Cases
Peak. N. P. C	Peake's Nisi Prius Cases
Perk	Perkin's Conveyances
Per. & K	Perry and Knapp, Election Cases
Ph	Phillip's Reports, Chancery
Ph. Ev	Phillip's Evidence
Phillim	Phillimore's Reports, Ecclesiastical
Pig	Pigot's Recoveries
Pig. & R	Piggott and Rodwell's Election Cases
Pl. Com	Plowden's Com. or Reports, K. B.
Pl. pla. P. p	Placita
Pol	Pollexfen's Reports, K. B.
Poph	Popham's Reports, K. B.
2 Poph	Cases at the end of Popham's Rep.

(*m*) The Novels, or New Constitutions, are explanatory of the Code. The greatest part of these Novels was composed in Greek, owing to the seat of empire being then in Constantinople. Some, however, were published in Latin, and have been noticed by Antonius Augustinus. There are four translations of the Novels. The Novels are quoted by their respective numbers, chapters, and paragraphs, *e.g.*, Nov. 89, c. 9, § 1.

After Justinian's death some part of his Novels, to the number of 168, were collected and reduced into one volume, together with 13 of the Greek Edicts, which make up the fourth and last divlsion of the *Corpus Juris Civilis.*

Postleth. Dict	Postlethwaite's Universal Dictionary of Trade and Commerce
Pow. R. & D	Power, Rodwell, & Dew's Election Cases
Pr. Ch	Precedents in Chancery (Finch)
Pr. Co	Prerogative Court
Pr. Falc	President Falconer's Reports, Court of Session
Pr. Reg. Ch	Practical Register in Chancery
Pres. Conv	Preston's Conveyancing
Pres. Abs	Preston on Abstracts
Pres. Es	Preston on Estates
Pres. Shep. T	Sheppard's Touchstone, by Preston
Price or Pr.	Price's Reports, Exchequer
Priv. Lond.	Privilegia Londini
Pr. St.	Private Statute
Q.	Quorum
Q. Attach.	Quoniam Attachiamenta
Q. B.	Adolphus & Ellis, Queen's Bench Reports, New Series
Q. War.	Quo Warranto
Quinti Quinto (*n*)	Year Book, 5 Hen. V.
R.	Resolved, Repealed
R. Ley	Ley's Reports
R. S. L.	Reading Statute Law
R. T. H.	Reports Time of Hardwicke, C. J. B. R.
R. T. H.	Reports time of Holt, C. J. B. R.
Rail. C	Railway Cases
Rast.	Rastell's Entries and Statutes
Ld. Raym.	Lord Raymond's Reports, K. B.
Ray. T	Sir Thos. Raymond's Reports, K.B.
Raym.	Raymond
Reev. E. L.	Reeve's English Law
Reg. Brev.	Register of Writs
Reg. Pl.	Regula Placitandi
Reg. Jud.	Registrum Judiciale
Reg. Maj.	Books of Regiam Majestatem, Scotland
Rep. (1, 2, &c.)	1, 2, Coke's Rep., &c.
Rep. Ch.	Reports in Chancery
Rep. Eq.	Gilbert's Rep. in Equity
Rep. Q. A.	Rep. *temp.* Q. Anne
Rep. *temp.* Finch	Finch's Reports, Chancery
Rich. C. P.	Richardson's Practice, Common Pleas
Ridgw. Ap.	Ridgway's Appeals, Ireland
Ridg. & H.	Ridgway, *temp*, Hardwick, Chancery
Ridg. L. & S.	Ridgway, Lapp, and Schoales' Reports, K.B., Ire'd.
Rob.	Robinson's Entries
Rob. A.	Robinson's Reps. Admiralty, or Robertson's Rep. of Appeals.
Rob. E.	Robertson's Ecclesiastical Reports
Robert. Ap.	Robertson's Appeal Cases, Scotland
Roll. and Roll. Abr.	Rolle, Rep. and Abridgment
Roll.	Roll of the Term
Rose	Rose's Reports, Bankruptcy
Ross.	Ross's Lectures on Conveyancing, &c., Scotland
Ross L. C.	Ross' Leading Cases
Rub.	Rubricks. In such a Rubrick or Title (*o*)
Run. Eject.	Runnington's Ejectment
Rush.	Rushworth's Collections
Russ.	Russell's Reports, Chancery

(*n*) V. 5 Hen. VII. 19, 24.

(*o*) The Titles of the Roman Law, being formerly written in red letters, were called Rubricks.

Russ. & M. ..... Russell and Mylne's Reports Chancery
Russ. & R. ..... Russell and Ryan's Crown Cases
Ry. F. ..... Rymer's Fœdera
Ry. & M. ..... Ryan and Moody, N. P. Reports

S., § ..... Section
S. B. ..... Upper Bench
S. C. ..... Same Case
S. C. C. ..... Select Chancery Cases
S. C. Rep. ..... Supreme Court (in reference to citations of American) Reps.
S. or S. & D. ..... Shaw & Dunlop, Court of Session, First Series.
S. P. ..... Same point or Principle
S. & S., or Sim. & St. ..... Simons and Stuart's Reports, Chancery.
S. & Sm. ..... Searle and Smith's Reports, Probate and Divorce
Salk ..... Salkeld's Reports, K.B.
Sau. & Sc. ..... Sause and Scully's Reports, Rolls, Ireland
Saund & C. ..... Saunders and Cole, Bail Court Reports
Saund. ..... Saunder's Reports, K. B.
Sav. ..... Savile's Reports, C. P.
Say. ..... Sayer's Reports, K. B.
Sc. Jur. ..... Scottish Jurist, Court of Session
Scac ..... Scaccaria Curia, Court of Exchequer
Sch. & Lef. ..... Schoale's and Lefroy's Reports, Chancery, Ireland
Sco. or Scott ..... Scott's Reports, C. P.
Sco. N. R. ..... Scott's New Reports, C. P.
Scriv. Cop. ..... Scriven on the Law of Copyholds
Selw. N. P. ..... Selwyn's Nisi Prius
Sect. ..... Section
Sel. Ca. ..... Select Cases, Chancery
Seld ..... Seldom
Sem ..... Semble, seems
Sess. Ca. ..... Sessions Cases, and Carrow, Hamerton, and Allen
Sett. & Rem. ..... Settlement and Remainder
Sh ..... Shaw's Reports, Court of Session Cases, First Series
Sh. App. ..... Shaw's Reports of Appeal Cases, House of Lords
Sh. Dig. ..... Shaw's Digest of Decisions, Scotland
Sh. & M'L. ..... Shaw & Maclean's Rep. of Ap. Cases, House of Lords
Shand Pr ..... Shand's Practice, Court of Session
Shep. Touch. ..... Shepherd's Touchstone
Show. ..... Shower's Reports, K.B.
Shower's P. C. ..... Shower's Parliament Cases
Sid. ..... Siderfin's Report's K. B.
Sim. or Sim. N. S ..... Simons, or Simons's New Series, Reports, Chancery
Skene ..... Sir John Skene's De Verborum Significatione
Skin. ..... Skinner's Reports, K. B.
Sm. & G. ..... Smale and Giffard's Reports, Chancery
Sm. Action ..... Smith's (John W.) Action at Law
Sm. Con. ..... ——Contracts
Sm. Landl. and Ten. ..... ——Landlord and Tenant
Sm. L. C. ..... ——Leading Cases
Sm. Merc. Law. ..... ——Compendium of Mercantile Law
Sm. Eq. Manual ..... Smith's (Jos. W.) Manual of Equity
Sm. Law of Prop. ..... ——Compendium of Law of Real & Personal Pro.
Sm. Mast. and Serv. ..... Smith's (Chas. Manley) Master and Servant
Smi. & Bat. ..... Smith and Batty's Reports, K. B., Ireland
Smith ..... Smith's Reports, K. B.
Smythe ..... Smythe's Reports, C. P., Ireland
Sol. J. ..... Solicitor's Journal
Som ..... Somner, Somers
Spel. ..... Spelman
Spottis. ..... Sir R. Spottiswoode's Reports, Court of Session

Spottiswoode.	Spottiswoode's Styles, Scotland
St.	Stair's Institutions of the Law of Scotland
Stair	Lord Stair's Reports, Court of Session
Stark. C. L.	Starkie's Criminal Law
Stark. Ev.	Starkie's Evidence
Stark. N. P.	Starkie's Reports, N. P.
Stat. W.	Stat. Westminster
Staunf. St. P. C. & Pr.	Staunforde Pleas and Prerogative
Steph. Com.	Stephen's Commentaries
Stew. Ans.	Sir J. Stewart's Ans. to Dirleton's Doubts, Scotland
Story L. U. S.	Story's Laws of the United States
Story B. Exch.	Story's Bills of Exchange
Story Bail.	Story on Bailments
Story Con.	Story's Conflict of Laws
Story Const	Story upon the Constitution
Story Eq. Jur.	Story's Equity Jurisprudence
Story Eq. Pl.	Story's Equity Pleading
Story Pl.	Story's Pleading
Story Pr.	Story's Promisory-Notes
Stra.	Strange's Reports, K. B.
Stuart.	Stuart, Milne, and Peddie's Court of Session Reports
Sty.	Style's Reports, K. B.
St. Tri	State Trials
Sug. V. & P.	Sugden's Vendors
Sug. P.	Sugden's Powers
Swa. Ad.	Swabey's Admiralty Reports
Sw. & Tr.	Swabey and Tristram's Reports, Probate & Divorce
Swans.	Swanton's Reports, Chancery
Swin	Swinburn on Wills
T. & M.	Temple and Mew's Criminal Appeal Cases
T. R.	Teste Rogo
T. R.	Term Reports, (Durnford and East,) K. B.
T. R. E., or T. E. R. (*p*)	*Tempore Regis Edwardi*
Taml.	Tamlyn's Reports, Rolls
Taun.	Taunton's Reports, C. P.
Taylor	Taylor's Reports, Ontario
Th.	Thomson on Bills and Notes, Scotland
Th. Dig.	Theloall's Digest
Th. Br.	Thesaurus Brevium
Tinw.	Lord Tinwald's Reports, Court of Session
Tidd P	Tidd's Practice
Toth	Tothill's Reports, Chancery
Tr. Eq	Treatise of Equity
Trem.	Tremain, Pleas of Crown
Trin.	Trinity Term
Tudor Ca. M. L.	Tudor's Leading Cases on Mercantile Law
Tudor Cas. Pr.	Tuder's Leading Cases on Real Property
Turn	Turner
Turn. & R.	Turner and Russell's Reports, Chancery
Tyrw.	Tyrwhitt's Reports, Exchequer
Tyrw. & G.	Tyrwhitt and Granger's Reports, Exchequer
U. C. C. P.	Common Pleas Reports, Ontario
U. K.	United Kingdom
Ulp.	Ulpiani Fragmenta
U. C. L. J.	Upper Canada Law Journal

(*p*) This abbreviation is frequently used in Domesday Book, and in the more ancient law writers See Tyrrel's Hist. Eng. Introd. v. iii. 49. See also Cowel's Dict., verb. *Reveland*, where notice is taken of a wrong inference of Lord Coke's, 1 Inst. 86, from a quotation of Domesday Book, where this abbreviation is interpreted, *Terra Regis Edwardi*.

U. C. P. R .....Practice Reports, Ontario
U. C. Q. B .....Queen's Bench Reports, Ontario
U. C. Q. B. O. S. .....Queen's Bench Reports, Ontario, Old Series

V. & B., or Ves. & Bea. .....Vesey and Beame's Reports, Chancery
Vatt .....Vattel's Law of Nations
Vaugh. .....Vaughan's Reports, C. P.
Vent .....Ventris's Reports, K. B.
Ves. .....Vesey's, Sen., Reports, Chancery
Ves. Jun. .....Vesey's, Jun., Reports, Chancery
Vet. Entr .....Old B. Entries
Vet. N. Br. .....Old Nat. Brev.
Vern .....Vernon's Reports, Chancery
Vern. & S. .....Vernon and Scriven's Reports, K. B., Ireland
Vid. .....Vidian's Entries
Vin. Abr. .....Viner's Abridgment
Vin. Supp. .....Viner's Supplement

W. 1, W. 2 .....Statutes Westminster, 1, 2.
W. R. .....Weekly Reporter in all the Courts
W. W. & H. .....Willmore, Woolaston, and Hodges
W. & S. App .....Wilson and Shaw's Reports, House of Lords
Wallis .....Wallis's Reports, Chancery, Ireland
Wats. .....Watson
Wat. Cop. .....Watkins's Copyholds
Web. P. C. .....Webster's Patent Cases
Welsh. .....Welsh Registry Cases, Ireland
Went. Off. Exor .....Wentworth's Office of Executor
Went. E. .....Wentworth's Executor
West, H. L. .....West's Reports, House of Lords
West & H. .....West's Reports, Chancery, *temp.* Hardwick
Wils. Ch. .....Wilson's Chancery Reports
Wils. Ex. .....Wilson's Exchequer Reports
Willes. .....Willes's Reports, K. B. and C. P.
Wilm. .....Wilmot's Notes and Opinions, K. B.
Win .....Winch's Reports, C. B.
Wight. .....Wightwicke's Reports, Exchequer
Wils .....Wilson's Reports, K. B.
Wm. Rob. .....William Robinson's New Admiralty Reports
Wms. .....Williams's Rep., or Peere Williams, Chancery
Wms. Ex. .....Williams's Law of Executors
Wms. Just. .....Williams's Justice
Wolf. & B. .....Wolferstan and Bristow's Election Cases
Wolf. & D. .....Wolferstan and Dew's Election Cases
H. Wood .....Hutton Wood's Decrees in Tithe Cases
Woodf. L. & T. .....Woodfall's Law of Landlord and Tenant

Y. B. (*q*) .....Year Book
Y. & C., or You. & Coll. .....Younge and Collyer's Eq. Exch.
Y. & C. C. C .....Younge and Collyer's Chancery Cases
Y. & J., or You. & Jer .....Younge and Jervis, Reports, Exchequer
Yelv .....Yelverton's Reports, K. B.
You. .....Younge, Reports, Exchequer

(*q*) The Year-books are usually referred to by the year of each king's reign, the initial letter of his name, and the page and number of the placita: to which is sometimes prefixed the initial letter of the term, *e.g.*, M. 4, H. 7, 18, 10.—Michaelmas Term, 4th Henry VII., page 18, placitum 10.

TABLE OF CASES.

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LIST OF

THE CONSOLIDATED GENERAL ORDERS,

OF JUNE, 1868,

And of those subsequently promulgated up to, and including No. 597, shewing the pages on which each order noticed is quoted.

It has not been thought necessary to notice in this work Orders 3, 4, 5, 26, 27, 28, 29, 30, 50, 51, 52, 362, 363, 364, 366, 370, 372, 492 to 516, 551, 553, 554, 555, 556, 557, 558.

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577.	738
578.	738, 739
579.	739
580.	739
581.	739
582.	739
583.	740
584.	741
585.	741
586.	742

No.	
587.	757, 884
588.	1772
589.	984
590.	725, 1608
591.	725, 1608
592.	725, 1609
593.	725, 1609
594.	1609
595.	*See* Order 37
596.	629
597.	523, n. (4), 1140, 1617

NOTE—The remaining Orders were promulgated too late for notice in the Practice.

THE PRACTICE
OF
THE COURT OF CHANCERY,
FOR UPPER CANADA.

CHAPTER I.

THE COMMENCEMENT OF A SUIT.

THE practice of the Court of Chancery, and of its various offices, is egulated by rules laid down in Acts of Parliament, in the General)rders of the Court, passed or promulgated from time to time, in the legulations of the Judges for the conduct of business in their chambers, nd of the Registrars of the Court respecting the transaction of busi- ess in their office; and by custom or usage, to be ascertained generally :om former decisions of the Court[1]; the decisions of the Court are also mportant in determining the construction to be put upon the Acts of 'arliament, General Orders, and Regulations.

A suit, on behalf of a subject, is ordinarily commenced by preferring petition, containing a statement of the plaintiff's case, and praying he relief which he considers himself entitled to receive. This petition s called a *Bill*.

If the suit is instituted on behalf of the Crown, or of those who artake of its prerogative, or whose rights are under its particular pro- ection, such as the objects of a public charity, the matter of complaint s offered to the Court, not by way of petition, but of information, by he proper officer, of the rights which the Crown claims on behalf of self or others, and of the invasion or detention of those rights for 'hich the suit is instituted.[2] This proceeding is then styled an *Infor- ation*. The rules of practice incidental to these two methods of

ensuing Treatise, what is said with respect to the one may be considered as applicable to both, unless where a distinction is specifically pointed out.

Where, however, the relief sought to be obtained is the administration of the estate of a deceased person, a summary and inexpensive practice has been established by our Orders, which will be fully noticed hereafter.

Again, under an Act of Parliament,[1] a very convenient form of application to the Court has been provided, for cases where the parties, agreeing upon the facts that form the foundation of their claims, are desirous of obtaining a judicial decision upon the construction of an instrument, or upon almost any point of law resulting from the admitted facts. In cases of this description, the parties are enabled, without going through any forms of pleadings, at once to submit the case that they have agreed upon for the decision of the Court.

The several forms of proceeding enumerated above relate to the original jurisdiction of the Court, and are different means by which the suitor may call into exercise some portion of that original jurisdiction in his behalf. There are a great number of Acts of Parliament—many of them of recent enactment—under which statutory powers are conferred upon the Court. Many of these Acts point out the particular mode by which relief thereunder is to be sought from the Court; and it may be stated, as a general rule, that a person seeking the aid of the statutory jurisdiction must commence by presenting a petition, which differs in some important particulars from the bill above mentioned, and is not regarded as the commencement of a formal suit.

All these different methods of originating applications to the Court of Chancery, lead to somewhat different proceedings in the subsequent stages of the case, and which it will be the object of this Treatise to explain. As a preliminary step, however, it will be convenient to point out the peculiarities of practice incident to different descriptions of persons appearing, either as plaintiffs themselves to obtain relief from the Court, or as defendants to resist the applications of others.

[1] 28 Vic. c. 17. This Statute gives to our Court the same jurisdiction as the Court of Chancery in England has in such cases, under the Imp. Stat. 13 & 14 Vic. c. 35.

CHAPTER II.

PERSONS BY WHOM A SUIT MAY BE INSTITUTED.

SECTION I.—*The Queen's Attorney-General.*

IT is a general rule, subject to very few exceptions, that there is no sort or condition of persons who may not sue in the Court of Chancery, and this rule extends from the highest person in the State to the most distressed pauper.

The Queen herself has the same right which a subject has to institute proceedings in her own Courts for the assertion of any right which she claims, either on behalf of herself or others; and the same principles which entitle a subject to the assistance of a Court of Equity, to enable him to assert his legal rights, are equally applicable to the Sovereign. Thus, a suit has been instituted on behalf of the Queen to have the benefit of a discovery, from persons charged to be aliens, of the place of their birth, in order to assist her in a commission to inquire into their lands, with the view of seizing them into her hands by inquisition.[1] For the same reason, where an office cannot be found for the Crown without the aid of a Court of Equity, the Court will, at the suit of the Crown, interfere to restrain the commission of waste in the meantime.[2]

It has been said that the Queen is not bound to assert her rights in any particular Court, but that she may sue in any of her Courts which she pleases, without reference to the question whether the subject-matter of her suit is such as comes within the peculiar jurisdiction of such Court.[3] Thus, she may have a *quare impedit* in the Queen's Bench,[4] or she may elect to sue either in a Court of Common Law, or in a Court of Equity.[5] Upon an accurate examination, however, of the cases that have given rise to these general assertions of the rights of the Crown, it appears that equitable grounds were alleged in each case for instituting the proceedings in Chancery. It seems, nevertheless, to be true, that the Queen may proceed, in questions relating to the property to which she is entitled in right of her Crown, either in a Court of Law or in a Court of Equity; and that where she has caused a Court of Equity

[1] *Du Plessis* v. *Attorney-General*, 1 Bro. P. C. Ed. Toml. 415, 419.

[2] *Attorney-General* v. *Du Plessis*, 2 Ves. S. 286.

[3] 11 Rep. 68 B: *ibid.* 75 A; Plowden, 236, 240, 244.

[4] 11 Rep. 68 B.

[5] *The King* v. *Countess Dowager of Arundel*, Hob. 109; *Attorney-General* v. *Vernon*, 1 Vern. 277, 370: 2 Ch. R. 353: 1 Eq. Ca. Ab. 75, pl. 1; 133, pl. 16: and see the cases cited 8 Beav. 283, and the Judgment, p. 287.

to be informed that an intrusion has been committed on her land, although no matter of equitable jurisdiction has been stated, yet the information has been entertained; but in such cases, if any question of law arises, the Court will put it in the course of trial by a Court of Law, and retain the information till the result of such trial is known.[1]

In all cases where the rights of the Queen, or of those who partake of her prerogative, are the subject of the suit, the name of the Queen is not made use of as the party complaining; but the matter of complaint is offered to the Court by way of information given by the proper officer. That officer is the Attorney-General, or, if the office of Attorney-General should happen to be vacant, the Solicitor-General.[2]

Besides the cases in which the immediate rights of the Crown are concerned, the Queen's officers may, in some cases, institute proceedings on behalf of those who claim under the Crown, by grant or otherwise; or, more correctly speaking, those who claim under the Crown may make use of the Queen's name, or of that of her proper officer, for the purpose of asserting their right against a third party. Thus, a *chose in action* may be assigned to the Queen, and may also be granted or assigned by her to another person; and, in the latter case, the grantee may either sue for it in his own name, or in that of the Queen;[3] but if he sues in his own name, he must make the Attorney-General a party to his suit. In *Balch* v. *Wastall*,[4] *A.*, having outlawed *B.*, brought a bill against *C.*, a trustee for *B.*, with respect to an annuity, to subject this annuity to the plaintiff's debt; and the Court held, that forasmuch as by the outlawry all the defendant's interest, as well equitable as legal, was vested in the Crown, the plaintiff must not only get a grant thereof from the Crown, but must make the Attorney-General a party to the suit.[5]

In like manner, the Attorney-General may exhibit informations on behalf of individuals who are considered to be under the protection of the Crown as *parens patriæ;* such as the objects of general charities, idiots, and lunatics. Moreover, this privilege of the Attorney-General is not confined to suits on behalf of charities, strictly so called; but has been held, in many instances, to extend to cases where funds have been made applicable to legal and general purposes.[6] In the case of the

[1] *Attorney-General to the Prince of Wales* v. *Sir J. St. Aubyn*, Wightw. 167, and the cases there cited; see also *Attorney-General* v. *The Mayor of Plymouth*, *ibid.* 134.

[2] Ld. Red. 7, 21, 22; *Wilkes' case*, 4 Bur. 2527.

[3] Dyer, 1 Pl. 7, 8; Keilw. 169; 5 Bac. Ab. tit. Prerog. F. 3; *Miles* v. *Williams*, 1 P. Wms. 249, 252; *Earl of Stafford* v. *Buckley*, 2 Ves. S. 170, 181.

[4] 1 P. Wms. 445.

[5] *Hayward* v. *Fry*, *ibid.* 446; see also *Rex* v. *Fowler*, Bunb. 33.

[6] *Attorney-General* v. *Brown*, 1 Swanst. 265; *Attorney-General* v. *Corporation of Shrewsbury*, 6 Beav. 220, 227; *Evan* v. *Corporation of Avon*, 29 Beav. 144: 6 Jur. N. S. 1361.

Attorney-General v. *Compton*,[1] which was an information for the purpose of compelling the restitution of money alleged to have been improperly applied out of funds raised for the relief of the poor, by means of rates and assessments, Sir J. L. Knight-Bruce, V. C., said that he apprehended the rule was, "that where property, affected by a trust for public purposes, is in the hands of those who hold it devoted to that trust, it is the privilege of the public that the Crown should be entitled to intervene by its officer, for the purpose of asserting, on behalf of the public generally, that public interest and that public right, which probably no individual could be found willing effectually to assert, even if the interest were such as to allow it."

With respect to idiots and lunatics, it is to be observed that suits on their behalf are usually instituted by the committees of their estates; but that, sometimes, where there has been no committee, or where the interest of the committee was likely to clash with that of the persons whose estates were under his care, informations have been exhibited on their behalf by the Attorney-General, as the officer of the Crown.[2] Where informations have been filed on behalf of persons found lunatic, but who have had no committee appointed, the Court will proceed to give directions for the care of the property of the lunatic, and for proper proceedings to obtain the appointment of a committee.[3] Persons incapable of acting for themselves, though not coming under the description of idiots or lunatics, have been permitted to sue by their next friend, without the intervention of the Attorney-General.[4]

It seems, that when an information is filed on behalf of a lunatic, he must be named as a party to the suit, and that merely naming him as a relator will not be sufficient;[5] but in the cases of the *Attorney-General* v. *Parkhurst*,[6] and *Attorney-General* v. *Woolrich*,[7] a distinction appears to be taken between cases where the object of the suit is to avoid some transaction of the lunatic, on the ground of his incapacity, and those in which it is merely to affirm a contract entered into by him for his benefit, or to assert some claim on his behalf. In the former case, it was held that the lunatic ought not to be named as plaintiff, because no man can be heard to stultify himself; if he is named, however, it will be no ground

[1] 1 Y. & C. C. C. 417, 427; and see *Attorney-General* v. *Corporation of Lichfield*, 11 Beav. 120; *Attorney-General* v. *Eastlake*, 11 Hare, 205; 17 Jur. 801.

[2] *Attorney-General* v. *Parkhurst*, 1 Cha. Ca. 112; *Attorney-General* v. *Woolrich*, *ibid.* 153; *Attorney-General* v. *Tyler*, 1 Dick. 378: 2 Eden, 230.

[3] *Attorney-General* v. *Howe*, Ld. Red. 30, n. (*m*).

[4] *Liney* v. *Wetherley*, Ld. Red. 30, n. (*n*); *Light* v. *Light*, 25 Beav. 248 *West* v. *Davis*, Rolls, 1863, W. No. 83.

[5] *Attorney-General* v. *Tyler*, 1 Dick. 378.

[6] 1 Cha. Ca. 112.

[7] *Ibid.* 153.

for demurrer.[1] The reason for making a lunatic a party in proceedings of this nature appears to be, that as no person can be bound by a decree in a suit to which he, or those under whom he derives title, are not parties, and as a lunatic may recover his understanding, the decree will not have the effect of binding him unless he is a party to the suit; and upon the same principle, it is held that where a suit is instituted on behalf of the lunatic by his committee, the committee must be named as a co-plaintiff, in order that the right which the committee acquires in the lunatic's estate, by virtue of the grant from the Crown, may be barred. The same reason does not apply to cases of idiots, because in contemplation of law they never can acquire their senses; they are, therefore, not considered necessary parties to proceedings on their behalf.[2]

In all cases of informations which immediately concern the rights of the Crown, its officers proceed upon their own authority, without the intervention of any other person;[3] but where the informations do not immediately concern the rights of the Crown, they generally depend upon the relation of some person whose name is inserted in the information, and who is termed the *Relator*.[4] This person in reality sustains and directs the suit, and he is considered as answerable to the Court and the parties for the propriety of the proceedings, and the conduct of them;[5] but he cannot take any step in the cause in his own name, and independent of the Attorney-General. Where, therefore, in the case of the *Attorney-General* v. *Wright*,[6] notice of motion was given on behalf of a relator, and an objection was made that it ought to have been on behalf of the Attorney-General, Lord Langdale, M. R., decided that the notice was irregular, and said that "relators should know that they are not parties to informations, and have no right, of their own authority, to make any application to the Court. The Attorney-General is the only person whom the Court recognizes in such cases." And in the *Attorney-General* v. *Barker*,[7] which was an information and bill, Lord Cottenham refused to hear the relator and plaintiff in person on behalf of the Attorney-General, and said he could not separate the information from the bill, so as to hear him as the plaintiff in the bill. It sometimes happens that the relator has an interest in the matter in dispute, of the

[1] *Ridler* v. *Ridler*, 1 Eq. Ca. Ab. 279, pl. 5.

[2] *Attorney-General* v. *Woolrich*, 1 Cha. Ca. 153.

[3] Ld. Red. 22; *Attorney-General* v. *Vernon*, 1 Vern. 277, 370; *Attorney-General* v. *Crofts*, 1 Bro. P. C. Ed. Toml. 136.

[4] Ld. Red. 22; 1 Ves. J. 247, n.

[5] Ld. Red. 22; *Attorney-General* v. *Vivian*, 1 Russ. 226, 236.

[6] 3 Beav. 447; and see *Attorney-General* v. *The Haberdashers' Company*, 15 Beav. 397; *Attorney-General* v. *Wyggeston's Hospital*, 16 Beav. 313; *Attorney-General* v. *Sherbourne Grammar School*, 18 Beav. 256: 18 Jur. 636.

[7] 4 M. & C. 262.

injury to which interest he is entitled to complain. In this case, his personal complaint being joined to, and incorporated with, the information given to the Court by the officer of the Crown, they form together an information and bill, and are so termed. In some respects, however, they are considered as distinct proceedings; and the Court will treat them as such, by dismissing the bill and retaining the information, even though the relief to be granted is different from that prayed. Thus, in *Attorney-General* v. *Vivian*,[1] where the record was both an information for a charity and a bill, and the whole of the relief specifically prayed was in respect of an alleged interest of the relator in the trust property, which he did not succeed in establishing, Lord Gifford, M. R., although he dismissed the bill with costs, retained the information for the purpose of regulating the charity. It is, moreover, necessary that the person joined as plaintiff should have some individual interest in the relief sought to be obtained by the suit: for in the case of the *Attorney-General* v. *The East India Company*,[2] Sir Lancelot Shadwell, V. C., allowed a demurrer to the whole record, because persons were made plaintiffs who asked nothing for themselves, and did not show that they were individually entitled to anything; as, however, there appeared a case for relief, he gave leave to amend for the purpose of converting the record into an information only, and directed that the plaintiffs should remain on the record in the character of relators, in order that they might be answerable for costs.

But although it is the general practice, where the suit immediately concerns the rights of the Crown, to proceed without a relator, yet instances have sometimes occurred where relators have been named. In such cases, however, it has been done through the tenderness of the officers towards the defendant, in order that the Court might award costs against the relator if the suit should appear to have been improperly conducted: it being a prerogative of the Crown not to pay costs to a subject.[3]

It has been said, that as the Queen, by reason of her prerogative, does not pay costs to a subject, so it is beneath her dignity to receive them; but many instances occur, in the course of practice, in which the Attorney-General receives costs. Thus, when collusion is suspected between the defendants and the relators, the Attorney-General attends by a distinct solicitor, and always receives his costs. In *Attorney-General* v. *Lord Ashburnham*,[4] Sir John Leach, V. C., said, in reference to the

[1] 1 Russ. 226, 233, 235.

[2] 11 Sim. 380, 386.

[3] See 3 Bl. Com. 400. But by Pro. Sta. c. 21, Con. Sta. U. C. s. 6 and 7, the Crown pays, as well as recovers, costs.

[4] 1 S. & S. 394, 397.

asserted principle that the Crown can neither pay nor receive costs, "I find no such principle in Courts of Equity. The Attorney-General constantly receives costs, where he is made a defendant in respect of legacies given to charities,[1] and even where he is made a defendant in respect of the immediate rights of the Crown in cases of intestacy; and where charity informations have been filed by the Attorney-General, costs have been frequently awarded him in interlocutory matters, independently of the relator."[2] And in the case of the *Attorney-General* v. *The Corporation of London*,[3] Lord Cottenham said, "The principle that the Attorney-General never receives nor pays costs, may be modified in this way, namely, that the Attorney-General never receives costs in a contest in which he could have been called upon to pay them, had he been a private individual." By the 18 & 19 Vic., c. 90, however, provision is made for the payment of costs by or to the Crown, in proceedings instituted, after the passing of the Act, on its behalf, in matters relating to the revenue.[4] Our statute, however, extends to every description of case.

The propriety of naming a relator for the purpose of his being answerable for costs, and the oppression arising from a contrary practice, were particularly noticed by Baron Perrot, in a cause in the Exchequer, *Attorney-General* v. *Fox*,[5] in which case no relator was named; and though the defendants finally prevailed, they were put to an expense almost equal to the value of the property in dispute. The introduction of a relator, however, in cases in which the information is merely concerning the rights of the Crown, is a mere act of favor on the part of the Crown and its officers; and it appears to have been the opinion of Lord Eldon that, even in informations concerning charities, the introduction of a relator was an indulgence on the part of the Crown, which, though usual, might be withheld. Thus, in *The Matter of the Bedford Charity*,[6] in speaking of informations concerning charities, his Lordship said, "there is no doubt that, though a relator is commonly required for the purpose of securing costs, the Attorney-General may, if he pleases, proceed without a relator." This *dictum* appears to be at variance with the opinion of Lord Thurlow, in the *Attorney-General* v.

[1] *Moggridge* v. *Thackwell*, 7 Ves. 36, 88; *Attorney-General* v. *Lewis*, 8 Beav. 179.

[2] See, however, *Burney* v. *Macdonald*, 15 Sim. 6, 16.

[3] 2 M'N & G. 247, 269, 271, 273. See also, on this point, S. C. before the M. R., 12 Beav. 171, and on demurrer before House of Lords, 1 H. L. Cas. 471, and Ld. Cottenham's comments on the case, 2 M'N. & G. 271; *Attorney-General* v. *Drapers' Co.*, 4 Beav. 305; *Ware* v. *Cumberlege*, 20 Beav. 510; *Kane* v. *Maule*, 2 S. & G. 331; S. C., on appeal, nom. *Kane* v. *Reynolds*, 4 DeG. M. & G. 565, 569: 1 Jur. N. S. 148.

[4] *Attorney-General* v. *Hanmer*, 4 De G. & J. 205: 5 Jur. N. S. 693; and see *Bauer* v. *Mitford*, 9 W. R. 135; See also 24 and 25 Vic. c. 92, s. 1, in cases as to succession duty; and 23 and 24 Vic. c. 34, ss. 11, 12, in proceedings by petition of right.

[5] Ld. Red. 23, n. (*g*).

[6] 2 Swanst. 520.

Oglender,[1] in which case his Lordship is reported to have expressed his belief that an information without a relator would not do; and the opinion of Lord Thurlow upon this point appears to have been adopted by Lord Redesdale.[2] Upon the whole, therefore, it seems that although in cases of informations for charities, the general and almost universal practice is to have a relator for the purpose of answering the costs, yet the rule is not imperative; and the Attorney-General, as the officer of the Crown, may, in the exercise of his discretion, exhibit such an information without a relator. In confirmation of this it is to be observed, that in informations under the former statutes,[3] for giving additional facilities in applications to Courts of Equity regarding the management of estates or funds belonging to charities, it was not the practice to have a relator.

All persons who are not under any of the legal disabilities after-mentioned, may be relators in informations; but a written authority, signed by them, permitting their names to be used, must be filed with the information.[4] There is no such rule, however, in this Province.

It has not been deemed necessary that relators should be interested in the charities concerning which they institute proceedings;[5] and the Court was in the habit, in the times when a much stricter system of practice prevailed than at present, of relaxing several of its rules on behalf of charities. Thus, where the relief sought was erroneous and refused, the Court still took care to make such decree as would best answer the purposes of the charities.[6]

It appears, on reference to the old cases, that where a relator himself claims an interest in the subject-matter of the suit, and proceeds by bill as well as by information, making himself both plaintiff and relator, the suit abates by his death. Where, however, the suit is merely an information, the proceedings can only abate by the death or determination of interest of the defendant.[7]

If there are several relators, the death of any of them, while there survives one, will not in any degree affect the suit; but if all the relators

[1] 1 Ves. J. 246.

[2] Ld. Red. 99; and see *Attorney-General* v. *Smart*, 1 Ves. S. 72; *Attorney-General* v. *Middleton*, 2 Ves. S. 327; *Attorney-General of the Duchy of Lancaster* v. *Heath*, Prec. in Ch. 13.

[3] 59 Geo. III. c. 91; continued and extended by 2 & 3 Will. IV. c. 57. See, however, *Attorney-General* v. *Boucherett*, 25 Beav. 116.

[4] 15 and 16 Vic. c. 86, s. 11. In an injunction case, the authority was allowed to be filed the day after the information, *Attorney-General* v. *Murray*, 13 W. R. 65, V. C. K. Where the solicitor had given the relator an indemnity against the costs, the information was ordered off the file, with costs to be paid by the relator and solicitor, *Attorney-General* v. *Skinners' Co.*, C. P. Coop. 7.

[5] *Attorney-General* v. *Vivian*, 1 Russ. 226, 236. See, however, *Attorney-General* v. *Bucknall*, 2 Atk. 328; *Corporation of South Molton* v. *Attorney-General*, 5 H. L. Ca. 1.

[6] *Attorney-General* v. *Bucknall*, 2 Atk. 328; *Attorney-General* v. *Whiteley*, 11 Ves. 241, 247; *Attorney-General* v. *Oglender*, 1 Ves. J. 246; *Attorney-General* v. *Middleton*, 2 Ves. S. 327; *Attorney-General* v. *Brereton*, *ib.* 425; *Attorney-General* v. *Mayor of Stamford*, 2 Swanst. 591; *Attorney-General* v. *Parker*, 1 Ves. S. 43.

[7] *Waller* v. *Hanger*, 2 Bulst. 134; Ld. Red. 100.

die, or if there is but one, and that relator dies, the suit is not abated. It is, however, irregular for the solicitors of a relator to proceed in a charity information after the death of the relator; and the Court will not permit any further proceedings till an order has been obtained for liberty to insert the name of the new relator, and such name is inserted accordingly; otherwise there would be no person to pay the costs of the suit, in case the information should be deemed improper, or for any other reason should be dismissd.[1] Where, however, a relator dies, the application for leave to name a new relator must be made by the Attorney-General, or with his consent, and not by the defendant; otherwise the defendant might choose his own prosecutor.[2]

With respect to informations on behalf of idiots and lunatics, it seems that it is not only necessary that the lunatic should be a party, but also that there should be a relator who may be responsible to the defendant for the costs of the suit. Thus, in the case of the *Attorney-General* v. *Tyler*, mentioned in the note to Lord Redesdale's Treatise,[3] it appears that the lunatic had been made the relator; but that on a motion being made that a responsible relator should be appointed, Lord Northington directed that all further proceedings in the cause should be suspended, until a proper person should be named as relator in his stead. This appears to be the same cause which has been before referred to as reported in Mr. Dickens' Reports,[4] in which, upon the hearing, it was objected that the lunatic was not a party to the suit, although he was named as relator; and the cause was consequently ordered to stand over, with liberty to amend by adding parties, and, if so advised, to change the information into a bill.

The object in requiring that there should be a relator, in informations exhibited on the part of the Attorney-General, is, as we have seen,[5] that there may be some person answerable for the costs, in case they should have been improperly filed. Thus, in the case of *Attorney-General* v. *Smart*,[6] before referred to, where the information was held to have been unnecessary, and in contradiction to the right, the costs were ordered to be paid by the relator. But in the case of *Attorney-General* v. *Oglender*,[7] before referred to, where the relator insisted upon a particular construction of the will of the person by whom the charity was founded, and in which there was considerable ambiguity, although he failed in

[1] Ld. Red. 100; *Attorney-General* v. *The Haberdashers' Company*, 15 Beav. 397.

[2] Ld. Red. 100, n. (*e*). *Attorney-General* v. *Harvey*, 1 Jur. N. S. 1062; *Attorney-General* v. *Plumtree*, 5 Mad. 452.

[3] Ld. Red. 29; 2 Eden, 230.

[4] *Ante.*

[5] *Ante.*

[6] 1 Ves. S. 72; *Attorney-General* v. *Parker*, 3 Atk. 576, 579: 1 Ves. S. 43.

[7] 1 Ves. J. 246.

satisfying the Court that his construction was the right one and the information was consequently dismissed, the Court did not make him liable to the costs of the defendant, although it refused to permit the costs to be paid out of the funds of the charity. And in general, where an information prays a relief which is not granted, but the Court thinks proper to make a decree according to the merits, so that the information is shown to have had a foundation, although the relief is not such as the relator prayed, the relator will not be ordered to pay the costs.[1]

And in general, where relators conduct themselves properly, and their conduct has been beneficial to the charity, they are allowed their costs;[2] and it seems that, in some cases, the costs of relators will be taxed as between solicitor and client, on the principle that otherwise people would not come forward to file informations;[3] and in special cases they will be allowed their charges and expenses, in addition to the costs of the suit.[4] But where they incurred expenses without the sanction of the Master, in obtaining information for the purpose of preparing a scheme, they were only allowed their expenses actually out of pocket;[5] and where a petition would have done instead of an information, the relators were refused their costs.[6]

In the case of *Attorney-General* v. *Kerr*,[7] an order was in the first instance made to refer it to the Master to tax and settle the costs, charges, and expenses of the relator, of, incidental, and preparatory to the cause, properly incurred; to be paid by the trustees of the hospital of St. Thomas for the time being, or the treasurer thereof, out of the funds belonging to the hospital. To this order two objections were made; first, that the decree was wrong, so far as it gave the relator the extra costs, charges, and expenses incidental and preparatory to the cause, properly incurred; secondly, that these extra costs ought not to be charged on the whole property of the hospital generally, but only on the property which was the subject of the information. Lord Langdale, M. R., said, "on considering the cases which have occurred, it appears that the relator in a charity information, where there is nothing to impeach the propriety of the suit, and no special circumstances to justify a special order, is, upon obtaining a decree for the charity, entitled to his costs as between solicitor and client, and to be paid the

[1] *Attorney-General* v. *Bolton*, 3 Anst. 820.
[2] Beames on Costs, 14; *Attorney-General* v. *The Brewers' Company*, 1 P. Wms. 376.
[3] *Attorney-General* v. *Taylor*, cited in *Osborne* v. *Denne*, 7 Ves. 424; see also *ib.* 425; *Attorney-General* v. *Carte*, 1 Dick. 113; Beames on Costs, App. No. 2, 229; *Moggridge* v. *Thackwell*, 7 Ves. 36, 88; affirmed by H. L., see 13 Ves. 416; *Attorney-General* v. *Kerr*, 4 Beav. 297, 303.
[4] *Attorney-General* v. *Kerr*, *ubi sup.*
[5] *Attorney-General* v. *The Ironmongers' Company*, 10 Beav. 194, 196.
[6] *Attorney-General* v. *Berry*, 11 Jur. 114.
[7] 4 Beav. 297, 301-2.

difference between the amount of such costs and the amount of the costs which he may recover from the defendants, out of the charity estate. There may be special cases in which the relator may be entitled to charges and expenses, in addition to his costs of the suit as between solicitor and client; but it appears to me that such cases must depend upon their peculiar circumstances, to be brought forward and established by evidence on proper occasions. Upon the second point, I find that there are several cases in which the costs to be paid by the trustees of a charity have been ordered to be paid out of the funds of the charity generally; but the trustees objecting, it appears to me more regular and proper, in the first instance at least, to charge the costs which fall upon the charity estate on the fund recovered by the information, or on the estate which is the subject of the suit." The decree was accordingly varied, and the relator, instead of being allowed his costs, charges, and expenses of, incidental, and preparatory to the cause, properly incurred, was only allowed his costs as between solicitor and client; and the costs and sums which were to be paid by the defendants the trustees, instead of being directed to be paid out of the funds of the hospital, were made a charge on the property which was the subject of the suit, and ordered to be raised by sale or mortgage thereof.[1]

As the principal object in having a relator is, that he may be answerable for the costs of the proceedings, in case the information shall appear to have been improperly instituted or conducted, it follows, as a matter of course, that such relator must be a person of substance, and if it is made to appear to the Court that the relator is not a responsible person, all further proceedings in the information will be stayed, till a proper person shall be named as relator.[2]

It is to be observed, that an information by the Attorney-General without a relator cannot be dismissed for want of prosecution; it is his privilege to proceed in what way he thinks proper; but an information in his name by a relator is subject to be dismissed for want of prosecution with costs.

[1] This was the practice before the Charitable Trusts Act, 1853, 16 & 17 Vic. c. 137. Under that Act, no proceeding can be taken without the consent of the Charity Commissioners, except by the Attorney-General acting *ex officio*, or by adverse claimants; see s. 17.

[2] *Attorney-General* v. *Tyler*, 2 Eden, 230; see also *Attorney-General* v. *Knight*, 3 M. & C. 154. It is presumed, that the same rules for determining who is a "person of substance," apply here as in the case of next friends of married women: as to whom, see *post*. There is a reported case in which a relator was required to give security for costs; see *Attorney-General* v. *Skinners' Co.*, C. P. Coop. 1, 5; and see *Attorney-General* v. *Knight*, 3 M. & C. 154.

Section II.—*Governments of Foreign States.*

It seems to have been considered by Lord Thurlow as a doubtful point, whether the sovereign of a foreign state could sue in the municipal courts of England, or whether the claims of such a person were not matter of application from state to state.[1] The point, however, has now been determined in the affirmative.[2] Thus, a bill was filed on behalf of the King of Spain, and of two other persons resident in London, claiming some property which had been received by one of the defendants, under a treaty between France and Spain, and which it was alleged was the property of the King of Spain. To this bill a general demurrer was put in; and amongst other grounds of demurrer, it was contended, that the King of Spain being a foreign absolute sovereign, was not capable of maintaining a suit in a Court of Equity here, or at least, that he was not capable of maintaining a suit for the enforcement of alleged rights belonging to him only in his royal character. This demurrer was allowed by Lord Lyndhurst, but upon a different ground, namely, that the parties who had been joined with the King of Spain as co-plaintiffs had no interest in the subject-matter of the suit;[3] and after the allowance of the demurrer, the King of Spain alone filed another bill against the same defendants, for the same purposes as before, and the defendants demurred again; but the demurrer was overruled by Lord Lyndhurst,[4] and his Lordship's judgment was confirmed by the House of Lords on appeal.[5] In giving judgment upon that occasion, Lord Redesdale observed, "This is one of the clearest cases that can be stated. I conceive that there can be no doubt that a sovereign may sue. If he cannot, there is a right without a remedy; for it is only by suit in Court that the respondent can obtain his remedy: he sues, as every sovereign must sue, generally, either on his own behalf, or on behalf of his subjects." But it seems that the right of a foreign sovereign to sue in the municipal courts of this country is confined to those cases in which it is sought to enforce the private

[1] *Barclay* v. *Russell*, 3 Ves. J. 424, 431; see also *The Nabob of the Carnatic* v. *East India Comp'y*, 1 Ves. J. 371, where the authorities upon this point are collected.

[2] *The King of Spain* v. *Machado*, 4 Russ. 225, 236; *Hullett* v. *King of Spain*, 2 Bligh, N. S. 31; see also *City of Berne* v. *Bank of England*, 9 Ves. 347; *Dolder* v. *Bank of England*, 10 Ves. 352; *Dolder* v. *Lord Huntingfield*, 11 Ves. 283; *King of the Two Sicilies* v. *Willcox*, 1 Sim. N. S. 301, 332; *U. S. of America* v. *Privleau*, 2 H. & M. 559: 11 Jur. N. S. 792.

[3] *King of Spain* v. *Machado*, 4 Russ. 225, 236.

[4] *Ibid* 560; see also *The Columbian Government* v. *Rothschild*, 1 Sim. 94; *King of Hanover* v. *Wheatley*, 4 Beav. 78.

[5] 2 Bligh, N. S. 60; and see *Duke of Brunswick* v. *King of Hanover*, 6 Beav. 1: 2 H. L. Ca. 1 and *post*, on the liability of foreign states to be sued.

rights of the sovereign or of his subjects; and that the infringement of his prerogative rights does not constitute a ground of suit.[1]

To entitle a foreign government to sue in the English Courts, it is necessary that it should have been recognized by the British Government. This point appears to have been first discussed in the case of *The City of Berne, in Switzerland*, v. *The Bank of England*,[2] which arose from the application of a person, describing himself as a member of the common council chamber of the city of Berne, on behalf of himself and of all others the members of the common council chamber, and the burghers and citizens of that city, to restrain the Bank of England and South Sea Company from permitting the transfer of certain funds standing in the names of trustees, under a purchase by the old government of Berne before the revolution; the application was opposed, on the ground that the existing government of Switzerland, not being acknowledged by the British Government, could not be noticed by the Court; and Lord Eldon refused to make the order: observing that it was extremely difficult to say that a judicial Court can take notice of a government never recognized by the government of the country in which the Court sits; and that whether the foreign government was recognized or not, was matter of public notoriety. The recognition of a foreign goverment by the British Government is conclusive, and the Court cannot listen to any objections to its title.[3]

The fact of a foreign government not having been recognized by the British Government, must be judicially taken notice of by the Court, even though there is an averment introduced into the bill that the government in question has been recognized.[4] Thus, where, in order to prevent a demurrer, it was falsely alleged in the bill that a revolted colony of Spain had been recognized by Great Britain as an independent state, and a demurrer was nevertheless put in, Sir Lancelot Shadwell, V. C., allowed the demurrer: observing, that if the plaintiff makes the fact that this is an independent government recognized by the British government, where it is not so, the foundation of his case, the Court must judicially take notice of what is the truth of the fact, notwithstanding the averment on the record; because nothing is taken to be true except that which is properly pleaded, and that when a fact is pleaded which is historically false, and which the judges are bound to take notice of as being false, it cannot be said to have been properly

[1] Per L. J. Turner, in *Emperor of Austria* v. *Day*, 3 De G. F. & J. 217, 251, 252: 7 Jur. N. S. 639, 644.

[2] 9 Ves. 347; and see *Dolder* v. *Bank of England*, 10 Ves. 353; *Dolder* v. *Lord Huntingfield*, 11 Ves. 283.

[3] *Emperor of Austria* v. *Day*, 2 Giff. 628: 7 Jur. N. S. 483; 3 De G. F. & J. 217: 7 Jur. N. S. 639.

[4] *Taylor* v. *Barclay*, 2 Sim. 213, 220-3.

pleaded merely because it is averred, and the Court must take it just as if there had been no such averment on the record. And, upon the same principle, it has been held that the English Courts will not entertain a suit for matters arising out of contracts entered into by individuals with the governments of foreign countries which have not been acknowledged by the British Government.[1]

Where a foreign state comes for the aid of an English Court in the assertion of its rights, it must sue in a form which makes it possible for the Court to do justice to the defendants; therefore, where a bill was filed by the government of the State of Columbia, and by a person describing himself as a citizen of that state, and minister plenipotentiary for the same to the court of his Britannic Majesty, and residing at No. 33, Baker-street, Portman-square, in the county of Middlesex, Sir John Leach, V. C., held, that the bill could not be sustained; because there was no public officer named who was entitled to represent the interest of the state, and upon whom process could be served on the part of the defendants, in case they were advised to file a cross bill and to require an answer.[2] And where a foreign prince comes voluntarily as a suitor into a Court of Law in England, he becomes subject, as to all matters connected with that suit, to the jurisdiction of a Court of Equity.[3] An ambassador, or minister plenipotentiary, of a foreign state, does not properly represent that state in a Court of Justice.[4]

It seems that a colonial government, existing by letters patent, which is in some degree similar to a corporation possessing rights in England, may sue here, and ought to be regulated by the law of England, under which it has existence;[5] thus, in *Penn* v. *Lord Baltimore*,[6] Lord Hardwicke made a decree at the suit of the governor of a province in America, claiming under letters patent, by which the district, property, and government had been granted to his ancestor and his heirs. The suit was for the specific performance of articles, executed in England, respecting the boundaries of the two provinces of Maryland and Pennsylvania in North America; and Lord Hardwicke, although he admitted that the original jurisdiction, in cases relating to boundaries between provinces, was in the King in Council, made a decree: founding the jurisdiction upon articles executed in England under seal, for mutual considerations, which he considered as giving jurisdiction to the King's Courts, both of law and equity, whatever the subject-matter might be.

[1] *Thomson* v. *Powles*, 2 Sim. 194, 210.
[2] *The Columbian Government* v. *Rothschild*, 1 Sim. 94, 104.
[3] *Rothschild* v. *Queen of Portugal*, 3 Y. & C. Ex. 594.
[4] *Schneider* v. *Lizardi*, 9 Beav. 461, 466; *The Columbian Government* v. *Rothschild*, 1 Sim. 94.
[5] *Barclay* v *Russell*, 3 Ves. 424, 434.
[6] 1 Ves. S. 444, 446.

Section III.—*Corporations and Joint-Stock Companies.*

The right to sue is not confined to persons in their natural capacities; the power to sue and be sued in their corporate name is a power inseparably incident to every corporation, whether it be sole or aggregate.[1]

As a corporation must take and grant by their corporate name, so by that name they must, in general, sue and be sued; and they may sue by their true name of foundation, though they be better known by another name. Thus, the masters and scholars of the Hall of Valens Mary, in Cambridge, brought a writ by that name, which was the name of their foundation, though they were better known by the name of Pembroke Hall, and the writ was held good.[2]

As a corporation by prescription may have more than one name, they may sue by the one name or the other, alleging that they and their predecessors have from time immemorial been known, and been accustomed to plead, by the one or by the other.[3]

A suit by a corporation aggregate, to recover a thing due to them in their corporate right, must not be brought in the name of their head alone, but in their full corporate name, unless it appear that the Act of Parliament or charter by which they are constituted enables them to sue in the name of their head. Yet, though it appear that the head of a corporation is enabled to sue in his own name for anything to which the corporation is entitled, this will not preclude it from suing by its name of incorporation; thus, where an action of debt was brought in the name of the President and College of Physicians, to recover the penalty of £5 per month, under the stat. 14 Hen. VIII, c. 15, for practising physic in London without a licence: on demurrer to the declaration, this objection, among others, was taken, that the action ought to have been brought in the name of the College only, or of the President only, the words of the patent being "*quod ipsi per nomina Presidentis Collegii seu communitatis facultatis medicinæ London*," should sue and be sued. To this it was answered, that they were incorporated by the name of President and College, and had, in consequence of that, a power to sue and be sued by that name; and that this power was not taken away by the additional affirmative power which was given them.[4]

It has been determined, that where an Act of Parliament grants any thing to a corporation, the grant shall take effect, though the true

[1] 1 Bla. Com. 475.

[2] 44 Ed. III. 35; 1 Kyd, on Corp. 253; and see, as to title by which municipal corporations must sue and be sued, *Corporation of Rochester* v *Lee*, 15 Sim. 376; *Attorney-General* v. *Corporation of Worcester*, 2 Phil. 3: 1 Coop. t. Cott. 18.

[3] See 9 Ed. IV. 21; 13 Hen. VII. 14; 16 Hen. VII. 1; and 21 Hen. VI. 4, which last seems *contra*.

[4] 2 Salk. 451.

corporate name be not used, provided the name actually used be a sufficient description of the corporation; though it may be doubtful whether, in suing to enforce its claim under that Act, it can use the name therein mentioned.[1]

In the case of *The Attorney-General* v. *Wilson*,[2] which was a joint bill and information, and in which the corporation of Leeds was both plaintiff and relator, an objection was made that a corporation being a body whose identity is continuous, could not be heard to impeach transactions carried into effect in its own name by its former governing body. The objection was overruled by Lord Cottenham, who thought that the true way of viewing this was to consider the members of the governing body of the corporation as its agents, bound to exercise its functions for the purposes for which they were given, and to protect its interests and property; and that if such agents exercised those functions for the purpose of injuring its interests, and alienating its property, the corporation ought not to be estopped in this court from complaining, because the act done was ostensibly an act of the corporation.

We have seen above, that a corporation cannot, unless specially authorised by its constitution, sue by its head alone; so neither can a corporation aggregate which has a head sue or be sued without it, because without it the corporation is incomplete.[3] It is not, however, necessary to mention the name of the head,[4] nor is it necessary, in the case of corporations aggregate, to name any of the individual members by their proper christian and surnames;[5] but if, in a suit in equity by the members of a corporation in their corporate capacity, they are mentioned by their names, the suit will not become defective by the death of some of the members, although it would have abated if the suit had been by them in their individual characters. Thus, where the warden and fellows of Manchester College filed a bill for tithes in their corporate capacity, but in their proper names, wherein a decree was pronounced, from which both the plaintiffs and defendants appealed, and pending the appeal two of the fellows died, and two new fellows were elected in their place, an objection was taken, on the ground that the new fellows were not parties; but Lord Eldon held, that there was no defect of parties, and directed the appeal to proceed.[6]

A sole corporation, suing for a corporate right, having two capaci-

[1] 10 Mod. 207, 208; 1 Kyd, on Corp. 256.
[2] C. & P. 1, 21, 24.
[3] 2 Bac. Ab. tit. Corp. E. 2.
[4] 1 Kyd, on Corp. 281.
[5] 2 Inst. 666.
[6] *Blackburn* v. *Jepson*, 3 Swanst. 132, 138.

ties, a natural and a corporate, must always show in what right he sues.[1] Thus, a bishop or prebendary, suing for land which he claims in right of his bishopric or prebend, must describe himself as bishop or prebendary; and if a parson sue for anything in right of his parsonage, he ought to describe himself as parson. In this respect a sole corporation differs from a corporation aggregate, because the latter having only a corporate capacity, a suit in its corporate name can be only in that capacity.[2] It also differs from corporations aggregate, in that by the death of a corporation sole a suit by him, although instituted in his corporate capacity, becomes abated, which is not the case, as we have seen, with respect to suits by corporations aggregate.

It is to be observed, that in cases of abatement by the death of a corporation sole, there is a material distinction with regard to the right to revive. If the plaintiff was entitled to the subject-matter of the suit for his own benefit, his personal representatives are the parties to revive; but if he was only entitled for the benefit of others, his successor is the person who ought to revive. Thus, if the master of an hospital, or any similar corporation, institute proceedings to recover the payment of an annuity and die, his successor shall have the arrears, and not his executors, because he is entitled only as a trustee for the benefit of his house; but it is otherwise in the case of a parson; there the executors are entitled, and not the successor, because he was entitled to the annuity for his own benefit.[3] On the same principle, if a rent due to a dean and chapter be in arrear, and the dean die, there is no abatement, because the rent belongs to the succeeding dean and chapter; but if the rent be due to the dean in his sole corporate capacity, it shall go to his executors, and they must revive.[4]

Although corporations aggregate are entitled to sue in their corporate capacity, the Court will not permit parties to assume a corporate character to which they are not entitled; and where it appears sufficiently on the bill that the plaintiffs have assumed such a character without being entitled to it, a demurrer will hold. Thus, in the case of *Lloyd* v. *Loaring*,[5] where a bill was filed by some of the members of a lodge of freemasons against others, for the delivery up of certain specific chattels, in which bill there was great affectation of a corporate character in stating their laws and constitutions, and the original charter by which they were constituted, a demurrer was allowed; because the Court will not permit persons who can only sue as partners,

[1] 2 Bac. Ab. tit. Corp. E. 2.
[2] *Ibid.*
[3] 1 Kyd, on Corp. 77.
[4] *Ibid.* 78.
[5] 6 Ves. 773.

to sue in a corporate character; and, upon principles of policy, the Courts of this country do not sit to determine upon charters granted by persons who have not the prerogative to grant them.

A suit may be supported in England by a foreign corporation, in their corporate name and capacity; and in pleading, it is not necessary that they should set forth the proper names of the persons who form such corporation, or show how it was incorporated; though, if it is denied, they must prove that by the law of the foreign country they were effectually incorporated.[1]

It is to be observed that, in the above case of *Lloyd* v. *Loaring*, Lord Eldon gave the plaintiffs leave to amend their bill, by striking out their present style as plaintiffs, and suing as individuals on behalf of themselves and the other persons interested.[2] Ever since that period it has been held, that where all parties stand in the same situation, and have one common right and one common interest, two or three or more may sue in their own names for the benefit of all; and upon this principle, large partnerships or associations in the nature of joint-stock companies, although not incorporated, have been permitted to maintain suits instituted in the name of a few or more individuals interested, on behalf of themselves and the other partners in the concern.[3]

It may here be observed that, by the statute 7 Will. IV. & 1 Vic. c. 73, her Majesty is empowered to grant letters patent, establishing companies, and providing that the companies so established shall be able to sue and be sued by their public officer; and that many joint-stock companies or associations for insurance, trading, and other purposes, have from time to time been established by special Acts of Parliament, which, although they have not formed them into corporations, have still conferred upon them many privileges, in consequence of which such companies have acquired something of a corporate character; amongst other privileges so conferred, may be reckoned that of suing and being sued in the name of their public officer.[4] The history of these companies or associations, and of the provisions which have from time to time been introduced into Acts of Parliament creating or regulating them, has been detailed at considerable length by Lord Eldon, in *Van Sandau* v. *Moore*;[5] and his Lordship's observations may be

[1] *Dutch West India Company* v. *Van Moyses* 2, Ld. Ray. 1535.

[2] 6 Ves. 779.

[3] See *Chancey* v. *May*, Prec. in Ch. 592; *Good* v. *Blewitt*, 13 Ves. 397; *Cockburn* v. *Thompson*, 16 Ves. 321, 325; *Pearce* v. *Piper*, 17 Ves. 1; *Blain* v. *Agar*, 1 Sim. 37, 43; *Gray* v. *Chaplain*, 2 S. & S. 267, 272: 2 Russ. 126; *Van Sandau* v. *Moore*, 1 Russ. 441; *Lund* v. *Blanchard*, 4 Hare, 290, 292; and see *post*.

[4] As to abatement by death of a public officer, see 7 Geo. IV. c. 46, s. 9, and *Burmester* v. *Baron von Stenz*, 23 Beav. 32. For form of order to substitute a new officer, see Seton, 1173.

[5] 1 Russ. 441, 458.

useful to those upon whom the duty may devolve of framing suits on behalf of, or against, persons connected with the different classes of joint-stock companies there enumerated. It will suffice, however, for our present purpose, to observe, that although under Acts of Parliament of this description it is competent for the company to maintain suits in the names of the officers designated in the Acts, yet where any of the company wish to sue the directors or others who are members as well as themselves, they may maintain such a suit in their own individual capacities; either suing by themselves, and making the rest of the company defendants, or suing on behalf of themselves and the other members of the association.[1] Although the rights and duties of the public officer are chiefly to sue and be sued on behalf of the company, in matters arising between the company on the one hand, and strangers or persons who are not partners on the other, yet it has been held, that the public officer may also institute proceedings against certain of the directors, in respect of past transactions, to compel them to refund sums alleged to be due from them to the partnership. This was decided by Sir James Parker, V. C., with reference to the Joint-Stock Banking Act, 7 Geo. IV. c. 46, s. 9,[2] but the reasons on which his judgment rested would seem to render his decision applicable to all joint-stock companies duly registered.

Section IV.—*Persons residing out of the Jurisdiction.*

The rule that all persons, not lying under the disabilities after pointed out, are entitled to maintain a suit as plaintiffs in the Court of Chancery, is not affected by the circumstance of their being resident out of the jurisdiction of the Court, unless they be alien enemies, or are resident in the territory of an enemy without a license or authority from the government here.

In order, however, to prevent the defendant, or respondent in the case of a petition, from being defeated of his right to costs, it is a rule that if the plaintiff in a suit,[3] or the petitioner,[4] is resident abroad, the Court will, on the application of the defendant or respondent, order him

[1] *Hitchens* v. *Congreve*, 4 Russ. 562.

[2] *Harrison* v. *Brown*, 5 De G. & S. 728; and see *Sedden* v. *Connell*, 10 Sim. 58, 76.

[3] Though suing as executor or administrator, *Knight* v. *De Blaquiere*, Sau. & S. 648.

[4] *Drever* v. *Maudesley*, 5 Russ. 11; *Re Norman*, 11 Beav. 401; *Atkins* v. *Cooke*, 3 Drew. 694: 3 Jur. N. S. 283; *Partington* v. *Reynolds*, 6 W. R. 307. This does not apply to the case of a petition in the cause by a party, *Cochrane* v. *Fearon*, 18 Jur. 568.

to give security for the costs of the suit or petition, and in the meantime direct all proceedings to be stayed.[1]

So, also, where a plaintiff appears to have no permanent residence, he will be made to give security for costs.[2]

Where it appears that the residence of the plaintiff is not known, and there is reason to believe he has left the country, security for costs will be ordered to be given, although it does not appear by the bill that the plaintiff is resident out of the jurisdiction, and it is not shown positively where he is resident.[3] The plaintiff, a British subject, having gone to reside in the United States, where he had remained for several years, but had never taken any oath of naturalization, or exercised the right of citizenship in that country, returned to this province, and some months afterwards filed a bill in this Court; a motion for security for costs was refused, although several persons swore that his intention was to leave immediately on the decision of the case, the plaintiff having sworn that his intention was to remain in the country.[4]

It has been held in Ireland,[5] that notwithstanding the 41 Geo. III, c. 90, s. 5, by which an attachment is given in England to enforce an order or decree made in Ireland for the payment of money, a plaintiff residing in England must, on filing a bill in Ireland, give security for costs;[6] and although the same Act applies to persons who are resident in Ireland commencing suits in England, it has been decided in the English Courts, that where a plaintiff resident in Ireland files a bill here, he must also give security.[7] It has likewise been held, that a person resident in Scotland must, in like manner, give security for costs.[8] The bill stated the plaintiff to be resident *in the Parish of Rigaud, in the County of Vaudreuil*, and an application had on a previous day been made for an order for security for costs; a doubt was suggested whether the Court can judicially take notice that Vaudreuil was out of the jurisdiction; but now the Chancellor thought that, by the Pro. Stat., 16 Vic., c. 152, the whole province having been set off into territorial divisions, the Court was bound to take notice of such sub-divisions of

[1] *Fox* v. *Blew*, 5 Mad. 147; *Latour* v. *Holcombe*, 1 Phil. 262, 264.

[2] *Bailey* v. *Gundry*, 1 Keen, 53; *Player* v. *Anderson*, 15 Sim. 104: 10 Jur. 169; and see *Calvert* v. *Day*, 2 Y. & C. Ex. 217; *Sibbering* v. *Earl of Balcarras*, 1 De G. & S. 683: 12 Jur. 103; *Hurst* v. *Padwick*, 12 Jur. 21; *Lumley* v. *Hughes*, 2 W. R. 112; *Manby* v. *Bewicke*, 8 De G. M. & G. 468: 2 Jur. N. S. 671; *Oldale* v. *Whitcher*, 5 Jur. N. S. 84, V. C. K.; *Knight* v. *Cory*, 9 Jur. N. S. 491, V. C. W. The rule extends to the next friend of the plaintiff, see *Kerr* v. *Gillespie*, 7 Beav. 269; *Watts* v. *Kelly*, 6 W. R. 206.

[3] *Somerville* v. *Kerr*, 2 Cham. R. 168.

[4] *O'Grady* v. *Munro*, 7 Grant 106.

[5] *Moloney* v. *Smith*, 1 M'Cl. & Y. 213.

[6] *Mullett* v. *Christmas*, 2 Ball & B. 422; see also *Stackpole* v. *Callaghan*, 1 Ball & B. 566.

[7] *Hill* v. *Reardon*, 6 Mad. 46; *Moloney* v. *Smith*, 1 M'Cl. & Y. 213; and see, as to plaintiff resident in Ireland suing here in other cases, *Craig* v. *Bolton*, 2 Bro. C. C. 609.

[8] *Kerr* v. *Duchess of Munster*, Bunb. 35; *Exparte Latta*, 3 De G. & S. 186.

the country as the Act makes, and that therefore the security for costs should be given.[1] The Statute 22 Vic., c. 33, has effected a material change in the practice of this Court, as to granting or refusing security for costs. The fact that the plaintiff has not any fixed place of abode within the province, will not be sufficient to warrant an order for that purpose, where it is shewn that he has property within the jurisdiction.[2] An infant out of the jurisdiction petitioning for relief, will be required to give security for costs.[3] If a plaintiff residing out of the jurisdiction is shown to have property in Upper Canada, an order for security for costs made against him will be set aside.[4]

Where there are co-plaintiffs resident in England, the Court will not make an order that other plaintiffs who are abroad shall give security for costs;[5] and where the plaintiff is abroad as a land or sea officer in the service of her Majesty, he will not be ordered to give security;[6] and so, where he is resident abroad upon public service, as an ambassador or consul, he cannot be called upon to give security.[7] The Court of Queen's Bench, however, has required a Judge in the East India Company's service to give security;[8] and peers of the realm, although they are privileged from personal arrest, must, if they reside abroad, give security for costs; for although such costs cannot be recovered by personal process, they may by other process, if the plaintiff becomes a resident in this country.[9] And it may be stated generally, that wherever a plaintiff is out of the jurisdiction, the defendant is entitled to security for costs, unless it is distinctly shown that the plaintiff is exempted from his liability.[10] The mere fact of a plaintiff being in the service of the Crown, and absent from the jurisdiction of the Court, is not sufficient to exempt him from giving security for costs; to do so, it must be shewn that he is absent from his domicile in the service of the Crown.[11]

As a general rule, the plaintiff in a cross suit cannot be called upon to give security for costs to the plaintiff in the original suit, on the principle that a cross bill is, in reality, a portion of the defence to the original bill;[12] but his co-defendants to the cross bill may move for such

[1] *McDonald* v. *Dicarie*, 1 Cham. R. 34.

[2] *White* v. *White*, 1 Cham. R. 48.

[3] *Stinson* v. *Martin*, 2 Cham. R. 86.

[4] *Galt* v. *Spenser*, 2 Cham. R. 92; and see *Marsh* v. *Beard*, 1 Cooper's C. & P. R. 52.

[5] *Winthrop* v. *Royal Exch. Ass. Co.*, 1 Dick. 282; *Walker* v. *Easterby*, 6 Ves. 612.

[6] *Evelyn* v. *Chippendale*, 9 Sim. 497; *Clark* v. *Fergusson*, 1 Giff. 184: 5 Jur. N. S. 1155.

[7] *Colebrook* v. *Jones*, 1 Dick. 154; Beames on Costs, 123. As to ambassadors resident here, and their servants, see *post.*

[8] *Plowden* v. *Campbell*, 18 Jur. 910, Q. B.

[9] *Lord Aldborough* v. *Burton*, 2 M. & K. 401, 403.

[10] *Lillie* v. *Lillie*, 2 M. & K. 404. As to security by a limited company, see *ante.*

[11] *Dickenson* v. *Duffill*, 1 Cham. R. 108.

[12] *Vincent* v. *Hunter*, 5 Hare, 320; *M'Gregor* v. *Shaw*, 2 De G. & S. 360; *Sloggett* v. *Viant*, 13 Sim. 187; *Wild* v. *Murray*, 18 Jur. 892; *Tynte* v. *Hodge*, 2 J. & H. 692: 8 Jur. N. S. 1226; and see *Manley* v. *Williams*, 1 Cham. R. 48.

security against their plaintiff;[1] and it has been held, that a bill to restrain an action at common law is so far a defensive proceeding as to exempt the plaintiff in equity from the liability to give security for costs;[2] but, on the other hand, a defendant in an interpleader suit being out of the jurisdiction, was looked upon as plaintiff, and ordered to give security for costs;[3] and so also, a defendant who had obtained the conduct of the cause has been required to give security.[4] And where the right to require security for costs from a plaintiff out of the jurisdiction had been waived, such waiver did not preclude the defendant from requiring security from the representative of the original plaintiff, by whom on his death the suit was revived, and who was also out of the jurisdiction.[5]

A plaintiff cannot be compelled to give security for costs, unless he himself states upon his bill that he is resident out of the jurisdiction, or unless the fact is established by affidavit; and the mere circumstance of his having gone abroad will not be a sufficient ground on which to compel him to give security, unless it is stated, either by the plaintiff himself, or upon affidavit, that he is gone abroad for the purpose of residing there.[6]

Whenever security is asked for, the question arises whether the party is resident abroad or not within the meaning of the rule; and the answer to that question depends, in each case, upon the interpretation to be put upon the phrase "resident," or "permanently resident" abroad. Thus, if a plaintiff goes to reside abroad, under circumstances rendering it likely that he will remain abroad for such a length of time that there is no reasonable probability of his being forthcoming when the defendant may be entitled to call upon him to pay costs in the suit, that is sufficient;[7] and where a plaintiff, domiciled in Scotland, took furnished lodgings in London, and then filed his bill, it was held that he must give security for costs;[8] and so, where the plaintiff went out of the jurisdiction on matters connected with the suit, he was ordered to give security; but on his return the order was discharged.[9]

[1] *Sloggett* v. *Viant*, 13 Sim. 187.

[2] *Watteeu* v. *Billam*, 3 De G. & S. 516: 14 Jur. 165; *Wilkinson* v. *Lewis*, 3 Giff. 394: 8 Jur. N. S. 908.

[3] *Smith* v. *Hammond*, 6 Sim. 10, 15.

[4] *Mynn* v. *Hart*, 9 Jur. 860, V. C. K. B.

[5] *Jackson* v. *Davenport*, 29 Beav. 212: 7 Jur. N. S. 1224.

[6] *Green* v. *Charnock*, 3 Bro. C. C. 371: 2 Cox, 284: 1 Ves. J. 396; *Hoby* v. *Hitchcock*, 5 Ves. 699; *Edwardes* v. *Burke*, 9 L. T. N. S. 406, V. C. K.

[7] *Blakeney* v. *Dufaur*, 16 Beav. 292: 2 DeG. M. & G. 771: 17 Jur. 98; and see *Kennaway* v. *Tripp*, 11 Beav. 588; *Drummond* v. *Tillinghurst*, 15 Jur. 384, Q. B.; *Stewart* v. *Stewart*, 20 Beav. 322; *Wyllie* v. *Ellice*, 11 Beav. 99: 12 Jur. 711.

[8] *Ainsley* v. *Sims*, 17 Beav. 57: 17 Jur. 657; and see *Swanzy* v. *Swanzy*, 4 K. & J. 237: 4 Jur. N.S. 1013.

[9] *O'Conner* v. *Sierra-Nevada Co.*, 24 Beav. 435.

In order to entitle a defendant to require security for costs from a plaintiff, he must make his application at the earliest possible time after the fact has come to his knowledge, and before he takes any further step in the cause; therefore, where the fact of the plaintiff being resident abroad appears upon the bill, he must apply before he puts in his answer, or applies for time to do so: either of which acts will be considered as a waiver of his right to the security.[1] Filing a demurrer has, however, been held not to be a waiver.[2]

If the plaintiff is not described in the bill as resident abroad, and the defendant does not become apprised of that fact before he puts in his answer, he may make the application after answer; if, however, he takes any material step in the cause after he has notice, he cannot then apply. In *Mason* v. *Gardner*,[3] the plaintiff was described in the original bill as late of the West Indies, but then of the city of London, and the defendant, having answered, filed a cross bill against the plaintiff; exceptions, however, were taken to the answer, to which the defendant submitted, and put in a further answer, and then applied to the Court that the plaintiff in the original bill might give security for costs: alleging in his affidavit, that upon application to the plaintiff's solicitor in the original suit to appear for him to the cross bill, he discovered, for the first time, that the plaintiff did not reside in London, as alleged in the bill, but in Ireland. To this it was answered, and so it appeared, that the defendant had, in his cross bill, stated the plaintiff to be resident in Ireland, and after that had answered the exceptions to his answer to the original bill, and had thereby taken a step in the cause after it was evident that he had notice of the plaintiff's being out of the jurisdiction; and Lord Eldon held that the defendant had thereby precluded himself from asking for security for costs, and therefore refused the motion. *Ex parte Seidler*[4] was a petition under an Act of Parliament, authorizing the Court to make an order in a summary manner upon petition. The petitioner being out of the jurisdiction of the Court, and the respondent having answered the affidavits in support of the petition, the question was whether he had thereby lost his right to require the petitioner to give security for costs; Sir Lancelot Shadwell, V. C., ruled that he had not, but that he might make the application on the petition coming on to be heard.[5]

[1] *Meliorucchy* v. *Meliorucchy*, 2 Ves. S. 24: 1 Dick. 147; *Craig* v. *Bolton*, 2 Bro. C. C. 609; *Anon.* 10 Ves. 287; and see *Swanzy* v. *Swanzy*, 4 K. & J. 237: 4 Jur. N. S. 1013; *Murrow* v. *Wilson*, 12 Beav. 497; *Cooper* v. *Purton*, 8 W. R. 702; and see *Atkins* v. *Cook*, 3 Drew. 694: 3 Jur. N.S. 283.

[2] *Watteeu* v. *Billam*, 3 De G. & S. 516: 14 Jur. 165.

[3] 2 Bro. C. C., Ed. Belt, 609, *notis*.

[4] 12 Sim. 106.

[5] See, however, *Atkins* v. *Cook*, 3 Drew. 694: 3 Jur. N. S. 283.

In *Dyott* v. *Dyott*,[1] where the defendant had sworn to his answer before he had notice of the fact of the plaintiff being resident abroad, but in consequence of some delay in the Six Clerk's Office, the answer was not filed till after the defendant had been informed of the plaintiff's residence, a motion that the plaintiff might give security for costs was considered too late: although the defendant himself was not privy to, or aware of the delay which had taken place in filing his answer.

If a plaintiff, after filing a bill, leave the kingdom for the purpose of settling, and do actually take up his residence in foreign parts, it is, in any stage of the cause, ground for an order that he shall give security for costs.[2] Such application ought to be made as early as possible after the defendant has become apprised of the fact; and it is not enough to support such an application to swear that the plaintiff has merely gone abroad, but the affidavit should go on to say that he is gone to settle abroad. In *Weeks* v. *Cole*,[3] an application was made by the defendant, after answer, that the proceedings might be stayed until the plaintiff gave security for costs, on an affidavit that the plaintiff, who, when the bill was filed was resident in London, had, since the answer was put in, entirely abandoned the country, and gone to reside in the Isle of Man; and Lord Eldon made the order, observing, however, that the plaintiff ought to have an opportunity of answering the affidavit; the propriety of which suggestion is evident from the case of *White* v. *Greathead*,[4] where an order for the plaintiff to give security for costs, after answer, was refused, in consequence of an affidavit which had been filed by the plaintiff's solicitor, stating that the plaintiff had gone to the West Indies merely for the purpose of arranging his affairs, and that he had informed the deponent that he intended soon to return to this country, where he had left his family.

To entitle a defendant to an order that the plaintiff may give security for costs, it is necessary that the plaintiff should absolutely be gone abroad: the mere intention to go will not be sufficient;[5] in a case, however, where the plaintiff, who was an alien enemy, was under confinement preparatory to his removal out of the country, upon a warrant by the Secretary of State under the Alien Act, the proceedings were stayed until he gave security for costs, although he was not actually gone out of the country.[6] In proceedings at Common Law, where

[1] 1 Mad. 187; and, as to laches, see *Wyllie* v. *Ellice*, 11 Beav. 99: 12 Jur. 711; *Swanzy* v. *Swanzy*, 4 K. & J. 237; 4 Jur. N. S. 1013; *Murrow* v. *Wilson*, 12 Beav. 497.

[2] *Anon.* 2 Dick. 775; see also *Busk* v. *Beetham*, 2 Beav. 537; *Blakeney* v. *Dufaur*, 2 De G. M. & G. 771: 17 Jur. 98.

[3] 14 Ves. 518.

[4] 15 Ves. 2.

[5] *Adams* v. *Colthurst*, 2 Anst. 552.

[6] *Seilaz* v. *Hansom*, 5 Ves. 261.

after the commencement of an action, and after issue joined, the plaintiff has been convicted of felony and ordered to be transported, the Courts have ordered security to be given for costs, as well retrospective as prospective;[1] and it is presumed that courts of equity will follow the rule at law. Where, however, the plaintiff had not been convicted of felony, but only of a misdemeanour under the 52 Geo. III. c. 130, s. 2, for poaching, for which he was sentenced to seven years' transportation, and it was admitted that he had not sailed for the place of transportation, but was in a penitentiary place of confinement, Sir John Leach, V. C., refused a motion for stay of proceedings till the plaintiff had given security for costs.[2]

From analogy to the course adopted where the plaintiff is resident out of the jurisdiction, the Court will, upon application, restrain an ambassador's servant, whose person is privileged from arrest by the 7 Ann. c. 12, from proceeding with his suit until he has given security for costs.[3]

By the old practice, £40 was the amount of security required to answer costs by any plaintiff who was out of the jurisdiction of the Court, but this sum has been increased to £100.[4] In an anonymous case,[5] Sir Lancelot Shadwell, V. C., ruled, that where a person out of the jurisdiction of the Court presents a petition to have his solicitor's bills taxed, he must give security for the costs of the petition, and also for the balance that may be found due from him on the taxation. In our Court £100 is the amount usually inserted in the Bond.

Where it appears on the Bill[6] that the plaintiff is resident out of the jurisdiction, an order that he give security for costs is obtained on *præcipe* from the Clerk of Records and Writs, if the Bill be filed in Toronto,[7] or from the Local Master of the County (if filed out of Toronto) where it is filed.[8] Our Order 36, empowers Local Masters to grant orders for security for costs; our Order 321 provides that "Bonds executed upon an order for security for costs are to be given "to the Registrar, or Deputy Registrar, with whom the pleadings in "the suit are filed; all the defendants are to be included in the same

[1] *Harvey* v. *Jacob*, 1 B. & Ald. 159; *Barrett* v. *Power*, 9 Exch. 338: 18 Jur. 156.

[2] *Baddeley* v. *Harding*, 6 Mad. 214.

[3] *Anon.* Mos. 175; *Goodwin* v. *Archer*, 2 P. Wms. 452; *Adderly* v. *Smith*, 1 Dick. 355.

[4] Ord. of 1828, No. 40. The order applies to the case of a plaintiff, within the jurisdiction, ordered to give security, *Bailey* v. *Gundry*, 1 Keen, 53. It seems, however, that in the case of a petition, the amount is still only £40, *Atkins* v. *Cook*, 3 Jur. N. S. 283, V. C. K.; *Partington* v. *Reynolds*, 6 W. R. 307, V. C. K.

[5] 12 Sim. 262; see also *In re Passmore*, 1 Beav. 94; *Re Dolman*, 11 Jur. 1095, M. R.

[6] What is stated in the text as to a bill suit, will apply, *mutatis mutandis*, to a petition, or other proceeding in which security is directed to be given.

[7] Under Con. G. O. No. 25.

[8] Under Con. G. O. No. 36.

"bond; and the final sum to be inserted therein is to be fixed upon the "application for security, by the Judge or Master who makes the "Order." To bring a case within the Statute, 29 and 30 Vic., c. 42, requiring security for costs to be given when another action for the same cause is pending, it must be clearly shewn that the causes of action are identically the same, and not merely growing out of the same transaction. And *quære*, does the Act apply at all to this Court, or to a case where one action is at law, and the other in this Court.[1]

Where it appears on the Bill that the plaintiff is resident out of the jurisdiction, the order for security for costs is obtained on motion of course, or more usually by petition, on production of an office copy of the Bill served on the defendant.

In other cases, a special application by motion[2] must be made. The notice of motion must be served on the plaintiff's solicitor, and the application must be supported by evidence of the facts entitling the applicant to the order.

The order directs the plaintiff to procure some sufficient person on his behalf to give security, according to the course of the Court, by bond to the Registrar or Deputy Registrar, in the penalty of £100, conditioned to answer costs, in case any shall be awarded to be paid by the plaintiff; and it restrains proceedings in the meantime.

When an order of course has been obtained, it must be served on the plaintiff or his solicitor; service of a special order, made on notice to him, is unnecessary.

The security is given in one of the following modes: (I.) The plaintiff's solicitor prepares a bond in the terms of the order; engrosses it; procures it to be executed by the obligor or obligors; lodges it with the Record and Writ Clerk, or Deputy Registrar; and on the same day serves notice thereof on the solicitor of the defendant who obtained the order. It is also advisable to serve the notice on the solicitor of any co-defendants who have not applied for security;[3] and the security is deemed to have been given on the day the bond is lodged.[4] (II.) The plaintiff, instead of giving the bond in the first instance, may serve the defendant's solicitor with a notice of the name, address, and description of the proposed obligor or obligors; and if no objection be made by him within two days thereafter, the bond may be prepared, executed, lodged, and notified as above explained.[5] (III.) The plaintiff may apply by

[1] *Dean* v. *Lamprey*, 2 Cham. R. 202.
[2] *Tynte* v. *Hodge*, 2 J. & H. 692.
[3] Braithwaite's Pr. 534.
[4] *Ibid.*
[5] Braithwaite's Pr. 533.

special motion[1] that, in lieu of giving a bond, he may pay a sum of money into Court, to a separate account, to answer the costs; the amount should be sufficient to cover the sum mentioned in the order directing the security to be given, and the costs of bringing it into Court and getting it out.[2] The usual amount is £120;[3] no evidence in support of the application is necessary, beyond the production of the former order; the costs of the application are made costs in the cause. The order is drawn up and passed by the registrar, and entered, and the money is paid into Court in the manner hereafter explained.

A bond for security for costs of appeal should be styled in the Court of Error and Appeal. The style of the cause in the Court below, if adopted, should be the style in full, and the parties should be described as they respectively become appellants or respondents; but to carry out the view of the Court, as intimated in *Harvey* v. *Smith*, 2 Grant, E. & A. R. 480, they may be given in the same order as in the style of the original cause.[4] It is for the plaintiff's convenience to submit the name of the proposed surety to the opposite party before filing the bond, as he may risk the surety, not being successfully objected to by the defendants; and it is not necessary that the surety should be first approved of by the defendant's solicitor, or the registrar; nor is a plaintiff bound to give more than one surety, unless he alone is insufficient. The bond should contain the condition to the effect, that upon the surety, not the plaintiff paying the costs, the obligation shall be void.[5] Where the plaintiffs, who were resident out of the jurisdiction, had paid a certain sum into Court in lieu of security for costs, an application to have this money paid out to them was refused, although a decree for specific performance had been made in their favor, the suit not being finally terminated.[6]

One obligor is sufficient, but it is prudent to have two or more; as on the death or bankruptcy[7] of the sole, or sole surviving, obligor, the defendant is entitled to apply by special motion[8] that a new security may be given, and for a stay of proceedings in the meantime.

Where one or more of several defendants have obtained an order for security, it is advisable to extend the bond to the costs of all the defendants, as otherwise the defendants who have not obtained the order

[1] *Cliffe* v. *Wilkinson*, 4 Sim. 122; and see *Fellows* v. *Deere*, 3 Beav. 353; *Re Norman*, 11 Beav. 401.
[2] *Cliffe* v. *Wilkinson*, 4 Sim. 123.
[3] See *Cliffe* v. *Wilkinson*, *ubi sup.*; *Australian Co.* v. *Fleming*, 4 K. & J. 407. In the case of a petition, it is presumed £60 would be sufficient.
[4] *Weir* v. *Mathieson*, 2 Cham. R. 73.
[5] *Beaton* v. *Boomer*, 1 Cooper's C. & P. R. 63.
[6] *Luther* v. *Ward*, 2 Cham. R. 175.
[7] *Transatlantic Co.* v. *Pietroni*, cited Seton, 1269; *Cliffe* v. *Wilkinson*, *ubi sup.*
[8] *Lautour* v. *Holcombe*, 1 Phil. 262; and see *Veitch* v. *Irving*, 11 Sim. 122.

may afterwards apply for a further bond as to their costs; and it is presumed that, where a bond embracing the costs of all the defendants is lodged with the Record and Writ Clerk, or Deputy Registrar, and notified to them, he will hold the bond on behalf of all the defendants, by analogy to the old practice, where the bond was deposited with a Six Clerk;[1] and that a separate bond or bonds cannot afterwards be required.[2] Whatever number of bonds, however, may be given, they all form a security for one sum only.[3]

In *Panton* v. *Labertouche*,[4] it was decided that a solicitor ought not to be surety for his client. The bond of an incorporated society has been held sufficient.[5]

The defendant, on receiving notice that a bond has been lodged in the first instance, may, if dissatisfied with the bond, apply by special motion[6] that in lieu of, or in addition to, such bond, the plaintiff may be ordered, within a limited time, to give security for costs, according to the course of the Court, or, in default thereof, that the bill may be dismissed with costs, and that in the meantime all proceedings may be stayed.[7] The application should be supported by affidavit, showing that the obligor is not a solvent person; and may be opposed by his own affidavit, justifying in double the amount named in the bond,[8] and by other evidence that he is a person of substance. In *Bainbrigge* v. *Moss*,[9] the costs of inquiring into the circumstances of the proposed surety were allowed.

Where a bond for security for costs, or prosecution of an appeal, is filed in an outer County, all objections to it, or to the solvency of the securities, should be decided by the Master in the County in which it is filed. A party giving a bond for security need not provide more than one surety therein.[10] This case, however, has been overruled. It was a case of security for the costs in the Court of Error and Appeal, and by the orders of that Court two sureties are necessary; and it was subsequently held,[11] that in bonds for security for costs of appeal, there should be two sufficient sureties; and if one dies, or becomes insolvent,

[1] See *Lowndes* v. *Robertson*, 4 Mad. 465.

[2] See, however, 1 Smith's Pr. 866; Braithwaite's Pr. 532.

[3] *Lowndes* v. *Robertson*, *ubi sup.*

[4] 1 Phil. 265: 7 Jur. 589.

[5] *Plestow* v. *Johnson*, 1 Sm. & G., App. 20: 2 W. R. 3.

[6] *Panton* v. *Labertouche*, *ubi sup.*

[7] *Giddings* v. *Giddings*, 10 Beav. 29, and the cases collected, *ib.* 31; and see *Denny* v. *Mars*, Seton, 1279, where the order is given; *Payne* v. *Little*, 14 Beav. 647; *O'Connor* v. *Sierra-Nevada Co.*, 23 Beav. 608.

[8] See 1 Turn. and Ven. 764; 1 Grant, 444.

[9] 3 Jur. N. S. 107, V. C. W.

[10] *Brigham* v. *Smith*, 1 Cham. R. 334.

[11] *Saunders* v. *Furnivall*, 2 Cham. R. 159.

another will be ordered to be substituted. The rule that one surety is sufficient in the Court of Chancery, is not affected by these decisions.

The proper practice seems to be, that when, under an order for security for costs obtained from a Local Master under Order 36, a bond is filed to which the defendant objects, he is to move for an order for better security; and that in default of its being furnished within fourteen days,[1] the bill be dismissed.[2] As the Local Master has no power to dismiss a bill on the application of a defendant, it is presumed that this motion must be made in Court, or Chambers.

Where the plaintiff, in the first instance, submits for approval the name of the proposed obligor, the defendant, if he objects to the person proposed, must notify his objection to the plaintiff's solicitor within two days; otherwise, the plaintiff may complete and lodge the bond. The plaintiff, on receiving notice of the defendant's objection, must either propose another person, or the person already offered must justify by affidavit in double the sum for which he is to be bound;[3] in the latter case, it is presumed the plaintiff should file the affidavit and lodge the bond, and give notice thereof to the defendant. In *Cliffe* v. *Wilkinson*,[4] the defendant, being dissatisfied with the proposed sureties, moved, on notice, that the plaintiff might be ordered to give security in lieu of, or in addition to, the persons so proposed; but it seems usual in practice to notify the objection to the plaintiff before incurring the expense of a formal application to the Court or Judge, or to a Local Master.

If the plaintiff fail to comply with the order to give security, the defendant may apply by special motion that the plaintiff give security within a limited time, or, in default, that his bill may be dismissed with costs; and that proceedings may, in the meantime, be stayed.[5]

"The day on which an order that the plaintiff do give security for "costs is served, and the time thenceforward and until, and including "the day on which, such security is given, is not to be reckoned in "the computation of time allowed a defendant to answer or demur."[6] If it becomes necessary for the defendant to put the bond in suit, he must obtain an order,[7] on special motion, that he may be at liberty to do so, and may have the bond delivered out to him for that purpose, and may use the name of the Registrar or Deputy Registrar, the obligee, on giving him an indemnity, such indemnity to be settled by a Judge.

[1] *Kennedy* v. *Edwards*, 11 Jur. N. S. 153.

[2] See Daniell's Forms, n. 74.

[3] See 1 Turn. & Ven. 764; 1 Grant, 444.

[4] 4 Sim. 122.

[5] See *Giddings* v. *Giddings*, and other cases cited, *ante*.

[6] Con. G. O. No. 409; see *Henderson* v. *Atkins*, 7 W. R. 318, V. C. K.

[7] *Robinson* v. *Brutton*, 6 Beav. 147; *Bainbrigge* v. *Moss*, 3 Jur. N. S. 107, V. C. W.: Reg. Lib. 1857, A. 283.

if the parties differ. The notice of motion must be served on the plaintiff's solicitor; and the application must be supported by production of evidence of the costs having been directed to be paid, and of the amount and non-payment thereof. The order on such application is drawn up by the Registrar; a plain copy of it is lodged with the Record and Writ Clerk, together with a receipt for the bond, and an undertaking to indemnify him against the costs of any proceedings to be taken thereon in his name; and, if satisfied therewith, he will deliver out the bond. The receipt and undertaking are required to be signed by the defendant applying, and also by his solicitor, and are usually written at the foot of the copy of the order.[1]

On an application by the defendant to be at liberty to sue on a bond given for security for costs, the plaintiff being resident out of the jurisdiction, Spragge, V. C., required the decree to be produced, to shew that the defendants were ordered to receive the costs.[2] And on an application for liberty to sue upon the bond given to secure the payment of the costs of an appeal brought by the defendants against a decree of this Court, Esten, V. C., required the party moving to shew a demand from and refusal of the costs by the sureties named in the bond before making the order asked.[3]

Where money has been paid into Court as security for costs in lieu of a bond, an application may be made at chambers, for payment thereout of any costs ordered to be paid by the plaintiff to the defendant. The notice of motion must be served on the plaintiff, and on co-defendants interested in the fund, and must be supported by evidence of such payment having been directed, and of the amount payable, and by production of the Registrar's certificate of the fund being in Court.

It may here be mentioned that where a bill was filed by an assignee in insolvency against B, for the indemnification of the estate in respect of a claim by C, which it was alleged that B should pay,—and it appeared that the plaintiff himself was an insolvent person, that there were no assets whatever of the estate he represented, and that the suit was brought at his instigation, risk, and expense, and for his benefit,—it was held, that the plaintiff must give security for costs.[4] The plaintiff (a vendor) had sued at law to recover the purchase money due under an agreement for the sale of lands, but had failed, and the costs of the action were given against him; the defendant (the vendee) issued a *fi fa* goods to recover the costs, which was returned *nulla bona*. After-

[1] Braithwaite's Pr. 535, 536.
[2] *Ralph* v. *Topping*, 1 Cham. R. 14.
[3] *Stokes* v. *Crysler*, 1 Cham. R. 14.
[4] *Mason* v. *Jeffery*, 1 Cham. R. 379.

wards, the vendor filed his bill in Equity to enforce specific performance of the contract. On motion of the defendant in the suit, the proceedings in equity were stayed till security for the costs at law should be given.[1] The plaintiff will be ordered to give security for costs where it is shown that he is insolvent, and is carrying on the suit for the benefit of another party who seeks to escape the risk of costs.[2]

If, subsequently to the order directing security for costs to be given, the plaintiff becomes resident within the jurisdiction, he may apply, on special motion, that the order may be discharged; but he must pay the costs of the application.[3]

Where a plaintiff, who, when the bill was filed, was out of the jurisdiction, and had been ordered to give security for costs, afterwards returned within the jurisdiction,—but it had appeared that he had no business, and no intention of entering into any—no final place of abode, —no house and no family, or ties to bind him to the Province,—and the Court was of opinion that the return of the plaintiff was merely to get rid of the order for security,—the Court declined to rescind it.[4] But where a plaintiff who has been ordered to give security for costs, returns within the jurisdiction to reside permanently, the order will be discharged.

Section V.—*Paupers.*

It has been before stated to be a general rule, subject to very few exceptions, that there is no sort or condition of persons who may not sue in the Court of Chancery. Amongst the exceptions to this rule, those who are in indigent circumstances are not included, and any party, however poor he may be, being in other respects competent, has the same right as another to commence proceedings in the Court of Chancery for the assertion of his claims; and that, without being required to give any security for the payment of costs to the opposite party, in case he fails in his suit.[5] Lord Eldon, in *Ogilvie* v. *Hearn*,[6] said, that the Court would not require security for costs from any man in England, upon any representation of his circumstances; and this

[1] *Follis* v. *Todd*, 1 Cham. R. 288.

[2] *Mason* v. *Jeffrey*, 2 Cham. R. 15.

[3] *O'Connor* v. *Sierra-Nevada Co.*, 24 Beav. 435; *Mathews* v. *Chichester*, 30 Beav. 135. For more on the subject of security for costs, see *post.*

[4] *Marsh* v. *Beard*, 1 Cham. R. 390.

[5] This right must not be abused; see *Burke* v. *Lidwell*, 1 Jo. & Lat. 703, where a pauper plaintiff was required to give security: the person really interested having nominally assigned to the pauper, in order to avoid liability to costs.

[6] 11 Ves. 600; and see *Wellesley* v. *Wellesley*, 16 Sim. 1.

liberality seems to be extended to the case of the next friends of infants. Indeed, any other rule would amount to a denial of justice to the children of poor persons, who might become entitled to property, and yet be precluded from asserting their right because their father, who is the proper person to be their next friend, by reason of his circumstances could not be so, without giving security for costs, which he might not be able to procure.[1] With regard to the next friend of a *feme covert*, there is, in this respect, a great difference in the rule; for it has been held, that the next friend of a married woman must be a person of substance;[2] because a married woman and an infant are differently circumstanced, as the infant cannot select his own next friend, but must rely upon the good offices of those who are nearest to him in connection, or otherwise his rights might go unasserted, but the married woman has the power of selecting; she is, therefore, required to select for her next friend a person who, if her claim should turn out to be unfounded, can pay to the defendant the costs of the proceeding.

In consequence of the provisions of Stat. 11 Hen. VII. c. 12,[3] the practice of the courts of law has been to admit all persons to sue *in forma pauperis* who could swear that they were not worth £5, except their wearing apparel, and the subject matter of the suit; and the practice of the courts of law in this respect has been adopted by courts of equity, although persons suing in these courts do not come within the provisions of the Act of Parliament above referred to; and, proceeding further, they have extended the relief to the case of defendants.

In no instance, however, has the privilege been exercised, either by a plaintiff or a defendant suing in a representative character, as executor or administrator;[4] but where a person sustained the mixed character of executor and legatee, Lord Eldon held that it formed an exception to the general rule; but to prevent any undue practice in suing *in forma pauperis*, and under colour of that privilege obtain any *dives* costs, his lordship thought that a special order was necessary, to enable the pauper to proceed in that character as to the legacy.[5] And Sir J. L. Knight Bruce, V. C., made an exception to the strict application of the rule, by allowing an executor to proceed *in forma pauperis*, for the single purpose of clearing a contempt incurred in the cause.[6]

It is said, that a person filling the character of next friend cannot

[1] See *Squirrel* v. *Squirrel*, 2 Dick. 765; *Fellows* v. *Barrett*, 1 Keen, 119.

[2] *Hind* v. *Whitmore*, 2 K. & J. 458; *Elliott* v. *Ince*, 7 De G. M. & G., 475: 3 Jur. N. S. 597; *Smith* v. *Etches*, 1 H. & M. 711: 10 Jur. N. S. 124.

[3] Beames on Costs, 72.

[4] *Paradice* v. *Shepherd*, 1 Dick. 136: Beames on Costs, 79, App. No. 21; *Oldfield* v. *Cobbett*, 1 Phil. 613: 10 Jur. 2; *Fowler* v. *Davies*, 16 Sim. 182: 12 Jur. 321; *St. Victor* v. *Devereux*, 6 Beav, 584: 8 Jur. 26.

[5] *Thompson* v. *Thompson*, H. T. 1824, cited 1 Turn. & Ven. 513; and see *Everson* v. *Matthews*, 3 W. R. 159, V. C. W.; *Parkinson* v. *Chambers*, *ib.* 34, V. C. W.

[6] *Oldfield* v. *Cobbett*, 1 Coll. 169.

sue *in forma pauperis*,[1] although, as we have seen before, the poverty of a next friend of an infant is no ground for dismissing him; and, until recently, some uncertainty prevailed as to the practice, when a married woman could not obtain a substantial next friend to sue on her behalf; but it has now been determined, that she may, on an *ex parte* motion, supported by affidavit that she is unable to procure any substantial person to act as her next friend, obtain an order to institute a suit without a next friend, and prosecute it *in forma pauperis*;[2] or to carry on proceedings after decree.[3]

It seems also that, in a proper case, an infant will be permitted to sue by a next friend *in forma pauperis*, on a special *ex parte* motion, supported by affidavit that the infant cannot get any substantial person to act as next friend.[4]

It has been held, that a bankrupt may be admitted to petition against his commission *in forma pauperis*;[5] and a husband and wife may obtain an order of course to sue *in forma pauperis*, in respect of the wife's reversionary interest;[6] and where a woman was ordered to be examined *pro interesse suo*, respecting a claim set up by her to some lands taken under a sequestration, but was unable from poverty to make out or support her right, liberty was given to her to do so *in forma pauperis*.[7]

A plaintiff may be admitted to sue as a pauper, upon the usual affidavit, at any time after the bill has been filed, or summons issued,[8] but he will be liable to all the costs incurred before his admission.[9]

The question whether, after a dismissal of a former suit, a plaintiff can be admitted to sue again for the same matter *in forma pauperis*, without paying the costs of the first suit has been much discussed. In a case in Vernon,[10] a plaintiff was permitted to file a bill of review, without payment of the costs of a former suit, amounting to £150 upon his making oath that he was not worth £40, besides the matter in question in that and another suit between the same parties. That, however,

[1] *Anon.* 1 Ves. J. 410.

[2] *Re Foster*, 18 Beav. 525; *Wellesley* v. *Wellesley*, 16 Sim. 1: 1 De G. M. & G. 501; *Wellesley* v. *Mornington*, 18 Jur. 552, V. C. K.; *Re Lancaster*, 18 Jur. 229, L. C. & L. JJ.; *Crouch* v. *Waller*, 4 De G. & J. 43: 5 Jur. N. S. 326; *Re Barnes*, 10 W. R. 464, V. C. S.; *Smith* v. *Etches*, 1 H. & M. 711: 10 Jur. N. S. 124: 3 N. R. 457. *Page* v. *Page*, 16 Beav. 588, where such an order was discharged, is overruled by these cases. The order is not as of course, *Coulsting* v. *Coulsting*, 8 Beav. 463: 9 Jur. 587.

[3] *D'Oechsner* v. *Scott*, 24 Beav. 239. Poverty is no excuse for delay in making an application to the Court, as in such case the party can apply *in forma pauperis*, *Harris* v. *Myers*, 1 Cham. R. 229.

[4] *Lindsey* v. *Tyrell*, 2 De G. & J. 7: 24 Beav. 124: 3 Jur. N. S. 1014.

[5] *Ex parte Northam*, 2 V. & B. 124.

[6] *Pitt* v. *Pitt*, 1 S. M. & G., App. 14: 17 Jur. 571.

[7] *James* v. *Dore*, 2 Dick. 788.

[8] See Braithwaite's Pr. 562; but a married woman may apply before bill, if the draft bill has been settled and signed by counsel, *Wellesley* v. *Mornington*, 18 Jur. 552; *Re Barnes*, 10 W. R. 464, V. C. S.

[9] *Anon. Mos.* 68; *Davenport* v. *Davenport*, 1 Phil. 124. See, however, *Bennett* v. *Chudleigh*, 2 Y. & C. C. C. 164; *Snowball* v. *Dixon* 2 De G. & S. 9.

[10] *Fitton* v. *Earl Macclesfield*, 1 Vern. 264.

appears to have been an extreme case; and the instance cited by Lord Eldon in his judgment in *Corbett* v. *Corbett*,[1] shows, that Courts of Law, whose decisions are upon this point applicable, by analogy, to Courts of Equity, would, after judgment of nonsuit against a plaintiff stay a second action by the same plaintiff suing as a pauper, till the costs of the former action had been paid. His Lordship, however, expressed a doubt whether the decision he referred to was right.

It is no ground of objection to a party suing *in forma pauperis*, that the suit is a second suit for the same matter as a former suit, in which the plaintiff had likewise sued as a pauper, unless the second suit can be justly characterised as vexatious;[2] and in *Corbett* v. *Corbett*,[3] Lord Eldon appears to have held, that the circumstance of the plaintiff having conducted himself vexatiously in the first suit would not be a ground for dispaupering him in the second; and that the fact of his having been supplied with money by a charitable subscription, for the purpose of assisting him in the conduct of his suit, although it might afford ground for impeachment as maintenance, was no ground upon which he could deprive him of the right to sue as a pauper in equity.

In *Taylor* v. *Bouchier*,[4] it is stated by Mr. Dickens to have been said, that a pauper could not appeal, and that the proposition was assented to by the bar; but in *Bland* v. *Lamb*,[5] Lord Eldon said that it was a very singular proposition, and that he could not see why, because a party was poor, the court should not set itself right: and he made an order that the appellant should be at liberty to prosecute the appeal *in forma pauperis*.[6] And paupers have been allowed to appeal, without making the usual deposit of £20.[7]

Where pauper plaintiffs are guilty of vexatious conduct in the suit, the Court will order them to be dispaupered; and an order to that effect was made by Sir L. Shadwell, V. C., upon motion, in *Wagner* v. *Mears*.[8] And in *Pearson* v. *Belchier*,[9] Lord Rosslyn said, that a pauper is liable to be committed if he files an improper bill, as otherwise he might be guilty of great oppression.

[1] 16 Ves. 410; see Chitty's Arch, 1281.

[2] *Wild* v. *Hobson*, 2 V. & B. 105, 112; see *Brook* v. *Alcock*, and *Elsam* v. *Allcock*, cited 1 Smith's Pr., 874.

[3] 16 Ves. 407, 409, 412.

[4] 2 Dick. 504.

[5] 2 J. & W. 402.

[6] See *Fitton* v. *Earl Macclesfield*, 1 Vern. 264; *Crouch* v. *Waller*, 4 De G. & J. 43: 5 Jur. N. S. 326.

[7] Where the appellant has not been already admitted a pauper, an order for leave to appeal is necessary, and which can only be made by the Court of Appeal: Seton, 1271. The order is obtainable on *ex parte* motion; for form of motion paper, see Vol. III.; see also *Clarke* v. *Wyburn*, 12 Jur. 167, L. C.; *Heaps* v. *Commissioners of Churches*, mentioned in note to that case: *Bradberry* v. *Brooke*, 25 L. J. Ch. 576; 4 W. R. 699, L. J. J.; but it must appear from the certificate of counsel that he is of opinion there are special and strong grounds for the appeal: *Grimwood* v. *Shave*, 5 W. R. 482, L. C.

[8] 3 Sim. 127; and see *Perry* v. *Walker*, 1 Coll. 229, 230.

[9] 4 Ves. 630.

In order to be admitted to sue *in forma pauperis*, the plaintiff must present a petition containing a short statement of his case, and of the proceedings, if any, which have been had in the cause, and praying to be admitted to sue *in forma pauperis*, and that a counsel and a solicitor may be assigned him.[1]

This petition must be under-written by a certificate signed by counsel[2] that he conceives the case to be proper for relief in this Court;[3] and must be supported by an affidavit, sworn by the plaintiff, that he is not worth the sum of £5, his wearing apparel and the subject-matter of the suit only excepted.[4] The meaning of the affidavit is, that the plaintiff has not £5 in the world available for the prosecution of the suit; and if he can make an affidavit with truth in that sense, the omission to set forth the details of his means, and the circumstances which render them unavailable, is not such an omission of material facts as will induce the Court, on that ground alone, to discharge the order.[5]

It is to be observed, that this affidavit must be sworn by the party himself; and that in a case in which it afterwards appeared that the affidavit had been sworn by a third person, the party was dispaupered.[6]

The petition and certificate, and an office copy of the plaintiff's affidavit, and usually also a copy of the bill, are lodged with the Registrar, who draws up and enters an order, by which the petitioner is admitted to sue *in forma pauperis*, and a counsel and solicitor are assigned to act on his behalf.[7]

The order should be served upon the opposite party as soon as possible; for in the case of *Ballard* v. *Catling*,[8] Lord Langdale, M. R., decided that a plaintiff admitted to sue *in forma pauperis* should pay *dives* costs to the defendant, in respect of a step in the cause taken before service of the order; and in *Church* v. *Marsh*,[9] Sir James Wigram, V. C., admitted the propriety of the practice, although he held that there was a discretion in the Court in such cases, and that the order to sue *in forma pauperis* was not necessarily inoperative in all cases until service. The order should also be lodged with the Record and Writ Clerk, for entry in his

[1] But a plaintiff *feme covert* cannot obtain the order as of course, and it must therefore be applied for on an *ex parte* motion, *Coulsting* v. *Coulsting*, 8 Beav. 463; *Re Lancaster*, 18 Jur. 229, L. C. & L. JJ.; *Re Foster*, 18 Beav. 525.

[2] As to the duty of counsel for a pauper, see *Iles* v. *Flower*, 6 L. T. N. S. 843, L. C.

[3] Order of 1688.

[4] The affidavit must not except the just debts of the plaintiff, as appears at one time to have been allowed: per Sir J. L. Knight Bruce, V.C., in *Perry* v. *Walker*, 1 Coll. 233; Beames on Costs, 80.

[5] *Dresser* v. *Morton*, 2 Phil. 286; and see, as to the poverty which entitles a person to sue *in forma pauperis*, *Goldsmith* v. *Goldsmith*, 5 Hare, 125; *Perry* v. *Walker*, 1 Coll. 233, 236.

[6] *Wilkinson* v. *Belsher*, 2 Bro. C. C. 272.

[7] For form of order, see Seton, 1271.

[8] 2 Keen, 606; see also *Smith* v. *Pawson*, 2 De G. & S. 490.

[9] 2 Hare, 652; 8 Jur. 54

books,[1] and must be produced to the officers of the Court, whenever required by them.

After admittance, no fee, profit, or reward, is to be taken of the pauper by any counsel or solicitor, for the despatch of his business, whilst it depends in Court, and he continues *in forma pauperis;* nor is any agreement to be made for any recompense or reward afterwards; and any person offending is to be deemed guilty of a contempt of Court; and the party admitted giving any such fee, or making any such agreement, is to be thenceforth dispaupered, and not be admitted again in that suit to sue *in forma pauperis.*[2]

The counsel or solicitor assigned by the Court to assist a person admitted *in forma pauperis,* either to sue or defend, may not refuse so to do, unless he satisfies the Judge who granted the admittance with some good reason for his unwillingness.[3]

When a pauper has had counsel assigned to him, he cannot be heard in person.[4]

No process of contempt will be issued, at the instance of any person suing or defending *in forma pauperis,* until it be signed by his solicitor in the suit. And all notices of motion served, or petitions presented on behalf of any person admitted to sue or defend *in forma pauperis* (except for the discharge of his solicitor) must be signed by his solicitor; and such solicitor should take care that no such process be taken out, and that no such notice or petition be served, needlessly, or for vexation, but upon just and good grounds.[5]

In *Pearson* v. *Belsher,*[6] it is said that a motion was made on the part of the plaintiff in a pauper cause, to dismiss the bill against two of the defendants without costs; but that the Lord Chancellor ordered it to be made on payment of costs. It appears, however, from the registrar's book, that the order for dismissal in that case was drawn up without costs;[7] and it is to be observed, that in *Corbett* v. *Corbett,*[8] before referred to, the pauper's first bill had many years before been dismissed without costs, before hearing, although the cause had reached that stage; and that this very circumstance was relied upon as a ground for dispaupering him in the second suit, but was not considered as sufficient to induce the Court to make the order. The motion must not be made *ex parte;*[9]

[1] Braithwaite's P. R. 563.

[2] Ord. May, 1661.

[3] Ord. *Ibid.*

[4] *Parkinson* v. *Hanbury,* 4 De G. M. & G. 508.

[5] Ord. May, 1661; *Perry* v. *Walker,* 2 Y. & C. C. C. 655; 4 Beav. 452; and see Ord. III. 10, and *Brown* v. *Dawson,* 2 Hogan, 76 as to the liabilities of a pauper's solicitor.

[6] 3 Bro. C. C. 87.

[7] Reg. Lib. 1789, B. fo. 524, entered *Pearson* v. *Wolf*: 3 Bro. C. C. 87, Ed. Belt, n. 1; Beames on Costs, 88.

[8] 16 Ves. 407, *ante.*

[9] *Parkinson* v. *Hanbury,* 4 De G. M. & G. 508.; and see *Wilkinson* v *Belsher,* 2 Bro. C. C. 272.

and a pauper cannot amend his bill by striking out defendants, except on payment of their costs.[1] It is also to be observed, that if a cause goes against a pauper at the hearing, he shall not pay costs to the defendant; but he may be punished personally, though such punishment is not very often inflicted.

It seems to have been formerly considered, that where a plaintiff sues *in forma pauperis*, and has a decree in his favour with costs, he will only be entitled to such costs as he has been actually out of pocket;[2] but it is now settled, that the costs of a successful pauper are in the discretion of the Court;[3] and where costs are ordered to be paid to a party suing or defending *in forma pauperis*, such costs are to be taxed as *dives* costs, unless the Court otherwise directs.[4]

It was determined as long ago as the time of Tothill, that a pauper must pay the costs of scandal in his answer.[5]

As a party may be admitted to sue *in forma pauperis* at any time during the suit, so if, at any time, it is made to appear to the Court that he is of such ability that he ought not to continue to sue *in forma pauperis*, the Court will dispauper him;[6] therefore, where it was shown to the Court that a pauper was in possession of the land in question, the Court ordered him to be dispaupered, though the defendant had a verdict at Law and might take a writ of possession at any time;[7] and in the case of *Boddington* v. *Woodley*,[8] Lord Langdale, M. R., decided that an officer upon half pay (which is not alienable) could not proceed *in forma pauperis*, notwithstanding he had taken the benefit of the Insolvent Act. The application to dispauper is made by special motion on notice; and should be made without delay.[9]

At Common law, if a pauper act vexatiously or improperly in the conduct of the action, the court will order him to be dispaupered;[10] and in like manner, in the Courts of Equity, if a party who is admitted to sue *in forma pauperis* be guilty of vexatious delays, or make improper

1 *Wilkinson* v. *Belsher* 2 Bro. C. C. 272.

2 *Angell* v. *Smith*, Prec. Cha. 220.

3 *Scatchmer* v. *Foulkard*, 1 Eq. Ca. Ab. 125, pl. 3; *Hautton* v. *Hager*, cited in *Angell* v. *Smith*, Prec. Cha. 220; *Wallop* v. *Warburton*, 2 Cox. 409; *Rattrey* v. *George*, 16 Ves. 233; *Church* v. *Marsh*, 2 Hare, 655; 8 Jur. 54; *Roberts* v. *Lloyd*, 2 Beav. 376; *Stafford* v. *Higginbotham*, 2 Keen 147.

4 Ord. December, 1849: see Beames on Costs, 77; and for cases since the order, *Wellesley* v. *Wellesley*, 1 De G. M. & G. 501; *Mornington* v. *Keen*, 3 W. R. 429; 24 L. J. Ch. 400, V. C. W.

5 Per Lord Eldon, in *Rattray* v. *George*, 16 Ves. 234; Tothill, 237.

6 *Romilly* v. *Grint*, 2 Beav. 186; *Mather* v. *Shelmerdine*, 7 Beav. 267; *Butler* v. *Gardener*, 12 Beav. 525; *Perry* v. *Walker*, 1 Coll. 229, 236; 8 Jur. 680; *Goldsmith* v. *Goldsmith*, 5 Hare, 125; *Daintree* v. *Haynes*, 12 Jur. 594, V. C. E.

7 Wyatt's P. R. 321; see *Spencer* v. *Bryant*, 11 Ves. 49; see also *Taprell* v. *Taylor*, 9 Beav. 493.

8 5 Beav. 555.

9 See *St. Victor* v. *Devereaux*, 9 Jur. 519, L. C.; *Parkinson* v. *Hanbury*, 4 De G. M. & G. 508.

10 2 Chitty's Arch. 1280.

motions, he will be dispaupered, though the Court always proceeds very tenderly in such points.[1]

Where an issue is directed in a pauper's suit, he must be admitted as a pauper in the Court in which the issue is to be tried, or otherwise he cannot proceed in it, *in forma pauperis*.[2] In a case, however, where the plaintiff, a pauper, claimed as heir at law, and the defendant claimed under a will and deed, which were disputed, the bill was retained, with liberty to the plaintiff to bring an action; and the tenants were ordered to pay the plaintiff £150 to enable him to go to trial.[3]

An order admitting a party to sue or defend *in forma pauperis*, while in force, exempts the pauper from the payment of any fees in the offices of the Court, except for office copies made therein: for such copies, a charge of one penny-halfpenny per folio will be made.[4] Copies of documents which the pauper may himself make will be marked as office copies, without charge.[5] The charges for copies of pleadings, and other proceedings and documents delivered, under the 3rd, 4th, and 5th rules of the 36th General Order of the Court,[6] to a person admitted to sue or defend *in forma pauperis*, or to his solicitor, by or on behalf of any other party, are to be at the rate of one penny-halfpenny per folio; but if such person shall become entitled to receive *dives* costs, the charges for such copies are to be at the rate of fourpence per folio; and nothing is to be allowed, on taxation, in respect of such charges, until such person, or his solicitor, shall have paid or tendered to the solicitor or party by whom such copies were delivered, the additional twopence-halfpenny per folio. But this proviso is not to apply to any copy which shall have been furnished by the party himself, who is directed to pay the costs, and not by his solicitor.[7]

The charges for copies delivered by a person admitted to sue or defend *in forma pauperis*, other than those delivered by his solicitor, are to be at the rate of one penny-halfpenny per folio.[8]

It should be observed as to this Section on Paupers, that our Court has made no orders respecting them; that the orders quoted, are, for the most part, similar to the old ones which governed the English practice when it was introduced into this country in 1837, and it is presumed that our Court would be guided by them.

[1] *Whitelocke* v. *Baker*. 13 Ves. 511; *Wagner* v. *Mears*, 3 Sim. 127; *Daintree* v. *Haynes* 12 Jur. 594, V. C. E.; and see *Perry* v. *Walker*, 1 Coll. 229: 8 Jur. 680; *Burry, Port Co.* v. *Bowser*, 5 W. R. 325, V. C. K.

[2] *Gibson* v. *M'Carty* Ca. t, Hardwicke, 311.

[3] *Perishal* v. *Squire*. 1 Dick. 31; Beames on Costs, 76: App. 22; but see *Nye* v. *Maule*, 4 M. & C. 342, 345.

[4] Braithwaite's Pr. 563; and see Wyatt's P. R. 320; Beames' Orders, 216, n. (143).

[5] Braithwaite's Pr. 563.

[6] These rules relate to copies of documents not made or delivered by the officers of the Court, but by the solicitors of other parties in the cause.

[7] Regul. to Ord. Part IV. 2.

[8] *Ibid.* 3.

Where a party sues a defendant *in forma pauperis*, the Masters and Deputy Registrars, being officers of the Court, are not entitled to receive any fees from the pauper.[1]

CHAPTER III.

SUITS BY PERSONS WHO ARE UNDER DISABILITY.

SECTION I.—*Generally.*

The general rule that all persons, of whatever rank or condition, and whether they have a natural or only political character, are capable of instituting suits in Equity, is liable, as has been stated,[2] to a few exceptions. What these exceptions are will be the subject of the present Chapter.

The disabilities by which a person may be prevented from suing, may be divided into two sorts: namely, such as are absolute, and, during the time they last, effectually deprive the party of the right to assert his claim; and such as are qualified, and merely deprive him of the power of suing without the assistance of some other party to maintain the suit on his behalf. Of the first sort, are the disabilities which arise from *Alienage*, *Outlawry*, *Attainder*, *Conviction of felony*, and *Bankruptcy*; of the second sort, are those which arise from *Infancy*, *Coverture*, *Idiotcy* and *Lunacy*.

To the first list of disabilities, which disqualify a man from entertaining any suit in his own right, might formerly have been added excommunication and popish recusancy. But these disqualifications no longer exist: the first, except in certain cases, having been abolished by the statute 53 Geo. III. c. 127, the third section of which Act directs, that in those cases in which excommunication is to continue, no person pronounced or declared excommunicate shall incur any civil penalty or incapacity whatever, save such imprisonment as the Court is thereby authorized to inflict. The disqualification arising from popish recusancy has been virtually, if not entirely, abolished by the 31 Geo. III. c. 32, by which Papists and persons professing the popish religion, on taking the oath and subscribing the declarations therein mentioned, are relieved

[1] *Chambers* v. *Chambers*, 1 Cham. R. 238.
[2] *Ante*.

from most of the penalties and disabilities to which they were then subject. It has lately been held, that a nun is neither civilly dead, nor under any disability arising from duress or undue influence.[1]

SECTION II.—*Aliens.*

WITH respect to aliens in general, it is to be observed that, although by the old law no alien, whether friend or enemy, could sue in the Queen's Courts, yet the necessity of trade has gradually done away with the too rigorous restraints and discouragements which formerly existed; and it is now clear, that for a mere personal demand, an alien born, provided he be not an alien enemy, may sue in the English Courts. This rule is clearly recognised in *Ramkissenseat* v. *Barker*,[2] where a bill was filed against executors for an account, by a plaintiff who had been employed by the testator in India as his banyan or broker, and a plea was put in on the ground that the plaintiff was an alien born and an infidel, not of the Christain faith, and upon a cross bill incapable of being examined upon oath, and therefore disqualified from suing in England; but the Court overruled the plea, without argument: observing, that the plaintiff's was a mere personal demand, and that it was extremely clear that he might bring a bill in an English Court. It was a matter of doubt to what extent the Court would protect the copyright of a foreigner;[3] it has, however been decided, that where a foreign author owes a temporary allegiance to the Crown of England, by residence in that country at the time of his first publication of the work, not having previously published it elsewhere, he is an author within the protection of the Copyright Acts.[4]

The right of an alien to sue in the English Courts was, at Common Law, confined to cases arising upon personal demands; for an alien might trade and traffic, and buy and sell, and therefore he was considered to be of ability to have personal actions; but he could not maintain either real or mixed actions:[5] because an alien, though in amity, was incapable of holding real property.[6] The right at Common Law of an alien friend in respect of trade marks, stands on the same ground as that of a subject.[7]

[1] *Re Metcalfe's Will*, 10 Jur. N. S. 287, L. JJ.; *ib.* 224, M. R.; and see as to civil death, and the status of a nun, the cases there cited, and *Evans* v. *Cassidy*, 11 Ir. Eq. Rep. 243; *Blake* v. *Blake*, 4 Ir. Ch. Rep. 349.

[2] 1 Atk. 51; see also *Pisani* v. *Lawson*, 6 Bing. N C. 90.

[3] *Delondre* v. *Shaw*, 2 Sim. 237; *Bentley* v. *Foster*, 10 Sim. 329; *Buxton* v. *James*, 5 De G. & S. 80.

[4] See 5 & 6 Vic. c. 45; *Jefferys* v. *Boosey*, 4 H. L. Ca. 815: 1 Jur. N. S. 615; overruling S. C. 4 Exch. 145: in Ex. Ch. 6 Exch. 580.

[5] Co. Litt. 129 b.

[6] *Ibid.* 2 b.

[7] *Davies* v. *Kennedy*, 13 Grant 523.

It is sometimes a matter of considerable difficulty to determine, whether a descendant of British subjects, who have settled abroad, has or has not become an alien, and forfeited his rights as a British subject. In the case of *Fitch* v. *Weber*,[1] the statutes affecting the question are considered, and the principles on which the Courts proceed in deciding such questions will be found.

Although an alien may maintain a suit in England, yet, if one alien sues another upon a contract entered into in a foreign country, it would be contrary to all the principles which guide the Courts of one country in deciding upon contracts made in another, to give a greater effect to the contract than it would have by the laws of the country where it took place; therefore, where a French emigrant, resident in England, obtained by *duress* securities from another French emigrant, for the payment of a demand, alleged to be due from him under an obligation entered into in France as security for another, and for which, according to the laws of France, his person could not be affected, Lord Rosslyn refused to dissolve an injunction which had been obtained to restrain an action at Law upon those securities, and intimated a very strong opinion, that when the case came on for hearing he should in all probability set the securities aside.[2] Upon the same principle, it was held by Lord Hardwicke, that the Court will not grant a writ of *Ne exeat Regno*, where it appears that the transactions between the parties were entered into upon the faith of having justice in the place where they respectively resided;[3] though, in the case before him, he considered that the parties did not deal upon any such understanding, and therefore refused to discharge the writ without security.

But although, in the case of foreigners resident abroad entering into engagements in a foreign country, which, by the law of that country, do not admit of arrest, the law of England will not allow one party to arrest another, either in an action at common law, or in a suit in equity for a *Ne exeat Regno;* yet if one of the parties is an Englishman, and they were both resident in different countries at the time the contract was entered into, the court will not discharge a *Ne exeat* obtained by the party resident in England, against the other who had casually come to England, on the ground that, by the law of the country of which the other was a native, he would be exempt from arrest for a debt of the same nature.[4] It is, however, to be observed, that with respect to writs of *Ne exeat Regno*, Lord Northington is distinctly stated to have thought, that this process

[1] 6 Hare, 51. See also *Count de Wall's case*, 6 Moore, P. C. 216: 12 Jur. 145; *Barrow* v. *Wadkin*, 24 Beav. 327; *Ritson* v. *Stordy*, 3 Sm. & G. 230.

[2] *Talleyrand* v. *Boulanger*, 3 Ves. 447, 450.

[3] *Robertson* v. *Wilkie*, Amb. 177; and see *De Carriere* v. *De Calonne*, 4 Ves. 590.

[4] *Flack* v. *Holm*, 1 J. & W. 405, 413, 418.

ought not to be granted between foreigners;[1] and in *De Carriere* v. *De Calonne*,[2] Lord Rosslyn said, it is very delicate to interfere as against foreigners, whose occasions or misfortunes have brought them here, by an application of this writ to them; and that it would be a necessary term, that it should be simply a case of equity, affording no ground to sue at law.

With respect to alien enemies, the law is clearly settled by numerous cases, that an alien enemy not resident in England, or resident there without the permission of the government, cannot institute any suit whatever in England, whether at law or in equity, either for real or personal property, until both nations be at peace;[3] and it is said, that the question whether he is in amity or not, should be tried by the record, *viz.*, by the production of the proclamation of war.[4] It is to be observed, that in declaring war, the Queen, in her proclamation, usually qualifies it, by permitting the subjects of the enemy resident here to continue so, as long as they peaceably demean themselves; so that, without doubt, such persons are to be deemed in effect alien friends;[5] therefore, where an alien enemy has lived in England peaceably a long time, or has come to England for refuge and protection, the Court will discountenance pleas of alienage against him.[6] It seems, also, that a prisoner of war may sue upon a contract entered into by him during the time of his captivity; thus, where the subject of a neutral state was taken in an act of hostility to England, on board an enemy's fleet, and brought there as a prisoner of war, it was held that he was not disqualified, while in confinement, from maintaining a suit on a contract entered into by him as a prisoner of war.[7]

The mere circumstance of residing in a foreign country, the government of which is at war with Great Britain, and of carrying on trade there, is sufficient to constitute any person an alien enemy, even though he would not otherwise be considered in that character. Thus, a subject of a neutral state, resident in a hostile state in the character of consul of the neutral state, will, if he carry on trade in the hostile country, be considered as an alien enemy, and disqualified from suing in the Courts of England; although, had he merely resided there in his diplomatic character, he would not have been disqualified.[8] And even if a British subject, residing in a foreign state which is at war with Britain, carry

[1] 4 Ves. 585.
[2] *Ib.* 590.
[3] Co. Litt. 129 b.; 6 T. R. 23; 1 Bos. & P. 163; 3 Bos. & P. 113; *Alcinous* v. *Nigren*, 4 El. & Bl. 217; S. C. *nom. Alsenius* v. *Nygren*, 1 Jur. N. S. 16.
[4] Co. Litt. by Harg. & But., 129 b. n. 2.
[5] *Ibid.* n. 3.
[6] Wyatt's P. R. 327.
[7] *Sparenburgh* v. *Bannatyne*, 1 Bos. & P. 163; *Maria* v. *Hall*, 2 Bos. & P. 236: 1 Taunt. 33.
[8] *Albretcht* v. *Sussman*, 2 V. & B. 323, 327.

on trade there without a license from the British government, his trading will be considered such an adherence to the Queen's enemies as will incapacitate him from maintaining a suit in England;[1] and although he be an ambassador, or other representative of the Crown residing in a hostile state, yet if he carry on trade in such state without a license, he will deprive himself of the right to sue in the municipal courts of Britain, because he is lending himself to the purposes of the enemy by furnishing him with resources.[2]

If, however, a subject of Great Britain, residing in a hostile country, have a license from the British Government to trade, he will not incur any disability as long as he confines himself to the trade authorized by such license,[3] but if a person having a license, to reside in a hostile country, and to export corn or other specified articles to Britain, were to use such license beyond its expression, for the purpose of dealing in articles to which it has no relation, he cannot maintain that such dealing is not an enemy's dealing.[4]

The disability to maintain a suit on account of alienage, extends to all cases in which an alien enemy is interested, although his name does not appear in the transaction; thus, it has been held, that an action at law cannot be maintained upon a policy of insurance upon the property of an alien enemy, even though the action is brought in the name of an English agent,[5] and though it is alleged that the alien is indebted to the agent in more money than the value covered by the policy.[6] Where, however, a certain trading of an alien enemy (*viz.*, for specie and goods to be brought from the enemy's country in his ships into colonial ports) was licensed by the King's authority, it was held, that an insurance on the enemy's ship, as well as on the cargo, was in furtherance of the same policy, which allowed the granting of the licenses to authorize the trade; and that effect ought, therefore, to be given to the ordinary means of indemnity, by which that trade (from the continuance of which the public must be supposed to derive benefit,) may be best promoted and secured; the Court of King's Bench, therefore, determined, that an action brought by an English agent to recover the amount of the insurance on the ship, might be maintained, notwithstanding the ship belonged to an enemy.[7] It was held, however, that although in such a

[1] *M'Connell* v. *Hector*, 3 Bos. & P. 113; *O'Mealey* v. *Wilson*, 1 Camp. 482; but he may lawfully provide for the necessities of Englishmen detained abroad, and may, on the return of peace, enforce contracts made for such purposes, *Antoine* v. *Morshead*, 6 Taunt. 237; *Duhammel* v. *Pickering*, 2 Stark. 92.

[2] *Ex parte Baglehole*, 18 Ves. 525, 528.

[3] *Ex parte Baglehole*, 18 Ves. 529.

[4] *Ibid.*

[5] *Bristow* v. *Towers*, 6 T. R. 35.

[6] *Brandon* v. *Nesbitt*, *ib.* 23.

[7] *Kensington* v. *Inglis*, 8 East, 273, 288.

case the agent might sue, because the King's license had purged the trust in respect to him of all its injurious consequences to the public interest, yet that it had not the same effect of removing the personal disability of the principal, so as to enable him to sue in his own name.[1]

The disability to sue under which an alien enemy lies is personal, and takes away from the Queen's enemies the benefit of her Courts, whether for the purpose of immediate relief, or of giving assistance in obtaining that relief elsewhere; therefore, an alien enemy cannot institute a suit for the purpose of obtaining a discovery, even though he seek no further relief.[2]

It is to be observed, that the right of an alien to maintain a suit relating to a contract, is only suspended by war if the contract was entered into previously to the commencement of the war, and that it may be enforced upon the restoration of peace.[3] Upon this principle, in bankruptcy, the proof of a debt due to an alien enemy, upon a contract made before the war broke out, was admitted, reserving the dividend.[4] But no suit can be sustained to enforce an obligation arising upon a contract entered into with an alien enemy during war, such contract being absolutely void.[5] And where a policy of insurance, on behalf of French subjects, was entered into just before the commencement of the war, upon which a loss was sustained in consequence of capture by a British ship, after hostilities had commenced, the proof of a debt arising from such policy, which had been admitted by the commissioner in bankruptcy, was ordered to be expunged.[6] The principle upon which the last-mentioned case was decided is fully stated by Lord Ellenborough in *Brandon* v. *Curling*,[7] where it is laid down by his lordship as a rule, that every insurance on alien property by a British subject must be understood with this implied exception, "that it shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and assurer."

A defence, on the ground that the plaintiff is an alien enemy, should be made by plea before answer. Thus, where a bill was filed by a plaintiff residing in a foreign country at war with Britain, for a commission to examine witnesses there, and the defendant put in an answer, an application for an order for the commission was granted: though it was

[1] *Kensington* v. *Inglis*, 8 East, 273, 288.

[2] *Daubigny* v. *Davallon*, 2 Anst. 462; but see *Albretcht* v. *Sussman*, 2 V. & B. 324, 326, 327; Story. Eq. Pl. s. 53, n. (4).

[3] *Alcinous* v. *Nigren*, 4 El. & Bl. 217; S. C. *nom. Alcenius* v. *Nygren*, 1 Jur. N. S. 16.

[4] *Ex parte Boussmaker*, 13 Ves. 71.

[5] *Ibid.*; and see *Exposito* v. *Bowden*, in Ex. Ch., 7 El. & Bl. 779: 5 W. R. 732, as to the dissolution of contracts by a declaration of war.

[6] *Ex parte Lee*, 13 Ves. 64.

[7] 4 East. 410.

objected that the Court ought not to grant a commission to an enemy's country, the Court being, as it seems, of opinion that the objection had come too late.[1]

It does not appear, from any case in the books, what would be the effect of a war breaking out between the country of the plaintiff and Great Britain, after the commencement of the suit; but, from analogy to what is stated by Lord Chief Baron Gilbert to be the practice of the Court with regard to outlawry, namely, that if it is not pleaded it may be shown to the Court on the hearing, as a peremptory matter against the plaintiff's demands, because it shows the right to the thing to be in the Queen,[2] it is probable that the Court would, under such circumstances, stay the proceedings.

It appears to be the essence of a plea that the plaintiff is an alien enemy, to state that the plaintiff was born out of the liegance of the Queen, and within the liegance of a state at war with her; but where the plea contains words which amount in substance to an allegation of these facts, it will be sufficient, although they are not averred with the same strictness that is required by the rules of law. Thus, where a plea averred that the plaintiffs were Frenchmen, aliens and enemies of the King, the Court held that the plea was sufficient: the word alien being a legal term, importing born out of the liegance of the King, and within the liegance of some other state; and the words, Frenchmen and enemies of the King, showing that they were the subjects of a state at war with this country.[3]

It is to be observed, that the Courts here take notice, without proof, of a war in which Britain is engaged; but a war between foreign countries must be proved.[4]

In all cases of a person permitted to sue in equity, if he state himself in his bill to be resident abroad, or if it come to the knowledge of the defendant that he is actually so, the defendant may obtain an order of the Court that the plaintiff shall, before he proceeds further, give security to answer to the defendant the costs of the suit.[5] The practice with respect to this rule has been before stated;[6] and is applicable to aliens and foreigners, as well as to natural-born subjects.[7]

[1] *Cahill* v. *Shepherd*, 12 Ves. 335.

[2] Gilb. For. Rom. 53.

[3] *Daubigny* v. *Davallon*, 2 Anst. 462, 468.

[4] *Dolder* v. *Lord Huntingfield*, 11 Ves. 292; and see *Alcinous* v. *Nigren*, 4 El. & Bl. 217; S. C. *nom Alcenius* v. *Nygren*, 1 Jur. N. S. 16.

[5] *Meliorucchy* v. *Meliorucchy*, 2 Ves. S. 24; *Green* v. *Charnock*, 1 Ves. J. 396; *Hoby* v. *Hitchcock*, 5 Ves. 699; *Seilaz* v. *Hanson*, *ib.* 261; *Drever* v. *Maudesley*, 5 Russ. 11.

[6] See *Ante*.

[7] For more as to trading with alien enemies, see *The Hoop*, Tudor's L. C. Mere. Law, 673, 688.

SECTION III.—*Bankrupts.*

THE disability to maintain a suit on account of alienage, outlawry, and attainder, or conviction, arises partly from the plaintiff being personally disqualified, and partly from his not being capable of holding the property which is the object of the suit. The disability accruing from bankruptcy, arises from the latter cause only, or rather from the fact that, by the bankruptcy, all the bankrupt's property, whether in possession or action, is vested in his assignees; and a bankrupt, even though uncertificated or undischarged, is not personally disqualified from suing; and may, in many cases, sustain suits either at Law or Equity.[1]

Thus, under the old Bankrupt Law, if a bankrupt disputed his liability to the commission, or the validity of the adjudication under it, he might maintain trespass against his assignees,[2] or trover for his books and papers;[3] and it has been held, that where assignees have employed the bankrupt in carrying on his trade or manufacture for the benefit of the estate, and paid him money from time to time, it is evidence of such a contract between him and the assignees, as will enable him to maintain an action against them for a compensation for his work and labour.[4] And so, as a bankrupt, though uncertificated, can acquire and hold property against every one except his assignees, he can maintain an action of *assumpsit* against a third person for his own work and labour performed,[5] and for money lent or advanced[6] since the issuing of the commission or fiat; and where no claim is made by the assignees, he may also maintain trover for goods acquired after his bankruptcy,[7] as well as trespass *quare clausum fregit*, for a trespass committed before his bankruptcy;[8] for the defendant, in any of these actions, cannot object to the bankrupt's claim unless his assignees interfere, and the bankrupt in fact sues at Law as a trustee for his assignees.[9]

In Equity also, a bankrupt who had not obtained his certificate has been allowed to file a bill to restrain a nuisance, or the infliction of any injury of a private or particular nature, without making his assignees parties;[10] and where sued at Law upon a bond or note, he has been allowed to file a bill of discovery, in order to obtain proof that such

[1] See *Herbert* v. *Sayer*, 5 Q. B. 978; Calvert on Parties, 199, *et seq.*

[2] *Perkin* v. *Proctor*, 2 Wils. 382.

[3] *Summersett* v. *Jarvis*, 6 Moore, 56: 3 B. & B. 2.

[4] *Coles* v. *Barrow*, 4 Taunt. 754.

[5] *Chippendale* v. *Tomlinson*, 4 Doug. 318; 1 Cooke's B. L. 428; *Silk* v. *Osborne*, 2 Esp. 140; see Selwyn's N. P. Sup. 323.

[6] *Evans* v. *Brown*, 1 Esp. 170.

[7] *Fowler* v. *Down*, 1 Bos. & P. 44; *Laroche* v. *Wakeman*, Peake 190; *Webb* v. *Ward*, 7 T. R. 296; *Webb* v. *Fox*, *ib.* 391; *Hole* v. *Hole*, 10 Jur. N. S. 1089; 13 W. R. 39, M. R.

[8] *Clarke* v. *Calvert*, 3 Moore, 96.

[9] *Cumming* v. *Roebuck*, 1 Holt, N. P. 172.

[10] *Semple* v. *London and Birmingham Railway Company*, 9 Sim. 209.

bond or note was fraudulently procured; the specific relief prayed is, however, material in determining whether the assignee is a necessary party to the bill; for where it prayed that the instrument upon which an insolvent debtor was sued at law might be delivered up, the assignee was considered a necessary party.[1] Where, under the former Bankrupt Acts, persons claiming to be creditors of bankrupts, instead of seeking relief under the commission, brought an action against the bankrupts, and the bankrupts filed a bill seeking a discovery in aid of their defence to the action, and praying that the accounts between them and the plaintiffs at law might be taken, and that the plaintiffs at law might pay the balance, a plea of bankruptcy was overruled: Sir Thomas Plumer, V. C., being of opinion that the bankrupts were entitled to the discovery and account, although they were not entitled to that part of the prayer which sought the payment to them of the balance.[2]

In general, however, a bankrupt, although he is by law entitled to the surplus of his estate which remains after payment of his debts, cannot bring a bill in equity for any property which is vested in his assignees under the adjudication, even though there may be collusion between them and the persons possessed of the property;[3] thus, where a bill was filed by a bankrupt to recover property due to his estate, stating that the commission against him was invalid, and that there was a combination between his assignees and the debtor, to which a demurrer was put in, Sir John Leach, V. C., allowed the demurrer: saying, that if it had been true that the commission was invalid, the plaintiff ought to have tried its validity by an action, and could not by bill impeach the commission; and that if there were a combination between the debtor and his assignees, his proper course was to apply, by petition, to have the assignees removed and new assignees appointed.[4]

In the case of *Heath* v. *Chadwick*,[5] the question arose, whether creditors of an insolvent, under the English Insolvent Debtors' Act,[6] could maintain a suit respecting property, or rights alleged to have belonged to the insolvent, and to be vested in his assignee, upon an allegation of collusion between the assignee and the party against whom relief is prayed. Lord Cottenham reviewed the various cases upon the subject,

[1] *Balls* v. *Strutt*, 1 Hare, 146; *Meddowcroft* v. *Campbell*, 13 Beav. 184.

[2] *Lowndes* v. *Taylor*, 1 Mad. 423. This decision was afterwards affirmed on appeal, *ib.* 425: 2 Rose, 432; and see *Govet* v. *Armitage*, 2 Anst. 412; *Kaye* v. *Fosbrooke*, 8 Sim. 28.

[3] Property belonging to the bankrupt as factor, executor, or trustee, does not pass to the assignees: Archbold's Bkpcy. 328-333; *Ex parte Ellis*, 1 Atk. 101; *Bennet* v. *Davis*, 2 P. Wms. 316; *Ex parte Butler*, Amb. 74; *Ex parte Chion*, 3 P. Wms. 187, n. (*a*); *Godfrey* v. *Furzo*, *ib.* 185; *Pennell* v. *Deffell*, 4 De G. M. & G. 372, 379; and see Lewin on Trusts, 180-185.

[4] *Hammond* v. *Attwood*, 3 Mad. 158; see also *Yewens* v. *Robinson*, 11 Sim. 105, 120.

[5] 2 Phill. 649; and see *Major* v. *Aukland*, 3 Hare, 77; *Goldsmith* v. *Russell*, 5 De G. M. & G. 547; *Tudway* v. *Jones*, 1 K. & J. 691, and cases at Common Law there cited; and the observations of Lord Cottenham in *Rochfort* v. *Battersby*, 2 H. L. Ca. 403, 409; *Davis* v. *Snell*, 28 Beav. 321.

[6] 1 & 2 Vic. c. 110; 5 & 6 Vic. c. 116; 7 & 8 Vic. c. 96.

and from his judgment, it appears that the creditors of an insolvent cannot under such circumstances sue, and that the same principle is applicable also to cases in bankruptcy; and further, that there is no distinction in this respect between bankrupts or insolvents themselves and their creditors, or persons claiming under them.

In *Spragg* v. *Binkes*,[1] it was held by Lord Alvanley, M. R., that a bankrupt cannot file a bill for the redemption of a mortgage, in respect of his right to the surplus of his estate; and in *Benfield* v. *Solomons*,[2] a demurrer was allowed to a bill by a bankrupt against a mortgagee of estates in England and Berbiec, for an account and payment of the balance to the assignees, who were made defendants and charged with collusion.

As a bankrupt cannot file a bill against strangers respecting property vested in his assignees under the bankruptcy, so it has been held that he cannot maintain a suit against his assignees for an account of their receipts and payments under the bankruptcy, and for payment of the surplus. This doctrine was clearly laid down by Lord Eldon, and has since been acted upon.[3]

It is to be observed, that whatever property a bankrupt has, or, to use a technical expression, may depart with, becomes, upon bankruptcy, the property of the assignees, who are to have it for the benefit of the creditors; and the circumstance of such property being in a foreign country, where the bankrupt laws of this country do not prevail, makes no difference; so that a bankrupt cannot maintain a suit in this country, even though the property in respect of which the suit is instituted is in another country.[4]

The rules with regard to bankrupts, applied, by analogy, to persons who had taken the benefit of the Insolvent Debtors' Acts, who were equally considered as being divested of all right to maintain a suit in respect of any surplus to which they might eventually be entitled;[5] but these provisions are no longer in force;[6] and all persons, whether traders or non-traders, are in England now subject to the bankrupt laws.[7]

[1] 5 Ves. 583, 589.

[2] 9 Ves. 77, 82.

[3] *Saxton* v. *Davis*, 18 Ves. 72, 79; *Tarleton* v. *Hornby*, 1 Y. & C. Ex. 172, 188.

[4] *Sill* v. *Worswick*, 1 H. Bl. 665; *Hunter* v. *Potts*, 4 T. R. 182; *Phillips* v. *Hunter*, 2 H. Bl. 402; *Benfield* v. *Solomons*, 9 Ves. 77.

[5] *Gill* v. *Fleming*, 1 Ridg. P. C. 431; *Spragg* v. *Binkes*, 5 Ves. 583; *Dyson* v. *Hornby*, 7 De G. M. & G. 1; *Cook* v. *Sturgis*, 3 De G. & J. 506: 5 Jur. N. S. 475; *Troup* v. *Ricardo*, 10 Jur. N. S. 859: 12 W. R. 1135, M. R.; 13 W. R. 147, L. C. As to insolvents under 5 & 6 Vic. c. 116, see *Wearing* v. *Ellis*, 6 De G. M. & G. 596: 2 Jur. N. S. 204, 1149. A suit for administration of a deceased insolvent's estate may be instituted by a scheduled creditor, *Galsworthy* v. *Durant*, 2 De G. F. & J. 466: 7 Jur. N. S. 113; 29 Beav. 277: 6 Jur. N. S. 743.

[6] 24 & 25 Vic. c. 134, s. 230, and Sched G.

[7] *Ibid*, s. 69.

But although neither bankrupts nor insolvent debtors can sue in respect of their interest in the surplus of the property, yet, as they have such an interest in the surplus as is capable of assignment, it seems that the persons claiming under such assignments, if made for valuable consideration, may maintain bills respecting them. This appears to ~~have~~ been the opinion of Lord Alvanley, M. R., in *Spragg* v. *Binkes*,[1] though his Lordship seems to have doubted whether the Court had not gone too far in permitting such assignments, and to have held, that a party could not parcel out a right in accounts to be taken to different persons, so that every one of those persons might file a bill *pro interesse suo*.

The disability of a bankrupt to maintain a suit, does not apply to a bankrupt who has obtained his order of discharge, where he is suing in respect of property acquired after his order of discharge has taken effect.

In most respects the situation of an insolvent debtor, as far as regards the right to sue for property acquired previous to his discharge, was similar to that of a bankrupt whose order of discharge has taken effect; but there was a material difference in their situations with regard to after-acquired property. A bankrupt may, has we have seen, after his order of discharge has taken effect, become entitled to property in the same manner that he might before his bankruptcy;[2] but in the case of an insolvent debtor, his future property was made liable to the payment of his debts contracted before his discharge.

The proper course by which to take advantage of the bankruptcy or isolvency of the plaintiff in a suit, where such bankruptcy or insolvency has occurred previously to the filing of the bill, is by demurrer, if the fact appears upon the bill;[3] and if the fact does not so appear, it should be pleaded. In *Bowser* v. *Hughes*,[4] which was the case of a plea to a bill by an insolvent debtor against his assignees, and a debtor to the estate, the facts stated in the plea appeared upon the face of the bill, and yet the plea was held good; and it has been held, that as at Law any matter which arises between the declaration and the plea may be pleaded, so bankruptcy or other matters arising between the bill and plea may be pleaded in Equity.[5]

[1] 5 Ves. 583, 589; *Cook* v. *Sturgis*, 3 De G. & J. 506: 5 Jur. N. S. 475.

[2] The Court may, however, grant the order of discharge, subject to any condition touching after-acquired property of the bankrupt: see 24 & 25 Vic. c. 134, s. 159, rule 3; and see *Ex parte Griffiths*, 10 Jur. N. S. 785, 787, L. C. Property coming to the bankrupt, between the time of pronouncing the order of discharge and the time allowed for appealing therefrom, belongs to the bankrupt, when the order is not recalled or suspended on appeal, *Re Laforest*, 9 Jur. N. S. 851: 11 W. R. 738, L. C.

[3] *Benfield* v. *Solomons*, 9 Ves. 77, 82.

[4] 1 Anst. 101

[5] *Turner* v. *Robinson*, 1 S. & S. 3; *Sergrove* v. *Mayhew*, 2 M'N. & G. 97: *Lane* v. *Smith*, 14 Beav. 49.

In pleading bankruptcy, it was the rule that all the facts should be stated successively and distinctly; and it was not sufficient to say that a commission or fiat of bankruptcy was duly issued against the plaintiff, under which he was duly found and declared a bankrupt, and that all his estate and effects had been duly transferred to or become vested in the assignees:[1] a plea of bankruptcy must have stated distinctly the trading, the contracting debts, the petitioning creditor's debt, the act of bankruptcy, the commission or fiat, and that the plaintiff had been found bankrupt; but it may be doubted how far this rule would now be strictly enforced.[2]

With respect to the bankruptcy of the plaintiff after the commencement of a suit or after plea and answer put in, it seems that the bankruptcy of a sole plaintiff does not strictly cause an abatement, but renders the suit defective;[3] or, according to the language of Lord Eldon, in *Randall* v. *Mumford*,[4] "this Court, without saying whether bankruptcy is or is not strictly an abatement, has said that, according to the course of the Court, the suit is become as defective as if it was abated."

The result in practice of the above principle is, that if the assignees of a bankrupt, sole plaintiff, desire to prosecute the suit, they must obtain, on motion of course, an order enabling them so to do.[5] And upon the non-prosecution of a suit in which the plaintiff has become bankrupt, the defendant, if he wishes to get rid of the suit entirely, must adopt a course of proceeding analogous to that pursued where the plaintiff obtains an injunction and dies; in which case, the defendant may move that the injunction be dissolved, unless the representatives of the deceased plaintiff revive within a certain time;[6] he must move that the assignees may, within a specified time (usually three weeks) after notice of the order, take proper supplemental proceedings for the purpose of prosecuting the suit against him; or in default thereof, that the plaintiff's bill may stand dismissed.[7] This is, however, not a motion of course, and the assignees must be served with notice of it.[8] It should also be supported by an affidavit of facts;[9] and it is to be observed, that

[1] *Carleton* v. *Leighton*, 3 Mer. 667, 671.

[2] See 12 & 13 Vic. c. 106, s. 235; but see *Lane* v. *Smith*, 14 Beav. 49.

[3] *Lee* v. *Lee*, 1 Hare, 621.

[4] 18 Ves. 427.

[5] *Jackson* v. *Riga Railway*, 28 Beav. 75.

[6] *Weeler* v *Malins*, 4 Mad. 171; *Lord Huntingtower* v. *Sherborn*, 5 Beav. 380; *Robinson* v. *Norton* 10 Beav. 484.

[7] This is the course before decree; after decree, the motion should ask to stay all further proceedings, *Clarke* v. *Tipping*, 16 Beav. 12; and see *Whitmore* v. *Oxborrow*, 1 Coll. 91; and an application by the defendant for an order to revive under 15 & 16 Vic. c. 86, s. 52, after decree was refused, *Maw* v. *Pearson*, 12 W. R. 701, M. R.; where the bankruptcy has occurred in a foreign country, see *Bourbaud* v. *Bourbaud*, 12 W. R. 1024, V. C. W. And for an order in like case, see Seton, 1278. As to the effect on a suit of a trust deed by the plaintiff, under 24 & 25 Vic. c. 134, see s. 197.

[8] As to the proper time for making the applications, see *Sharp* v. *Hullet*, 2 S. & S. 496.

[9] *Porter* v. *Cox*, 5 Mad. 80.

the dismissal will be without costs, as a bankrupt cannot be made to pay costs.[1] Where, however, the bankruptcy takes place between the hearing and judgment, the Court will not, before giving judgment, compel the assignees to revive.[2]

After the bankruptcy of the plaintiff, the defendant cannot make the ordinary motion to dismiss; and in *Sellas* v. *Dawson*,[3] Lord Thurlow held, that such an order, pending the bankruptcy of the plaintiff, was a nullity, and therefore refused to discharge one obtained under such circumstances.

The rule of practice, by which a defendant is required to give notice to the assignees in the case of the bankruptcy of a plaintiff, is confined to the case of a sole plaintiff, who, becoming bankrupt, is supposed to be negligent of what is sought by the bill, and the Court, to prevent surprise and save expense, requires notice to be given to the assignees; but there is no instance where the Court has taken upon itself to interpose the rule where there are two plaintiffs, one of whom is solvent and the other insolvent; for it is as competent to the solvent plaintiff as it is to the assignees, to rectify the suit.[4]

In the case of an injunction granted at the suit of a plaintiff who afterwards becomes bankrupt, the practice which has been adopted is to require the bankrupt to bring his assignees before the Court; and the Court will make an order to dissolve the injunction and dismiss the bill, unless the assignees shall be brought before it within a reasonable time; which order, it seems, may be served upon the bankrupt alone, as it is supposed that the bankrupt will find the means of giving his assignees notice.[5] Such an order will also be without costs.

Section IV.—*Infants.*

We come now to the consideration of those disqualifications which incapacitate a person from maintaining a suit alone, but do not prevent his suing, provided his suit be supported by another person. Such disqualifications arise from *infancy, idiocy, lunacy or imbecility of mind,* and *marriage.* With respect to infants, idiots, lunatics, and persons of weak minds, the law considers that, by reason of the immaturity or imbecility of their intellects, they are incapable of asserting or protecting their own rights, or of forming a judgment as to the necessity of

[1] *Wheeler* v. *Malins*, 4 Mad. 171; *Lee* v. *Lee*, 1 Hare, 621; *Meiklam* v. *Elmore*, 4 De G. & J. 208; 5 Jur. N. S. 904; *Boucicault* v. *Delafield*, 10 Jur. N. S. 937; 12 W. R. 1025, V. C. W.; 10 Jur. N. S. 1063; 13 W. R. 64, L.JJ.

[2] *Boucicault* v. *Delafield*, 12 W. R. S, V. C. W.

[3] 2 Anst. 458, n.

[4] *Caddick* v. *Masson*, 1 Sim. 501; *Latham* v. *Kenrick*, *ib.* 502,

[5] *Randall* v. *Mumford*, 18 Ves 424, 428; *Wheeler* v. *Malins*, 4 Mad. 171.

applying for protection or redress to the tribunals of the country; it therefore requires, that whenever it is necessary that application should be made on their behalf to the Court of justice, such application should be supported by some person, who may be responsible to the Court that the suit has not been wantonly or improperly instituted. With respect to married women, their incapacity does not arise from want of reason, but from the circumstance that, by the law of England, the property of all women in a state of coverture vests in the husband; the consequence of which is, that, as a general rule, no suit can be maintained by the wife without her husband being made a party.

In the present section, the attention of the reader will be directed to the peculiarities in the practice of the Court, arising from the circumstance of the party, or one of the parties suing, being an infant.

The laws and customs of every country have fixed upon particular periods, at which persons are presumed to be capable of acting with reason and discretion. According to the law of this country, a person is styled an infant until he attains the age of twenty-one years, which is termed his full age.[1]

An infant attains his full age on the completion of the day which precedes the twenty-first anniversary of his birth; but, as the law will make no fraction of a day, he may do any act which he is entitled to do at full age, during any part of such day. Thus, it has been adjudged, that if one is born on the 1st day of February, at eleven at night, and on the last day of January, in the twenty-first year of his age, at one in the morning, he makes his will of lands and dies, it is a good will, for he was then of full age.[2]

Although, for many purposes, an infant is under certain legal incapacities and disabilities, there is no doubt that a suit may be sustained in any Court, either of law or of equity, for the assertion of his rights, or for the security of his property; and for this purpose, a child has been considered to have commenced his existence as soon as it is conceived in the womb.[3] Under such circumstances, it is termed in law an infant *en ventre sa mere*, and a suit may be sustained on its behalf; and the Court will, upon application in such suit, grant an injunction to restrain waste from being committed on his property.[4] In *Robinson* v. *Litton*,[5] Lord Hardwicke seems to have considered, that the point that a Court of equity would grant an injunction to stay waste at the suit of an infant *en ventre sa mere*, though it had often been said

[1] Jacob's Law Dict. tit. Infant.
[2] Salk. 44, 625; 1 Ld. Ray. 480; 2 *Ib.* 1096; 1 Bla. Com. 463.
[3] See *Wallis* v. *Hodson*, 2 Atk. 117.
[4] See *Musgrave* v. *Parry*, 2 Vern. 710.
[5] 3 Atk. 209, 211; see also *Wallis* v. *Hodson*, 2 Atk. 117.

arguendo, had never been decided; but it seems that, though Lord Hardwicke was not aware of the circumstance, such an injunction was actually granted by Lord Keeper Bridgman.[1]

But although an infant may maintain a suit for the assertion of his rights, he can do nothing which can bind himself to the performance of any act; and therefore, where from the nature of the demand made by the infant it would follow that, if the relief sought were granted, the rules of mutuality would require something to be done on his part, such a suit cannot be maintained. Thus it has been held, that an infant cannot sustain a suit for the specific performance of a contract: because, in such cases, it is a general principle of Courts of equity to interpose only where the remedy is mutual; and if a decree were to be made for a specific performance, as prayed on the part of the infant, there would be no power in the Court to compel him to perform it on his part, either by paying the money or executing a conveyance.

Although an infant, as we have seen, is in general capable of maintaining a suit, yet, on account of his supposed want of discretion, and his inability to bind himself and make himself liable to the costs, he is incapable of doing so without the assistance of some other person, who may be responsible to the Court for the propriety of the suit in its institution and progress.[3] Such person is called the *next friend* of the infant; and if a bill is filed on behalf of an infant without a next friend, the defendant may move to have it dismissed with costs, to be paid by the solicitor. In a case, however, where a bill was filed by the plaintiff as an adult, and it was afterwards discovered that he was an infant at time of filing the bill, and still continued so, whereupon the defendant moved that the bill might be dismissed, with costs to be paid by the plaintiff's solicitor, the Vice-Chancellor made an order that the plaintiff should be at liberty to amend his bill, by inserting a next friend.[4]

When an infant claims a right, or suffers an injury, on account of which it is necessary to resort to the Court of Chancery, his nearest relation is supposed to be the person who will take him under his protection, and institute a suit to assert his rights; and it is for this reason that the person who institutes a suit on behalf of an infant is termed his next friend. But, as it frequently happens that the nearest relation of the infant is the person who invades his rights, or at least neglects to give that protection to the infant which his consanguinity or affinity

[1] *Lutterel's* case. cited Pree. Ch. 50.

[2] *Flight* v. *Bolland*, 4 Russ. 298; *Hargrave* v. *Hargrave*, 12 Beav. 408.

[3] There must be a next friend for every application on behalf of an infant, *Cox* v. *Wright*, 9 Jur. N. S. 981: 11 W. R. 870, V. C. K. An infant, by being made party to a suit, becomes thereby a ward of Court, *Gynn* v. *Gilbard*, 1 Dr. & S. 356: 7 Jur. N. S. 91; and see *Re Hodge's Trust*, 3 K. & J. 213: 3 Jur. N. S. 860.

[4] *Flight* v. *Bolland*, 4 Russ. 298.

calls upon him to give, the Court, in favour of infants, will permit any person to institute suits on their behalf;[1] and whoever thus acts the part which the nearest relation ought to take, is also styled the next friend to the infant, and is named as such in the bill.[2] And it is to be observed, that although an infant has a guardian assigned him by the Court, or appointed by will, yet, where the infant is plaintiff, the course is not to call the guardian by that name, but to call him the next friend. But where the infant is defendant, the guardian is so called; and if the guardian be so called where the infant is plaintiff, it is no cause of demurrer.[3]

As any person may institute a suit on behalf of an infant, it frequently occurs, that two or more suits for the same purpose are instituted in his name by different persons, each acting as his next friend; in such cases, the court will direct an inquiry to be made at chambers, or before a Master, as to which suit is most for his benefit; and, when that point is ascertained, will stay the proceedings in the other suits.[4] Where no decree has been made in any of the suits,[5] and none of them are in the paper for hearing,[6] such inquiry will be directed on an *ex parte* motion; the Court being satisfied, in the first instance, with the allegation that the suits are for the same purpose.[7] When the result of the inquiry has been certified, any application that may be necessary is made by motion, on notice.[8] Under special circumstances, the Court may, upon motion, on notice, make an order staying the suits, without directing an inqury.[9]

If, upon the inquiry at chambers, or before a Master, it appears that although it would be beneficial to the infant to prosecute the first, yet it will be more beneficial to him to prosecute a subsequent suit, the Court will stay the first suit, and give the next friend his costs.[10] When another next friend takes upon himself to file a second bill, it is incumbent upon him to show some defect in the first suit, or a decided preference in the second; if their merits are only equal, the priority must prevail.[11] The order directing the inquiry should be made in both suits.

[1] Story Eq. Pl. s. 58. n,; *Andrews* v. *Craddock*, Prec. Ch. 376; see *Cross* v. *Cross*, 8 Beav. 455. A defendant, however, may not be next friend, *Payne* v. *Little*, 13 Beav. 114; *Anon.* 11 Jur. 258, V. C. E.

[2] Ld. Red. 25.

[3] Toth. 173; Wyatt's P. R. 224.

[4] Ld. Red. 27; *Mortimer* v. *West*, 1 Swanst. 358.

[5] Where a decree has been made in one of the suits, it is not usual to direct such a reference, *Taylor* v. *Oldham*, Jac. 527; but see *Harris* v. *Harris*, 10 W. R. 31, V. C. K.

[6] *Rundle* v. *Rundle*, 11 Beav. 33.

[7] *Sullivan* v. *Sullivan*, 2 Mer. 40.

[8] *Staniland* v. *Staniland*, M. R., 21 Jan., 1864; and see *Frost* v. *Ward*, 12 W. R. 285, L.JJ.

[9] *Ibid.*

[10] *Starten* v. *Bartholomew*, 6 Beav. 143.

[11] Per Lord Cottenham, *Campbell* v. *Campbell*, 2 M. & C. 30; and see *Harris* v. *Harris*, 10 W. R. 31, V. C. K.

The order is obtained on special motion, of which notice must be given to the other parties to the suits,[1] and does not of itself stay the proceedings in the suits;[2] and the amendment of one of the bills, pending the inquiry, does not stay the inquiry.[3]

As a check to the general license to institute suits on behalf of infants, the Court will, upon the application of the defendant, or of any person acting as next friend of the plaintiff for the purpose of the application,[4] where a strong case is shown that a suit preferred in the name of an infant is not for the infant's benefit, or is instituted from improper motives, direct an inquiry concerning the propriety of the suit;[5] but an objection at the hearing to the propriety of the suit was held too late.[6] If, upon such inquiry, it appears that the suit is not for the benefit of the infant, either the proceedings will be stayed,[7] or else, if there is no excuse for the fact of the suit having been instituted, the bill will be dismissed with costs, to be paid by the next friend;[8] and in the case of *Sale* v. *Sale*,[9] where it appeared clearly upon affidavits that the suit was commenced by the next friend, to promote his own views, and not for the benefit of the infant, Lord Langdale, M. R., summarily, and without a reference to the Master, made such an order. And in a case before Lord Brougham, where an application was made, on behalf of the defendants, that the next friend of the infant plaintiff might be restrained from further proceeding with the suit, and for a reference to the Master to appoint a new next friend to conduct it in his stead: which application was supported by strong affidavits, to show that the suit had, in fact, been instituted from improper motives, for the purpose of benefiting the solicitor, at whose request the person named as next friend (who was a stranger to the family, and had lately held the situation of farm servant or bailiff at monthly wages) had consented to act as such: his Lordship directed the Master to inquire, not only whether the suit was for the benefit of the infant, but whether the next friend was a fit and proper person to be continued in that character. The Master was also directed to inquire who would be the proper person to conduct the suit,

[1] See *Bond* v. *Barnes*, 2 De G. F. & J. 387.

[2] *Westby* v. *Westby*, 1 De G. & S. 410.

[3] *Goodale* v. *Gawthorne*, 1 M'N. & G. 319, 323; but it is irregular, in such a case, to obtain an *order of course*, to amend, *Fletcher* v. *Moore*, 11 Beav. 617.

[4] *Guy* v. *Guy*, 2 Beav. 460.

[5] *Stevens* v. *Stevens*, 6 Mad. 97; *Lyons* v. *Blenkin*, Jac. 259; *Smallwood* v. *Rutter*, 9 Hare 24.

[6] *Lacy* v. *Burchnall*, 3 N. R. 293.

[7] Ld. Red. 27; see also *Da Costa* v. *Da Costa*, 3 P. W. 140; *Richardson* v. *Miller*, 1 Sim. 133. In *Da Costa* v. *Da Costa*, the inquiry was directed upon a petition; but the modern practice is to apply to the Court upon motion, of which notice is given to the next friend. See, however *Anderton* v. *Yates*, 5 De G. & S. 202.

[8] *Fox* v. *Suwerkrop*, 1 Beav. 583.

[9] 1 Beav. 586: see also *Guy* v. *Guy*, 2 Beav. 460; *Staniland* v. *Staniland*, *ante*, p. 73.

in case the next friend was removed, and to report special circumstances.[1]

The result of the cases seems to be, according to the language of Lord Langdale, M. R., in *Starten* v. *Bartholomew*,[2] that the Court exercises a very careful discretion on the one hand, in order to facilitate the proper exercise of the right which is given to all persons to file a bill on behalf of infants; and on the other, to prevent any abuse of that right, and any wanton expense to the prejudice of infants.

No inquiry, however, as to the propriety of the suit, will be ordered at the instigation of the next friend himself; because the Court considers that in commencing a suit, the next friend undertakes, on his own part, that the suit he has so commenced is for the benefit of the infant.[3] This rule, nevertheless, applies only to cases where an application is made for such an inquiry in the cause itself; if there is another cause pending by which the infant's property is subject to the control and disposition of the Court, such an inquiry is not only permitted, but is highly proper, when fairly and *bona fide* made, and may have the effect of entitling the next friend to repayment of his costs out of the infant's estate, even though the suit should turn out unfortunate, and the bill be dismissed with costs.[4]

If an infant is made a co-plaintiff with others in a bill, and it appears that it will be more for his benefit that he should be made a defendant, an order to strike his name out as plaintiff, and to make him a defendant, may be obtained upon motion, on notice;[5] and it is to be observed, that an infant heir-at-law, against whose estate a charge is sought to be raised, ought to be made a defendant, and not a plaintiff, although he is interested in the charge when raised; and that, where an infant heir had, under such circumstances, been made a co-plaintiff, Lord Redesdale ordered the cause to stand over, with liberty for the plaintiffs to amend, by making the heir-at-law a defendant instead of plaintiff, and thereupon to prove the settlement anew against him as a defendant.[6] The reason given for this practice is, because an infant defendant, where his inheritance is concerned, has, in general, a day given him after attaining twenty-one, to show cause, if he can, against the decree, and is in some other respects privileged beyond an adult; but an infant plaintiff has no such privilege, and is as much bound as one of full age.[7] In amicable

[1] *Nalder* v. *Hawkins*, 2 M. & K. 243; *Towsey* v. *Groves*, 9 Jur. N. S. 194: 11 W. R. 252, V. C. K.; see also *Clayton* v. *Clarke*, 2 Giff. 575; 7 Jur. N. S. 562: 9 W. R. 718, L.JJ.; and *Raven* v. *Kerl*, 2 Phil. 692.

[2] 6 Beav. 144.

[3] *Jones* v. *Powell*, 2 Mer. 141.

[4] *Taner* v. *Ivie*, 2 Ves. S. 466.

[5] *Tappen* v. *Norman*, 11 Ves. 563.

[6] *Plunket* v. *Joyce*, 2 Sch. & Lef. 159.

[7] *Lord Brook* v. *Lord Hertford*, 2 P. Wms. 518; *Gregory* v. *Molesworth*, 3 Atk. 626; see also *Morison* v. *Morison*, 4 M. & C. 216. The practice of giving infants a day to show cause is now nearly obsolete; but the present state of the law on this subject will be more suitably stated in the future chapter concerning infant defendants; see *post*: and see Seton, 419, 686–9, and cases there cited.

suits, however, it is often an advantage to make an infant the plaintiff; because he may have such relief as he is entitled to, though not prayed for.[1]

Although, however, an infant is, in general, bound by a decree in a cause in which he himself is plaintiff, yet there is no instance of the Court binding the inheritance of an infant by any discretionary act. From this principle it follows, that where an infant heir is plaintiff, it is not the practice to establish the will, or to declare it well proved; although, if there be no question raised concerning its validity, the Court will in many respects act upon it.[2]

According to this doctrine, in *Lord Brook* v. *Lord Hertford*, above referred to, which was the case of a bill filed by an infant plaintiff for a partition against a co-tenant in common, although the Court decreed a partition, it would not direct any conveyance to be made until the infant plaintiff attained twenty-one;[3] and so in *Taylor* v. *Philips*,[4] where it had been referred to the Master to see whether certain proposals, which had been made as to the surrender of a copyhold estate by the infant plaintiff, were reasonable, and for the infant's benefit, and the Master reported that they were so, the Court, nevertheless, would not make the order for the surrender, without inserting the words "without prejudice to the plaintiff, the infant, after he shall attain the age of twenty-one years."[5]

In general, however, where decrees are made in suits by infant plaintiffs, it is not usual to give the infant a day to show cause.[6]

When a day is given to an infant plaintiff to show cause against a decree after he comes of age, the proper course appears to be to have the cause reheard; for which purpose he must, within the period appointed by the decree, present a petition of rehearing.[7]

Though an infant is, in ordinary cases, bound by the effect of any suit or proceedings instituted on his behalf, and for his benefit, yet if there has been any mistake in the form of such suit, or of the proceedings under it, or in the conduct of them, the Court will, upon application, permit such mistake to be rectified. Thus, an infant plaintiff may have a decree upon any matter arising from the state of his case,

[1] See *post*. A decree against an adult as if an infant, will not bind him, *Snow* v. *Hole*, 15 Sim. 161; *Green* v. *Badley*, 7 Beav. 271, 273.

[2] *Hills* v. *Hills*, 2 Y. & C. C. C. 327.

[3] The Court has now power, under the Trustee Act, to declare the infant a trustee, and to vest the lands, *Bowra* v. *Wright*, 4 De G. & S. 265. See Seton, 571, *et seq.*, and *post*.

[4] 2 Ves. S. 23.

[5] Belt. Sup. to Ves. S. 259.

[6] *Gregory* v. *Molesworth*, 3 Atk. 626; but see *Lady Effingham* v. *Sir John Napier*, 4 Bro. P. C. Ed. Toml. 340; *Sir J. Napier* v. *Lady Effingham*, 2 P. Wms. 401; Mos. 67, for an exception to this rule under very peculiar circumstances.

[7] Wyatt's P. R. 225. See *ante*.

though he has not particularly mentioned and insisted upon it, and prayed it by his bill; and accordingly where a bill was filed on behalf of an infant, claiming, as eldest son of his grandfather's heir at law, the benefit and possession of an estate, and to have an account of the rents and profits, and for general relief; and, upon the hearing, an issue was directed to try whether his father was legitimate, which the jury found him not, so that the plaintiff's claim, as heir at law, was defeated: he was yet allowed to set up a claim to part of the estate, to which it appeared that he was entitled under certain deeds executed by his grandfather, but which claim was in no way raised or insisted upon by his bill, although the Court said it might have been otherwise if he had been adult.[1] And where the persons acting on behalf of an infant plaintiff, by mistake make submissions or offers on behalf of the infant, which the infant ought not to have been called upon to make, the Court will not suffer the infant to be prejudiced. Thus, where an infant plaintiff had, by mistake, submitted by her bill to pay off a mortgage, which she was not liable to pay, Sir J. Jekyll, M. R., said he must take care of the infant, and not suffer her to be caught by any mistake of her agent; and, therefore, the infant was allowed to amend her bill, on paying the costs of the day.[2] It has been said, however, that in matters of practice, infants are in general as much bound by the conduct of the solicitor acting *bona fide* in their behalf as adults.[3]

It has been before stated[4] that any person who may be willing to undertake the office, may be the next friend of an infant; and it seems that even a person who has been outlawed in a civil action may fill that character.[5] Though it has been doubted,[6] it is now clear, as we have already seen,[7] that a next friend of an infant need not be a person of substance;[8] and though there does not appear to be any case where an infant has been allowed to sue by his next friend *in forma pauperis*, it would seem that such a course would be permitted, on a special case being made.[9]

If the next friend of an infant does not do his duty, or if any other sufficient ground be made out, the Court will, on motion, on notice,

[1] *Stapillon* v. *Stapillon*, 1 Atk. 2, 6; see also *De Manneville* v. *De Manneville*, 10 Ves. 52, 59; *Walker* v. *Taylor*, 8 Jur. N. S. 681, H. of L.

[2] *Serle* v. *St. Eloy*, 2 P. Wms. 386.

[3] *Tillotson* v. *Hargrave*, 3 Mad. 494; *Wall* v. *Bushby*, 1 Bro. C. C. 484, 487.

[4] *Ante*.

[5] Gilb. For. Rom. 54.

[6] Ld. Red. 26; *Turner* v. *Turner*, 1 Stra. 708; 2 P. Wms. 297; 2 Eq. Ca. Ab. 233, pl. 18.

[7] *Ante*.

[8] *Anon.* 1. Ves. J. 410; *Squirrel* v. *Squirrel*, 2 Dick. 765; *Fellows* v. *Barrett*, 1 Keen 119; *Davenport* v. *Davenport*, 1 S. & S. 101; and see observations of V. C. Wood in *Hind* v. *Whitmore*, 2 K. & J. 458.

[9] *Lindsey* v. *Tyrell*, 24 Beav. 124: 3 Jur. N. S. 1014; 2 De G. & J. 7. *Ante*.

order him to be removed.[1] Thus, when the next friend will not proceed with the cause, the Court will change him.[2] And although a next friend may not have been actually guilty of any impropriety or misconduct, yet, if he is connected with the defendants in the cause in such a manner as to render it improbable that the interest of the plaintiff will be properly supported, the Court will remove such next friend, and appoint another in his place.[3]

In *Peyton* v. *Bond*,[4] it appeared that the solicitor for the infants acted for the father also, and had been for ten years his confidential solicitor; and Sir Anthony Hart, V. C., said, that although he was warranted by high authority in saying that in family suits it was proper that the same solicitor should be employed for all parties, yet the Court will watch with great jealousy a solicitor who takes upon himself a double responsibility; and if it sees a chance of his miscarrying, will take care, where the plaintiffs are infants, that he shall not stand in that relation to a defendant under circumstances of very adverse interest; and, upon this ground, his Honour decided that the solicitor of the father ought not to continue in the character of solicitor of the next friend.

It may be here remarked, that the next friend of an infant cannot be permitted to act as receiver in the cause; and that where an application was made on behalf of infant plaintiffs, that the next friend might be at liberty to go before the Master, and propose himself to be the receiver, Sir Thomas Plumer, V. C., refused to accede to the motion, although it was consented to: observing, that it was the duty of the next friend to watch the accounts and conduct of the receiver, to be a control over him; and that the two characters were incompatible, and could not be united.[5]

If the next friend of an infant takes any proceeding in the cause which is incompatible with the advancement of the suit, such as moving to discharge an attachment issued by the solicitor in the regular progress of the cause, the Court will direct an inquiry whether it is fit that such next friend should continue in that capacity any longer.[6] But so long as the next friend continues such record, he is considered by the Court to be responsible for the conduct of the cause; and for this reason, Sir Thomas Plumer, M. R., on a petition being presented to him on the part of the infant plaintiff, complaining of great delay in

[1] *Russel* v. *Sharp*, 1 Jac. & W. 482; *Lander* v. *Ingersoll*, 4 Hare, 596.

[2] *Ward* v. *Ward*, 3 Mer. 706.

[3] *Peyton* v. *Bond*, 1 Sim. 390; *Bedwin* v. *Asprey*, 11 Sim. 530; *Towsey* v. *Groves*, 9 Jur. N. S. 194; 11 W. R. 252, V. C. K; and see *Gee* v. *Gee*, 12 W. R. 187, L.JJ.; *Sandford* v. *Sandford*, 9 Jur. N. S. 398; 11 W. R. 336, V. C. K.; *Lloyd* v. *Davies*, 10 Jur. N. S. 1041, M. R.

[4] 1 Sim. 391.

[5] *Stone* v. *Wishart*, 2 Mad. 64.

[6] *Ward* v. *Ward*, 3 Mer. 706.

prosecuting the decree, refused to refer it to the Master to inquire into the cause of delay, and to appoint proper persons on behalf of the infant to assist in taking the accounts: saying, that if there had been misconduct, he would assist the petitioner, but that it must be in a regular way.[1]

The next friend of an infant plaintiff was considered so far interested in the event of the suit, that neither he nor his wife could be examined as a witness.[2]

In general, a next friend will not be allowed to retire without giving security for the costs already incurred.[3] And where the new next friend proposed in the notice of motion to be substituted, in the room of the one to be withdrawn, was alleged to be in indigent circumstances, and an inquiry was asked for as to whether he was a proper person to act in that capacity, with a view to his circumstances, Sir John Leech, V. C., stated, as his reason for refusing such inquiry, that he would be at liberty to file a new bill.[4]

In *Melling* v. *Melling*,[5] his Honour refused to allow another next friend to be substituted for the one who had up to that time conducted the suit in that capacity, and who desired to withdraw himself, without a previous reference to the Master, to inquire whether it was for the benefit of the infant that such substitution should take place, as it might be that the suit was improper, or had been improperly conducted; and the next friend was not thus to escape from costs to which he might be liable. And in *Harrison* v. *Harrison*,[6] Lord Langdale, M. R., observed that "any person may commence a suit as next friend to an infant, but when once here in that character, he will not be removed, unless the Court is informed of the circumstances and respectability of the party proposed to be substituted in his place, and that such person is not interested in the subject of the suit;" and accordingly, he required the production of an affidavit to that effect, before an order was made to substitute a new next friend: though the application was not opposed by the defendants.

When, in consequence of death, incapacity,[7] or removal of the next friend of an infant, pending the suit, it becomes necessary to appoint a new next friend, the proper course of proceeding is, for the solicitor of

[1] *Russell* v. *Sharp*, 1 Jac. & W. 482.

[2] *Head* v. *Head*, 3 Atk. 511.

[3] Ld. Red. 27, note (*y*). It is sometimes made a term of the order to substitute, that the substituted next friend shall give security, to be approved of by the Judge if the parties differ, to answer the defendant's costs to that time, in case any shall be awarded: see Seton, 1252, No. 6. The security usually given is a recognizance.

[4] *Devonport* v. *Devonport*, 1 S. & S. 101.

[5] 4 Mad. 261.

[6] 5 Beav. 130; and see *Lander* v. *Ingersoll*, 4 Hare, 596.

[7] A female next friend will, on marriage, become incapacitated to act further as such.

the plaintiff to apply to the Court, or Judge at chambers, for an order appointing a new next friend in his stead,[1] whose fitness, as we have seen, must be proved;[2] and after such appointment, the name of the new next friend should be made use of in all subsequent proceedings where the former one, if alive, would have been named. Before the defendant has appeared, the name of the new next friend may be introduced into the record, under an order as of course to amend; and after appeaarnce the same may be done, where the new next friend is appointed in the place of a deceased next friend, if the application for the order is made by the solicitor who acted in the suit for the deceased next friend. In other cases the order may be obtained on the plaintiff's petition, as of course, if the defendant's solicitors subscribe their consent thereto; if not, by motion upon notice at chambers. If the plaintiff's solicitor omits to take this step within a reasonable time, the defendant may apply to the Court by motion, upon notice, for an order directing the approval of a new next friend, and for the insertion of his name as such in the bill.[3] In *Large* v. *De Ferre*,[4] the new next friend was appointed by the Chief Clerk's certificate, without further order.

The order appointing the next friend must, in every case, be served on the solicitors of the defendants in the cause, and be left for entry in the cause books kept by the Clerks of Records and Writs.[5]

Before appointing a new next friend, the Court or Judge requires to be satisfied of his willingness to act; and an authority signed by such next friend should be produced and filed.

On any application on behalf of an infant plaintiff, a next friend must be named for the purpose of the application.[6]

Where a bill has been filed in the name of an infant, his coming of age is no abatement of the suit;[7] but he may elect whether he will proceed with it or not. If he goes on with the cause, all further proceedings may be carried on in his own name, and the bill need not be amended or altered;[8] he will also be liable to all the costs of the suit, in the same manner as he would have been had he been of age

[1] *Westby* v. *Westby*, 2 C. P. Coop. t. Cott. 211.

[2] *Harrison* v. *Harrison*, 5 Beav. 130.

[3] The defendant may obtain the order on *ex parte* motion, but then he must give four days' notice to the plaintiff of the order, before the inquiry can be proceeded with; see *Lancaster* v. *Thornton*, Amb. 398; *Ludolph* v. *Saxby*, *ib.*: 12 Sim. 351; *Countess of Shelburne* v. *Ld. Inchiquin*, Amb. 398, n.; 12 Sim. 352; *Bracey* v. *Sandiford*, 3 Mad. 468; *Glover* v. *Webber*, 12 Sim. 351.

[4] Braithwaite's Pr. 558.

[5] Braithwaite's Pr. 558.

[6] *Cox* v. *Wright*, 9 Jur. N. S. 981: 11 W. R. 870. V. C. K.; and see *Guy* v. *Guy*, 2 Beav. 460; *Furtado* v. *Furtado*, 6 Jur. 227, as explained by *Cox* v. *Wright*, *ubi. sup.* A notice of motion should be given by the infant by his next friend, and not merely by the next friend, *Pidduck* v. *Boultbee*, 2 Sim. N. S. 223.

[7] Wyatt's P. R. 225.

[8] *Ibid.*: 1 Fowl Ex. Prac. 421. The title of the suit, in such case, however, is corrected, to read thenceforth thus: "A.B., late an infant, by C. D., his next friend, but now of full age, plaintiff."

when the bill was originally filed.[1] If he chooses to abandon the suit, he may move to dismiss it on payment of costs by himself, or refrain from taking any step in it; but he cannot compel the next friend to pay the costs, unless it be established that the bill was improperly filed. Therefore, where an infant, on attaining twenty-one, moved to dismiss a bill filed on his behalf, with costs to be paid by the next friend, the Court refused to make an order; but directed the bill to be dismissed, on the late infant plaintiff giving an undertaking to pay the costs, and the costs of the next friend.[2]

If the infant refrains from taking any step in the suit, he cannot be made liable to costs; thus where the next friend of an infant died during the minority of the plaintiff, who, after he came of age, took no step in the cause, and the defendant brought the cause on again, and procured the bill to be dismissed, such dismissal was without costs; because the plaintiff, not having been liable to costs during his infancy, and never having made himself liable by taking any step in the cause after attaining twenty-one, and there being no next friend to be responsible for them, there was no person against whom the Court could make an order for payment of costs.[3] In that case, the next friend, if living, would, of course, have been liable to the payment of the costs to the defendant: the general rule being, that the next friend shall pay the defendant's costs of dismissing the plaintiff's bill; and so, if a motion is made on behalf of an infant plaintiff which is refused with costs, such costs must be paid by the next friend.[4]

Where an infant, on coming of age, repudiates the suit, that repudiation relates back to the commencement of the suit, over-riding all that has been done in it.[5]

An infant co-plaintiff, on coming of age, and desiring to repudiate the suit, if he takes any step, must move, on notice, not to dismiss the bill, but to have his name struck out as co-plaintiff;[6] and if the next friend requires it, the late infant's name must be introduced in the future proceedings as a co-defendant.[7]

After an infant sole plaintiff comes of age, his next friend ought not to take any proceedings in the cause in the name of the plaintiff, even though they are consequential on former proceedings if the suit is to be

[1] Coop. Eq. Pl. 29.
[2] *Anon.* 4 Mad. 461.
[3] *Turner* v. *Turner*, 1 Stra. 708: 2 P. Wms. 297; Ld. Red. 26, n. (*t*); and see *Dunn* v. *Dunn*, 7 De G. M. & G. 25: 1 Jur. N. S. 122; 3 Drew. 17: 18 Jur. 1068.
[4] *Buckley* v. *Puckeridge*, 1 Dick. 395.
[5] *Dunn* v. *Dunn*, 7 De G. M. & G. 29: 1 Jur. N. S. 123, per L. J. Turner.
[6] *Acres* v. *Little*, 7 Sim. 138; *Guy* v. *Guy*, 2 Beav. 460; *Cook* v. *Fryer*, 4 Beav. 13.
[7] *Bicknell* v. *Bicknell*, 32 Beav. 381: 9 Jur. N. S. 633.

prosecuted;[1] but an infant co-plaintiff, on coming of age, will not be allowed to appear by another solicitor or counsel, unless he has obtained an order to change solicitors.[2]

The rule above referred to, under which a next friend is held liable to the costs of dismissing a bill, or of an unsuccessful motion, is applicable only as between the next friend and the defendant in the cause; for the Court is extremely anxious to encourage, to every possible extent, those who will stand forward in the character of next friend on behalf of infants,[3] and will, wherever it can be done, allow the next friend the costs of any proceeding instituted by him for the infant's benefit, out of the infant's estate, provided he appears to have acted *bona fide* for the benefit of the infant. Therefore, where a suit was instituted on behalf of an infant, in which there was a decree made, under which the money recovered was brought into Court, and put out for the benefit of the infant plaintiff, and the defendant was ordered to pay the costs, but ran away: upon a motion by the solicitor of the plaintiff, (in which the father, who was the next friend, and very poor, joined,) that his costs might be paid out of the fund in Court, Lord King granted the motion, but with some reluctance.[4] And in another case, where a supplemental bill had been filed on behalf of an infant, for which there were apparent grounds, but which was eventually dismissed as against one of the defendants with costs, which were paid by the receiver in the original cause, upon a petition by the next friend to be allowed such costs out of the infant's estate in the original cause, Lord Hardwicke made the order: observing, that the next friend and the receiver had done nothing but what any man would do in his own case; and that though it had turned out unfortunately, the Court would not say that they ought to bear the costs; as if they were, nobody would undertake the management of an estate for an infant.[5]

An inquiry may be directed whether it is for the benefit of the infant to proceed with a suit.[6] It seems, however, that such an inquiry will not be directed, on the application of the next friend, in the suit respecting which the reference is sought,[7] but that the next friend must carry it on at his own risk, which appears to be a proper restraint to prevent suits of this description from being rashly undertaken; for as, on the one hand, the next friend, in case a fund should be recovered by

[1] *Brown* v. *Weatherhead*, 4 Hare, 122; *Brown* v. *Brown*, 11 Beav. 502.
[2] *Swift* v. *Grazebrook*, 13 Sim. 185.
[3] *Whittaker* v. *Marlar*, 1 Cox, 286.
[4] *Staines* v. *Maddox*, Mos. 319.
[5] *Taner* v. *Ivie*, 2 Ves. S. 466; *Cross* v. *Cross*, 8 Beav. 455.
[6] *Taner* v. *Ivie*, 2 Ves. S. 469.
[7] *Jones* v. *Powell*, 2 Mer. 141; *ante*.

means of the suit, has, through his solicitor's lien for his costs upon that fund,[1] an adequate protection from losing the charge he may have been put to by means of the suit, so the risk which he runs of losing those costs, in case the suit should be unsuccessful, tends to make persons cautious in undertaking proceedings of this nature on behalf of infants, without having very good reason for anticipating a successful result.

It is to be observed, however, that although the Court will so far encourage persons acting fairly or *bona fide* to institute proceedings on behalf of infants, or to protect them, when it is possible so to do, from all costs and expenses which they may incur by such step, a protection which it will not suffer any degree of mistake or misapprehension to deprive them of:[2] yet, if it should turn out that the next friend has acted from improper motives, or merely to answer the purposes of spleen, the principle which guides the Court in encouraging an honest next friend, *i. e.*, the anxiety to have the affairs of infants properly taken care of, will involve a dishonest one in the expenses of his own proceeding.[3] And so, if it should appear that, in the case of an infant, due diligence has not been exerted to acquire a proper knowledge of the facts of the case, and the bill should be dismissed, or an order discharged, upon facts which, though not known when the bill was filed, or the motion made, might have been known if proper inquiry had been made, the next friend will not be allowed the costs out of the infant's estate.[4] Thus, where it appeared that a writ of *Ne exeat Regno* had been improperly obtained by the next friend, on motion supported by the affidavit of the infant plaintiff, by which the infant, who was of the age of eighteen years, swore positively to facts which it appeared he could not have known himself, but which he could only have been told by other persons, Lord Rosslyn discharged the order, and directed that the next friend should pay the costs of obtaining it.[5]

There appears to be no doubt, that a solicitor conducting a cause on the part of an infant has the same lien upon the money recovered in the suit by his means, and at his expense, as he has in the case of an adult;[6] and, therefore, if the suit is successful, the next friend is, in general, secure from being put to any charges on the infant's behalf. But it seems that a solicitor who obtains possession of papers, as solicitor to the next friend, has not any lien upon them by virtue of such possession.[7]

[1] *Staines* v. *Maddox*, Mos. 319.
[2] *Whittaker* v. *Martar*, 1 Cox, 286; *Anderton* v. *Yates*, 5 De G. & S. 202.
[3] *Whittaker* v. *Martar*, 1 Cox, 286; and see *Cross* v. *Cross*, 8 Beav. 455.
[4] *Pearce* v. *Pearce*, 9 Ves. 548.
[5] *Roddam* v. *Hetherington*, 5 Ves. 91, 95.
[6] *Staines* v. *Maddox*, Mos. 319.
[7] Montagu on Lien. 53; and see *Turner* v. *Letts*, 20 Beav. 185; 7 De G. M. & G. 243; 1 Jur. N. S. 487, 1057; *Dunn* v. *Dunn*, 7 De G. M. & G. 25, 29: 1 Jur. N. S. 122; 3 Drew, 17: 18 Jur. 1068.

It is said, that where a legacy is given to an infant, the testator makes it necessary to come into this Court for directions how to lay it out; and that, therefore, such an application ought to be considered as an incumbrance on the estate, and the costs must be paid out of the assets.[1] This rule was acted upon by Lord Alvanley, M. R., in a case where the executors were plaintiffs, in which case his Lordship said that, if the testator wishes to prevent the costs of such a suit from coming out of his estate, he ought to give the legacy to a trustee for the infant; he, however, said that, for the future, he should not give the costs in such a case: for since the Legacy Act, 36 Geo. III. c. 52, s. 32, the executor has nothing to do but, under that Act, to pay the legacy into Court, and then he has done; and the infant, when he comes of age, may petition for it.[2] Before that Act, an executor could not safely pay an infant's legacy without a decree.

With respect to the right of the next friend of an infant to receive anything beyond his taxed costs out of a general fund, in order to reimburse him for any extra expense he may have been put to, some difference of opinion appears to have existed between Lord Eldon and Sir William Grant, M. R. In *Osborne* v. *Denne*,[3] where a bill had been filed by a legatee on behalf of himself, and as next friend of an infant legatee, in which the usual decree was made, and the costs ordered to be taxed and paid out of the estate, an application was made to the Master of the Rolls, on behalf of the next friend, that he might in some way have costs beyond his taxed costs: either by a direction to have them taxed as between solicitor and client, or by a reference to the Master to see what extra costs he had been put to; but Sir William Grant refused to make the order: saying, that if a next friend is to a certainty to have all that exceeds the taxed costs, it would lead him to be very careless. In *Fearns* v. *Young*,[4] where an application was afterwards made to Lord Eldon for the costs of trustees, as between solicitor and client, his Lordship refused to make such an order, on the ground that where the costs of a trustee are directed to be taxed, that means as between party and party, not in the larger way; although, where a trustee, in the fair execution of his trust, has expended money by reasonably and properly taking opinions, and procuring directions that are necessary for the due execution of his trust, he is entitled not only to his costs, but also to his charges and expenses, under the head of just allowances. His lordship, however, added, "With regard to an infant, this requires great consideration; for as the infant himself

[1] *Anon*, Mos. 5.
[2] *Whopham* v. *Wingfield*, 4 Ves. 630.
[3] 7 Ves. 424.
[4] 10 Ves. 184.

cannot incur charges and expenses, if they cannot be claimed under 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 that office.[1]

Section V.—*Idiots, Lunatics, and Persons of Weak Mind.*

Although, as it has been observed,[2] in certain cases suits on behalf of idiots or lunatics may be instituted in the form of informations by the Attorney-General, yet the proper course of proceeding to assert their rights in Equity is by bill.[3]

Suits on behalf of a lunatic are usually instituted in the name of the lunatic; but as he is a person incapable in law of taking any step on his own account, he sues by the committee of his estate, if any, or if none, by his next friend, who is responsible for the conduct of the suit. The lunatic must be named a co-plaintiff, as well in a bill as in an information, on his behalf; where, however, the object of the suit is to avoid some transaction entered into by the lunatic on the ground of his incapacity at the time, it has been held, that a lunatic ought not to be a co-plaintiff, because it is a principle of Law that no man can be heard to stultify himself. This distinction was recognized and adopted in some early cases,[4] but it would scarcely be considered important in modern times; and where a bill was brought by a lunatic and his committee, to avoid an act of the lunatic's on the ground of insanity, a demurrer, on the ground that a lunatic could not be allowed to stultify himself, was disallowed:[5] the Lord Chancellor observing, that the rule that a lunatic should not be admitted to excuse himself on pretence of lunacy, was to be understood of acts done by the lunatic to the prejudice of others, but not of acts done by him to the prejudice of himself.

It was said by the Lord Keeper Bridgman, in the case of *Attorney-General* v. *Woolrich*, above referred to, that the reason why a lunatic is required to be a party to a suit instituted on his behalf is, because he may recover his understanding, and then he is to have his estate in his own disposition; but that it is otherwise of an idiot: from which it seems that an idiot is not a necessary party to a suit instituted on his behalf. But neither an idiot nor a lunatic can institute a suit, nor can one be instituted on his behalf, without the committee, if any, of his

[1] For more as to costs of infants' suits, see Beames on Costs, 69—71, 83—87.

[2] *Ante.*

[3] Or, where applicable, by administration order.

[4] *Attorney-General* v. *Woolrich*, 1 Ca. in Cha. 153; *Attorney-General* v. *Parkhurst*, *ib.* 112.

[5] *Ridler* v. *Ridler*, 1 Eq. Cas. Ab. 279, pl. 5; and see Tothill, 130.

estate being a party, either as a co-plaintiff or as a defendant;[1] and therefore, where the committee of a lunatic filed a bill on behalf of the lunatic, without making himself a co-plaintiff, Sir Thomas Plumer, M. R., directed the case to stand over, with liberty to amend, by making the committee a co-plaintiff:[2] and in the *Bishop of London* v. *Nicholls*,[3] a bill for tithes by the bishop and sequestrator, during the incapacity of the incumbent, was dismissed, because neither the incumbent nor his committee was a party.

If a person exhibiting a bill appear upon the face of it to be either an idiot or a lunatic, and therefore incapable of instituting a suit alone, and no next friend or committee is named in the bill, the defendant may demur;[4] but if the incapacity does not appear on the face of the bill, the defendant must take advantage of it by plea.[5] The objection arising from lunacy extends to the whole bill, and advantage may be taken of it, as well in the case of a bill for discovery merely, as in the case of a bill for relief; for the defendant in a bill of discovery, being entitled to costs, after a full answer, as a matter of course, would be materially injured by being compelled to answer such a bill by a person whose property is not in his own disposal, and who is therefore incapable of paying the costs.[6]

If the plaintiff becomes a lunatic after the institution of a suit, it was formerly requisite that a supplemental bill should be filed, in the joint names of the lunatic and of the committee of his estate, which answered the same purpose as a bill of revivor in procuring the benefit of former proceedings;[7] and if the committee of a lunatic's or idiot's estate died, after a suit had been instituted by him for the benefit of the idiot or lunatic, and a new committee was appointed, the proper way of continuing the suit was by a supplemental bill filed by the idiot or lunatic and the new committee; but under the present practice of the Court, the suit would be continued, in either of these cases, by a supplemental order or order of revivor.[8] After a decree, and pending proceedings under an enquiry, the Court will stay the cause till the issue of a commission of lunacy concerning the plaintiff is known.[9]

A committee, previously to instituting a suit on behalf of an idiot or lunatic, should obtain the sanction of the Court. In order to obtain

[1] *Fuller* v. *Lance*, 1 Ca. in Cha. 19.
[2] *Woolfryes* v. *Woolfryes*, Rolls, Feb. 17, 1824, MSS.
[3] Bumb. 141.
[4] Ld. Red. 153.
[5] Ld. Red. 153, 229. In this Province, by answer; as pleas are abolished by Con. G. O. No. 6.
[6] Ld. Red. 153.
[7] See *Brown* v. *Clerk*, 3 Wooddesen, Lect. 378, *notis*, where the form of such a bill is stated.
[8] See Seton, 1166, 1170; *Dangar* v. *Steward*, 9 W. R. 266, V. C. K.; *Thewlis* v. *Farrar*, cited, Seton, 1166. In this province by order of revivor, under Con. G. A. No. 337.
[9] *Hartley* v. *Gilbert*, 13 Sim. 596.

such sanction, a statement of facts showing the propriety of the suit should be laid before a Judge in Chambers.

It may be observed here, that the Court of Chancery will not, as a matter of course, interfere to set aside contracts entered into and completed by a lunatic, without fraud in the parties dealing with him, even where such contracts are overreached by the inquisition taken in lunacy, and may be void at law;[1] but the interference of the Court will depend very much upon the circumstances of each particular case; and where it is impossible to exercise the jurisdiction in favour of the lunatic so as to do justice to the other party, the Court will refuse relief, and leave the lunatic to his remedy, if any, at Law.[2] It seems also, that although a contract is entered into by a lunatic, subsequent to the date from which he is found by the inquisition to have become lunatic, yet if the fact of his being a lunatic at the time of the contract is denied by the defendant, the establishment of that fact is indispensably necessary; and formerly when the Court had any doubt upon it, it directed an issue to try it.[3]

Persons of full age, but who are incapable of acting for themselves, though neither idiots or lunatics, have been permitted to sue by their next friend, without the intervention of the Attorney-General;[4] and it seems, that if a bill has been filed in the name of a plaintiff who, at the time of filing it, is in a state of mental incapacity, it may, on motion, be taken off the file.[5] If, however, a suit has been properly instituted, and the plaintiff subsequently becomes imbecile, that circumstance will not be a sufficient ground for taking the bill off the file. Thus, where a motion was made on the part of the defendant to take a bill off the file, on the ground of the plaintiff having been for some time reduced by age and infirmity to a state of mental imbecility, which rendered her incapable of instituting a suit: the circumstances of the case not appearing, in the opinion of Lord Eldon, to warrant the inference that, at the time of filing the bill, she was incompetent to authorize the proceedings, and the bill appearing to be a proper one with a view to her rights and interests, his Lordship thought, that as the suit was rightly commenced and the further prosecution of it proper, it would be a strong

[1] *Price* v. *Berrington*, 3 M'N. & G. 486, 490.

[2] Shelf. on Lun. 551; *Niell* v. *Morley*, 9 Ves. 478, 481, 482.

[3] *Neill* v. *Morley*, 9 Ves. 478.

[4] Ld. Red. 30, cites *Elizabeth Liney*, a person deaf and dumb, by her next friend, against *Witherley and others*, in Ch.: Decree, 1 Dec. 1760; ditto on Supplem. Bill, 4 Mar. 1779. As to the jurisdiction of the Court of Chancery with regard to the property of a lunatic not so found by inquisition, see *Nelson* v. *Duncombe*, 9 Beav. 211, 216, 219; 10 Jur. 399; *Edwards* v. *Abrey*, 2 C. P. Coop. t. Cott. 177, and cases there collected; *Re Burke*, 2 De G. F. & J. 124; *Re Tayler*, *ib.* 125; *Re M'Farlane*, 2 J. & H. 673; 8 Jur. N. S. 208; *Light* v. *Light*, 25 Beav. 248; and see Seton, 709, No. 11 and *ante*, p. 9. The next friend of a person of weak mind is, in every respect, in the same position as the next friend of an infant.

[5] *Wartnaby* v. *Wartnaby*, Jac. 377; *Blake* v. *Smith*, Younge, 596.

step even to stay the proceedings, merely because her state of mind was such that she could not revoke the authority previously given; but that to take the bill off the file, and make the answer waste paper, could not be done.[1]

The committee of a lunatic, and the next friend of a person of unsound mind, before he consents to any departure from the ordinary mode of taking evidence, or of any other procedure in the suit, should first obtain the sanction of the Court or Judge.

Section VI.—*Married Women.*

By marriage, the husband and wife become as one person in law; and upon this union depends all the legal and equitable rights and disabilities which either of them acquires or incurs by the intermarriage. One of the consequences of this unity of existence and interest between the husband and wife is, that at Common Law a married woman cannot, except in the cases mentioned below, during the continuance of her coverture, institute a suit alone; therefore, whenever it is necessary to apply to a judicial tribunal respecting her rights, the proceeding must be commenced and carried on in their joint names. The exceptions to this rule are: when the husband can be considered *civiliter mortuus*, and when the wife is judicially separated from her husband, or has obtained a protection order;[2] in which cases, the wife is looked upon as restored to her rights and capacity as a *feme sole*, and may sue alone.

With respect to what is called a civil death in law, Lord Coke says, that a deportation for ever into a foreign land, like to a profession, is a civil death, and that in such cases the wife may bring an action, or may be impleaded during the natural life of her husband; and so, if by an Act of Parliament the husband be attained of treason or felony, and is banished for ever, this is a civil death, and the wife may sue as a *feme sole;* but if the husband have judgment to be exiled but for a time, which some call a *relegation*, this is no civil death.[3] At law, also, every person who is attained by ordinary process of treason or felony, is disabled to bring an action, for he is *extra legem positus*, and is accounted in law *civiliter mortuus*;[4] and where the husband is an alien, and has left

[1] *Warthaby* v. *Wartnaby*, Jac. 377.

[2] *Re Rainsdon's Trusts*, 4 Drew. 446; 5 Jur. N. S. 55; *Re Kingsley*, 26 Beav. 84; 4 Jur. N. S. 1010; *Cook* v. *Fuller*, 26 Beav. 99; *Rudge* v. *Weedon*, 4 De G. & J. 216; 5 Jur. N. S. 723; *Bathe* v. *Bank of England*, 4 K. & J. 564; 4 Jur. N. S. 505; *Re Whittingham's Trusts*, 10 Jur. N. S. 818; 12 W. R. 775, V. C. W. See Pro. Sta. Con. Sta. U. C. C. 73.

[3] Co. Litt. 133 a.

[4] 2 B. & P. 231; 4 Esp. 27; Bac. Ab. tit. Bar, and Feme (M); 9 East. 472.

this kingdom, or has never been in this country, the wife may, during such absence, sue alone,[1] although in ordinary cases, the absence of the husband affords no ground for the wife's proceedings separately.[2]

In these respects, Courts of Equity follow the rules of law.[3] Thus, it has been held in Equity, that where a husband has been banished for life by Act of Parliament, the wife may in all things act as a *feme sole*, as if her husband were dead, and that the necessity of the case requires that she should have such power;[4] and where a husband was attainted of felony, and pardoned on condition of transportation, and afterwards the wife became entitled to some personal estate as orphan to a freeman of London, such personal estate was decreed to the wife as a *feme sole*.[5]

In Equity, however, as well as at Law, the general rule, which requires the husband to be joined in a suit respecting the rights of his wife, prevails, except under particular circumstances, which will be hereafter pointed out; but at Law there exists a distinction between actions for property which has accrued to the wife before marriage, and actions for property which have come to her afterwards; which distinction does not prevail in Equity; for with respect to such debts and other *choses in action* as belong to the wife and continue unaltered, since the husband cannot disagree to her interest in them, and as he has only a qualified right to possess them, by reducing them into possession during her life, he is unable to maintain an action for such property without making his wife a party;[6] but for all personal estate which accrues to the wife, or to the husband and wife jointly, during marriage, and for all covenants made or entered into with them during that period, the husband may, at Law, commence proceedings in his own name; because the right of action having accrued after marriage, the husband may disagree as to his wife's interest, and make his own absolute: an intention to do which he manifests in bringing an action in his own name, when it might have been commenced in the name of both of them;[7] and in such case it has been held, that if the husband recover a judgment for a debt due to the wife, and die before execution, his personal representative will be entitled to the benefit of it, and not the wife.[8] The distinction above pointed out does not, however, as has

[1] 2 Esp. 554, 587; 1 B. & P. 357; 2 B. & P. 226; 1 Bos. & P. N. R. 80; 11 East, 301; 3 Camp. 123; 5 T. R. 679, 682; 8 T. R. 545.

[2] 11 East, 301; *Du Wahl* v. *Braune*. 1 H. & N. 178: 4 W. R. 646.

[3] See Ld. Red. 28; Story, Eq. Pl. s. 61; Coop, Eq. Pl. 30; Calvert on Parties, 414.

[4] *Countess of Portland* v. *Prodgers*, 2 Vern. 104: 1 Eq. Ca. Ab. 171, Pl. 1.

[5] *Newsome* v. *Bowyer*, 3 P. Wms. 37.

[6] 1 Bright, H. & W. 63, and the cases there cited, *notis*.

[7] *Ibid* 62; and see Add. Cont. 761.

[8] *Oglander* v. *Baston*, 1 Vern. 396; *Garforth* v. *Bradley*, 2 Ves. S. 675, 677.

been stated, exist in Courts of Equity, where it seems necessary that in all cases in which the husband seeks to recover the property of the wife, he should make her a party co-plaintiff with himself, whether the right to the property accrued before or after marriage. Thus, in *Clearke* v. *Lord Angier*,[1] where a legacy was given to a woman whilst she was covert, and the husband, without her, exhibited a bill for it, to which the defendant demurred, on the ground that the wife ought to have been joined in the suit, the demurrer was allowed.

The ground upon which Courts of Equity require the wife to be joined as co-plaintiff with her husband in suits relating to her own property is, the parental care which such Courts exercise over those individuals who are not in a situation to take care of their own rights; and as it is presumed that a father would not marry his daughter without insisting upon some settlement upon her, so, those Courts, standing *in loco parentis*, will not suffer the husband to take a wife's portion, until he has agreed to make a reasonable provision for her,[2] or until they have given the wife an opportunity of making her election, whether the property shall go to her husband, or shall be made the subject of a settlement upon her and her children.

This right of a wife is termed her equity to a settlement; and it attaches whenever proceedings are pending in the Court of Chancery, with reference to her personal property,[3] or her equitable interest in real estate,[4] except as against the particular assignee of her life estate.[5] She may herself institute proceedings for the purpose of raising her equity;[6] but it cannot be enforced until the Court is about to make a decree or order directing payment, transfer or application of the property.[7]

The question whether the right attaches to the wife's life interest has been much discussed; but it is now determined that, subject to the above-mentioned exception, it does so attach.[8]

[1] Freeman, 160; S. C. *nom Clerke* v. *Lord Anglesey*, Nels. 78; see also *Blount* v. *Bestland*, 5 Ves. 515; *Anon.* 1 Atk. 491; *Meales* v. *Meales*, 5 Ves. 517, n.; *Carr* v. *Taylor*, 10 Ves. 574, 579.

[2] Per Lord Hardwicke, in *Jewson* v. *Moulson*, 2 Atk. 419.

[3] Even where the fund is not in court, see *Henry* v. *Ogle*, 1 C. P. Coop. t. Cott. 447.

[4] *Sturgis* v. *Champneys*, 5 M. & C. 97; *Hanson* v. *Keating*, 4 Hare, 1; *Wortham* v. *Pemberton*, 1 De G. & S. 644; but see *Gleaves* v. *Payne*, 1 De G. J. & S. 87. In *Smith* v. *Matthews*, 3 De G. F. & J. 139, it was held that the possible estate by courtesy of the husband could not be interfered with.

[5] *Tidd* v. *Lister*, 3 De G. M. & G. 857, 861, 869: 18 Jur. 543; and see *Durham* v. *Crackles*, 8 Jur. N. S. 1174, V. C. W. and *post*.

[6] *Lady Elibank* v. *Montolieu*, 5 Ves. 737; and cases collected in *Bosvil* v. *Brander*, 1 P. Wms. 459; *Duncombe* v. *Greenacre*, 2 D. G. F. & J. 509: 7 Jur. N. S. 175; *Postgate* v. *Barnes*, 9 Jur. N. S. 456: 11 W. R. 356, V. C. S.

[7] *Jewson* v. *Moulson*, 2 Atk. 419; *De La Garde* v. *Lempriere*, 6 Beav. 344; *Osborne* v. *Morgan*, 9 Hare, 432; *Wallace* v. *Auldjo*, 1 Dr. & Sm. 216: 9 Jur. N. S. 687; 2 N. R. 567, L. J. J.

[8] *Sturgis* v. *Champneys*, 5 M. & C. 97; *Wilkinson* v. *Charlesworth*, 10 Beav. 324; see, however, *Shillito* v. *Collett*, 7 Jur. N. S. 385, where V. C. Kindersley held, that an annuity given to a married woman by will, might be paid to her husband without her consent in court.

The right of a married woman to have a settlement made upon herself and her children, out of her personal property which is the subject of a suit in Equity, is totally distinct from her right by survivorship to such of her *choses in action* as have not been reduced into possession during the joint lives of herself and husband. The right by survivorship is a legal right, applying equally to her legal and equitable interest; but her right to a settlement depends upon the peculiar rule of Courts of Equity before alluded to, which, standing in *loco parentis* with regard to a *feme covert*, will not suffer the husband to take the wife's portion until he has agreed to make a reasonable provision for her and her children, unless they are satisfied that it is with her free consent that it is paid over to him.[1] This rule of Equity is not of modern adoption, but has been recognized and acted upon from a very early period. In the case of *Tanfield* v. *Davenport*,[2] which occurred in the 14 Chas. I., Lord Keeper Coventry takes notice of it; and it has been acknowledged and followed in all subsequent cases, where a wife has had a demand in her own right, and application has been made to a Court of Equity to enforce it.[3] Where, however, the demand is not one which accrues to the husband in right of his wife, although he may be entitled to it under a contract made upon his marriage, yet if he alone has the right to sue for it, the equity of the wife to a settlement will not attach.[4] Thus, where, in contemplation of marriage, the father of the intended wife covenanted to pay £1000 to the husband on marriage, and also that his heirs, or executors, should, within six months after his death, pay the further sum of £500 to the husband as the remainder of the wife's portion, it was held, that the wife was not entitled to a settlement out of the £500, as it never was her money, and was only a debt due to the husband from the father.[5]

In order to ascertain whether the married woman waives her equity to a settlement, and consents to her husband taking the property, the practice of the English Court is, when she is resident in London, or is willing to attend, for the Judge to examine her apart from her husband, at the time of pronouncing the decree or order disposing of the fund:[6] in which case, a note of the examination is made by the Registrar in Court, and is embodied in the decree or order. If the married woman is unable or unwilling to attend the Court, owing to her residence in

[1] *Jewson* v. *Moulson*, 2 Atk. 419.

[2] Tothill, 114; and see 1 Spence, Eq. Jur. 581, 596.

[3] *Jewson* v. *Moulson*, 2 Atk. 419; *Milner* v. *Colmer*, 2 P. Wms. 641; *Adams* v. *Peirce*, 3 P. Wms. 11; *Brown* v. *Elton*, *ib.* 202; *Harrison* v. *Buckle*, 1 Stra. 239; *Winch* v. *Page*, Bumb. 86; *Middlecome* v. *Marlow*, 2 Atk. 519.

[4] *Brooke* v. *Hickes*, 12 W. R. 703, V. C. S.

[5] *Brett* v. *Forcer*, 3 Atk. 403. For case of a legacy given to husband and wife jointly, see *Atcheson* v. *Atcheson*, 11 Beav. 485, 488.

[6] On this subject see Seton, 657, 671; 1 Bright's H. & W. 88.

the country or other cause, her examination may be taken by commissioners, under an order specially appointing them for this purpose.[1]

Where it would be attended with inconvenience to have a married woman examined by the Court or a Judge, touching her consent to abandon her interest in the fund in litigation, the examination may be taken by the Master.[2]

Such order may be made in various forms, and at different stages of the proceedings. Thus, where, on pronouncing the decree or order dealing with the fund, it is suggested by counsel that an immediate examination of the wife by commissioners is intended, the Court, to save expense, will sometimes direct the fund to be carried over to the separate account of the wife, and by the same order appoint the commissioners, reserving liberty to apply: in which case, on completion of the examination, an application for payment of the fund may be made by petition, or, in cases where there is jurisdiction at chambers, by motion. Or, the Court will direct the drawing up of the decree or order to be suspended for a few days, to afford an opportunity of taking the examination in the interval: in the latter case, an *ex parte* motion is made for an order to appoint the commissioners; and when the examination has been completed, the matter is mentioned again to the Court, and the decree or order is directed to be drawn up, embodying therein the result of the examination.

Where, in any case, a fund has been carried over to the wife's separate account, an application to deal with it may be made by petition,[3] or, where there is jurisdiction at chambers, by motion. When made by petition, the usual course is to get the petition answered for a day sufficiently distant to allow of the examination being taken in the meantime; on the petition being thus answered, an *ex parte* motion is made in chambers for an order to appoint the commissioners, and the examination is taken thereon before the petition is heard. If the petition, in any case, is brought on before the wife is examined, an order to examine her will be made, and the petition will be ordered to stand over till the return thereto;[4] after such return, the petition will be placed in the paper and disposed of.

If the application for payment out is made by motion, evidence of the title to the fund should be adduced on the hearing, and the summons will be adjourned till after the examination: to procure which, a motion is made for an order to appoint commissioners; and when the

[1] See form Seton, 658. No. 4.

[2] *Tomkins* v. *Holmes*, 14 Grant, 245.

[3] In our Court these proceedings, it is presumed, would be by notice of motion.

[4] See form of order, Seton, 658. No. 4.

examination has been perfected, the motion to pay out is brought on again, and an order made.

The married woman, may, however, attend the Court at the hearing of the petition, or the Judge at chambers, on the summons, to pay out the fund, and give her consent, so as to save the expense of an examination by commissioners.

The married woman, on attending the commissioners, (or Master) is examined secretly and apart from her husband,[1] to whom, in what manner, and for what purpose she is willing and desirous that the fund should be disposed of; they read over to her the order under which the examination is taken, and explain to her its purport; the examination is taken in writing, and is signed by her; a certificate of the examination, written at the foot thereof, is then signed by the commissioners; an affidavit verifying all the signatures is made; and the examination, certificate, and affidavit[2] are filed at the Record and Writ Clerk's Office: whence office copies are procured.

Where the married woman is abroad, an order will be made appointing commissioners resident there;[3] and the mode of taking and authenticating an examination out of the British dominions, is exemplified by the following case. In *Minet* v. *Hyde*,[4] the order was, that she should appear before some of the plaintiffs, and a magistrate of Leyden, to be privately examined as to her consent: such examination to be in writing, in the French or German language, and to be signed by her, and attested by notaries-public, whose certificate thereof was also to be in writing, either in the French or German language. It was also ordered, that such signing and certificate should be verified by the affidavit of some credible witnesses, either in the German or French language, before a proper magistrate of Leyden; and that the examination, certificate, and affidavit should be translated into English by certain notaries-public, sworn to the truth of their translation.[5]

Where, however, the wife is domiciled abroad, and in a country by the law of which there is no equity to a settlement, but the whole is payable to the husband, her consent is not necessary;[6] that the law is so, must, however, be proved as a fact in each case.[7]

[1] The husband, or his solicitor, or any person connected with them, should not be present at this examination; see *Re Bendyshe*, 3 Jur. N. S. 727; 5 W. R. 816, V. C. K.

[2] *Re Tasburgh*, 1 V. & B. 507.

[3] *Parsons* v. *Dunne*, 2 Ves. S. 60; *Bourdillon*, v. *Adair*, 3 Bro. C. C. 237; *Gibbons* v. *Kibbey*, 7 Jur. N. S. 1298: 10 W. R. 55, V. C. K.; *Wedderburn* v. *Wedderburn*, M. R. in Chamb. 5 Aug., 1864.

[4] 2 Bro. C. C. 663.

[5] 2 Bro. C. C. ed. Belt, p. 662, n. 1; see also *Parsons* v. *Dunne*, Belts Sup. to Ves. S. 276.

[6] *Campbell* v. *French*, 3 Ves. 321; *Dues* v. *Smith*, Jac. 541; *Anstruther* v. *Adair*, 2 M. & K. 513; *Hitchcock* v. *Clendinen*, 12 Beav. 534; *M'Cormick* v. *Garnett*, 5 De G. M. & G. 278: 18 Jur. 412; see however, *Schwabacher* v. *Becker*, 2 Sm. & G. App. 4; but if the *feme covert*, is a ward of Court, the case is different, and the Court will direct a settlement. *In re Tweedale's Settlement*, Johns. 109.

[7] *M'Cormick* v. *Garnett*, *ubi. sup.* In *Sutherland* v. *Young*, 5 L. T. N. S. 738, M. R., legacies of £250 each to a Frenchman's daughters, married to French subjects, were ordered to be paid to the wives.

Before a fund belonging to a married woman will be paid out of Court,[1] an affidavit is required to be made by the husband and wife, that no settlement, or agreement for a settlement, has been made; or, if there is any settlement, or agreement, then an affidavit by them identifying the instrument, and stating that there is no other;[2] and the instrument must be produced. Where produced in Court, the counsel of the husband and wife certifies that he has carefully perused it, and that the fund in question is not affected thereby;[3] but where produced in chambers, an affidavit by their solicitor to the like effect is required. On an application for an order to examine the wife, unless the affidavit of no settlement be produced, the order will direct that it be made before the examination is taken:[4] in which case, it is usual to swear the affidavit before one of the commissioners appointed by the order, if he is competent to administer an oath in Chancery. Where the marriage is not otherwise proved, the affidavit should state the time and place of the marriage, and a certificate thereof should be exhibited.

As a general rule, the consent of the wife will not be taken by the Court until the amount of the fund is clearly ascertained,[5] except where it is subject only to a deduction for costs;[6] but her consent has been taken to the part ascertained from time to time.[7] Formerly, it was not the practice of the Court to direct a fund belonging to a married woman to be paid out of Court at the hearing of the cause;[8] but it was directed to be transferred to a separate account, usually entitled the account of the husband and wife; and after such transfer, a petition was presented for payment out of Court of the money so transferred.[9] Now, however, where the wife appears in Court and consents, the fund may be directed to be paid out at the hearing of the cause, or on further consideration.[10]

If the wife be not of full age, she is incapable of giving her consent; in that case, therefore, the Court will not examine her, but will require

[1] See *Hough* v. *Ryley*, 2 Cox, 157; *Elrington* v. *Elrington*, 4 Drew, 545.

[2] When the joint affidavit cannot be obtained, the Court has been satisfied with other evidence, *Rowland* v. *Oakley*, 14 Jur. 845, V. C. K. B.; *Anon*, 3 Jur. N. S. 839, V. C W. As to the affidavit required where the wife is dead, and an affidavit of no settlement could not be obtained, see *Clarke* v. *Woodward*, 25 Beav. 455. Where the settlement was Scotch, the Court required the affidavit of a Scotch advocate that it did not affect the fund, *Re Todd*, *Shand*, v. *Kidd*, 19 Beav. 582.

[3] See form of recital thereof in Seton, 657. No. 2.

[4] See form of order, Seton, 658. No. 4. The V. C Kindersley requires the affidavit to be produced before the order to examine is made, Seton, 663.

[5] *Sperling* v. *Rochfort*, 8 Ves. 164, 178; *Woollands* v. *Crowther*, 12 Ves. 174, 178; *Jernegan* v. *Baxter*, 6 Mad. 32; *Moss* v. *Dunlop*, 8 W. R. 39, V. C. W. *S. C. nom. Anon.* 5 Jur. N.S. 1124.

[6] *Packer* v. *Packer*, 1 Coll. 92; *Musgrove* v. *Flood*, 1 Jur. N. S. 1086, V. C. W.; *Roberts* v. *Collett*, 1 Sm. & G. 138.

[7] *Powell* v. *Merrett*, Seton, 661.

[8] *Campbell* v. *Harding*, 6 Sim. 283.

[9] *Ibid.*

[10] 13 & 14 Vic. c. 35, s. 28; and see *ante*. We have no Statute similar to this.

the husband, in case he applies to this Court for her equitable property, to make a proper settlement upon her.[1] If the wife is of age, and persists in giving her consent, and waiving her equity to a settlement, it appears that the Court cannot refuse to act in accordance with her wish. In *Ex parte Higham*,[2] however, Lord Hardwicke considered himself entitled to object to the whole fund being paid over to the husband, who was in trade, even though the wife consented; but in the previous case of *Willats* v. *Kay*,[3] where the wife had appeared in Court, and being examined, desired that the whole money might be paid to her husband, the Master of the Rolls, although the parties had married without the consent of the wife's relations, and the husband appeared to be insolvent, refused to refer it to the Master to consider a scheme for securing a provision for the wife: observing, that it was never done unless circumstances of fraud, or of compulsion on the part of the husband appear; and that a wife might as well dispose of her personal estate, over which she has an absolute control, as of real estate, which she might do by joining in a fine with her husband.[4]

It would seem that, as long as the money remains in Court, the wife may claim a settlement out of it, although she has consented to its being paid to her husband; or that, at any rate, this is so where she was not aware of material circumstances at the time of giving her consent.[5]

It seems that, were a wife's consent has been already given upon her examination before another competent tribunal, she need not be again examined in a Court of Equity; thus, in *Campbell* v *French*,[6] Lord Rosslyn did not think it necessary to issue a commission to take the examination of a married woman residing in America, as she appeared to have been examined under a commission issued by the government of Virginia, and had consented to a power of attorney to receive the legacy, which had been executed by her husband. And so it has been held, that where a married woman is entitled to a share of money arising from the sale or mortgage of an estate which has been mortgaged or sold, and in order to effect such sale or mortgage she has joined in levying a fine of her share, and for that purpose has undergone the

[1] *Stubbs* v. *Sargon*, 2 Beav. 496; *Abraham* v. *Newcombe*, 12 Sim. 566. As to the course, where the wife is *non compos*, see *Caldecott* v. *Harrison*, Seton, 663.

[2] 2 Ves. S. 579. The ground of this decision appears to have been, that the lady had been a ward of Court; see also *Biddles* v. *Jackson*, 26 Beav. 282; 3 De G. & J. 544: 4 Jur. N. S. 1069: 5 *ib.* 901.

[3] 2 Atk. 67.

[4] See *Milner* v. *Colmer*, 2 P. Wms. 659, 642; *Lanoy* v. *Athol*, 2 Atk. 444, 448; *Oldham* v. *Hughes*, *ib.* 452; *Hearle* v. *Greenbank*, 3 Atk. 695, 709; *Parsons* v. *Dunne*, 2 Ves. S. 60; *Minet* v. *Hyde*, 2 Bro. C. C. 663; *Dimmoch* v. *Atkinson*, 3 Bro. C. C. 195; *Ellis* v. *Atkinson*, *ib.* 565; *Hood* v. *Burlton*, 4 Bro. C. C. 121.

[5] *Watson* v. *Marshall*, 17 Beav. 363.

[6] 3 Ves. 321, 323.

usual examination in the Court where such fine has been levied, she will be barred, by the fine, of her equity for a settlement.[1]

The right of a married woman to have a settlement made of, or out of, a fund in Court, arises, however small the fund may be; but if it is under £200, or is likely to be reduced thereto by costs,[2] or produces less than £10 a-year,[3] she may waive her equity to a settlement without being separately examined.[4]

When the Accountant-General is directed to pay or transfer any sum of money or stock to an unmarried woman, and she marries before payment or transfer, and the sum does not exceed £200, or £10 a year, the Accountant-General may pay or transfer the same to the woman and her husband, upon proof of the marriage, and such affidavit of no settlement as has been mentioned above;[5] or, in case there has been a settlement, upon the affidavit of the solicitor, that in his judgment the settlement does not affect the fund. But where the fund in Court exceeds the limit above mentioned, a special order for payment is necessary: which can be obtained at chambers, on *ex parte* motion, supported by the production of the order under which the fund was directed to be paid to the woman, the Accountant-General's certificate, and an affidavit by her and her husband of the marriage, and of no settlement; or by petition on the like evidence, where there is no jurisdiction at chambers.

The Court will not dispense with the separate examination of the married woman, in cases where it is proposed to pay the fund to her separate receipt; as that would be, in effect, the same as payment to the husband.[6]

The rule of the Court appears to be, that the wife can only consent to part with that interest which is the creature of a Court of Equity: *viz.*, the right which she has, in a Court of Equity, to claim a provision by way of settlement on herself and children, out of the property which, at Law, the husband could take possession of in her right.[7] This equity arises upon the husband's legal right to present possession; and the principle has no application to a remainder or reversion, which can only be passed to the husband when it falls into possession.[8] With respect

[1] *May* v. *Roper*, 4 Sim. 360; see now 3 & 4 Will. IV. c. 74, s. 77, substituting an acknowledged deed for a fine: Shelford, R. P. Stat. 389.

[2] *Roberts* v. *Collett*, 1 Sm. & G. 138; but see *Sporle* v. *Barnaby*, 10 Jur. N. S. 1142, V. C. S.

[3] See Seton, 660; Ord. I. 1.

[4] *Re Kinkaid*, 1 Drew. 326. The case of *Foden* v. *Finney*, 4 Russ. 428, is not now binding, *Re Cutler*, 14 Beav. 220; and see *Doody* v. *Higgins*, 2 Jur. N. S. 1068, V. C. W.

[5] *Ante*. It may be observed that in this Province the Registrar may be considered, in a general way, as the Accountant General under Orders 352 *et seq.*

[6] *Mawe* v. *Heaviside*, 7 Jur. N. S. 817; 9 W. R. 649, V.C.K.; *Gibbons* v. *Kibbey*, 7 Jur. N. S. 1298; 10 W. R. 55, V. C. K.; and see Seton, 664.

[7] *Pickard* v. *Roberts*, 3 Mad. 385.

[8] *Ibid.*

to an interest of this description, it has been stated generally, that the Court will not allow her, by any act of hers during coverture, to bind her future rights. Without her consent, the Court will not deal with it or dispose of it at all: and her consent the Court will refuse to take.[1] Thus, a petition, which had for its object the payment to the husband of a sum of money, to which the wife was entitled in reversion after the death of her mother, was refused.[2]

In *Macarmick* v. *Buller*,[3] however, Lord Kenyon, M. R., made an order, upon the consent of a married woman given in Court, for the payment of trust money to her husband, which appears to be completely at variance with the rule laid down in the cases just cited. In that case, on the marriage of the plaintiff, a sum of £9,000 had been vested in trustees, upon trust to pay the interest to the husband for life, and after his death to the wife for life, and upon the death of the survivor to pay the principal to such persons as such survivor should direct; but the husband, having occasion for the money, joined with the wife in executing a deed-poll, whereby they appointed the money immediately to the husband; and upon personal examination of the wife in Court, the trustees were directed to pay the money to the husband.

In the case of *Whittle* v. *Henning*,[4] the important question came before Lord Cottenham, whether a married woman, entitled under settlement to a reversionary interest in a fund in Court, could, by obtaining assignments of all the interests in the fund previous to that settled upon herself, make herself absolutely entitled to the whole fund, so as to have it paid out of Court. It was held, after an elaborate judgment, and a review of all the cases, that she could not do so.

Where property is settled to the separate use of a married woman, her separate examination is not necessary in order to pass her interest to a purchaser. The principle upon which this rule is founded is, that she is, as to that property, a *feme sole*, and, as such has a disposing power over it;[5] and it applies as much to reversionary property as to property in possession.[6] Upon the same principle, where a married woman to whom an annuity was bequeathed for her separate use, joined with her husband in assigning part of it for a valuable consideration, and she, the husband, and the purchaser, afterwards filed a bill against the executors of the testator under whom the annuity was claimed: a doubt having

[1] Per Lord Cottenham, in *Frank* v. *Frank*, 3 M. & C. 178. She may however, now release her equity, under the provisions of the 20 & 21 Vic. c. 57.

[2] *Pickard* v. *Roberts*, 3 Mad. 384, see *Stiffe* v. *Everitt*, 1 M. & C. 37, 41; *Richards* v. *Chambers*, 10 Ves. 580; *Ritchie* v. *Broadbent*, 2 J. & W. 456; *Osborne* v. *Morgan*, 9 Hare, 434; and *post*, p. 117, *et seq.*

[3] 1 Cox, 357.

[4] 2 Phil. 731 : 11 Beav. 222 : *Story* v. *Tonge*, 7 Beav. 91.

[5] Unless she is restrained from anticipation, see *Symonds* v. *Wilks*, 12 W. R. 541, M. R.

[6] *Sturgis* v. *Corp*, 13 Ves. 190; and see *Keene* v. *Johnston*, 1 Jones and Car. 255.

occurred whether, in such a case, a decree could be taken by consent, Sir J. Leach, M. R., was of opinion that it could, and directed the decree to be drawn up accordingly.[1]

But although, where property has been settled to the separate use of a married woman, the Court will give effect to her alienation of such property; in the same manner that it gives effect to an alienation of a *feme sole*, the rule does not extend to transactions with her husband, which are looked upon by the Court with considerable jealousy; so much so, that the Court has refused to pay the separate money of the wife to the husband, without the examination of the wife in Court.[2] It is not, however, to be understood that a wife may not, in any case, dispose of her separate property to her husband, unless by consent in Court, or before commissioners. Several instances have occurred where wives, by acts *in pais*, have parted with separate property to their husbands.[3] It should be observed, however, that such gifts are never to be inferred without very clear evidence.[4]

If a married woman, upon being examined apart from her husband, refuses to give her consent to the money being paid to him, the consequence of such refusal is, that the Court directs a proper settlement to be made, generally determining at once[5] the amount to be settled, and referring it to chambers to approve of the necessary deed; and the proceedings are usually completed there, without further mention to the Court.[6] If the fund is small, it is usual, for the purpose of saving the expense of a deed, to settle the fund at once by the decree or order.[7]

It is to be remarked, that although the Court will, in general, oblige the husband to make a settlement upon his wife and children of any property which he may be entitled to in right of his wife, for the recovery of which it is necessary to resort to a Court of Equity, yet, where there is no suit pending, the husband is authorised to lay hold of his wife's property, wherever he can find it.[8]

[1] *Stinson* v. *Ashley*, 5 Russ. 4; but it would seem that there must be an affidavit of no settlement, *Anon*, 3 Jur. N. S. 839, V. C. W.

[2] 2 Bright, H. & W. 257; *Gullan* v. *Trimbey*, 2 J. & W. 457, n.; *Wordsworth* v. *Dayrell*, 2 Jur. N. S. 631, V. C. K.; and see *Milnes* v. *Busk*, 2 Ves. J. 498. In *Anon.*, 3 Jur. N. S. 839, before referred to, the fund was paid to the wife on her separate receipt, without examination in Court; but, *quære*, whether this was not done in consequence of her living separated from her husband. As to the mode by which the husband can be excluded, where the wife is entitled to stock for her separate use, see Seton, 663.

[3] *Pawlet* v. *Delaval*, 2 Ves. S. 663.

[4] *Rich* v. *Cockell*, 9 Ves. 369; *Harvey* v. *Ashley*, cited 2 Ves. S. 671.; 3 Atk. 607; Co. Litt. by Harg. 3. a. n.

[5] *Coster* v. *Coster*, 9 Sim. 597, 605; *Napier* v. *Napier*, 1 Dr. & War. 407.

[6] For forms of orders, see Seton, 664.

[7] Seton, 665; *Re Cutler*, 14 Beav. 220; *Bagshaw* v. *Winter*, 5 De G. & S. 466; *Walson* v. *Marshall*, 17 Beav. 363; and see abstract of order, *ib.*, p. 365; *Re Kincaid*, 1 Drew. 326; *Wright* v. *King*, 18 Beav. 461; *Duncombe* v. *Greenacre*, No. 2, 29 Beav. 578. Where the husband refuses to execute the settlement, and the trustees decline to act, the fund was ordered to remain in Court as settled, and the interest to be paid to the wife for her separate use for life, *Re Butt*, cited, Seton, 671.

[8] *Jewson* v. *Moulson*, 2 Atk. 419.

There is no doubt that, previously to a bill, a trustee who is in possession of the wife's property, real or personal, may pay the rents of the real estate to the husband, or may hand over to him the personal estate;[1] and the Court will not, upon bill filed, recall it.[2] But the trustee may equally refuse to pay the husband till compelled by the filing of a bill, in order that the wife may obtain the full benefit of the protection afforded her by a Court of Equity; and the circumstance that the wife joined with the husband in making the demand is of no weight whatever.[3] Where, however, a bill has already been filed, a trustee cannot exercise his discretion upon this point; as the bill makes the Court the trustee, and takes away from the actual trustee his right of dealing with the property, without its sanction.

With respect to the nature of the settlement made by the Court, and the proportion of the interest given to the wife, no certain rule can be laid down: the amount being entirely in the discretion of the Court, and depending upon the particular circumstances of each case. If the husband is living with her, and maintaining her and her children, he will, in the absence of any special circumstances, be allowed the interest on the whole, so long as he maintains her.[4] When the husband is not living with the wife and maintaining her and her children, as when he has become bankrupt or insolvent, or has deserted her, the whole, or some portion of the fund will be settled, immediately, upon the wife and children. With regard to the amount which will be settled, it has been before observed, that this depends upon all the circumstances of each particular case; but it may be mentioned, that the whole fund has been settled: where the husband was bankrupt, and had received large advances from the wife's father;[5] where the husband deserted his wife, and contributed nothing to her support;[6] where the husband was insolvent, and had received large sums in right of his wife;[7] and where the husband was bankrupt, and had deserted his wife;[8] and in the recent reports, numerous cases will be found in which, under the circumstances, the whole fund was settled.[9] In other cases, the fund has been divi-

[1] *Murray* v. *Lord Elibank*, 10 Ves. 90.

[2] *Glainster* v. *Hewer*, 8 Ves. 206; *Macaulay* v. *Philips*, 4 Ves. 15; *Murray* v. *Elibank*, 10 Ves. 90.

[3] *Re Swan's Settlement*, 12 W. R. 738, V. C. W

[4] *Bullock* v. *Menzies*, 4 Ves. 798; *Sleech* v. *Thorington*, 2 Ves. S. 560.

[5] *Gardner* v. *Marshall*, 14 Sim. 575, 584.

[6] *Gilchrist* v. *Cator*, 1 De G. & S. 188; *Re Ford*, 32 Beav. 621; 9 Jur. N. S. 740. In *Kernick* v. *Kernick*, 4 N. R. 533, V. C. W.. where the husband had deserted the wife, but maintained their children, the whole fund was settled on her for life; but leave was reserved to him to apply, on her death, in respect to the payment to him of any part of the income during his life.

[7] *Scott* v. *Spashett*, 3 M'N. & G. 599.

[8] *Dunkley* v. *Dunkley*, 2 De G. M. & G. 390, 396.

[9] *Re Culler*, 14 Beav. 220; *Marshall* v. *Fowler*, 16 Beav. 249; *Re Kincaid*, 1 Drew. 326; *Watson* v. *Marshall*, 17 Beav. 363; *Francis* v. *Brooking*, 19 Beav. 347; *Barrow* v. *Barrow*, 5 De G. M. & G. 782; *Geni* v. *Harris*, 10 Hare, 384; *Re Wilson*, 1 Jur. N. S. 569, V.C.S.; *Koeber* v. *Sturgis*, 22 Beav. 588; *Re Disney*, 2 Jur. N. S. 206, V.C.W.; *Re Welchman*, 1 Giff.31; 5 Jur. N. S. 886;

ded;[1] and in the older cases one-half has been frequently settled;[2] but the rule that one half is generally the proportion settled, which is often referred to in the older reports, is, it would seem, not much regarded in the more recent cases;[3] where however, the fund is under £200, it is the usual pratice not to divide it.[4]

The Court, however, will not permit the equity of the wife, to maintenance out of her own fortune, to be defeated by any trick or contrivance for that purpose on the part of her husband. If, therefore, as in *Colmer* v. *Colmer*,[5] he, with an intention to desert her (which he afterwards carries into effect), make a fraudulent conveyance of his and her property, upon trust to pay his own debts, the transaction will not prejudice her right to maintenance; but the Court will follow her property into the hands of the trustees, and order her an allowance suitable to her fortune, and the circumstances of her husband, although it may be necessary, in order to effect that purpose, to resort to part of his own property so vested in trust.

It is to be observed, that the Court will, as has been shown, not only appropriate the interest of a wife's equitable property, for her support, in cases where she has been deserted by her husband, or obliged to leave him in consequence of his improper conduct towards her, but it will, under similar circumstances, if a stranger has advanced to the wife money for her maintenance, order it to be repaid to him out of her estate.[6] Thus, in *Guy* v. *Pearkes*,[7] where it appeared that the wife was unprovided for; that her husband, after having gone to sea and deserted her, had subsequently to his return neither cohabited with her, nor afforded her any support, but had since gone to the East Indies, and had not been again heard of; and that it was unknown whether he were living or dead; and it also appeared that *A.* had made advances to her of £30 a-year during the above period, which were her only support: upon application being made to the Court, that so much of the wife's stock standing in the Accountant-General's name as would raise £210 might be sold, and the proceeds paid to *A.* in satisfaction of his debt, and that a further sum of £50 might be paid to the wife, and that the

Smith v. *Smith*, 3 Giff. 121; *Ward* v. *Yates*, 1 Dr. & S. 80; *Duncombe* v. *Greenacre*, 29 Beav. 578: 7 Jur. N. S. 650; *Re Tubbs*, 8 W. R. 270, V.C.K.; and see *Re Grove*, 3 Giff. 575; 9 Jur. N. S. 38; *Re Merriman*, 10 W. R. 334; *Kernick* v. *Kernick*, 4 N. R. 533, V. C. W.

[1] *Napier* v. *Napier*, 1 Dru. & War. 407; *Coster* v. *Coster*, 9 Sim. 597: *Ex parte Pugh*, 1 Drew. 202; *Bagshaw* v. *Winter*, 5 De G. & S. 466; *Walker* v. *Drury*, 17 Beav. 482.

[2] *Jewson* v. *Moulson*, 2 Atk 417, 423; *Worrall* v. *Marlor*, 1 Cox. 153; 2 Dick. 647; *Brown* v. *Clark* 3 Ves. 166; *Pringle* v. *Hodgson*, *ib.* 617, 620; *Steinmetz* v. *Halthin*, 1 Glyn. & J. 64; *Ex parte O'Ferrall*, *ib.* 347.

[3] *Re Kincaid*, 1 Drew. 326; *Ward* v. *Yates*, 1 Dr. & S. 80; *Archer* v. *Gardner*, C. P. Coop. 340; *Spirett* v. *Willows*, 12 W. R. 734; *Re Tubbs*, 8 W. R. 270, V. C. K.; but see *Re Grove*, 3 Giff. 575: 9 Jur. N. S. 38.

[4] *Ibid.*

[5] Mos. 118, 121; see also *Atherton* v. *Nowell*, 1 Cox, 229.

[6] 1 Bright, H. & W. 258.

[7] 18 Ves. 196; and see *Re Ford*, 32 Beav. 621: 9 Jur. N. S. 740.

dividends upon the remaining fund might in future be paid to her for her support, the application was granted: *A.* having made an affidavit, that he was induced to make the advances upon the faith of being repaid them out of the above property. In pronouncing his judgment, Lord Eldon thus expressed himself: "I have a strong impression upon my mind that this has been done, and, independently of precedent, I think the Court may do it: as the husband, deserting his wife, leaves her credit for necessaries, and would be liable to an action; and although execution could not be had against the stock, the effect might be obtained circuitously, as he could not relieve himself, except by giving his consent to the application of this fund."

If a husband be willing, and offer to maintain his wife, and she, without sufficient reason, refuse to reside with him: upon his application for the interest of her fortune, the Court will order payment of it to him, even though he decline to make a settlement upon her.[1]

As to the effect of the wife's misconduct upon her equity for a maintenance, it is a trite observation, that persons appealing to a Court of Justice ought to enter it with clean hands; *i. e.*, they must be worthy and proper to receive the redress which they seek: hence it follows, that if the wife has been guilty of gross misconduct, a Court of Equity will not consider her to be entitled to protection. If, therefore, she has committed adultery, or has eloped from her husband without a sufficient reason, the Court will remain passive, and not interfere at her suit to allow her a maintenance out of her equitable property.[2]

The question whether, in the case of a particular assignee claiming by purchase from the husband for a valuable consideration, the Court would or would not impose upon him the condition of making a settlement, was long considered doubtful;[3] it is now settled, however, that such an assignee of a capital fund is bound to make a provision, out of the fund, for the wife and her children;[4] but the assignment for value by a husband, of his wife's life estate, will prevail against her,[5] though he desert her and leave her destitute,[6] during their joint lives, but not after his death.[7] On principle, however, it seems difficult to distinguish between the case of a capital fund and a life interest.[8]

[1] *Bullock* v. *Menzies*, 4 Ves. 798; see, however, *Eedes* v. *Eedes*, 11 Sim. 569.

[2] 1 Bright, H. & W. 249 *et seq.*; *Ball* v. *Montgomery*, 2 Ves. J. 191; *Duncan* v. *Campbell*, 12 Sim. 616; but see *Re Lewin's Trusts*, 20 Beav. 378; *Kernick* v. *Kernick*, 4 N. R. 353, V. C. W.; *Greedy* v. *Lavender*, 13 Beav. 62.

[3] *Like* v. *Beresford*, 3 Ves. 506, 511; *Pryor* v. *Hill*, 4 Bro. C. C. 139; *Macaulay* v. *Philips*, 4 Ves. 19.

[4] *Macaulay* v. *Philips*, 4 Ves. 19; *Franco* v. *Franco*, 4 Ves. 515, 530; *Johnson* v. *Johnson*, 1 J. & W. 472; *Carter* v. *Taggart*, 5 De G. & S. 49; 1 De G. M. & G. 286; *Tidd* v. *Lister*, 3 De G. M. & G. 857: 18 Jur. 543.

[5] *Elliott* v. *Cordell*, 5 Mad. 149; *Stanton* v. *Hall*, 2 R. & M. 175.

[6] *Tidd* v. *Lister*, 3 De G. M. & G. 587: 18 Jur. 543.

[7] *Stiffe* v. *Everill*, 1 M. & C. 37.

[8] *Re Duffy*, 28 Beav. 386.

Although, in general, the Court allows the husband, whilst he maintains his wife, the income of her property, yet it must not be supposed that this is an absolute right on his part, or that, upon the death of the husband, his representative is entitled to the arrears of income accrued during his life. As a general rule, the wife surviving is entitled to all property of her own not reduced into possession during the coverture; and this applies to the arrears upon life income which accrued, but were not received, during the coverture.[1]

It appears formerly to have been considered, that if the husband had made a settlement upon his wife upon their marriage, the wife would be debarred of her right to a further provision out of any property which might subsequently accrue to her.[2] This is not the rule,[3] but in such cases it depends upon the terms of the settlement; for if it appears, either by express words or by fair inference, that it was the intention of the parties that the husband should be the purchaser of the future as well as the present property of the wife, the Court will not require the husband to make an additional settlement.[4] In such cases, however, the settlement, for this purpose, must either express it to be in consideration of the wife's fortune, or the contents of it, altogether, must import it, and plainly import it, as much as if it were expressed.[5] But in determining the amount to be settled, any previous settlement is always taken into consideration;[6] as is also the amount of property received by the husband in right of his wife.[7]

The wife's equity to a settlement is not for her benefit only, but for that of herself and children;[8] and though, as has been before stated,[9] she may, upon her examination, waive it, she cannot take the benefit of it for herself, and relinquish it on behalf of her children.

But though the equity which compels the husband to make a settlement out of the wife's personal estate is the right of the children, as well as of the wife, yet it does not survive to the children after her death;[10] but in such case the whole fund will go to the husband by

[1] *Wilkinson* v. *Charlsworth*, 10 Beav. 324.

[2] *Lanoy* v. *Duke of Athol*, 2 Atk. 448.

[3] *March* v. *Head*, 3 Atk. 720; *Tomkins* v. *Ladbroke*, 2 Ves. S. 591, 595; *Slackpole* v. *Beaumont*, 3 Ves. 89, 98; *Lady Elibank* v. *Montolieu*, 5 Ves. 737.

[4] *Brooke* v. *Hickes*, 12 W. R. 703, V. C. S.

[5] Per Lord Eldon, in *Druce* v. *Denison*, 6 Ves. 395.

[6] *Lady Elibank*, v. *Montolieu*, 5 Ves. 737; *Freeman* v. *Fairlie*, 11 Jur. 447, V. C. E.; *Re Erskine*, 1 K. & J. 302.

[7] *Green* v. *Otte*, 1 S. & S. 250, 254; *Napier* v. *Napier*, 1 Dr. & War. 407.

[8] *Murray* v. *Lord Elibank*, 10 Ves. 84; *Lloyd* v. *Williams*, 1 Mad. 450, 459; *Re Walker*, L. & G. t. Sug. 299; *Hodgens* v. *Hodgens* 4 Cl. & F. 323; 11 Bli. 62. *Johnson* v. *Johnson*, 1 J. & W. 472, *contra*, would not now, it is apprehended, be followed.

[9] *Ante*.

[10] *Scriven* v. *Tapley*, 2 Eden, 337; Amb. 509; *Fenner* v. *Taylor*, 2 R. & M. 190; *De la Garde* v. *Lempriere*, 6 Beav. 344; *Baker* v. *Bayldon*, 8 Hare, 210; *Lovett* v. *Lovett*, Johns. 118; *Wallace* v. *Auldjo*, 2 N. R. 567, L.JJ.; 2 Dr. & Sm. 216; 9 Jur. N. S. 687.

survivorship.[1] It has been thought that Sir Thomas Sewell, M. R., in the case of *Cockel* v. *Phipps*,[2] acted in direct contradiction to Lord Northington's decision upon this point in *Scriven* v. *Tapley*. It appears, however, from the very elaborate judgment of Sir Thomas Plumer, V. C., in *Lloyd* v. *Williams*,[3] that the former case has been erroneously reported, and that it does not bear upon the question.

In *Murray* v. *Lord Elibank*,[4] and particularly in the above-cited case of *Lloyd* v. *Williams*, all the previous cases, and the reasoning upon the subject, have been collected and commented upon; and it appears from them to have been the opinion, both of Lord Eldon, and of Sir Thomas Plumer, that the children have no equity after the death of the mother, unless there has been a contract, or a decree or order, for a settlement, in her lifetime.[5]

The wife may, at any time before the settlement has been finally ordered, appear in Court, or before Commissioners, and waive her right, so as altogether to defeat her children.[6] She cannot, however, after insisting upon her right to a settlement as against her husband's assignees in bankruptcy, subsequently waive her equity, and defeat her children's interest, except it be in favour of the assignees.[7] After a contract entered into on the part of the husband to make a settlement, it would seem that the wife can waive it as far as her own interest is concerned, but not for her children.[8]

It seems that if, after a reference to approve of a settlement, one of the parties die before the settlement be approved of by the Court, and there are no children of the marriage, the right of survivorship, as between the husband and the wife, is not affected. Thus, in *Macauley* v. *Philips*,[9] Lord Alvanley, M. R., laid it down, that if the wife had died even after a proposal had been made by the husband under such an order, the husband would have been entitled. His lordship, however, said, that he did not mean to determine what the case would have been if the proposal had been approved of by the Court, and a settlement ordered to be made, as perhaps then the Court would have considered it as actually made; and that he was far from determining that, in such

[1] *Wallace* v. *Auldjo*, *ubi sup.*

[2] 1 Dick. 391.

[3] 1 Mad. 450, 464.

[4] 10 Ves. 84, 92.

[5] 1 Mad. 467; and see *Lloyd* v. *Mason*, 5 Hare, 149, 152; *Groves* v. *Clarke*, 1 Keen, 132, 136; *S. C. sub. nom. Groves* v. *Perkins*, 6 Sim. 576, 584.

[6] *Barrow* v. *Barrow*, 4 K. & J. 409, 424; and see *Rowe* v. *Jackson*, 2 Dick. 604; *Murray* v. *Lord Elibank*, 10 Ves. 84; *Martin* v. *Mitchell*, cited, *ib.* 89; *Steinmetz* v. *Halthin*, 1 Glynn & J. 64.

[7] *Whittem* v. *Sawyer*, 1 Beav. 593; *Barker* v. *Lea*, 6 Mad. 330.

[8] *Anon.*, 2 Ves. S. 671; and *Fenner* v. *Taylor*, 2 R. & M. 190, reversing *S. C.* 1 Sim. 169; *Lovett* v. *Lovett*, Johns. 118.

[9] 4 Ves. 19.

a case, the settlement would be entirely at an end; on the contrary, he thought it would be binding, and that the accident would make no difference. However, in *Baldwin* v. *Baldwin*,[1] Sir James Parker, V. C., held, that after the Master had approved of a settlement, the wife, upon the death of her husband, might still repudiate the settlement, or set up her claim by survivorship.

It may be observed here, that, as a general rule, if the wife be an adulteress, living apart from her husband,[2] a Court of Equity will not interfere, upon her application for a settlement out of her own *choses in action*. In some cases, however, under special circumstances, a settlement in her favour has been made, notwithstanding the adultery:[3] and, of course, if she is not an adulteress, her living apart from her husband, is no bar to her equity.[4] In cases of this description, the fact of the husband living apart from his wife, and not supporting her, is a reason against the fund, or the income, being paid to him;[5] but, nevertheless, in some cases this has been done.[6]

Where, however, female wards of Court are married without its consent, although they afterwards live in adultery, the Court will enforce a settlement:[7] because, the marriage being a contempt, the Court thereby obtained jurisdiction to commit the husband, in consequence of his misconduct, until he should make a proper settlement, and will not part with that power until that act be done, whatever may be the irregularity of the wife's conduct: which may be attributed, in some degree, to her husband's conduct in procuring such a clandestine marriage.

With reference to the form of settlement, it is to be observed, that the practice is to settle the property in trust for the wife, for her separate use, for life, without power of anticipation, and after her death, for her children; and in default of children, for her absolutely, if she survives her husband; but if she dies in his lifetime, then in trust for her husband, or his assignees.[8]

Having now treated of the subject of a married woman's equity to a

[1] 5 De G. & S. 319; and see *Heath* v. *Lewis*, 10 Jur. N. S. 1093: 13 W. R. 129, V. C. S., where the wife, being subsequently divorced, was allowed to repudiate the settlement.

[2] 1 Bright, H. & W. 252; *Carr* v. *Eastabrooke*, 4 Ves. 146; *Ball* v. *Montgomery*, 2 Ves. J. 191, 199; *Watkyns* v. *Watkyns*, 2 Atk. 97; and see judgment of L. J. Turner in *Barrow* v. *Barrow*, 5 De G. M. & G. 795.

[3] *Greedy* v. *Lavender*, 13 Beav. 62; *Re Lewin's Trust*, 20 Beav. 378.

[4] *Eedes* v. *Eedes*, 11 Sim. 569; and see *Kernick* v. *Kernick*, 4 N. R. 533, V.C.W.

[5] *Carr* v. *Eastabrooke*, 4 Ves. 146.

[6] *Ball* v. *Montgomery*, 2 Ves. J. 191; *Duncan* v. *Campbell*, 12 Sim. 616, 635, 638.

[7] *Ball* v. *Coutts*, 1 V. & B. 292, 302, 304; *Re Walker*, L. & G. t. Sug. 299; and see, generally, as to the mode in which the Court deals with the property of a female ward marrying without consent, *Field* v. *Moore*, 7 De G. M. & G. 691; 2 Jur. N. S. 145.

[8] *Carter* v. *Taggart*, 1 De G. M. & G. 286; *Bagshaw* v. *Winter*, 5 De G. & S. 466; *Gent* v. *Harris*, 10 Hare, 383: Seton, 666; *Ward* v. *Yates*, 1 Dr. & S. 80; and see form of order, where fund was settled by the order, *Watson* v. *Marshall*, 17 Beav. 365; *Duncombe* v. *Greenacre*, No. 2, 29 Beav. 578; *Re Tubbs*, 8 W. R. 270, V. C. K.; Seton, 665.

settlement, into which we have been led in considering the ground on which the Court of Chancery requires a wife to be joined as co-plaintiff with her husband, in suits relating to her own property: we may return to the subject of suits by *femes covert* generally. It is now settled, that all cases in which the husband and wife sue as co-plaintiffs together, or in which the husband sues as next friend of his wife, are regarded as suits of the husband alone.[1] And upon this principle, where a married woman, having a separate interest, joins as a co-plaintiff with her husband, instead of suing by her next friend, the suit will not prejudice a future claim by the wife in respect of her separate interest;[2] and it has been decided, that a suit by a husband and wife against the trustees of the wife's separate property, cannot be pleaded in bar to a subsequent suit by her by her next friend against the trustees and her husband, although the relief prayed in both suits is the same.[3]

In general, therefore, where the suit relates to the separate property of the wife,[4] it is necessary that the bill should be filed in her name, by her next friend; otherwise, the defendant may demur, upon the ground that the wife might at any future time institute a new suit for the same matter, and that, upon such new suit being instituted a decree in a cause over which her husband had the exclusive control and authority, would not operate as a valid bar against her subsequent claim.[5]

In suits by a married woman respecting her separate property, she must sue separately from her husband (by her next friend) and must make her husband a defendant; as otherwise the proceeding is looked upon as exclusively the suit of the husband, and would not be conclusive on the wife or those claiming under her.[6] Where one of several co-plaintiffs is a married woman, she must sue by next friend, who must be a solvent person, capable of answering costs.[7] Where a married woman files a bill without a next friend, the proper order to make, in the first instance, is that a next friend be appointed, and that all proceedings in the suit be stayed in the meantime.[8]

[1] *Wake* v. *Parker*, 2 Keen, 59, 70; *Davis* v. *Prout*, 7 Beav. 288, 290. A plea of insolvency of the husband, was disallowed to a bill by him and his wife for payment of an annuity bequeathed for the benefit of the latter, which had fallen into possession after the insolvency, the assignees declining to interfere, *Glover* v. *Weedon*, 3 Jur. N. S. 903, V. C. S.

[2] *Hughes* v. *Evans*, 1 S. & S. 185; *Turner* v. *Turner*, 2 De G. M. & G. 28, 37.

[3] *Reeve* v. *Dally*, 2 S. & S. 464. On this principle, a plea of release by the husband, to a bill by the husband and wife for property limited to her separate use, was held good, *Stooke* v. *Vincent*, 1 Coll. 527.

[4] Where the bill is filed to rectify a marriage settlement, the wife ought to be a party independently of her husband, *M'Gilldowney* v. *Pemberton*, 10 L. T. N. S. 292, V. C. W.

[5] *Wake* v. *Parker*, 2 Keen, 59, 70; see also, *Warren* v. *Buck*, 4 Beav. 95, as to the time when the objection can be taken by the defendant; and see *Hope* v. *Fox*, 1 J & H. 456: 7 Jur. N. S., 186, where the suit related to the execution of a power vested in a married woman; and see *Mendes* v. *Guedalla* (No. 2), 10 W. R. 485, V. C. W.

[6] *Houlding* v. *Poole*, 1 Grant 206.

[7] *Rann* v. *Lawless*, 1 Cham. R. 333.

[8] *McPherson* v. *McCabe*, 1 Cham. R. 250.

Where, however, the suit is for a *chose in action* of the wife, not settled to her separate use, the defendant cannot object to the husband's suing jointly with her as co-plaintiff; nor will her right to a settlement be prejudiced by the fact of her husband being so joined with her in the suit.

Where the wife sues by her next friend, the husband must still be a party, and it is usual to make him a defendant;[1] but in some cases he has been allowed to be made a co-plaintiff.[2]

As a wife may sue her husband in respect of her separate property,[3] so may a husband in a similar case sue his wife.[4] Such suit, however, can only be in respect of his wife's separate estate: for a husband cannot have a discovery of his own estate against his wife.[5] In those cases where it is necessary that a suit respecting the property of a married woman should be instituted against her husband, or that the husband should be one of the defendants: as the wife, being under the disability of coverture, cannot sue alone, and she cannot sue under the protection of her husband, she must seek other protection, and the bill must be exhibited in her name, by her next friend,[6] who is named as such in the bill, as in the case of an infant.[7] A bill, however, cannot, as in the case of an infant, be filed by a next friend on behalf of a married women, without her consent;[8] and if a suit should be so instituted, upon special motion, supported by her affidavit of the matter, it will be dismissed.[9]

So also, in all applications to the Court, by petition or otherwise, by a married woman with respect to her separate estate, she must apply by her next friend.[10]

The next friend of a married woman need not be a relation, but he

[1] *Wake* v. *Parker*, 2 Keen. 59; *England* v. *Downs*, 1 Beav. 96; *Davis* v. *Prout*, 7 Beav. 288, 290; and see *Hope* v. *Fox*, *ubi sup.*; *Richards* v. *Millett*, 11 W. R. 1035, M. R.

[2] *Meddowcroft* v. *Campbell*, 13 Beav. 184; *Platel* v. *Craddock*, C. P. Coop. 469, 481; *Smith* v. *Etches*, 1 H. & M. 558: 9 Jur. N. S. 1228; 10 *ib.* 124.

[3] See *Woodward* v. *Woodward*, 9 Jur. N. S. 882, L. C.

[4] *Warner* v. *Warner*, 1 Dick. 90; *Ainslie* v. *Medlicott*, 13 Ves. 266; and making her a defendant, is an admission that the suit relates to her separate estate, *Earl* v. *Ferris*, 19 Beav. 67: 1 Jur. N. S. 5.

[5] *Brooks* v. *Brooks*, Prec. Ch. 24.

[6] *Griffith* v. *Hood*, 2 Ves. S. 452. A defendant cannot act as next friend, *Payne* v. *Little*, 13 Beav. 114; but a married woman defendant may appeal by a co-defendant as her next friend, *Elliot* v. *Ince*, 7 De G. M. & G. 475: 3 Jur. N. S. 597.

[7] Ld. Red. 28. Where the husband is under any of the disabilities enumerated, *ante*, the wife is considered as a *feme sole*, and may sue without the intervention of a next friend; and where he is out of the jurisdiction, see *Postgate* v. *Barnes*, 9 Jur. N. S. 456: 11 W. R. 356, V. C. S.

[8] Ld. Red. 28. If she is an infant, her consent is unnecessary, *Wortham* v. *Pemberton*, 1 De G. & S. 644: 9 Jur. 291.

[9] *Andrews* v. *Cradock*, Prec. Ch. 376: Gilb. Rep. 36; *Cooke* v. *Fryer*, 4 Beav. 13.

[10] *Re Waugh*, 15 Beav. 508; but she may apply without a next friend, where she has obtained a protection order under 20 & 21 Vic. c. 85, s. 21, *Bathe* v. *Bank of England*, 4 K. & J. 564; *Re Rainsdon*, 5 Jur. N. S. 55, V.C.K. If a motion on behalf of a married woman be made without a next friend, the solicitor instructing may be ordered to pay the costs, *Pearse* v. *Cole*, 16 Jur. 214, V.C.K.

must be a person of substance, because he is liable to costs;[1] and in this respect there is a material difference between the next friend of a *feme covert* and of an infant: for any person may file a bill in the name of an infant, but the suit of a *feme covert* is substantially her own suit, and her next friend is selected by her.[2] In the former case, therefore, as we have seen,[3] the Court does not require the next friend should be a person of substance, because if the friends of an infant are poor, the infant might, by such a rule, be deprived of the opportunity of asserting his rights; but in the case of a *feme covert*, as the object for which a next friend is required is, that he may be answerable for the costs,[4] the Court expects that the person she selects to fill that office should be one who can pay the costs, if it should turn out that the proceeding is ill-founded; and, therefore, if the next friend is in insolvent circumstances, it will order the suit to be stayed until he gives security for costs.[5]

Where a bill is filed by a next friend, if he be not a person of substance, the plaintiff will be required to give security for costs. The proper order in such case seems to be, to stay proceedings until the next friend be changed, or security given.[6] The next friend of a married woman, who is co-plaintiff with her husband, will be required to give security for costs if it appears that he is a person of no known means, and his residence not known, though it appears that the husband has a substantial interest, and is not a mere formal party to the suit.[7]

It is obvious that cases might arise where the rule, that the next friend of a *feme covert* must be a person of substance, would be practically, a denial of justice. In such cases the Court, as we have seen,[8] allows her to sue, or continue a suit, without a next friend; or to present a petition, in a case where the Court has jurisdiction without suit.[9]

If the next friend of a married woman dies, or becomes incapable of acting, or if for any reason the plaintiff desires to remove her next friend, she may, at any time before the defendants have entered an appearance to the bill, (in this province "after answer,") introduce into the record the name of the new next friend, under an order as of course

[1] *Anon*, 1 Atk. 570; *Pennington* v. *Alvin*, 1 S. & S. 264; *Drinan* v. *Mannix*, 3 Dr. & War. 154; *Jones* v. *Fawcett*, 2 Phil. 278; *Stevens* v. *Williams*, 1 Sim. N. S. 545; *Wilton* v. *Hill*, 2 De G. M. & G. 807-9; *Hind* v. *Whitmore*, 2 K. & J. 458; where all the cases are reviewed; *Re Wills*, 9 Jur. N. S. 1225; 12 W. R. 97, V.C.S.; *Elliot* v, *Ince*, 7 De G. M. & G. 475; 3 Jur. N. S. 597; see also *Dowden* v. *Hook*. 8 Beav. 399, 402, which must now be looked upon as overruled.

[2] *Gambie* v. *Atlee*, 2 De G. & S. 745; but see, where she is an infant, *Wortham* v. *Pemberton*, 1 De G. & S. 644: 9 Jur. 291.

[3] *Ante*.

[4] See *Re Wills*, 9 Jur. N. S, 1225: 12 W. R. 97, V.C.S.

[5] *Smith* v. *Etches*, 1 H. & M. 711; 9 Jur. N. S. 1228; 10 *ib*. 124.

[6] *Leishman* v. *Eastwood*, 2 Cham. R. 88.

[7] *Van Winkle* v. *Chaplin*, 2 Cham. R. 98.

[8] *Ante*.

[9] *In re Hakewell*, 3 De G. M. & G. 116; 17 Jur. 334.

to amend. After appearance, the same may be done, where a new next friend is to be named in the place of a deceased next friend, if the application for the order is made by the solicitor who acted in the suit for the deceased next friend; but in other cases, the order to appoint a new next friend is special, and must be obtained either in Court on motion, of which notice must be given, or on a summons in Chambers, (in this province "notice of motion,") which must be served.[1]

Where, however, a married woman applies for leave to change her next friend, it is in the discretion of the Court to grant or refuse the application; and it will be refused, where there is reason to believe that the defendant's security for costs will be thereby prejudiced;[2] and if the order be made, the new next friend is usually required to give security to answer the past costs, and to abide by the order of the Court as to future costs;[3] and in *Payne* v. *Little*,[4] the retiring next friend was required to give security for the costs incurred up to the time of the change.

Upon an application to appoint a new next friend the Court or Judge usually requires to be satisfied of his willingness to act; this may be evidenced by the production of his written consent.

If the plaintiff neglects or refuses to obtain the order in the case of the next friend's death, the defendant may apply to the Court, by motion upon notice, for an order directing her to name a new next friend within a limited time, or in default that the bill may be dismissed with costs;[5] and where the next friend becomes bankrupt, an order will, in like manner, be made, staying the proceedings until a solvent next friend is appointed.[6]

When it becomes necessary to substitute a new next friend, the motion for the appointment, should be on notice, and an order taken on *præcipe* is irregular. An order so taken was set aside with costs on the ground of irregularity, and without going into the question of the solvency of the party appointed.[7]

Wherever a new next friend is appointed, the order appointing him must be served on the solicitors of the defendants, and be left for entry in the cause books kept by the Clerks of Records and Writs; and thereupon, in all future proceedings in the cause, the name of the new next

[1] For form of order, see Seton, 1252; and see *Eastman* v. *Eastman*, 2 Cham. R. 183.

[2] *Jones* v. *Fawcett*, 2 Phil. 278; and see *Greenaway* v. *Rotheram*, 9 Sim. 88.

[3] *Lawley* v. *Halpen*, Bumb. 310; *Percy* v. *Percy*, M. R. in Chamb. 9 Dec., 1863. For form of order see Seton, 1252.

[4] 14 Beav. 647: 16 Beav. 563.

[5] *Barlee* v. *Barlee*, 1 S. & S. 100.

[6] *Wilton* v. *Hill*, 2 De G. M. & G. 807; *D'Oechsner* v. *Scott*, 24 Beav. 239; see also *Pennington* v. *Alvin*, 1 S. & S. 264; *Drinan* v. *Mannix*, 3 Dr. & War. 154.

[7] *Bennett* v. *Sprague*, 2 Cham. R. 194.

friend so appointed will be introduced, in the place and stead of the former next friend.[1]

If the next friend of a married woman goes to reside out of the jurisdiction, the practice with respect to giving security for costs is the same as if the next friend had been himself the actual plaintiff.[2]

Upon filing a bill in Chancery, a married woman, in respect of the suit, is held to have taken upon herself the liabilities of a *feme sole*, and therefore may be attached;[3] and her separate estate becomes liable to pay the costs incurred.[4]

If a bill has been filed by a *feme sole*, and she intermarry pending the suit, the proceedings are thereby abated, and cannot properly be continued without an order of revivor.[5] If, however, a female plaintiff marries, and afterwards proceeds in the suit as a *feme sole*, the mere want of an order of revivor is not an error for which a decree can be reversed, upon a bill of review brought by a defendant: because, after a decree made in point of right, a matter which may be pleaded in abatement is not an error upon which to ground a bill of review.[6]

It has been determined, that if a female plaintiff marries pending a suit, and afterwards before revivor her husband dies, an order of revivor becomes unnecessary: her incapacity to prosecute the suit being removed; yet the subsequent proceedings ought, however, to be in the name and with the description which she has acquired by the marriage.[7]

Where a bill has been filed by a man and his wife touching the personal property of the wife, and the husband dies pending the suit, no abatement of the suit takes place, but the wife becomes entitled to the benefit of the suit by survivorship,[8] unless any act has been done which may have the effect of depriving her of that right; and she may continue the suit without an order of revivor. If, however, she does not think proper to proceed with the cause, she will not be liable to the costs already incurred: because a woman cannot be made responsible

[1] Braithwaite's Pr. 558.

[2] *Alcock* v. *Alcock*, 5 De G. & S. 671, *ante*.

[3] *Otway* v. *Wing*, 12 Sim. 90.

[4] *Barlee* v. *Barlee*, 1 S. & S. 100; *Murray* v. *Barlee*, 4 Sim. 82, 91: 3 M. & K. 209, 219; see, however, *Re Pugh*, 17 Beav. 336. As to the liability of the wife's separate estate for her debts and engagements, see *Johnson* v. *Gallagher*, 7 Jur. N. S. 273, 9 W. R. 506, L. J. J., where the cases are reviewed; *Greenough* v. *Shorrock*, 4 N. R. 40, L. J. J. .; 3 N. R. 599, M. R.

[5] See *Trezevant* v. *Broughton*, 5 W. R. 517: Seton, 1165, 1170, M. R. Where a woman filed her bill as a spinster, and it afterwards appeared she had a husband living, proceedings were stayed, on motion by the defendant, till the appointment of a next friend, *Grant* v. *Mills*, 29 L. T. 11; and see *Pyke* v. *Holcome*, 9 Jur. 368, V. C. K. B.; *Davey* v. *Bennett*, 3 W. R. 353, V. C. W.

[6] *Viscountess Cranborne* v. *Dalmahoy*, Nels. R. 85: 1 Ch. R. 231. So at Law, if a woman sues or is sued as *sole*, and judgment is against her as such, though she was *covert*, she shall be estopped, and the sheriff shall take advantage of the estoppel: 1 Salk. 310; 1 Roll. Abr. 869, pl. 50.

[7] Ld. Red. 60; and *Godkin* v. *Earl Ferrers*, there referred to.

[8] And it extends to interest accrued during the life of the husband, and not received: *Wilkinson* v. *Charlesworth*, 10 Beav. 324: 11 Jur. 644.

for any act done by her husband during the coverture; but if she take any step in the cause, subsequent to her husband's death, she will make herself liable to the costs from the beginning.[1]

A different rule, with the respect to the right to continue a suit instituted by a husband and wife, prevails when the wife dies in the lifetime of her husband, from that which is acted upon when the husband dies in the lifetime of his wife; for in the former case, although the husband, upon the death of his wife, becomes entitled to all her *choses in action*, he does not require such title by survivorship, but in a new character, and an absolute abatement of the suit takes place; so that to entitle himself to continue it, the husband must first clothe himself with the character of her personal representative, by taking out administration to her effects, and then obtain an order of revivor.[2] And here it is to be observed that if, after the death of the wife, the husband were to die before the termination of the suit, the party to continue the suit is the person to whom administration has been granted. According to the present practice of the Court of Probate, administration is granted to the representatives of the husband, unless next of kin of the wife are the persons beneficially entitled: the former practice having been otherwise.[3]

But, although it is in general necessary that a husband, after the death of his wife, pending a suit instituted by them for the recovery of her personal property, should, in order to entitle him to proceed with the cause, take out administration to his wife, and then obtain an order of revivor, yet if any act has been done the effect of which would have been to deprive the wife, in case she had outlived her husband, of her right by survivorship, and to vest the property in the husband absolutely, the husband may, it is apprehended, continue the suit in his individual character, without taking out administration to his wife. In such case, however, it will be necessary, if such act has taken place subsequently to the institution of the suit, to bring the fact before the Court by means of an amendment or a supplemental statement or bill, unless it appears upon the proceedings which have already taken place in the cause. It will be recollected that supplemental bills are abolished in this Province by order 6 of Con. G. O.

This distinction renders it important to consider what the circumstances are which will have the effect of so altering the property, as to vest the right to the wife's personal property absolutely in the husband, and entitle him to proceed in a suit without assuming the character of her personal representative.

[1] Ld. Red. 59; see also 3 Atk. 726; *Bond* v. *Simmons*, *ib.* 21; *Mills* v. *Barlow*, 11 W. R. 351, L.J.J.

[2] For form of order, where husband, being defendant in wife's suit, revives as her administrator, see *Murray* v. *Newbon*, Seton, 1164. The order can be obtained on motion or petition of course.

[3] Wms. on Executors, 360.

Upon this subject it is to be observed, that a mere intention to alter the property will not have the effect of giving the husband the absolute right in it; and therefore, the mere bringing an action at Law, or filing a bill in Equity, will not alter the property, unless there be a judgment or decree for payment to the husband alone. And it has been decided, that an appropriation by an executrix of so much of the assets of her testator as was necessary to discharge a legacy bequeathed to a married woman, was not such a change of the property as would vest it in the husband.

But it seems, that if a person indebted to a married woman, or holding money belonging to her, pay such money into Court, in a cause to which the husband and wife are parties, such payment will be considered as an alteration of the property; for, as properly it could only have been paid during coverture to the husband, the circumstance of its having been paid into Court will not alter the rights of the parties, and it will be considered as a payment made to him.[1] For the same reason, where the jewels of the wife had been deposited in Court by the husband under an order, they were considered as belonging to the husband's executors, and not to the representative of the wife who had survived: because, having been in the possession of the husband, even a tortious act could not divest that property, and turn it into a *chose in action*;[2] much less could a payment into Court under an order. And so, where a married woman, who was the committee of the estate and person of her lunatic husband, was entitled to stock which was standing in the name of a trustee for her, and this stock was, by an order made in the lunacy, transferred into the name of the Accountant-General, in the matter of the lunacy, and part of it was afterwards sold out and applied in payment of costs in the lunacy, Lord Lyndhurst held, that the mode in which the stock had been dealt with amounted to a reduction into possession by the husband: because, as payment by the trustee to the lunatic, or to the committee would have been a reduction into possession, so payment into Court, to the credit of the lunacy, was equally a reduction into possession for the lunatic; and upon this ground his Lordship refused to grant a petition, presented by the wife after the death of the lunatic, praying that the stock might be transferred to her, as belonging to her by survivorship.[3] If, however, money paid into Court be carried, by order, to the joint account of the husband and wife, the case will be different, and the wife will not be deprived of her right of survivorship, in the case of the husband dying before he has procured an order for the payment of it out of Court;[4] and it seems, that a mere

[1] *Packer* v. *Wyndham*, Prec. Ch. 412.

[2] *Ibid.*

[3] *In re Jenkins*, 5 Russ. 183, 187.

[4] *Ibid.*; and see *Baldwin* v. *Baldwin*, 5 De G. & S. 319; *Laprimandaye* v. *Teissier*, 12 Beav. 206: 13 Jur. 1040.

payment or transfer of money or stock to trustees for the benefit of the wife, will not give the husband the absolute right to the money, to the exclusion of the wife.[1]

It appears formerly to have been held, that a promissory note given to a wife during coverture became the property of the husband absolutely, as the wife could not acquire property during coverture; and upon this principle, Lord Hardwicke, in *Lightbourne* v. *Holyday*,[2] held, that upon the death of the husband, in a suit respecting a note of this description, the suit abated; and in *Hodges* v. *Beverley*,[3] it was determined, that a note given to a *feme covert* was, upon her husband's death, to be considered as his assets. But in *Nash* v. *Nash*,[4] Sir Thomas Plumer, V. C., held, that a note given to a wife was a *chose in action* of the wife, and survived to her on the death of her husband; and that the circumstance of the husband having received the interest and part of the capital in his lifetime, for which he gave a receipt, did not alter the nature of the property, but that the remainder of the money still remained a *chose in action*.

In the last case, a reciept of part of the money by the husband was not, as we have seen, held sufficient to alter the nature of the property in the remainder, so as to deprive the wife of her right to it by survivorship. In general, however, if the husband, either alone or jointly with his wife, authorise another person to receive the property of the wife, whether it be money, legacy, or other thing, and such person actually obtain it, such reciept will change the wife's interest in the property, and be a reduction into possession by the husband. Thus, in *Doswell* v. *Earle*,[5] where an executor, with the wife's consent, had paid a legacy, to which the wife was entitled on the death of her mother, to the husband, upon his undertaking to pay the interest to the mother during her life, and the wife having survived her and her husband, filed a bill claiming the money against her husband's executors, the bill was dismissed.

The mere proof in bankruptcy, of a debt due to the wife by the husband, will not alter the property of the debt, and it still remains a *chose in action*.[6] It seems, however, that an award by an arbitrator giving money to the husband, to which he was entitled in right of his wife, will

[1] *Pringle* v. *Pringle*, 22 Beav. 631; and see *Exparte Norton*, 8 De G. M. & G. 258: 2 Jur. N. S. 479; see, however, *Hansen* v. *Miller*, 14 Sim. 22, 26: 8 Jur. 209, 352; *Cuningham* v. *Antrobus* 16 Sim. 436, 442: 13 Jur. 28; *Burnham* v. *Bennett*, 2 Coll. 254: 9 Jur. 888.

[2] 2 Eq. Ca. Ab. 1, pl. 5: 2 Mad. 135, n.

[3] Bunb. 188. See *Yates* v. *Sherrington*, 11 M & W. 42, and 12 M. & W. 855, as to the effect of bankruptcy of the husband upon a promissory note given to the wife *dum sola*.

[4] 2 Mad. 133, 139.

[5] 12 Ves. 473; see also *Burnham* v. *Bennett*, 2 Coll. 254: 9 Jur. 888; *Hansen* v. *Miller*, 14 Sim. 22, 26; 8 Jur. 209, 352; and *Cunningham* v. *Antrobus*, 16 Sim. 436, 442: 13 Jur. 28; but see *Pringle* v. *Pringle*, 22 Beav. 631.

[6] *Anon*, 2 Vern. 707.

have the effect of altering the property, and giving it to the husband absolutely.[1]

With respect to the effect of a judgment at Law in altering the property of a wife's *chose in action*, much depends, as we have seen,[2] upon whether the wife is or is not named in the proceedings. If the wife be not a party (which she need not be at Law, if the right accrued to her during coverture,)[3] a judgment in an action commenced by the husband will vest the property in him: so that, in the event of his death before execution, the wife would be deprived of her right by survivorship;[4] this, however, will not be the case if the wife be a party: in which case, if the husband die after judgment and before execution sued out, the judgment will survive to her.[5]

Decrees in Equity, as we have seen,[6] so far resemble judgments at Law in this respect, that until the money be ordered to be paid, or declared to belong to the one or the other, the rights of the parties will remain undisturbed; but an order for payment of a sum of money to the husband in right of his wife, changes the property, and vests it in the husband.[7]

Where, however, a decree or order has been made by the Court, for the payment of a sum of money to the husband and wife, and either party dies before payment, the money will belong to the survivor. Thus, where a plaintiff and his wife, brought their bill against an executor for a legacy bequeathed to the wife before marriage, and a decree was made that the money should be paid to the plaintiffs: upon a question whether the money should go to the wife or to the administratrix of the husband, the Court referred it to one of the Judges to certify, who gave it as his opinion that a decree in Chancery for money or any other personal thing, being a judgment in Equity, was of the like nature with, and ought to be governed by, the same rules as a judgment for a debt or damages at Common Law, and consequently that the interest or benefit of the decree, and the money due thereby, ought to go and be to such of the parties as should have the right thereto in case it were a judgment for debt or damages at Common Law: according to which, if a judgment be had by husband and wife, in an action brought by them for a debt due to the wife before marriage, and the husband dies after the judgment, and before execution sued, the debt

[1] *Oglander* v. *Baston*, 1 Vern. 396.
[2] *Ante.*
[3] *Ibid.*
[4] *Oglander* v. *Baston*, *ubi sup.*
[5] *Garforth* v. *Bradley*, 2 Ves. S. 676.
[6] *Ante.*
[7] *Heygate* v. *Annesley*, 3 Bro. C. C. 362; and see *Tidd* v. *Lister*, 3 De G. M. & G. 857, 871; 18 Jur. 543.

due on the judgment belongs to the wife, and she may sue execution upon the judgment, and not the executor or administrator of the husband.[1] Upon the same principle, in *Forbes* v. *Phipps*,[2] where a decree was made that one-sixth of the residue to which the wife was entitled should be paid to her and her husband, and the wife died before the money was received, it was determined by Lord Northington that the husband was entitled to the money, not as administrator to the wife, but as survivor under the decree.

With respect to the effect of an assignment by the husband of his wife's *chose in action*, upon her right of survivorship, it has been for some time settled, that where the *chose in action*, is not capable of immediate reduction into possession, as where it is in reversion or expectancy, an assignment of it will not bar the right which the wife would otherwise have had to possess it, in the event of her surviving her husband, unless it is actually reduced into possession before his death. And where a prior life interest is assigned to the wife, there will be no equitable merger, so as to enable the husband and wife to deal with the reversion, and bar her right of survivorship.[3]

It appears formerly to have been considered that, in this respect, there existed a difference between legal and equitable *choses in action*, or, to speak more correctly, between *choses in action*, and equitable interests in the nature of *choses in action*. With respect to the latter it appears to have been thought, that an assignment of them by the husband would, in certain cases, without any reduction into possession before his death, have the effect of defeating the wife's right to them by survivorship; and attempts have been made to establish distinctions in this respect between assignments for valuable consideration, and assignments without consideration or by operation of law: the former having been considered as barring the right of the surviving wife, and the latter as not having that effect. The decisions, however, of Sir Thomas Plumer, in *Hornsby* v. *Lee*,[4] and *Purdew* v. *Jackson*,[5] have removed all doubts upon this subject; and have shown, that no such distinction as that supposed between legal and equitable *choses in action*, or between assignments of the latter for valuable consideration, and voluntary or general assignments, exists. In the latter case, Sir Thomas Plumer, after long argument, and a diligent and careful investigation of all the cases which had occurred upon the point,

[1] *Nanney* v. *Martin*, 1 Ch. Rep. 234; *Coppin* v. ——, 2 P. Wms. 496.

[2] 1 Eden, 502.

[3] *Whittle* v. *Henning*, 2 Phil. 731, 735: 12 Jur. 1079; *ib.* 298: 11 Beav. 222, overruling *Creed* v. *Perry*, 14 Sim. 592, and *Hall* v. *Hugonin*, *ib.* 595; 10 Jur. 940; and see *Bishopp* v. *Colebrook*, 11 Jur. 793, V.C.E.; *Hanchett* v. *Briscoe*, 22 Beav. 496.

[4] 2 Mad. 16; see also *Hutchings* v. *Smith*, 9 Sim. 137: 2 Jur. 231.

[5] 1 Russ. 1, 24, 42.

expressed his opinion to be, "that all assignments made by the husband of the wife's outstanding personal chattel which is not or cannot be then reduced into possession, whether the assignment be in bankruptcy or under the Insolvent Act, or to trustees for the payment of debts, or to a purchaser for a valuable consideration, pass only the interest which the husband has, subject to the wife's legal right by survivorship."[1]

It will have been observed, that the rule, as laid down by Sir Thomas Plumer, is confined to such outstanding personal chattels of the wife as are not, or cannot, be reduced into possession; from whence an opinion at one time prevailed, that the rule did not apply to assignments for valuable consideration of such *choses in action* as at the time of the assignment were capable of reduction into possession, or as became reducible into possession before the death of the husband. This opinion had the high authority of Lord Lyndhurst, who, in *Honner* v. *Morton*,[2] thus explained the principle:—"Equity considers the assignment by the husband as amounting to an agreement that he will reduce the property into possession; it likewise considers what a party agrees to do as actually done; and therefore, when the husband has the power of reducing the property into possession, his assignment of the *chose in action* of the wife will be regarded as a reduction of it into possession." It appears, however, from later cases, that the distinction which has been thus pointed out, between the effect of an assignment for valuable consideration by the husband, upon a *chose in action* which is capable of being reduced into possession, and one which is not, can no longer be relied upon.[3] This point came before Sir J. L. Knight Bruce, V. C., in *Ashby* v. *Ashby*,[4] who, after stating that he agreed in the opinion expressed in the last-mentioned case of *Ellison* v. *Elwin*, decided, that an assignment by a husband for valuable consideration of a wife's *chose in action*, which had fallen into his power during his life, but had not been in fact reduced into possession by him, did not prevent the right to the *chose in action* from surviving to the wife.

In the case, moreover, of assignments by act of law, no distinction exists between assignments of *choses in action* capable of immediate reduction into possession, and those which are not so. Thus, in *Pierce* v. *Thornely*,[5] where a married woman had a vested interest in possession in a legacy, and her husband became bankrupt and died, it was decided

[1] 1 Russ. 70; see also *Honner* v. *Morton*, 3 Russ. 65; *Watson* v. *Dennis*, *ib.* 90; *Stamper* v. *Barker*, 5 Mad. 157, 164.

[2] 3 Russ. 68.

[3] *Ellison* v. *Elwin*, 13 Sim. 309, 315; S. C. *nom.* *Elwyn* v. *Williams*, 7 Jur. 337.

[4] 1 Coll. 553: 8 Jur. 1159; see also *Box* v. *Jackson*, Dru. 42, 83: 2 Con. & L. 605; *Le Vasseur* v. *Scratton*, 14 Sim. 116; *Michelmore* v. *Mudge*, 2 Giff 183.

[5] 2 Sim. 167, 176; and see *Gayner* v. *Wilkinson*, 2 Dick. 491: 1 Bro. C. C. 50, n; *Mitford* v. *Mitford*, 9 Ves. 87, 95, 100.

that the widow, and not the assignee, was entitled to the money: because the assignment in bankruptcy could not pass to the assignee a larger right, or better title, than the husband himself had, which was a right to reduce the legacy into possession, but which was not done in his lifetime. Of course, the assignment under bankruptcy passes the whole interest of the husband in the wife's *chose in action*, at the time of the bankruptcy.[1]

It follows, therefore, that an assignment by the husband of his wife's equitable *chose in action*, will neither have the effect of depriving the wife of her right to it in the event of her surviving her husband, nor of depriving her of her equitable right to a settlement out of it, should any application for that purpose be made by her during the lifetime of her husband.[2] And even the wife's concurrence in the assignment by her husband during coverture, will not have the effect of rendering such assignment valid against her claim by survivorship, in cases where an assignment by her husband alone would not have had that consequence.[3] Where also, a *feme covert* is an infant, the circumstance of her father being party to the deed will not alter the interest of the wife.[4]

With respect to the effect of a release by the husband, in depriving his wife of her right by survivorship to her *choses in action*, not reduced into possession during the coverture, it appears that he can release debts due to her before marriage; legacies absolutely given to her;[5] and interests accruing to her under the Statutes of Distributions, and the like; and that these acts might be done by him, although he and his wife were divorced *a mensa et thoro*, because the marriage still subsisted.[6] In the case of *Hore* v. *Becher*,[7] a single woman being entitled to an annuity secured by bond, married; her husband executed a release of the annuity, and died, leaving his wife surviving; it turned out that the release had been executed under a mistake, and was inoperative, so that it was not necessary to decide upon its effect on the wife's right by survivorship. Sir Lancelot Shadwell, V. C., however, observed, "If a man gives a bond, or a promissory note, to secure an annuity to a single woman, and she afterwards marries, her husband may release the bond or note; and if he releases the security, there is an end to the annuity."

[1] *Ripley* v. *Woods*, 2 Sim. 165.

[2] *Ante*.

[3] See *Re Whittingham*, 10 Jur. N. S. 818: 12 W. R. 775, V. C. W., as to effect of protection order, in defeating an assignment of reversionary interest which fell into possession after the order had been obtained.

[4] *Stamper* v. *Barker*. 5 Mad. 157, 164.

[5] Gilb. Eq. R. 88; 2 Roll Rep. 134; 1 Bright, H. & W. 72; Sir L. Shadwell, V. C., held, however, in the case of *Harrison* v. *Andrews*, 13 Sim. 595, that a receipt was insufficient.

[6] *Stephens* v. *Totty*, Noy. 45; Cro. Eliz. 908; but this cannot be done after a dissolution of marriage, nor after a judicial separation or protection order: *Wells* v. *Malbon*, 31 Beav. 48: 8 Jur. N. S. 249; *Heath* v. *Lewis*, 10 Jur. N. S. 1093: 13 W. R. 128, V. C. S.

[7] 12 Sim. 465: 6 Jur. 93.

Where, however, the interest of the wife in the *chose in action* is reversionary, the release of the husband is as inoperative as his assignment, to affect the wife's right by survivorship.[1] It seems also, that the assignment or release by the husband during coverture of his wife's annuity, does not prevent her right by survivorship to payments accruing after his death; it being considered that each successive payment thereof constitutes a separate reversionary interest.[2]

It is to be observed, that the rules above laid down apply to those interests of the wife which are of a strictly personal nature. In the case of those interests which fall under the description of chattels real, important distinctions exist with respect to the effect of an assignment by a husband, in barring his wife of her right in them by survivorship.[3]

The interest given by the law to the husband in the chattels real which a wife has, or may be possessed of during marriage, is a qualified title; being merely an interest in right of his wife, with a power of alienation during coverture;[4] so that, if he do not dispose of his wife's terms for years or other chattels real in his lifetime, her right by survivorship will not be defeated; if, however, he do not alien them, and he survive his wife, the law gives them to him: not as representing the wife, but as a marital right. Thus, if a *feme covert* has a term for years, and dies, the lease is the husband's, and he may maintain ejectment without taking out letters of administration;[5] and if a wife, tenant for a term of years of a copyhold, marries and dies before the term is expired, the husband shall continue without any new admisson or fine.[6] These rules equally apply where the interest of the wife in the chattel is only equitable; thus, where a term of years, determinable upon lives, was assigned to trustees in trust for a woman who married and died: upon a question whether this trust went to the husband, who survived, or to the wife's administrator, it was held clearly, that the trust of a term, as well as the term itself, survived to the husband, and that he need not take out administration;[7] and so, as we have seen in the last case, if a man assign over the trust of a term which he has in right of his wife, this shall prevail against the wife, though she survives.[8] This doctrine, as far as regards the trust of a term assigned to a trustee for

[1] *Rogers* v. *Acaster*, 14 Beav. 445.

[2] *Stiffe* v. *Everitt*, 1 M. & C. 37, 41; *Thompson* v. *Butler*, Moore's Rep. 522; *Whitmarsh* v. *Robertson*, 1 Y. & C. C. C. 715: 6 Jur. 921; *Whittle* v. *Henning*, 2 Phil. 731: 12 Jur. 1079; and see *Tidd* v. *Lister*, 3 De G. M. & G. 857, 874: 18 Jur. 543.

[3] On this subject, see 1 Bright, H. & W. 94—111.

[4] In a marginal abstract, 9 Mod. 104, it is said that a wife being possessed of a term of years, and having married an alien, the marriage is not a gift in law of the term.

[5] *Pale* v. *Mitchell*, 2 Eq. Ca. Ab. 138. pl. 4 n. (*a*).

[6] *Earl of Bath* v. *Abney*, 1 Dick. 263, arg.

[7] *Pale* v. *Mitchell*, *ubi sup.*

[8] *Packer* v. *Wyndham*, Prec. Ch. 412, 418; *Sanders* v. *Page*, 3 Ch. Rep. 223; *Pitt* v. *Hunt*, 1 Vern 18; 2 Cha. Ca. 73; *Donne* v. *Hart*, 2 R. & M. 360, 364.

a wife before marriage, appears to have been first laid down by the House of Lords, on appeal in *Sir E. Turner's* case,[1] which, from the report of the subsequent case of *Pitt* v. *Hunt*, appears to have excited the surprise of Lord Chancellor Nottingham; who, however, after some hesitation, said he must be concluded by the Lords' judgment, and decreed accordingly.[2] The ground of the decision in *Sir E. Turner's* case appears to have been this: that as the husband can at law dispose of a term for years, so he may dispose of the trust of a term in Equity, because the same rule of property must prevail in Equity as well as at Law;[3] and this has ever since been considered as the law of the Court.[4]

In *Walter* v. *Saunders*,[5] a distinction was attempted to be drawn, in argument, between a term in trust to raise money for a woman, and a trust of the term itself for the woman; but the Master of the Rolls determined, that no such distinction could be taken.[6] It has also been held, that if the wife has a judgment, and it is extended upon an *elegit*, the husband may assign it without consideration. So, if a judgment be given in trust for a *feme sole* who marries, and, by consent of her trustees, is in possession of the land extended, the husband may assign over the extended interest; and by the same reason, if she has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under this decree and marries, the husband may assign it without any consideration, for it is in the nature of an extent.[7] A husband may, as we have seen, assign his wife's mortgage for a term; but if the mortgage be in fee, then it seems clear that the wife's right to the debt by survivorship is not affected by any assignment made by the husband, or by his bankruptcy: unless the debt is reduced into possession in his lifetime.[8]

It is an established principle, in deciding upon the effect of mortgages, whether of the estate of the wife, or the estate of the husband, that if the wife joins in the conveyance, either because the estate belongs to her, or because she has a charge by way of jointure or dower out of the estate, and there is a mere reservation, in the proviso for redemption of the mortgage, which would carry the estate from the person who was

[1] 1 Vern. 7.
[2] 1 Vern. 18; 2 Cha. Ca. 73.
[3] Per Lord Hardwicke, in *Jewson* v. *Moulson*, 2 Atk. 417, 421.
[4] *Bates* v. *Dandy*, 2 Atk. 207; more fully reported, 3 Russ. 72, n.; *Incledon* v. *Northcote*, 3 Atk. 430.
[5] 1 Eq. Ca. Ab. 58, pl. 5.
[6] See also *Packer* v. *Wyndham*, Prec. Ch. 412, 418.
[7] *Lord Carteret* v. *Paschall*, 3 P. Wms. 200.
[8] *Burnett* v. *Kinnaston*, 2 Vern. 401; *Mitford* v. *Mitford*, 9 Ves. 87, 95; *Packer* v. *Wyndham*, *ubi sup.*; *Purdew* v. *Jackson*, 1 Russ. 68; *Honner* v. *Morton*, 3 Russ. 65; *Ellison* v. *Elwin*, 13 Sim. 309; *S. C. nom.*; *Elwyn* v. *Williams*, 7 Jur. 337; overruling *Bosvil* v. *Brander*, 1 P. Wms. 458: *Bates* v. *Dandy*, *ubi sup.*

owner at the time of executing the mortgage: there is a resulting trust for the benefit of the wife, or for the benefit of the husband, according to the circumstances of the case.[1]

It is to be observed, that although the husband is considered entitled to assign the trust of a term or other real chattel created for the benefit of his wife, yet, where a term or chattel real has been assigned in trust for a wife, with the privity or consent of her husband, then without doubt he cannot dispose of it.[2] *A fortiori* he may not, if he make a lease or term of years for the benefit of his wife.[3] And where a term was raised out of the wife's inheritance, and vested in trustees for purposes which were satisfied, and subject thereto for the benefit of the wife, her executors, administrators, and assigns, it was held, that the particular purpose being served for which the term was raised, the trust did not go to the husband, who was the administrator of the wife, but followed the inheritance.[4] From this it may be inferred, that the assignment of the trust of such a term by the husband in the lifetime of the wife, would not effect the wife's interest in it by survivorship.

In an anonymous case which occurs in 9 Modern Reports,[5] it appears that a *feme covert*, but who had been divorced *a mensa et thoro*, and had alimony allowed to support her, applied to the Court to restrain her husband from proceeding to sell a term of years of which she was possessed before her marriage, and that the Court at first refused the injunction, because the separation *a mensa et thoro*, did not destroy the marriage, and during the time the marriage continued, the husband had the same power to dispose of the term which he had in right of his wife, as he would have had if it had been in his own right; but afterwards, upon counsel still pressing for an injunction, in order that the merits of the cause might come before the Court, and insisting very much upon the hardship of the case, the Court granted it, on the ground that, though the marriage continues notwithstanding the divorce, yet, under such circumstances, the husband does nothing in his capacity of husband, nor the wife in that of wife. It is to be remarked, however, that this was merely an interlocutory order, to prevent the term being parted with by the husband till the question should be properly discussed, and it does not appear that any further proceedings were ever had in the cause.

[1] Lord Redesdale, in *Jackson* v. *Innes*, 1 Bligh, 126, cited by Sir J. L. Knight Bruce, V. C., in *Clark* v. *Burgh*, 2 Coll. 227: 9 Jur. 679; and see 3 De G. M. & G. 15.

[2] *Sir E. Turner's* case, 1 Vern. 7; see also *Bosvil* v. *Brander*, 1 P. Wms. 458; *Pitt* v. *Hunt*, 1 Vern. 18, where Lord Nottingham, however, said, that to prevent a husband, he must be a party to the assignment.

[3] *Wiche's* case, Scacc. Pasc. 8 Jac., cited 1 Vern. 7, Ed. Raithby, *notis*.

[4] *Best* v. *Stampford*, 2 Freem. 288; 2 Vern. 520; Prec. Ch. 252.

[5] 9 Mod. 43.

It seems, that an absolute transfer or assignment by the husband of his wife's term of years, or other chattel real, is not requisite to deprive the wife of her right by survivorship; but that, since an agreement to do an act is considered in equity the same as if the act were done, so, if the husband agree or covenant to dispose of his wife's term of years, such covenant will be enforced, although he dies in her lifetime.[1]

The power which the law gives the husband to alien the whole interest of his wife in her chattels real, necessarily authorizes him to dispose of it in part; if, therefore, the husband be possessed of a term of years in right of his wife or jointly with her, and demise it for a less term, reserving rent, and dies, such demise or underlease will be good against her, although she survive him: but the residue of the original term will belong to her, as undisposed of by her husband.[2]

So also, if the husband alien the whole of the term of which he is possessed in right of his wife, upon condition that the grantee pay a sum of money to his executors, and then dies, and the condition is broken, upon which his executors enter upon the lands, this disposition by the husband will be sufficient to bar the wife of her interest in the term: it having been wholly disposed of by him during his life, and vested in the grantee.[3] It seems, however, that if the condition had been so framed that it might have been broken in the husband's life-time, and he had entered for the breach, and had then died before his wife, without making any disposition of the term, she would be entitled to it by survivorship: because the husband, by re-entry for a breach of the condition, was returned to the same right and interest in the term as he was possessed of at the time of the grant, *viz.*, in right of his wife.[4]

In cases of assignments by the husband of his wife's chattels real, the wife will be equally barred of her survivorship, whether the assignment be for a valuable, or without any consideration;[5] but it is to be observed, that there is a great distinction where the disposition is of the whole or part of the property, and where it is only a collateral grant of something out of it; for although, if a husband pledge a term of years of his wife for a debt, and either assign or agree to assign all or part of such term to the creditor, the transaction will bind the wife,[6] yet, if the transaction be collateral to, and do not change the property in the term, as in the grant of a rent out of it, then, if the wife survive the husband, her right being paramount, and her interest in the chattel not having

[1] *Bates* v. *Dandy*, 2 Atk. 207: 3 Russ. 72, n.; see also *Steed* v. *Cragh*, 9 Mod. 43; *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 52.

[2] *Sym's* case, Cro. Eliz. 33; Co. Litt. 46 b.

[3] Co. Litt. 46 b.

[4] See *Watts* v. *Thomas*, 2 P. Wms. 364, 366.

[5] *Lord Carteret* v. *Paschal*, 3 P. Wms. 197, 200; *Mitford* v. *Mitford*, 9 Ves. 99.

[6] *Bates* v. *Dandy*, 2 Atk. 207: 3 Russ. 72, n.

been displaced, she will be entitled to the term, discharged from the rent.[1].

Moreover, it has been decided, that the husband cannot assign a reversionary interest of his wife's in chattels real, of such a description as that it cannot by possibility vest during the coverture.[2]

In regard to the right of the husband's executors, or his surviving wife, to rent reserved upon under-leases of her chattels real, and to the arrears of rent due at the husband's death, there is a difference of opinion in the books, which may probably be reconciled by attending to the manner in which the rents were reserved. Accordingly, if the husband alone grant an under-lease of his wife's term of years, reserving a rent, that would be a good demise, and bind the wife as long as the sub-demise continued; the husband's executors, therefore, would, as it is presumed, be entitled not only to the subsequent accruing rents, but to the arrears due at his death.[3] And it would seem, that the principle of the last case would entitle the executors, to the exclusion of the surviving wife, to subsequent rents and all arrears at the husband's death, although the wife was a party to the under-lease, provided the rent were reserved to the husband only: because the effect of the sub-demise and reservation was an absolute disposition, *pro tanto*, of the wife's original term, which she could not avoid, and the rent was the sole and absolute property of the husband. But if, in the last case, the rent had been reserved by the husband to himself and wife, then, as their interests in the term granted and the rent reserved were joint and entire, it is conceived that the wife, upon surviving her husband, would be entitled to the future rents, and that she would be equally entitled to the arrears of rent at her husband's death: because they remaining in action, and being due in respect of the joint interest of the husband and wife in the term, would, with their principal the term, survive to the wife.[4] It may lastly be remarked that, by the law of Scotland, the *choses in action* of the wife become the property of the husband, without any condition on his part of reducing them into possession. If, therefore, an English testator leaves a legacy to a married woman domiciled in Scotland, and her husband dies before payment, the legacy is the property of the husband's representatives, and not of the widow. Where, however, in such a case, the executors paid the legacy to the widow, in ignorance of the law of Scotland, the payment to her was held to be good.[5]

[1] Co. Litt. 184 b.
[2] *Duberley* v. *Day*, 16 Beav. 33: 16 Jur. 581.
[3] 1 Roll. Abr. 344, 345.; Co. Litt. 46 b.; 2 Lev. 100; 3 Keb. 300; 1 Bright H. & W. 43—47.
[4] 4 Vin. Abr. 117, D. a.
[5] *Leslie* v. *Baillie*, 2 Y. & C. C. C. 91, 95: 7 Jur 77.

CHAPTER IV.

PERSONS AGAINST WHOM A SUIT MAY BE INSTITUTED.

SECTION I.—*Generally.*

HAVING pointed out the persons who are capable of instituting suits in Equity, and considered the peculiarities of practice applicable to each description of parties complainant, we come now to the consideration of the persons against whom suits may be commenced and carried on, and the practice of the Court as applicable to them.

A bill in Equity may be exhibited against all bodies politic and corporate, and all other persons whatsoever, who are in any way interested in the subject-matter in litigation, except only the Sovereign, the Queen-consort, and the Heir-apparent; whose prerogatives prevent their being sued in their own names, though they may in certain cases, as we shall see presently, be sued by their respective Attornies or Solicitors-General.

But although all persons are subject to be sued in Equity, there are some individuals whose rights and interests are so mixed up and blended with those of others, that a bill cannot be brought against them, unless such other persons are joined with them as co-defendants; and there are other individuals who, although their interests are distinct and independent, so that they may be sued alone upon the record, are yet incapable, from the want of maturity or weakness of their intellectual faculties, of conducting their own defence, and must, therefore, apply for and obtain the assistance of others to do it on their behalf.

In the first class are included married women, whose husbands must be joined with them as co-defendants upon the record; unless they are plaintiffs or exiles, or have abjured the realm, or the wife has been judicially separated or has obtained a protection order;[1] and persons who have been found idiots or lunatics, whose committees must be made co-defendants with the persons whose property is entrusted to their care.[2]

Under the second head are comprised infants, and all persons who, although they have not been found idiots or lunatics by inquisition, are nevertheless of such weak intellects as to be incapable of conducting a

[1] See *ante*.
[2] Ld. Red. 30.

defence by themselves; in both which cases the Court will appoint guardians, for the purpose of conducting the defence on their behalf.

There is another class of persons, who, although they are under no personal disability which prevents their being made amenable to the jurisdiction of the Court, yet from the circumstance of their property being vested in others, either permanently or temporarily, are not only incapable of being made defendants alone, but as long as the disability under which they labour continues, ought not, as a general rule, to be parties to the record at all. In this class are included bankrupts, outlaws, and persons attained or convicted of treason or felony.

SECTION II.—*The Queen's Attorney-General.*

ALTHOUGH the Queen's Attorney-General, as representing the interests of the Crown, may, in certain cases which will be presently pointed out, be made a defendant to a bill in Equity, yet this is to be understood as only applicable to cases in which the interests of the Crown are incidentally concerned; for where the rights of the Crown are immediately in question, as in cases in which the Queen is in actual possession of the property in dispute, or where any title is vested in her which the suit seeks to divest, a bill will not in general lie, but the party claiming must apply for relief to the Queen herself by Petition of Right[1]

In cases in which the rights of the Crown are not immediately concerned, that is, where the crown is not in possession, or a title vested in it is not sought to be impeached, but its rights are only incidentally involved in the suit, it is the practice to make the Queen's Attorney-General a party in respect of those rights.[2] Indeed, it seems that in all cases of this description, in which any right appears to be in the Crown, or the interest of the Crown may be in any way affected, the Court will refuse to proceed without the Attorney-General,[3] unless it is clear the result will be for the benefit of the Crown,[4] or at least that it will not be in disaffirmance or derogation of its interests.[5]

[1] *Reeve* v. *Attorney-General*, 2 Atk. 223, cited 1 Ves. S. 446; Ld. Red. 31, 102; *Ryves* v. *Duke of Wellington*, 9 Beav. 579, 600; see also *Felkin* v. *Lord Herbert*, 1 Dr. & S. 608: 8 Jur. N. S. 90.

[2] Ld Red. 30, 31.

[3] By 5 & 6 Vic. c. 69, s. 2, the Attorney-General is to be made a party defendant in all suits under that act touching any honor, &c., in which the Queen may have any estate or interest. As to the necessity of making the Attorney-General a party in the cases of aliens, felons, no heir-at-law, no next of kin, lunatics and idiots; Calvert on Parties, 338, *et seq.*

[4] *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 618.

[5] *Stafford* v. *Earl of Anglesey*, Hardres, 181.

Thus in *Balch* v. *Wastall*,[1] and in *Hayward* v. *Fry*,[2] where, in consequence of the outlawry of the defendants, it was held that all the defendants' interest was forfeited to the crown, the Court directed the plaintiff to obtain a grant of it from the Exchequer, and to make the Attorney-General a party to the suit. In *Burgess* v. *Wheate*,[3] Lord Hardwicke directed the case to stand over, in order that the Attorney-General might be made a party; and in *Penn* v. *Lord Baltimore*,[4] which was a suit for the execution of articles relating to the boundaries of two provinces in America, held under letters patent from the King, the cause was ordered to stand over for the same purpose. In like manner, in *Hovenden* v. *Lord Annesley*,[5] in which the parties claimed under two distinct grants from the Crown, each reserving a rent but of different amounts, it was held that, inasmuch as the rights of the Crown were concerned, the Attorney-General ought to be before the Court.[6] In *Barclay* v. *Russell*,[7] Lord Rosslyn dismissed the bill, because a title appeared upon the record for the Crown, although no claim had been made on its behalf; and upon the same principle, in *Dolder* v. *The Bank of England*,[8] Lord Eldon refused to order the dividends of stock purchased by the old Government of Switzerland, which had been received before the filing of the bill, to be paid into Court by the trustees, on the application of the new Government, which had not been recognized by the Government of this country, until the Attorney-General was made a party to the suit. But although, in cases where a title in the Crown appears upon the record, the Court will not make a decree unless the Attorney-General be a party to the suit, yet it seems that the circumstance of its appearing by the record that the plaintiff has been convicted of manslaughter, and that a commission of attainder has been issued, will not support a plea for not making the Attorney-General a party: because an inquisition of attainder is only to inform, and does not entitle the Crown to any right.[9] It seems, however, that in this respect an inquisition of attainder differs from a commission to inquire whether a person under whom the plaintiff claims was an alien: the former being only for the sake of informing the Crown, but the latter to entitle.[10]

The Attorney-General is not a necessary party to such a suit.[11]

[1] 1 P. Wms. 445.
[2] *Ibid*, 446; and see *Rex*.v *Fowler*, Bumb. 38.
[3] 1 Eden, 177, 181.
[4] 1 Ves. S. 444.
[5] 2 Sch. & Lef. 607.
[6] *Ibid*., 617.
[7] 3 Ves. 424, 436.
[8] 10 Ves. 352, 354.
[9] *Burke* v. *Brown*, 2 Atk. 399.
[10] *Ibid*.
[11] *Paterson* v. *Bowes*, 4 Grant 170. See as to remedy of the subject against the Crown, *Miller* v. *Attorney-General*, 9 Grant, 558; and *Norwich* v. *Attorney-General*, 9 Grant 563.

The necessity of making the Attorney General a party, is not confined to those cases in which the interests of the Crown in its own right are concerned, but it extends also to cases in which the Queen is considered as the protector of the rights of others. Thus, as we have seen,[1] the grantee of a *chose in action* from the Crown may either institute proceedings in the name of the Attorney-General, or in his own name, making the Attorney-General a defendant to the suit; and so, in suits in which the Crown may be interested in its character of protector of the rights of others, the Attorney-General should be made a party. Thus, the Attorney-General is a necessary party to all suits where the subject-matter is, either wholly or in part, money appropriated for general charitable purposes; because the Queen, as *parens patriæ*, is supposed to superintend the administration of all charities, and acts in this behalf by her Attorney-General. Where, however, a legacy is given to a charity already established, as where it is given to the trustees of a particular foundation, or to the treasurer or other officer of some charitable institution, to become a part of the general fund of such foundation or institution, the Attorney-General need not be a party, because he can have no interference with the distribution of their general funds.[2] And it seems that there is a distinction where trustees of the charity are appointed by the donor, and where no trustees are appointed but there is a devise immediately to charitable uses; in the latter case, there can be no decree unless the Attorney-General be made a party, but it is otherwise where trustees are appointed by the donor.[3] Therefore, where a bill was filed to establish a will, and to perform several trusts, some of them relating to charities in which some of the trustees were plaintiffs, and other trustees and several of the *cestui que trusts* were defendants, an objection, because the Attorney-General was not made a defendant, was overruled: it being considered, that some of the trustees of the charity[4] being defendants, there might be a decree to compel the execution of trusts relating to these charities.[5] In that case, it was said by Lord Macclesfield, that if there should be any collusion between the parties relating to the charity, the Attorney-General might, notwithstanding a decree, bring an information to establish the charity and set aside the decree, and that he might do the same, though he were made a defendant, in case of collusion between the parties. But it seems that the mere circumstance of the Attorney-General not having been made a party to the proceeding, will not be a sufficient ground to sustain

[1] *Ante.*

[2] *Wellbeloved* v. *Jones*, 1 S. & S. 40, 43; *Chitty* v. *Parker*, 4 Bro. C. C. 38.

[3] 4 Vin. 500, Pl. 11, *notis*; 2 Eq. Ca. Ab. 167, pl. 13, n.

[4] It appears from a subsequent part of the case that one of the trustees of the charity was abroad.

[5] *Monil* v. *Lawson*, 4 Vin. 500, Pl. 11; 2 Eq. Ca. Ab. 167, pl. 13.

an information for the purpose of setting aside a decree made in a former suit, unless the decree is impeached upon other grounds.[1]

When it is said that, in cases where a legacy is given to the trustees of a charity already in existence, for the general purposes of the charity, it will not be necessary, in a suit concerning it, to make the Attorney-General a defendant, the rule must be understood to apply only to those charities which are of a permanent nature, and whose objects are defined; for it has been determined, that where legacies are given to the officers of a charitable institution which is not of a permanent nature, or whose objects are not defined, it is necessary to make the Attorney-General a party to a suit relating to them. Thus, in the case of *Wellbeloved* v. *Jones*,[2] where a legacy was given to the officers, for the time being, of an academical institution, established at York for the education of dissenting ministers, which officers, with the addition of such other persons as they should choose (in case they should think an additional number of trustees necessary), were to stand possessed of the money, upon trust to apply the interest and dividends for the augmentation of the salaries of dissenting ministers, a preference being given to those who should have been students in the York institution, and in case such institution should cease, then upon trust that the persons in whose names the fund should be invested, should transfer the same to the principal officers for the time being of such other institution as should succeed the same, or be established upon similar principles: Sir John Leach, V. C., upon a bill filed by the officers of the institution, praying to have the fund transferred to them, to which the Attorney-General was no party, ordered the case to stand over, with leave to amend by making the Attorney-General a party: his Honour observing, that the Court could not permit the legacy to come into the hands of the plaintiffs, who happened to fill particular offices in the society, but would take care to secure the objects of the testator by the creation of a proper and permanent trust, and upon hearing the cause, would send it to the Master for that purpose; and that it would be one of the duties of the Attorney-General to attend the Master upon the subject. And even in cases where a legacy is given to the trustees of a charity already in existence, the trusts of which are of a permanent and definite nature, unless it appears, from the terms of the bequest, that the trusts upon which the legacy is given are identical with those upon which the general funds of the corporation are held, it is necessary to make the Attorney-General a party.[3]

[1] *Attorney-General* v. *Warren*, 2 Swanst. 291, 311.
[2] 1 S. & S. 40, 43.
[3] *Corporation of the Sons of the Clergy* v. *Mose*, 9 Sim. 610, 613.

A bill was filed to administer an estate, and declare a legacy for religious purposes void. The trustees were made defendants, but a question arose whether the Attorney-General ought not also to have been made a defendant, Esten V.C. held that he was a necessary party.[1] The Attorney-General is not a necessary party to a bill filed by a corporator of the Church Society on behalf of himself, and all others members of the Society, to correct and prevent alleged breaches of trust by the corporation.[2]

It is to be observed also, that the Attorney-General is a necessary party only where the charity is in the nature of a general charity; and that where it is merely a private charity, it will not be necessary to bring him before the Court. Thus, were the suit related to a voluntary society, entered into for the purpose of providing a weekly payment to such of the members as should become necessitous, and their widows, Lord Hardwicke overruled the objection that the Attorney-General was not a party: because it was in the nature only of a private charity.[3]

When the Attorney-General is made a defendant to a suit, it is entirely in his discretion whether he will put in a full answer or not.[4] Formerly, the usual course was for him to put in a general answer, stating merely that he was a stranger to the matters in question, and that, on behalf of the Crown, he claimed such rights and interests as it should appear to have therein, and prayed that the Court would take care of such rights and interests of the Crown in the same.[5] In cases, however, in which the interests of the Crown, or the purposes of public justice require it, a full answer will be put in:[6] as in *Craufurd* v. *The Attorney-General*,[7] in which case the Lords of the Treasury had directed that the question might be brought before the consideration of a Court of Justice; and it would, therefore, have been unbecoming in the Attorney-General to urge any matter of form which might prevent the case from being properly submitted to the Court before which it was brought.[8] In *Errington* v. *The Attorney-General*,[9] the Attorney-General, being one of the defendants to a bill of interpleader, put in the usual general answer, upon which the other defendants moved that the bill might be dismissed, and the injunction dissolved; the Attorney-General opposed the motion, and at the same time prayed that he might be at liberty to withdraw

[1] *Long* v. *Wilmotte* 2 Cham. R. 87.
[2] *Boulton* v. *Church Society*, 14 Grant 123.
[3] *Anon.* 3 Atk. 277.
[4] *Davison* v. *Attorney-General*, 5 Pri. 398, n.
[5] See Bunb. 303; 1 Hare, 223
[6] *Colebrooke* v. *Attorney-General*, 7 Pri. 192.
[7] 7 Pri. 1.
[8] See also *Deare* v. *Attorney-General*, 1 Y. & C. Ex. 197.
[9] Bunb. 303.

his general answer, and put in another, insisting upon the particular right of the Crown to the money in question: which was granted.

The answer of the Attorney-General is put in without oath, but is usually signed by him. And it seems that such an answer is not liable to be excepted to, even though it be to a cross bill filed by the defendant in an information, for the purpose of obtaining a discovery of matters alleged to be material to his defence to the information. We have, however, seen before that where a cross bill is filed against the Attorney-General, praying relief as well as discovery, he cannot protect himself from answering by means of a demurrer:[1] but whether he could, by such means, protect himself from answering a mere bill of discovery, does not appear to have been decided; it is most probable that he might, and that the Court would, in such a case, if discovery were wanted from the Crown, leave the party to prefer his Petition of Right.[2]

The right of the Attorney-General to receive his costs, where he is made a defendant to a suit, has been before noticed.[3]

During the vacancy of the office of Attorney-General, the Solicitor-General may be made a defendant to support the interests of the Crown;[4] and where there has been an information by the Attorney-General, the object of which has been to set up a general claim on behalf of the Crown, at variance with the interests of a public charity, the Solicitor-General has been made defendant, for the purpose of supporting the interests of such charity against the general claim of the Attorney-General. On the other hand, where an information was filed by the Attorney-General, claiming certain property for charitable purposes, inconsistent with the rights of property of the Crown, the Solicitor-General was made a defendant, as the officer on whom the representation of such rights had devolved.[5]

The means of obtaining the appearance or answer of the Attorney-General, will be found in the subsequent Chapters upon Process.

Section III.—*Governments of Foreign States and Ambassadors.*

It has before been stated, that the Sovereign of a foreign country recognized by this Government, may sue either at Law or in Equity, in respect of matters not partaking of a political character;[6] and it has

[1] *Deare* v. *Attorney-General*, *ubi sup.*: *ante*.

[2] *Deare* v. *Attorney-General*, *ubi sup.*

[3] *Ante*.

[4] Ld. Red. 102.

[5] *Attorney-General* v. *Dean and Canons of Windsor*, 24 Beav. 679: 4 Jur. N. S. 818; 8 H. L. Ca. 369: 6 Jur. N. S. 833; and see *Attorney-General* v. *Mayor of Bristol*, 2 J. & W. 312; *Attorney-General* v. *Ironmongers' Company*, 2 M. & K. 578, n.

[6] *Ante*.

been determined, that if he files a bill, a cross bill may be filed against him: because, by suing here, he submits himself to the jurisdiction of the Court; and, in such a case, if required, he is bound to answer upon oath.[1]

The question whether a foreign Sovereign, who has not submitted to the jurisdiction, can be sued in the Courts of this country, was raised in the case of the *Duke of Brunswick* v. *The King of Hanover*.[2] It was an important feature in this case, that the defendant, as a subject of this kingdom, had renewed his allegiance after his accession to the throne of Hanover, and exercised the rights of an English peer. The general object of the suit was to obtain an account of property belonging to the plaintiff, alleged to have been possessed by the defendant, under colour of an instrument creating a species of guardianship unknown to the law of England. None of the acts complained of took place in this country, or were done by the defendant before he became King of Hanover. Moreover, though it was not necessary to decide the question, the Court seemed to consider that those acts were of a political character. The defendant demurred to the bill; and in giving judgment upon the demurrer, Lord Langdale, M. R., after elaborately reviewing all the authorities and arguments upon the subject, said: "His Majesty the King of Hanover is, and ought to be, exempt from all liability of being sued in the Courts of this country, for any acts done by him as King of Hanover, or in his character of sovereign prince; but being a subject of the Queen, he is and ought to be liable to be sued in the Courts of this country, in respect of any acts and transactions done by him, or in which he may have been engaged, as such subject. And in respect of any act done out of the realm, or any act as to which it may be doubtful whether it ought to be attributed to the character of Sovereign, or to the character of subject, it appears to me, that it ought to be presumed to be attributable rather to the character of Sovereign, than to the character of subject."[3] Accordingly, as it did not appear that the alleged acts and transactions of the defendant were of such a description as could render him liable to be sued in this country, the demurrer was allowed. It further appears from the last mentioned case, that as a Sovereign prince is *prima facie* entitled to special immunities, it ought to appear on the bill that the case is not one to which such special immunities extend.[4]

There have, moreover, been cases in which, the Court being called

[1] *Hullett* v. *King of Spain*, 2 Bligh, N. S. 47: 1 Dow & Cl. 169.

[2] 6 Beav. 1; affirmed 2 H. L. Ca. 1; and see *Wadsworth* v. *Queen of Spain*, 17 Q. B. 171; *Gladstone* v. *Musurus Bey*, 1 H. & M. 495; 9 Jur. N. S. 71.

[3] 6 Beav. 57.

[4] See 6 Beav. 58.

upon to distribute a fund in which some foreign Sovereign or State may have had an interest, it has been thought expedient and proper to make such Sovereign or State a party. The effect has been to make the suit perfect as to parties, but, as to the Sovereign made a defendant, the effect has not been to compel, or attempt to compel, him to come in and submit to judgment in the ordinary course, but to give him an opportunity to come in and claim his right, or establish his interest in the subject-matter of the suit.[1]

SECTION IV.—*Corporations and Joint-Stock Companies.*

IT has been stated before,[2] that corporations aggregate must be sued by their corporate name, that is, by their name of foundation: though it has been said that, if a corporation be known by a particular name, it is sufficient to sue it by that name.[3] This, however, must be confined to the case of a corporation by prescription; for in other cases, where the commencement of it appears by the record, it can have no other name by use than that under which it has been incorporated, and the Court will not permit it to be sued by any other name.[4]

A corporation aggregate which has a head, cannot be sued without it: because without its head it is incomplete.[5] It is not, however, necessary to mention the name of the head;[6] nor is it in general proper to make individual members of aggregate corporations parties by their proper Christian and surnames: though cases may occur where this will be permitted, for the purpose of compelling a discovery from them of some fact which may rest in their own knowledge. Thus, in the case put by Lord Eldon, in *Dummer* v. *The Corporation of Chippenham*,[7] of an individual corporator whose estate was charged with a rent or payment to a charitable use, of which the corporation had the management, and who had obtained possession of the deed, and had destroyed or cancelled it, his Lordship was of opinion that, upon an information for the purpose of having the estate of the charity properly administered by the corporation, it would be perfectly competent to call upon the mayor, if he was

[1] 6 Beav. 58. In *Gladstone* v. *Musurus Bey*, 1 H. & M. 495: 9 Jur. N. S. 71, the Sultan was made a defendant, but did not appear.

[2] *Ante.*

[3] *Attorney-General* v. *Corporation of Worcester*, 2 Phil. 3: 1 C. P. Coop. t. Cott. 18.

[4] *Ibid.*

[5] 2 Bac. Ab. tit. Corp. (E.) Pl. 2. In *Daugars* v. *Rivaz*, 28 Beav. 233, 249: 6 Jur. N. S. 854, it was held, that the corporation of the French Protestant Church having become divided into separate churches, and there being no public officer at the head of the corporation, the bill was properly filed against the governing body of the particular church, and not against the corporation by its corporate name.

[6] 3 Salk. 103: 1 Leon. 307.

[7] 14 Ves. 245, 254.

the individual implicated in that conduct, not only to answer with the rest under their common seal, but also to answer as to the circumstances relative to the deed supposed to be in his hands. So also, in the principal case, which was that of a bill by a schoolmaster against a corporation who were trustees of a charity, to be relieved against a resolution of the trustees by which he was deprived of his office of schoolmaster, on the ground that the resolution had been pronounced by five of the members of the corporation, from improper motives with reference to a parliamentary election, to which bill the five members were made parties, for the purpose of obtaining from them an answer upon oath as to their alleged improper conduct, a demurrer, which had been put in by these five members on the ground that no title was shown to the discovery against them, was overruled by Lord Eldon. And in the case of the *Attorney-General* v. *Wilson*,[1] a corporate body, suing both as plaintiff and relator, sustained a suit against five persons, formerly members of the corporation, in respect of unauthorized acts done by them in the name of the corporation.

The practice of making the officers or servants of a corporation parties to a suit, for the purpose of eliciting from them a discovery upon oath of the matters charged in the bill, has been too frequently acted upon and acknowledged to be now a matter of doubt.[2] The first case which occurs upon the point is an anonymous one, in Vernon,[3] where a bill having been filed against a corporation to discover writings, and the defendants answering under their common seal, and so, not being sworn, would answer nothing to their prejudice, it was ordered that the clerk of the company, and such principal members as the plaintiff should think fit, should answer on oath, and that the Master should settle the oath. In the case of *Glasscott* v. *Copper Miners' Company*,[4] the plaintiff was sued at Law by a body corporate, and filed his bill for discovery only: making the governor, deputy-chairman, one of the directors, and the secretary of the company, co-defendants with the company. It was objected, upon demurrer to the bill, that an officer

[1] C. & P. 1, 21.

[2] Ld. Red. 188, 189.

[3] 1 Vern. 117; but the answer cannot be read against the Corporation: *Wych* v. *Meal*, 3 P. Wms. 310, 312; *Gibbons* v. *Waterloo Bridge Company*, 1 C. P. Coop. t. Cott. 385; *Wadeer* v. *East India Co.*, 29 Beav. 300: 7 Jur. N. S. 350.

[4] 11 Sim. 305. See *M'Intosh* v. *Great Western Railway Company*, 2 De G. & S. 758; *Attorney-General* v. *Mercers' Company*, 9 W. R. 83; *Attorney-General* v. *East Dereham Corn Exchange*, 5 W. R. 486; *Ranger* v. *Great Western Railway Co.*, 4 De G. & J. 74: 5 Jur. N. S. 1191; see also *Moodaley* v. *Morton*, 1 Bro. C. C. 469. It should be observed here, that Lord Eldon, in *Dummer* v. *The Corporation of Chippenham*, 14 Ves. 254, mentioned it as his opinion, that the case of *Steward* v. *The East India Company*, 2 Vern. 380, in which a demurrer to a bill against the company and one of its servants, is reported to have been allowed, is a misprint; and that, instead of stating that the demurrer was allowed without putting them to answer as to matter of fraud and contrivance, which is nonsense, it should have been, that the demurrer was disallowed, with liberty to insist by their answer that they should not be compelled to answer the charges of fraud, &c.; this case however, appears to be correctly reported, see *M'Intosh* v. *Great Western Railway Company*, 2 De G. & S. 770.

of a corporation could not be made a co-defendant to a bill which sought for discovery only, or at any rate, that individual members could not be joined as defendants with the corporation at large; but the demurrer was overruled.

It may be observed here, that 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 transferred, and he demurred to the bill, Sir John Leach, V. C., allowed the demurrer, on the ground that the officer was in that case merely a witness.[1]

But 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 corporation, for the purpose of eliciting from him a discovery of entries or orders in the books of the corporation, yet, where such is not the case, it is still the duty of the corporation, when informed by the bill or information of the nature and extent of the claims made upon it, if required to put in an answer, to cause diligent examination to be made before they put in their answer, of all deeds, papers and muniments in their possession or power, and to give in their answer all the information derived from such examination; and it was said by Sir John Leach, M. R., that if a corporation pursue an opposite course, and in their answer allege their ignorance upon the subject, and the information required is afterwards obtained from the documents scheduled to their answer, the Court will infer a disposition on the part of the corporation to obstruct and defeat the course of justice, and on that ground will charge them with the costs of the suit.[2]

The rule, however, has been changed in this Province; for Order 63 declares that "Where a bill is filed against a corporation aggregate, no officer of the corporation is to be made a defendant for discovery only; but any officer who might by the former practice have been made a defendant for the purpose of discovery, may be examined by the plaintiff in the same way as a party, after the answer of the corporation is filed, or after the time for filing the same has expired." And Order 64, provides that "Where a bill is filed by a corporation aggregate, the defendant may, after filing his answer, examine for discovery such officer of the corporation as would, under the former practice, have been made a party defendant to a cross bill for discovery."

[1] *How* v. *Best*, 5 Mad. 19.
[2] *Attorney-General* v. *The Burgesses of East Retford*, 2 M. & K. 40.

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. But where corporations aggregate are sued in their corporate capacity, they must appear by attorney, and answer under the common seal of the corporation; however, those of the corporation who are charged as private individuals, must answer upon oath.

If the majority of the members of a corporation are ready to put in their answer, and the head or other person who has the custody of the common seal refuses to affix it, application must be made to the Court of Queen's Bench for a *mandamus* to compel him, and in the meantime the Court of Chancery will stay the process against the corporation.[1]

The process for compelling the appearance or answer of a corporation will be found in future Chapters.

SECTION V.—*Persons out of the Jurisdiction of the Court.*

WHERE a suit affects the rights of persons out of the jurisdiction, the Court will in some cases, where there are other parties concerned, proceed against those other parties, and if the absent persons are merely passive objects of the judgment of the Court, or their rights are incidental to those of the parties before the Court, a complete determination may be obtained without them.[2] Thus in *Attorney-General* at the relation of the *University of Glasgow* v. *Baliol College*,[3] which was an information filed to impeach a decree made in 1699, on a former information[4] by the Attorney-General against the trustees of a testator, his heirs at law and others, to establish a will and a charity created by it, alleging that the decree was contrary to the will, and that the University of Glasgow had not been made a party to the suit: Lord Hardwicke overruled the latter objection, as the University of Glasgow was a corporation out of the reach of the process of the Court, which circumstance warranted the proceedings, without making that body party to the suit.

And so, where a bill was filed for the recovery of a joint debt against one of two partners, the other being out of the kingdom, the question before the Court was: whether the defendant should pay the whole or

[1] *Rex* v. *Wyndham*, Cowp. 377; 2 Bac. Ab. tit. Corp. (E.) 2.

[2] Ld. Red. 31, 32; and see *Powell* v. *Wright*, 7 Beav. 444, 450. In *Postgate* v. *Barnes*, 9 Jur. N. S. 456, V.C.S., a demurrer to the bill of a married woman to enforce her equity to a settlement, on the ground that her husband was only made a defendant when he should come within the jurisdiction, was overruled; and see *Jackson* v. *Norton*, 4 Jur. N. S. 1067: 7 W. R. 4, M.R.

[3] Dec. 11, 1744; Ld. Red. 32, n. (*u*).

[4] Reported in 9 Mod. 407.

only a moiety of the debt; and Lord Hardwicke was of opinion that he ought to pay the whole.[1] Upon the same principle, a bill may be brought against one factor without his companion, if such companion be beyond sea;[2] and where there were two executors, one of whom was beyond sea, and a bill was filed by a residuary legatee against the other, to have an account of his own receipts and payments: the Court, upon an objection being taken at the hearing, on the ground of the absence of the co-executor, allowed the cause to go on.[3]

In his treatise on pleading, Lord Redesdale says, "when a person who ought to be a party is out of the jurisdiction of the Court, that fact being stated in the bill, and admitted by the defendants, or proved at the hearing, is, in most cases, a sufficient reason for not bringing him before the Court; and the Court will proceed, without him, against the other parties, as far as circumstances will permit;"[4] and on this principle, the Court as frequently made decrees without prejudice to the rights (if any) of absent parties, or reserving all questions in which they were interested, and determining only such as did not affect them.[5]

In bills of interpleader, also, a plaintiff may proceed with his suit and obtain an injunction against a party resident in this country, although the other parties claiming the property are out of the jurisdiction.[6] In such cases, however, the plaintiff is bound to use prompt diligence to get the parties who are absent to come in and interplead with those who are present. If he does not succeed in doing so within a reasonable time, the consequence is, that the party within the jurisdiction must have that which is represented to be the subject of competition, and the plaintiff must be indemnified against any proceeding being afterwards taken on the part of those who are out of the jurisdiction.[7] For this purpose, "if the plaintiff can show that he has used all due diligence to bring persons out of the jurisdiction to contend with those who are within it, and they will not come, the Court upon that default, and their so abstaining from giving him an opportunity of relieving himself, would, if they afterwards came here and brought an action, order service on their attorney to be good service, and injoin that action for ever: not permitting those who refused the plaintiff that justice, to commit that injustice against him".[8] Upon the same ground it has been

[1] *Darwent* v. *Walton*, 2 Atk. 510.

[2] *Cowslad* v. *Cely*, Prec. Ch. 83.

[3] *Cowslad* v. *Cely*, Prec. Ch. 83.

[4] Ld. Red. 164; see also *Smith* v. *Hibernian Mine Company*, 1 Sch. & Lef. 238, 240; *Rogers* v. *Linton*, Bunb. 200; *Walley* v. *Walley*, 1 Vern. 487; *Duxbury* v. *Isherwood*, 12 W. R. 821, V.C.W.

[5] *Willats* v. *Busby*, 5 Beav. 193, 200; *Powell* v. *Wright*, 7 Beav. 444, 450; *Morley* v. *Rennoldson*, 2 Hare, 570, 585; 7 Jur. 988; *Mores* v. *Mores*, 6 Hare, 125, 127, 135; 12 Jur. 620.

[6] *Stevenson* v. *Anderson*, 2 Ves. & B. 407, 411.

[7] *Ibid.*

[8] Per Lord Eldon, 2 Ves. & B. 412; see also *Martinius* v. *Helmuth*, G. Coop. 245, 248; reported also in some copies of 2 Ves. & B. 412 n.; *East and West India Dock Company* v. *Littledale*, 7 Hare, 57.

determined, that where a party to a bill of interpleader, who has been served, will not appear, and stands out all the process of contempt, the bill may be taken *pro confesso* against him, and he will be decreed to interplead with the other defendants.[1]

Where, however, the person who is out of the jurisdiction is one whose interests are principally affected by the bill, the Court cannot proceed in his absence, even though the parties having the legal estate are before the Court; thus, where a judgment-creditor, who had sued out an *elegit* upon his judgment, filed a bill for equitable execution against real estates, which were vested in trustees upon certain trusts, the Court would not proceed with the cause, because the equitable tenant for life, subject to the trusts, was abroad.[2] Upon the same principle it has been held, that bail cannot maintain an injunction against a creditor, who has recovered a verdict, where the principal debtor is out of the jurisdiction.[3] In a case where a contract for the sale of an estate in the West Indies had been entered into by a person who resided there, and had got into possession without paying the purchase money, and a suit was instituted in this country by the vendor against the consignees appointed by the purchaser, Lord Lyndhurst refused to entertain a motion for a receiver of the proceeds of the consignments, on the ground that the purchaser, who was the principal defendant, was abroad, and had never been served with *subpœna*.[4]

It has been held, that a receiver of a mortgaged estate may be appointed, notwithstanding the absence of the mortgagor. Thus, in the case of *Tanfield* v. *Irvine*,[5] an application for a receiver had been made to Sir John Leach, V. C., by the grantee of an annuity, which was secured by an equitable charge upon an estate; and though the grantor had gone abroad, and had not appeared to the suit, his Honour refused the application, on the ground that the Court had not jurisdiction to deprive a man, who was not present, of the possession of his estate; but upon the motion being renewed before Lord Eldon, he made the order for a receiver, but guarding it, however, in such a way as not to prevent any person having a better title to the possession of the estate, from ousting him if they pleased. His Lordship observed, that he did not see why the rights of the equitable mortgagee were to be taken away, by the circumstance that the mortgagor had not entered an appearance, and could not be compelled to do so; and that a second

[1] *Fairbrother* v. *Prattent*, Dan. Exc. Rep. 64; and the decree, *ib.* 69, n. (*c*).

[2] *Browne* v. *Blount*, 2 R. & M. 83; and see *Kirwan* v. *Daniel*, 7 Hare, 347; *M'Calmont* v. *Rankin*, 8 Hare, 1: 14 Jur. 475; *Anderson* v. *Stather*, 2 Coll. 209.

[3] *Roveray* v. *Grayson*, 3 Swanst. 145, n.

[4] *Stratton* v. *Davidson*, 1 R. & M. 484.

[5] 2 Russ. 149, 151; see also *Coward* v. *Chadwick*, *ib.* 634, and 150 n.; *Dowling* v. *Hudson*, 14 Beav. 423, and cases collected in the note thereto.

mortgagee might be delayed to all eternity, if the residence of the mortgagor out of the jurisdiction were to have the effect which the Vice-Chancellor had given it.

It is usual, in cases where any of the persons who, if resident in this country, would be necessary parties to a suit, are abroad, to make such persons defendants to the bill, stating the fact of their being abroad: which fact, unless they appear, must be proved at the hearing;[1] and, notwithstanding the observation of Lord Redesdale cited above, it seems that the admission of the parties before the Court is not evidence on which the Court will act.[2] When the proof of this fact at the hearing is not such as to satisfy the Court, the usual practice is to direct the cause to stand over for the purpose of supplying the proper evidence.[3] In some cases, however, if there are preliminary inquiries or accounts to be taken, they have been directed to be proceeded with in the meantime;[4] and in others, an enquiry as to the fact has been directed.[5] In *Penfold* v. *Kelly*,[6] Sir R. T. Kindersley, V. C., refused an application for leave to serve a defendant coming within the jurisdiction after decree, and against whom no specific relief was prayed, with a copy of the bill.

In *Capel* v. *Butler*,[7] where a party who was named as a defendant, but had never been served, appeared by counsel at the hearing, and consented to be bound by the decree, the defect arising from his not having been served was held to be cured.[8]

In some cases, where a defendant has been abroad during the proceedings in a cause, he has been allowed to come in after decree has been pronounced, and to have the benefit of it, without the process of filing a supplemental bill. Thus, in *Banister* v. *Way*,[9] after a decree, pronounced in a suit by a residuary legatee, establishing a will, and directing the necessary accounts, others of the residuary legatees, who were abroad, applied to have the benefit of the decree, submitting to be bound by it; and an order was made by Lord Thurlow (they submitting to the decree), that they should be at liberty to enter their appearance, and should have the like benefit of the decree as if they had put in an answer, and had appeared at the hearing of the cause. A

[1] *Moodie* v. *Bannister*, 1 Drew. 514. The party should not be named as a defendant "when he shall come within the jurisdiction," but as being "out of the jurisdiction:" see *Jackson* v. *Norton*, 4 Jur. N. S. 1067: 7 W. R. 4, M. R.

[2] *Wilkinson* v. *Beal*, 4 Mad. 408; *Hughes* v. *Eades*, 1 Hare, 486, 488: 6 Jur. 255; *Egginton* v. *Burton*, 1 Hare, 488, n.; *M'Calmont* v. *Rankin*, 8 Hare, 1: 14 Jur. 475.

[3] *Eddington* v. *Burton*, 1 Hare, 488, n.; *Smith* v. *Edwards*, 16 Jur. 1041, V. C. S.

[4] *Butler* v. *Borton*, 5 Mad. 40, 42; *Hughes* v. *Eades*, 1 Hare, 486: 6 Jur. 255.

[5] *Mores* v *Mores*, 6 Hare, 136: 12 Jur. 620; *Eades* v. *Harris*, 1 Y. & C. C. 230, 234; but see *Dibbs* v. *Goren*, 1 Beav. 457.

[6] 12 W. R. 286, and see Ord. X. 11, 18.

[7] 2 S. & S. 457, 462; and see *Sapte* v. *Ward*, 1 Coll. 24.

[8] For form of introductory part of decree, see Seton, 3, 4; and 1 Coll. 25.

[9] 2 Dick. 686.

similar order was made by Lord Lyndhurst, after a cause had been heard upon further directions.[1]

An order for leave for a defendant to come in, after decree, may be obtained by petition of course, if the plaintiff will consent thereto. If he will not consent, notice of motion, must be served on him.[2] The petition, or notice of motion, usually asks that the defendant, on submitting to be bound by the decree and proceedings already had, may be at liberty to answer the bill, and may have the like benefit of the decree, and may be at liberty to attend the subsequent proceedings, as if he had appeared at the hearing. A copy of the order, when passed and entered, should be served on the solicitors of the other defendants, and on the plaintiff's solicitor when the order is made on petition. On production of the order to the Record and Writ Clerk, an answer appearance by the defendant may be filed in the usual way; and notice thereof must be given, on the same day, to the plaintiff's solicitor; and the cause thenceforth proceeds against such defendant in the ordinary manner.

In the case of infants, however, the Court must be satisfied, by inquiry or otherwise, that it is for their benefit to adopt the proceedings.[3]

Where a defendant is stated to be abroad, he is not considered a party to the suit, at least not till he has been served with the bill, for the determination of any point of practice, arising between the plaintiff and the other defendants; therefore, an order to amend cannot be obtained, after the usual time, on the ground that a defendant abroad has not answered.[4]

Under the present practice of the Court, however, such questions as we have been considering, with reference to defendants out of the jurisdiction, will be of comparatively rare occurrence; for the Court can now, in many cases, direct service on persons out of the jurisdiction;[5] and can also, when the suit is defective for want of parties, and the defendant has not taken the objection by plea or answer, make a decree, if it shall think fit, saving the rights of absent parties.[6]

Our Court has the same power under order 65, which provides that "Where a defendant, at the hearing of a cause, objects that a suit is defective for want of parties, the Court, if it thinks fit, may make a decree saving the rights of the absent parties."

[1] *While* v. *Hall*, 1 R. & M. 332; and see *Prendergast* v. *Lushington* 5 Hare 177; *Potts* v. *Britton*, M. R. in Chamb., 22 Dec. 1864.

[2] Braithwaite's Pr. 323. For form of order, see Seton, 1250.

[3] *Copley* v. *Smithson*, 5 De G. & S. 583; *Baillie* v. *Jackson*, 10 Sim. 167.

[4] *King of Spain* v. *Hullet*, 3 Sim. 338.

[5] Pro. Sta. 20 Vic. c. 56, s. 15, and 28 Vic. c. 17. s. 12, and Con. G. O. Nos. 90, 92, 95, 101, 102.

[6] Ord. XXIII. 11; *Maybery* v. *Brooking*, 7 De G. M. & G. 673: 2 Jur. N. S. 76.

And it may here be observed that, as a general rule, persons are not now named parties to a suit unless direct relief is sought against them; and therefore, if they happen to be out of the jurisdiction, it will in general, on the authority of *Browne* v. *Blount*,[1] and the other cases before referred to, be necessary to serve them.

Section VI.—*Paupers.*

Although the 11 Hen. VII. c. 12, before referred to as that under which the practice of admitting parties to sue *in forma pauperis*, originated,[2] does not extend to defendants, and consequently a defendant in an action at law is never allowed to defend it as a pauper,[3] yet a greater degree of liberality is practised in Courts of Equity; and a defendant who is in a state of poverty, and, as such, incapable of defending a suit, may, as well as a plaintiff, obtain an order to defend *in forma pauperis*, upon making the same affidavit of poverty as that required to be made by a plaintiff. Indeed, originally, the right of admission *in forma pauperis* appears to have been confined to defendants. By Lord Bacon's orders it is said, that "any man shall be admitted to defend *in forma pauperis* upon oath; but for plaintiffs, they are ordinarily to be referred to the Court of Requests, or to the provincial counsels, if the case arise in the jurisdictions, or to some gentleman in the country, except it be in some special cases of commiseration or potency of the adverse party."[4]

It has been before stated, that no person suing in a representative character is allowed the privilege of proceeding *in forma pauperis*. The same rule applies to defendants sued in a representative character, even in cases where they have received no assets of the estate of the testator whom they represent.[5]

The order admitting a party to sue or defend *in forma pauperis*, has not the effect of releasing him from costs ordered to be paid prior to his admission, but the payment of such costs may be enforced in the usual manner; it may, however, be doubtful whether the admission may not have a retrospective effect upon costs incurred before the date of his admission, but concerning which no order for taxation and payment has been made.[6] Where a defendant had been committed for not

[1] 2 R. & M. 83, *ante*.

[2] *Ante*.

[3] Chitty's Arch. 1277.

[4] Beames' Ord. 44; Sand. Ord. 122. This order is abrogated by the Cons. Ord.; but see *ib.* Prel. Ord. r. 5; see also Lord Clarendon's Orders, Beames, 215—218: Sand. Ord. 312; now Cons. Ord. VII. 9—11.

[5] *Oldfield* v. *Cobbett*, 1 Phil. 613; *ante*.

[6] *Davenport* v. *Davenport*, 1 Phil. 124; see, however, *Prince Albert* v. *Strange*, 2 De G. & S. 652, 718: 13 Jur. 507, where a defendant, having been admitted to defend in the course of the cause, was ordered, at the hearing, to pay the plaintiff's costs up to the time of such admission.

answering, and had subsequently obtained permission to defend *in forma pauperis*, and thereupon had put in his answer, Sir J. L. Knight Bruce, V. C., ordered him to be discharged, without payment of the costs of the contempt: considering the Court to have power to make such an order, either under its general authority independent of the 11 Geo. IV. & 1 Will. IV. c. 36, or under that statute combined with its general authority.[1] It appears that where the plaintiff dismisses his bill against a pauper defendant, the practice is to allow the defendant *dives* costs.[2]

To entitle a party to defend as a pauper, he must make an affidavit similar to that required from a plaintiff applying to sue in that character; and it seems that if he is in possession of the property in dispute, he cannot be admitted, or if admitted, he may, upon the fact being afterwards shown to the Court, be dis-paupered.[3] In this and in most other respects, the rules laid down with regard to persons suing *in forma pauperis*[4] are applicable to persons defending in that character: the only difference being in the form of application for admission; for the petition, in the case of a defendant, is much shorter than in the case of a plaintiff, and is not required to contain any statement of the case, or to be accompanied by any certificate of counsel.[5]

Section VII.—*Bankrupts and Insolvent Debtors.*

It is a general rule of Courts of Equity, that no person can be made a party to a suit against whom no relief can be prayed; and it follows, as a consequence of this rule, that no person whose interest in the subject-matter of the suit has been vested by act of law in another, ought to be made a defendant. Consequently, it has been held, that bankrupts and insolvent debtors, whose interests, whether legal or equitable, in the property, must have devolved upon their assignees, cannot be made parties to suits relative to any property which is affected by the bankruptcy or insolvency.[6]

Upon this principle, a demurrer put in by a bankrupt, who was joined as a co-defendant with his assignees, in a bill to enforce the specific

[1] *Bennett* v. *Chudleigh*, 2 Y. & C. C. C. 164; see, however, *Snowball* v. *Dixon*, 2 De G. & S. 9; and *Dew* v. *Clark*, 16 Jur. 1, L. C.

[2] *Rubery* v. *Morris*, 1 Mc N. & G. 413: 16 Sim. 312, 433: 12 Jur. 689. Unless otherwise directed, costs ordered to be paid to a party suing or defending *in forma pauperis*, are to be taxed, as *dives* costs, Ord. XL. 5, 1849.

[3] *Spencer* v. *Bryant*, 11 Ves. 49; see also Wyatt's P. R. 321.

[4] *Ante.*

[5] See Ord. May 1861—1849.

[6] *Whitworth* v. *Davis*, 1 Ves. & B. 545, 547; *De Golls* v. *Ward*, 3 P. Wms. 311, n; *Collins* v. *Shirley*, 1 R. & M. 638; Judgment of Lord Cottenham in *Rochfort* v. *Battersby*, 2 H. L. Ca. 408; and see *Davis* v. *Snell*, 28 Beav. 321.

performance of an agreement entered into by him previously to his bankruptcy, was allowed.[1]

It is said by Lord Redesdale that, although a bankrupt made a party to a bill touching his estate may demur to the relief, all his interest being transferred to his assignees, yet it has been generally understood, that if any discovery is sought of his acts before he became a bankrupt, he must answer to that part of the bill for the sake of the discovery, and to assist the plaintiff in obtaining proof, though his answer cannot be read against his assignee; otherwise, the bankruptcy might entirely defeat the ends of justice.[2] This opinion has given rise to much discussion, and is made the subject of an elaborate judgment by Sir Thomas Plumer, V. C., in the case of *Whitworth* v. *Davis*,[3] in the course of which he observes that "the case of *Fenton* v. *Hughes*[4] lays down a broad principle, *viz*: that a person who has no interest, and is a mere witness, against whom there could be no relief, ought not to be a party; a bankrupt stands in that situation: a competent witness, having no interest, against whom, therefore, no relief can be had at the hearing; he falls precisely within that general rule."[5] He, however, allowed the demurrer in the case before him, without determining the general question.

When the bankruptcy of a defendant does not appear on the face of the bill, or has occurred subsequently to the filing of the bill, but before the expiration of the time for putting in his answer, the defendant may take the objection by way of plea.[6] He may also plead the bankruptcy of a co-defendant, even where it took place after the filing of the bill.[7]

The decision of Sir Thomas Plumer, in *Whitworth* v. *Davis*, still leaves it doubtful whether a bankrupt can be made a party to a bill against his assignee for the mere purpose of discovery and injunction; but there is no doubt that if he is made a party for the purpose of obtaining relief against him, he may demur to the bill, and that in such case his demurrer will protect him from the discovery as well as the relief; where, however, fraud or collusion is charged between the bankrupt and his assignees, the bankrupt may be made a party, and he cannot demur, although relief be prayed against him. Thus, where a creditor, having obtained execution against the effects of his debtor,

[1] *Whitworth* v. *Davis*, 1 Ves. & B. 545; see also *Griffin* v. *Archer*, 2 Anst. 478; *Lloyd* v. *Lander* 5 Mad. 282, 288; *Collet* v. *Wollaston*, 3 Bro. C. C. 228.

[2] Ld. Red. 161.

[3] 1 Ves. & B. 545.

[4] 7 Ves. 287; see also *Le Texier* v. *Margravine of Anspach*, 15 Ves. 159, 166.

[5] 1 Ves. & B. 549, 550; see *Gilbert* v. *Lewis*, 1 De G. J. & S. 38: 2 J. & H. 452: 9 Jur. N. S. 187; Story Eq. Pl. s. 223, n.

[6] *Turner* v. *Robinson*, 1 S. & S. 3; *Lane* v. *Smith*, 14 Beav. 49; *Jones* v. *Binns*, 10 Jur. N. S. 119, 12 W. R. 329, M. R.

[7] *Sergrove* v. *Mayhew*, 2 M'N. & G. 97.

filed a bill against the debtor, against whom a commission of bankrupt had issued, and the persons claiming as assignees under the commission, charging that the commission was a contrivance to defeat the plaintiff's execution, and that the debtor having, by permission of the plaintiff, possessed part of the goods taken in execution for the purpose of sale, instead of paying the produce to the plaintiff had paid it to his assignees: a demurrer by the alleged bankrupt, because he had no interest, and might be examined as a witness, was overruled.[1] Upon the same principle, where a man had been fraudulently induced by the drawer to accept bills of exchange without consideration, and the drawer afterwards indorsed them to others; upon a bill filed against the holder and drawer of the bills of exchange, for a delivery up of the bills, and an injunction, the drawer pleaded his bankruptcy, which took place after the bill filed, in bar to the bill; but Sir Lancelot Shadwell, V. C., overruled the plea.[2]

Where a defendant becomes bankrupt after the commencement of the suit, the bankruptcy is no abatement, and the plaintiff has his choice, either to dismiss the bill and go in under the bankruptcy, or to go on with the suit, making the assignees parties.[3] It seems that in *Knox* v. *Brown*,[4] Lord Thurlow permitted the plaintiff to dismiss his own bill without costs, because it was by the act of the defendant himself that the object of the suit was gone. In a subsequent case, however, of *Rutherford* v. *Miller*,[5] the Court of Exchequer refused to make such an order without costs; and in *Monteith* v. *Taylor*,[6] where a motion was made on behalf of the defendant, who had become bankrupt, to dismiss the plaintiff's bill with costs, for want of prosecution, Lord Eldon, although he at first entertained a doubt whether he could make such an order with costs, afterwards expressed an opinion against the plaintiff upon that point, upon which the plaintiff submitted to give the usual undertaking to speed the cause; and in the case of *Blackmore* v. *Smith*,[7] Lord Cottenham, after referring to the order made in the last mentioned case, in the Registrars' book, held, that if the bill were dismissed it must be with costs.

It appears from the two cases last referred to, that a defendant may, notwithstanding he has become bankrupt, move to dismiss the plaintiff's

[1] *King* v. *Martin*, 2 Ves. J. 641, cited Ld. Red. 162; but see *Gilbert* v. *Lewis*, 1 De G. J. & S. 38: 2 J. & H. 452: 9 Jur. N. S. 187. By Con. G. O. No. 85, no bill is to be filed for discovery merely except in certain cases.

[2] *Mackworth* v. *Marshall*, 3 Sim, 368.

[3] *Monteith* v. *Taylor*, 9 Ves. 615.

[4] 2 Bro. C. C. 186.

[5] 2 Anst. 458.

[6] 9 Ves. 615.

[7] 1 M'N. & G. 80.

bill for want of prosecution; and it is the practice, on such a motion, to dismiss the bill with costs.[1]

After what has been said, it is scarcely necessary to observe that where a party who is a defendant to a suit becomes bankrupt, it will be necessary for the plaintiff, if he proceeds with the suit, to bring the assignees before the Court by order of revivor;[2] and it has been decided, that where the assignee of a bankrupt has been already before the Court as a defendant, and such assignee die or is removed, and a new assignee is appointed in his stead, the suit abates; and an order to carry on the proceedings against such new assignee must be obtained in like manner as against the original assignee.[3]

Where a bill had been filed against a defendant who afterwards became bankrupt, and a supplemental bill was in consequence filed against his assignees, the evidence taken in the original cause previously to the bankruptcy was allowed to be read at the hearing against the assignees; but where it appeared that some of the witnesses in the cause had been examined after the commission issued, and before the supplemental cause was at issue, an objection to reading their depositions was allowed; but the objection was over-ruled in so far as it extended to the witnesses who had been previously examined.[4]

It has been held that, on the death of the assignee of an insolvent's estate, where no new assignee has been appointed, a party having a demand against the insolvent, but not having proved under the insolvency, may sue the executors of the deceased assignee.[5]

It may here be observed that, after some difference of opinion upon the subject, it has been determined that in foreclosure suits, where assignees are made parties as defendants, in respect of the equity of redemption, they are not entitled to their costs from the plaintiff, even though they may have received no assets of the bankrupt wherewith to pay them.[6]

[1] *Blackmore* v. *Smith*, *ubi sup.*; see also *Robson* v. *Earl of Devon*, 3 Sm. & G. 227; *Levi* v. *Heritage*, 26 Beav. 560, which were cases of insolvent debtors; over-ruling *Blanshard* v. *Drew*, 10 Sim. 240. See, however, *Kemball* v. *Walduck*, 1 Sm. & G. App. 27: 18 Jur. 69.

[2] Con. G. O. No. 337; *Lash* v. *Miller*, 4 De G. M. & G. 841: 1 Jur. N. S. 457. After the assignees have been made parties, the bankrupt appears to be treated as out of the suit; see *Robertson* v. *Southgate*, 5 Hare, 223; *Stahlschmidt* v. *Lett*, *ib.* 595; and see Seton, 1166.

[3] *Gordon* v. *Jesson*, 16 Beav. 440. See *Gordon* v. *Jesson*, *ubi sup.*; and see *Bainbrigge* v. *Blair*, Younge, 386; *Mendham* v. *Robinson*, 1 M. & K. 217; *Man* v. *Ricketts*, 7 Beav. 484: 1 Phil. 617.

[4] *Hitchens* v. *Congreve*, 4 Sim. 420.

[5] *Fulcher* v. *Howell*, 11 Sim. 100; and see *ante*.

[6] *Appleby* v. *Duke*, 1 Phil. 272; *Clarke* v. *Wilmot*, *ib.* 276; *Ford* v. *White*, 16 Beav. 120, and cases there cited; and see *Ford* v. *Chesterfield*, 16 Beav. 516.

Section VIII.—*Infants.*

Infants as well as adults may, as we have seen,[1] be made defendants to suits in Equity; and, in such cases, it is not necessary that any other person should be joined with them in the bill; nor is it usual for the plaintiff to describe them as infants in his bill, unless any question in the suit turns upon the fact of their infancy.

Although it is not necessary that, in bringing a bill against infants, the plaintiff, as in the case of married women, should join any other person with them, yet they are not permitted, on account of their supposed want of capacity, to defend themselves; and therefore, where a defendant to a suit, or the respondent to a petition,[2] is an infant, the Court will appoint a proper person, who ought not to be a mere volunteer,[3] to put in his defence for him, and generally to act on his behalf in the conduct and management of the case.[4] The person so appointed is called "the guardian of the infant," and is generally styled "the guardian *ad litem*," to distinguish him from the guardian of the person or of the estate.

Formerly, it was usual, upon the appointment of a guardian *ad litem*, for the infant to appear personally in Court.[5] This is no longer necessary;[6] but where the infant himself desires the appointment, the order is obtained by proceeding under one of the late General Orders,[7] which provides that "A person desirous of appointing a guardian for him to defend a suit, may go before a Judge or Master with the proposed guardian, if he thinks fit to do so. But he must satisfy the Judge or Master, by affidavit, that the proposed guardian is a fit person, and has no interest adverse to that of the person of whom he is to be the guardian in the matter in question; and if the affidavit is not sufficient for this purpose, the Judge or Master may examine the proposed guardian, or the person making the affidavit, *viva voce*, or require further evidence to be adduced until he is satisfied of the propriety of the appointment." Where the infant is a respondent to a petition, the application must be supported by an affidavit that the petition has been served on the infant.[8] A co-defendant may be appointed, if he has no

[1] *Ante.*

[2] *Re Barrington*, 27 Beav. 272; *Re Ward*, 2 Giff. 122: 6 Jur. N. S. 441; *Re Duke of Cleveland's Harte Estates*, 1 Dr. & Sm. 46.

[3] *Foster* v. *Cautley*, 10 Hare, App. 24: 17 Jur. 370.

[4] A decree against an adult defendant, as if an infant, was held not to bind him, *Snow* v. *Hole*, 15 Sim. 161; *Green* v. *Badley*, 7 Beav. 271.

[5] *Crabbe* v. *Mowbery*, 5 De G. & S. 347; *Benison* v. *Wortley*, *ib.* 648.

[6] See *Drant* v. *Vause*, 2 Y. & C. C. C. 524: 7 Jur. 637, L. C.; *Egremont* v. *Egremont*, 2 De G. M. & G. 730: 17 Jur. 55; *Foster* v. *Cautley*, 10 Hare, App. 24: 17 Jur. 370; *Storr* v. *Pannell*, 1 W. R. 209, V. C. S.

[7] Con. G. O. No. 526.

[8] *Re Willan*, 9 W. R. 689, n.

adverse interest;[1] but the plaintiff, a married woman, or a person out of the jurisdiction,[2] cannot be appointed.

If no application for the appointment of a guardian is made on behalf of the infant, the plaintiff may obtain the appointment of one. One of our orders[3] provides that "In case it shall appear to the Court that any defendant upon whom an office copy of a bill has been served is an infant, or a person of weak or unsound mind not so found by inquisition, unable of himself to defend the suit, the Court, upon the application of the plaintiff, at any time after bill filed, may order that one of the Solicitors of the Court be assigned guardian of such defendant, by whom he may answer the bill and defend the suit." It has been seen[4] that by Order 36 of the Con. G. Orders, this appointment may be made by a Local Master. When the infant is a married woman, a guardian must be appointed; though it appears to be the practice to appoint her husband to be her guardian, where he is a defendant with her, and they intend to defend jointly.[5] It is no bar to the appointment of a guardian *ad litem* to an infant defendant, in an administration suit commenced by notice of motion, that the application for a guardian is made before the return of the notice of motion for administration.[6] But the infant should be served with the bill before the return of the notice of application for the appointment of guardian.[7] By another order[8] it is directed that "Notice of the application must be served upon, or left at the dwelling house of the person with whom, or under whose care the defendant resides, at least one week before the hearing of the application; and where the defendant is an infant, not residing with or under the care of his father or guardian, notice of the application must also be served upon, or left at the dwelling house of the father or guardian, unless the Court at the time of hearing the application thinks fit to dispense with such service." The notice should be served on, or left at the dwelling house of the person under whose care the defendant is;[9] and where it appeared that the mother and father of an infant defendant were living apart, and that the infant had absconded, and could not be found to be served with notice of the application for the appointment of a guardian, the notice was directed to be served at the residence of the mother, that being the last place of residence of the infant; service on

[1] See *Bonfield* v. *Grant*, 11 W. R. 275, M. R.; *Newman* v. *Selfe*, *ib.* 764, M. R; *Anon*, 9 Hare, App. 27.
[2] *Anon*, 18 Jur. 770, V. C. W.
[3] Con. G. O. No. 519.
[4] *Ante*.
[5] *Colman* v. *Northcote*, 2 Hare. 147.
[6] *Barry* v. *Brazil*, 1 Cham. R. 237.
[7] *Robinson* v. *Dobson*, *Ibid.* 257.
[8] Con. G. O. No. 520.
[9] *Taylor* v. *Ausley*, 9 Jur. 1055; *Christie* v. *Cameron*, 2 Jur. N. S. 635, and see *Bowman* v. *Beckett*, 2 Grant. 556.

the father being dispensed with.[1] Where the plaintiff was unable to discover where the parents lived, service was deemed sufficient on the head of a College, of which the infant was an undergraduate.[2] Upon an application to appoint a guardian *ad litem* to an infant, who was a resident pupil at Upper Canada College, Toronto, it appeared that notice of the application had been served upon the principal of the College, it was *held* that this was service upon "a person with whom, or under whose care" the infant was residing.[3] Where the infant's father was dead, service of the notice at the house of the infant's mother and stepfather was held sufficient.[4] Though the rule applies to infants residing abroad;[5] yet, where an infant defendant, having no substantial interest in the suit was abroad, service of notice of the application was dispensed with.[6] Where an absent defendant is an infant, the Court has like powers as to granting an order for service by publication as in case of an adult; but, *semble*, the notice published should not state that in default of answer, the bill will be taken *pro confesso*. The Court will also in exercise of the discretion given to it by 28 Vic. C. 17, Sec. 12, call upon such defendant by the same order to show cause why a Solicitor of the Court should not be appointed his guardian *ad litem*.[7] Where a guardian *ad litem* dies, a new one may be appointed without notice.[8] And where a guardian *ad litem* of infant defendants leaves the Province another will be appointed on the *ex parte* application of the plaintiff.[9] Notice of the application for the appointment of a guardian *ad litem* to an infant defendant of the age of fourteen years or upwards, is to be served upon such infant personally, unless the Court otherwise directs, and is also to be served as directed by order 520.[10]

In England, the Solicitor to the Suitors' Fee Fund is the person usually appointed.[11] The Court usually provides for the payment of the costs of the Guardian *ad litem*, by directing the plaintiff to pay them and add them to his own;[12] but where there is property of the infant's with which the Court can deal, it will, it seems, direct the costs to be paid out of it.[13] The Court will not, even at the request of the infant defendants, in an amicable suit, appoint the plaintiffs' Solicitor their

[1] *Biggar* v. *Beatty*, 1 Cham. R. 236.
[2] *Christie* v. *Cameron*, *Ubi. Sup.*
[3] *Whitemarsh* v. *Ford*, 1 Cham. Rep, 357.
[4] *Hitch* v. *Wells*, 8 Beav. 576.
[5] *O'Brien* v. *Maitland*, 10 W. R. 275; *Anderson* v. *Stather*, 10 Jur. 383.
[6] *Lambert* v. *Turner*, 10 W. R. 335; *Turner* v. *Sowden*, 2 Dr. & Sma. 265; and see *Chaffers* v. *Baker*, 5 D. M. & G. 482; *Lingren* v. *Lindren*, 7 Beav. 66.
[7] *Duffy* v. *O'Connor*, 1 Cham. R. 393.
[8] *Harper* v. *Harper*, 1 Cham. R. 217.
[9] *Weldon* v. *Templeton*, 1 Cham. R. 360.
[10] Con. G. O. No. 520.
[11] *Thomas* v. *Thomas*, 7 Beav. 47; *Sheppard* v. *Harris*, 10 Jur. 24.
[12] *Harris* v. *Hamlyn*, 3 De G. & S. 470; *Fraser* v. *Thompson*, 1 Giff. 337: 4 De G. & J. 659.
[13] *Robinson* v. *Aston*, 9 Jur. 224.

Guardian;[1] and where a father and his infant children are co-defendants, if it appears that the interest of the father conflicts with that of the children, the Court will not appoint the Solicitor defending for the father, Guardian *ad litem* to the infants.[2] It has become the practice in Toronto, as a general rule, to give these appointments to some one Solicitor; but the Court is in no way bound to this: and in the outer counties the Masters give them to such Solicitors as they may think fitting persons under the practice of the Court.

It may here be noticed that Order 314 provides that "Where a Guardian *ad litem* is appointed on the application of the plaintiff, to an infant, or to a person of unsound mind, not so found by inquisition, no costs are to be taxed to the Guardian; but in lieu thereof the plaintiff is to pay to the Guardian a fee of fifteen dollars, and his actual disbursements out of pocket: and the plaintiff in case he is allowed the costs of the suit, is to add to his own bill of costs the amount he so pays. But the Court may, in special cases, direct the allowance of taxed costs to a Guardian *ad litem*." The same rule as to the costs of a Solicitor appointed by the Court Guardian *ad litem* to infant defendants in suits for specific performance, seems applicable as in mortgage cases; but where the purchase money has not been paid, the Court will direct the payment of the Guardian's costs from it.[3]

The duty of the guardian is to put in the proper defence for the infant; and it seems that he is responsible for the propriety and conduct of such defence; and if he puts in an answer which is scandalous or impertinent, he is liable for the costs of it. 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.[4]

Where the guardian for infant defendants, being notified, did not appear at the hearing, and their interests, which were not fully ascertained, were not represented, the Court refused to pronounce a decree in their absence—removed the guardian—deprived him of his costs—appointed another in his stead, and directed the cause to be again brought on.[5] The guardian *ad litem* to an infant has no authority, after the object of the suit has been accomplished, to act for the infant in investing any funds for the infant.[6]

If the guardian of an infant defendant, or the next friend of an infant plaintiff, does not do his duty, or other sufficient ground be made out,

[1] *James* v. *Robertson*, 1 Cham. R. 197.
[2] *Aikins* v. *Blain*, 1 Cham. R. 249.
[3] *Commander* v, *Gilrie*, 6 Grant 473.
[4] Hinde, 241.
[5] *Sanborn* v. *Sanborn*, 11 Grant, 123.
[6] *Dix* v. *Jarman*, 1 Cham. R. 38.

the Court will remove him.[1] It was said by Sir John Leach, V. C.,[2] that infants are as much bound by the conduct of their solicitor as adults; thus, an issue *devisavit vel non* may, it seems, be waived on the part of the infant.[3] And so, although the Court usually will not, where infants are concerned, make a decree by consent, without an inquiry whether it is for their benefit, yet when once a decree has been pronounced without that previous step, it is considered as of the same authority as if such an inquiry had been directed, and a certificate thereupon made that it would be for their benefit. In the same manner, an order for maintenance, though usually made after an inquiry, if made without would be equally binding.[4]

The Court will in a proper case, set aside an appointment of guardian *ad litem*; thus, where a suit had been instituted by a creditor for the administration of the estate of a party deceased, and the agent of the solicitor for the plaintiff was appointed guardian *ad litem* to the infant defendants, after a sale of lands under the decree, at which the plaintiff, by leave of the Court, had bid off a portion of the lands, a motion was made to change the name of the purchaser. The Court upon looking into the papers refused the application, and directed that a new guardian should be appointed, who, unless the parties consented thereto, was to take measures to set the proceedings aside.[5] And an order appointing a guardian *ad litem* was set aside for irregularity, where it was shown that the notice of motion, for the appointment did not allow the infant six weeks to appear and show cause, as required by Order 6, of 10th January, 1863, (the infant as well as his father being resident in Montreal) but the guardian thus irregularly appointed, was allowed his costs up to decree.[6]

An infant defendant is as much bound by a decree in Equity as a person of full age; therefore, if there be an absolute decree made against a defendant who is under age, he will not be permitted to dispute it, unless upon the same grounds as an adult might have disputed it; such as fraud, collusion or error.

The general rule is clear that an infant plaintiff is equally with an adult, bound by proceedings in a suit instituted by him.[7]

To impeach a decree on the ground of fraud or collusion, the infant may proceed by original bill. He may also impeach a decree, on the

[1] *Russel* v. *Sharpe*, 1 J. & W. 482.

[2] *Tillotson* v. *Hargrave*, 3 Mad. 494; see *Morrison* v. *Morrison*, 4 M. & C. 216, 226.

[3] *Levy* v. *Levy*, 3 Mad. 245.

[4] *Wall* v. *Bushby*, 1 Bro. C. C. 484, 488; and see *Brook* v. *Mostyn*, 10 Jur. N. S. 554, M. R.; *ib.* 1114; 13 W. R. 115, L.JJ., as to compromises with the Court's sanction, where infants are interested.

[5] *Fletcher* v. *Bosworth*, 5 Grant. 448.

[6] *Hamilton* v. *Hamilton*, 2 Cham. R. 160.

[7] *M'Dougall* v. *Bell*, 10 Grant, 283.

ground of error, by original bill; and he is not obliged, for that purpose, to wait till he has attained twenty-one.[1]

Among the errors that have been allowed as sufficient grounds on which to impeach a decree against an infant, is the circumstance that, in a suit for the administration of assets against an infant heir, a sale of the real estate has been decreed before a sufficient account has been taken of the personal estate.[2] And so, if an account were to be directed against an infant in respect of his receipts and payments during his minority, such a direction would be erroneous.[3] Another ground of error for which a decree against an infant may be impeached is, that it does not give the infant a day after his coming of age to show cause against it, in cases where he is entitled to such indulgence.[4]

Upon the re-hearing of a cause where the decree of foreclosure did not reserve a day to the infant, it was *held per Cur*, (*Blake C. dissenting*) that in decrees of foreclosure against infant defendants, a day to show cause, after attaining twenty-one, must be reserved to the defendants.[5]

But in a decree against an infant defendant as trustee of real estate, it is not necessary to reserve a day for the defendant to show cause after attaining twenty-one.[6] In a later case[7] it was held by the Chancellor, that when a decree had been made against the ancestor of infant defendants, in a suit revived against such infant defendants, that the decree having been made in the lifetime of the ancestor, it was not necessary to insert in the final order a day to the infants to show cause. The decree being binding on the ancestor must be so on the infants; and he observed that it was, he thought "originally intended to give the infants a day to show cause, where a conveyance was required from him, and this seems to have been extended to foreclosures of his mere equity."

Besides the cases in which a conveyance was required from an infant, there was one case in which the decree was not made absolute against him until he had attained twenty-one, namely, the case of a legal foreclosure;[8] and it appears that, in this case, it is still necessary to insert in the decree a clause allowing the infant six months after he comes of age, to show cause against the decree.[9] It is to be observed, however, that in cases of foreclosure, the only cause which can be shown by the

[1] *Richmond* v. *Tayleur*, 1 P. Wms. 737; *Brook* v. *Mostyn*, *ubi sup.*

[2] *Bennett* v. *Hamill*, 2 Sch. & Lef. 566.

[3] *Hindmarsh* v. *Southgate*, 3 Russ. 324, 327; see *Stolt* v. *Meanock*, 10 W. R. 605, bis, L.JJ.

[4] *Bennett* v. *Hamill*, *ubi sup.*

[5] *Mair* v. *Kerr*, 2 Grant, 223; affirmed on appeal, 26th February, 1852.

[6] *Lake* v. *M'Intosh*, 7 Grant, 532.

[7] *Sutherland* v. *Dickson*, 2 Cham. R. 25.

[8] *Booth* v. *Rich*, 1 Vern. 295; *Williamson* v. *Gordon*, 19 Ves. 114; *Anon.* Mos. 66; *Bennett* v. *Edwards*, 2 Vern. 392; *Price* v. *Carver*, 3 M. & C. 161.

[9] *Newbury* v. *Marten*, 15 Jur. 166, V. C. Ld. C.; *Yates* v. *Crewe*, Seton, 635; and see *Ibid.* 689; but see Fisher on Mortgages, 631.

defendant is error in the decree; and it has been held, that he may not unravel the account, nor is he so much as entitled to redeem the mortgage by paying what is due.[1]

The clause, giving the infant a day to show cause against a decree of foreclosure after attaining twenty-one, must be inserted in the order for making the decree absolute, as well as in the original decree; and in *Williamson* v. *Gordon*,[2] an order was made, upon motion, for varying a decree, in which the clause had been omitted, by directing its insertion.

It was said by the Court in *Booth* v. *Rich*,[3] that where there is an infant defendant to a bill of foreclosure, the proper way is to decree the lands to be sold to pay the debt, and that such a sale would bind the infant; but in *Goodier* v. *Ashton*,[4] Sir William Grant, M. R., said, that the modern practice was to foreclose infants, and refused to refer it to the Master to inquire whether a sale would be for the benefit of the infant. In a subsequent case, however, Lord Eldon said,[5] it would be too much to let an infant be foreclosed when, if the mortagee would consent to a sale, a surplus might be got of perhaps £4000, considered as real estate for the benefit of the infant. His Lordship accordingly made a decree, by which it was referred to the Master, to inquire and report whether it would be for the benefit of the infant that the estate should be sold. In that case, the reference was to be made only in case the mortgagee consented; and the same appears to have been the order in *Pace* v. *Marsden*;[6] but in *Wakeham* v. *Lome*, and *Hamond* v. *Bradley*,[7] like decrees appear to have been made, without its being stated that they were made by consent, or even that a sale was prayed. It is to be observed also, that in those cases, as well as in *Pace* v. *Marsden*, the decree was made for a sale, without a previous reference to inquire whether it would be for the benefit of the infant. In *Pace* v. *Marsden*, however, it seems that a sale was prayed by the bill. In *Price* v. *Carver*,[8] Lord Cottenham seems to have suggested, that a decree for sale was the proper course, as against an infant defendant; and in the event of such a decree, it would appear that no day to show cause is given.[9] Now, however, in all foreclosure suits, the Court is empowered, if it thinks fit, to direct a sale, instead of a foreclosure; and where it

[1] *Mallack* v. *Galton*, 3 P. Wms. 352; *Lyne* v. *Willis*, *ib.* n. [B]; *Bishop of Winchester* v. *Beavor*, 3 Ves. 314, 317. This, however, must not be understood as applying to cases where the decree has been obtained by fraud, or where the infant claims by a title paramount to the mortgage.

[2] 19 Ves. 114.

[3] 1 Vern. 295.

[4] 18 Ves. 84.

[5] *Mondey* v. *Mondey*, 1 Ves. & B. 223.

[6] Seton, 275, 1st ed.

[7] *Ibid.*

[8] 3 M. & C. 157, 161.

[9] *Scholefield* v. *Heafield*, 7 Sim. 669; 8 Sim. 470; *Davis* v. *Dowding*, 2 Keen, 245.

is for the benefit of the infant, it is the practice to do so.[1] Where the value of the mortgaged property was clearly less than the amount due to the mortgagee, the Court, at the hearing, made an absolute decree for foreclosure against an infant defendant, upon the plaintiff's paying the infant's costs.[2]

Mere irregularities and errors in the proceedings of the Court will not invalidate a sale, or prevent a good title from being made under a decree;[3] it seems, however, that if there is a material error in substance, as well as in words and form, a purchaser may object to the title, and the Court will discharge him from his contract. Thus, in the case of *Calvert* v. *Godfrey*,[4] where a sale of an infant's estate was ordered, merely because it was beneficial to the infant, and without there being any person who had a right to call upon the Court to sell the estate for the satisfaction of a claim or debt, Lord Langdale, M. R., considering that such an order was not within the jurisdiction of the Court, allowed an objection to the title, made in consequence of the irregularity of the decree.

Where an answer is put in on behalf of an infant, it is put in upon the oath of the person appointed his guardian;[5] but the infant is not bound by such answer, and it cannot be read against him: the true reason of which is, because in reality it is not the answer of the infant, but of the guardian, who is the person sworn, and not the infant; and 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.[6] This being the case, it would be useless, and occasion unnecessary expense, to call upon an infant to put in a full answer to the plaintiff's bill;[7] and it is, therefore, held, that exceptions will not lie to the answer of an infant, for insufficiency.[8]

It is not now the practice to require any answer from an infant. Formerly, when an answer from every defendant was necessary, an infant's answer was generally confined to a mere submission of his rights and interests in the matters in question in the cause to the care and protection of the Court; the infant might, however, state in his answer anything which he meant to prove by the way of defence;[9] and he may now file a voluntary answer for this purpose, whenever it is for

[1] *Mears* v. *Best*, 10 Hare, App. 51; *Siffkin* v. *Davis*, Kay, App. 21.
[2] *Croxon* v. *Lever*, 10 Jur. N. S. 87: 12 W. R. 237, M. R., following *Billson* v. *Scott*, Seton, 686, V. C. W.
[3] *Calvert* v. *Godfrey*, 6 Beav. 97, 107; *Baker* v. *Sowter*, 10 Beav. 343, 348.
[4] 6 Beav. 97, 109. Now, however, the Court has statutory power to sell infants' settled estates.
[5] Ld. Red. 314.
[6] *Wrottesley* v. *Bendish*, 3 P. Wms. 236.
[7] *Strudwick* v. *Pargiter*, Bunb. 338.
[8] *Copeland* v. *Wheeler*, 4 Bro. C. C. 256; *Lucas* v. *Lucas*, 13 Ves. 274; Ld. Red. 315.
[9] Per Richards, C. B., in *Attorney-General* v. *Lambirth*, 5 Pri. 398.

his benefit so to do, as in many cases it may be;[1] but whatever admissions there may be in the answer, or whatever points may be tendered thereby in issue, it appears that the plaintiff is not in any degree exonerated from his duty in proving, as against the infant, the whole case upon which he relies.[2]

When an answer has been put in by a guardian on behalf of an infant defendant, and the infant comes of age, and is dissatisfied with the defence put in by his guardian, he may apply to the Court for leave to amend his answer, or to put in a new one; and it seems that this privilege applies as well after a decree has been made as before.[3]

An infant, however, wishing to make a new defence, must apply to the Court as early as possible after attaining twenty-one; for if he is guilty of any laches, his application will be refused.[4]

The same reasons which prevent an infant from being bound by his answer, operate to prevent his being bound by admissions in any other stage of proceeding, unless indeed such admissions are for his benefit. Thus, it was held that, where an infant is concerned, no case could be stated by the Court of Chancery for the opinion of a Court of Law: because an infant would not be bound by the admissions in such case.[5] Upon the same principle it has been held, that an infant is not bound by a recital in a deed executed during infancy.[6]

The consequence of this rule is, that where there are infant defendants, and it is necessary, in order to entitle the plaintiff to the relief he prays, that certain facts should be before the Court, such facts, although they might be the subject of admission on the part of adults, must be proved against the infants.[7] For the same reason, where a will relating to real estate is to be established in Chancery, and the heir at law is an infant, it is always necessary to establish the due execution of the will by the examination of witnesses.

From the report of the cases of *Cartwright* v. *Cartwright*, and *Sleeman* v. *Sleeman*, in Mr. Dickens' Reports,[8] it seems to have been held, that where the heir at law in an original suit, being adult, had by his answer

[1] *Lane* v. *Hardwicke*, 9 Beav. 148.

[2] *Holden* v. *Hearn*, 1 Beav. 445, 455: 3 Jur. 428.

[3] *Kelsall* v. *Kelsall*, 2 M. & K. 409, 416; *Snow* v. *Hole*, 15 Sim. 161: 10 Jur. 347; *Codrington* v. *Johnstone*, cited 1 Smith Pr. 675; Seton, 685.

[4] *Bennett* v. *Leigh*, 1 Dick. 89. In the case of *Bennell* v. *Lee*, 2 Atk. 487, and 529, referred to in the margin of 1 Dick. 89 as S. C., the application was made during the infancy, see *post*, and see *Cecil* v. *Lord Salisbury*, 2 Vern. 224; *Morris* v. *Morris*, 11 Jur. 260, V.C.K.B. *Monypenny* v. *Dering*, 4 De G. & J. 175: 5 Jur. N. S. 661.

[5] *Hawkins* v. *Luscombe*, 2 Swanst. 392; but it was done in *Walsh* v. *Trevannion*, 16 Sim. 178: 12 Jur. 547.

[6] *Milner* v. *Lord Harewood*, 18 Ves. 274.

[7] *Wilkinson* v. *Beal*, 4 Mad. 408; see also, *Quanlock* v. *Bullen*, 5 Mad. 81, where the Court refused to allow evidence, taken before the infants were made parties, to be read against them; but see *Baillie* v. *Jackson*, 10 Sim. 167, as to accounts; and see *Jebb* v. *Tugwell*, 20 Beav. 461.

[8] 2 Dick. 545, 787.

admitted the due execution of the will, but died before the cause was brought to a hearing, leaving an infant heir, who was brought before the Court by revivor, the will must be proved *per testes* against the infant heir. But in *Livesey* v. *Livesey*,[1] Sir John Leach, M. R., held, that the circumstance of the first heir having admitted the will, rendered it unnecessary to prove it against the infant; and in a subsequent case,[2] Sir Lancelot Shadwell, V. C., expressed himself to be of the same opinion as the Master of the Rolls, and said that he had referred to the entries of the cases of *Sleeman* v. *Sleeman*, and *Cartwright* v. *Cartwright*, in the Registrars' book; and that with respect to the former, no such thing as is mentioned by the reporter appears to have taken place, but the original heir having admitted the will, the Court established it; and with respect to the latter, all that was stated was, that on hearing the will and proofs read (not saying what proofs), the Court declared that the will ought to be established.[3]

By the English practice, where an infant has a day given him by the decree, to show cause against it, the process served upon him at his coming of age is a writ of *subpœna;* but by our Orders[4] it is provided that "Where, by an order, a day is reserved for an infant defendant to show cause, it shall not be necessary to issue a *subpœna* to show cause against the order, but the plaintiff is to serve the defendant after he attains twenty-one years of age, with an office copy of the order, endorsed with a notice in the form set forth in Schedule W." If after this service the party does not appear within the time limited, the decree will be made absolute, upon an *ex parte* motion, supported by an affidavit of service of the order and notice, and evidence that the infant is of age.[5]

It is said above,[6] that in cases of foreclosure, the only cause which can be shown by an infant after attaining twenty-one, against making the decree absolute, is error in the decree, and that he will not be permitted to unravel the account, nor even to redeem the mortgage on paying what is due. This strictness, however, must not be understood as applying to cases in which fraud or collusion have been made use of in obtaining the decree.[7] Neither, it is apprehended, will the above rule apply to cases where the title claimed by the infant is paramount the mortgage. Thus, in a case where an estate had been conveyed to the great-uncle and grandfather of the infant, as joint-tenants in fee, and

[1] Cited 4 Sim. 132.

[2] *Lock* v. *Foote*, 4 Sim. 132.

[3] See also *Robinson* v. *Cooper*, 4 Sim. 131. Such a statement by an ancestor plaintiff, in a bill, is an admission binding on his infant heir: *Hollings* v. *Kirkby*, 15 Sim. 183.

[4] Con. G. O. No. 536.

[5] For Form of Order, absolute, see Seton 685, 689.

[6] *Ante.*

[7] *Loyd* v. *Mansel*, 2 P. Wms. 73.

upon the death of the great-uncle, the grandfather, being the survivor, had mortgaged the estate, and died, leaving the infant his heir at law: upon a bill filed by the mortgagee against the infant to foreclose, the infant stated in his answer that the estate had been purchased and paid for by his great-uncle, who devised the same to his grandfather for life, with remainder to his heirs in tail, and so claimed the estate as heir in tail by a title paramount the mortgage; but the Court decreed an account, and that the defendant should redeem or be foreclosed, unless he showed cause within six months after he came of age, on the ground that the grandfather being by the deed joint-tenant in fee with his brother, whom he survived, must have appeared to the mortgagee to have a good title. The infant, however, when he came of age, upon being served with a *subpœna* to show cause, moved for leave to amend his defence, by putting in a new answer, and swore that he believed he could prove that the mortgagee had notice of the trust for his great-uncle at the time he lent the money, which was a point not insisted upon in his former answer; and the Court made the order.[1] The reason of this distinction between the case of a claim by the infant paramount the mortgage, and that of a claim subject to the mortgage, is obvious; for in the latter case, it will be presumed that the Court would not have made the decree had it not been satisfied that the mortgage was properly executed, and, therefore, it would not be reasonable to allow a party, claiming subject to that deed, to disturb the title which the mortgagee had acquired under it; but in the former case, the mortgage may have been properly executed, and the account taken under it may have been perfectly correct, and yet the mortgagor may not have had a title to make the mortgage: in which case, it would not be just to preclude the infant from an opportunity of establishing a case which, from the circumstance of its not having been insisted upon in the infant's answer, was not properly submitted to the decision of the Court at the time the decree was pronounced.

In ordinary cases, where an infant has a day given him to show cause against making a decree absolute, he may either impeach the decree on the ground of fraud or collusion between the plaintiff and his guardian, or he may show error in the decree. He may also show that he had grounds of defence which were not before the Court, or were not insisted upon at the hearing, or that new matter has subsequently been discovered, upon which the decree may be shown to be wrong.

If the late infant seeks to controvert the decree on the ground of fraud or collusion, he is not bound to proceed by way of rehearing, but he may impeach the former decree by an original bill, in which it will be enough for him to say, that the decree was obtained by fraud or collusion:

[1] *Anon.* Mos. 66.

he may in like manner impeach the decree by original bill, even though his ground of complaint against it is confined to error.[1] In such cases, it is not necessary for the infant to wait till he comes of age before he seeks redress, but application for that purpose may be made at any time.[2]

If the late infant seeks to impeach the decree, by showing that he had grounds of defence which were either not before the Court, or not insisted upon at the original hearing, he might under the old practice, apply to the Court, either by motion or petition, for leave to put in a new answer; and it seems that such application might be made *ex parte*, and was a matter of course;[3] but under the present practice (unless an answer has been put in, or it is thought desirable to put one in, on behalf of the infant), it is conceived the form of the motion or petition will be, for leave to make a new defence.

Although it was a matter of course, that an infant defendant to a suit, who had had a day given him to show cause against the decree after attaining twenty-one, might have leave to put in a new answer, yet, if he was plaintiff in a cross bill, and that suit or any part of it had been dismissed, he was not allowed to amend his cross bill, or to file a new one for the same matter.[4] He might, however, file a bill of discovery in aid of the case intended to be made by his answer; and it seems that if he did so, the time of six months allowed by the course of the Court for a defendant to show cause why a decree should not be made absolute after he comes of age, was not so sacred but that in particular cases, and where the matter was of consequence, the Court might enlarge it; and, therefore, in the case of *Trefusis* v. *Cotton*,[5] where a defendant, on attaining twenty-one, and being served with a *subpœna* to show cause against a decree, filed a bill against the plaintiffs in the original suit for discovery, and applied to the Court to have the time for showing cause enlarged till the defendants to the bill of discovery had put in their answer, Lord King made an order, enlarging the time for three months after the six months were expired; and on that time being out, and the defendants not having put in a full answer, the time was twice enlarged upon motion *quousque*. It seems, however, from a subsequent notice of the same case,[6] that an infant, after he attains

[1] *Richmond* v. *Tayleur*, 1 P. Wms. 737; *Carew* v. *Johnston*, 2 Sch. & Lef. 292; *Brook* v. *Mostyn*, 10 Jur. N. S. 554. M. R.; *ib.* 1114; 13 W. R. 115, L.JJ. In the case of gross fraud or collusion used in obtaining a decree, the Court will entertain an original bill for the purpose of impeaching it, even though the party complaining was not an infant at the time of the decree pronounced; see *Loyd* v. *Mansel*, 2 P. Wms. 73; *Sheldon* v. *Fortescue*, 3 P. Wms. 111.

[2] *Richmond* v. *Tayleur*, 1 P. Wms. 737; *Carew* v. *Johnston*, 2 Sch. & Lef. 292.

[3] *Fountain* v. *Caine*, 1 P. Wms. 504; *Napier* v. *Lord Effingham*, 2 P. Wms. 401, Affd. 4 Bro. P. C. ed. Toml. 340; *Bennett* v. *Lee*, 2 Atk; 529, 531; *Kelsall* v. *Kelsall* 2 M. & K. 409, in which the cases are reviewed.

[4] *Sir J. Napier* v. *Lady Effingham Howard*, cited Mos. 67, 68.

[5] Mos. 203.

[6] Mos. 308.

twenty-one, cannot controvert the original decree by a new bill praying relief, unless for fraud or collusion, or for error;[1] and that if he does so, the original decree may be pleaded in bar to such new bill.

Although, where a day is given to an infant to show cause against a decree, he need not, as we have seen,[2] stay till that time before he seeks to impeach it on the ground of fraud, collusion, or error,[3] yet, if he proceeds on the ground that he is dissatisfied with the defence which has been made, and wishes to make a new defence, he must, in general, wait till he has attained twenty-one before he applies; because, if he should apply before, and there should be a decree against him upon the second hearing, he may with as much reason make similar applications, and so occasion infinite vexation. This was the opinion originally expressed by Lord Hardwicke, in the case of *Bennet* v. *Lee*;[4] though he afterwards held, in the same case, that as the facts upon which the infant wished to rest his new defence were of long standing, and the witnesses were consequently very old, and might die before he came of age, the infant might put in a better answer.[5] And so in *Savage* v. *Carrol*,[6] leave was given to the infant defendant, upon the same grounds, to put in an amended answer before attaining twenty-one; but it was subsequently held in the same case,[7] that where an infant, before attaining twenty-one obtains leave to put in a new answer, he will thenceforth be considered as plaintiff, and as such will be bound by the decree.

Where an infant defendant on coming of age, having obtained leave to put in a new answer, did so accordingly, he might show that fact for cause why the decree should not be made absolute, and the plaintiff was obliged to proceed upon the answer according to the rules of the Court in other cases.[8]

The consequence of an infant putting in a new answer was, that, if it was replied to, he might examine witnesses anew to prove his defence; which might be different from what it was before.[9]

[1] *Richmond* v. *Tayleur*, 1 P Wms. 737.
[2] *Ante*.
[3] *Richmond* v. *Tayleur*, 1 P. Wms. 737.
[4] 2 Atk. 487.
[5] *Ibid.* 532.
[6] 1 Ball. & B. 548.
[7] 2 Ball. & B. 244.
[8] *Cotton* v. *Trefusis*, Mos. 313.
[9] *Napier* v. *Lord Effingham*, 2 P. Wms. 401, 403; and see *Codrington* v. *Johnstone*, Seton, 685; *Kelsall* v. *Kelsall*, 2 M. & K. 409, 416.

SECTION IX.—*Idiots, Lunatics, and persons of weak mind.*

AN idiot or a lunatic may, as we have seen,[1] be made a defendant to a suit, but then, where he has been found of unsound mind by inquisition, he must defend by the committee of his estate, who, as well as the idiot or lunatic whose estate is under his care, is a necessary party to a suit respecting that estate.[2] No order is required in the suit to entitle the committee to defend; but the committee must obtain the sanction of the Court, before defending, in the same manner as before instituting a suit.[3]

Usually the lunatic and his committee make a joint defence to the suit; but if it happens that an idiot or a lunatic has no committee, or the committee is plaintiff, or has an adverse interest, an order should be obtained, on motion of course, supported by affidavit, appointing a guardian to defend the suit;[4] and it is the same where he is respondent to a petition.[5]

Where, after decree, the committee died, and a new one was appointed, an order was made, on motion, that in all subsequent proceedings the name of the new committee should be substituted for that of the former;[6] where no decree had been made, such an order was refused.[7] Lunatics not so found by inquisition,[8] and persons of weak intellect, or who are by age or infirmity reduced to a second infancy,[9] must defend by guardian: who will be appointed on an application by motion, in the name of the person of unsound mind; and it is the same in the case of a petition, where no suit has been instituted.[10] The application must be supported by affidavits proving the mental incapacity of the defendant,[11] the fitness of the proposed guardian, and that he has no adverse interest.[12] A co-defendant may be appointed, if he has no adverse interest;[13] but not the plaintiff, nor a married woman, nor a person resident out of the jurisdiction.[14]

If the guardian dies, it appears that similar evidence of mental incapacity is necessary, in support of the application for the appointment

[1] *Ante.*
[2] Ld. Red. 30, 104
[3] *Ante.*
[4] Ld. Red. 104; *Snell* v. *Hyat*, 1 Dick, 287; *Lady Hartland* v. *Atcherley*, 7 Beav. 53; *Worth* v. *McKenzie*, 3 M 'N. & G. 363; *Snook* v. *Watts*, Seton, 1251. For form of order, see Seton, 1251.
[5] See *Re Greaves*, 2 W. R. 355: 2 Eq. Rep. 516, L. C. & L. J. J.
[6] *Lyon* v. *Mercer*, 1 S. & S. 356; *Bryan* v. *Twigg*, 3 Eq. Rep. 62: 3 W. R. 42, V. C. K.
[7] *Rudd* v. *Speare*, 3 De G. & S. 374.
[8] Ld. Red. 104; and see *Bonfield* v. *Grant*, 11 W. R. 275, M. R.
[9] Ld. Red. 103; and see *Newman* v. *Selfe*, 11 W. R. 764, M. R.; but see *Steel* v. *Cobb*, *ib* 298, M. R.
[10] *Re Greaves*, 2 W. R. 355: 2 Eq. Rep. 516, L. C. & L. JJ.
[11] *Simmons* v. *Bates*, 20 L. T. 272.
[12] *Piddocke* v. *Smith*, 9 Hare, 395; 11 Jur. 1120; and see *Foster* v. *Cautley*, 10 Hare. App. 24: 17 Jur. 370.
[13] *Bonfield* v. *Grant*, 11 W. R. 275, M. R.; *Newman* v. *Selfe*, *ib* 764, M. R.
[14] *Lady Hartland* v. *Atcherley*, 7 Beav. 53.

of a new guardian, to that required on the original application.[1] The death of the guardian, and fitness of the person proposed in his place, must also be proved. The application should be made by motion,[2] or by summons.

Where an application for the appointment of a guardian is to be made by or on behalf of a defendant of unsound mind, or weak intellect, the practice is the same as on the appointment of a guardian *ad litem* to an infant, which has been already pointed out.

The order is made under the jurisdiction in Chancery, and not in Lunacy;[3] and if the fact of the infirmity is disputed, or the order has been irregularly obtained, the plaintiff may move, on notice to the defendant, to discharge the order; and if necessary, the Court will direct an inquiry whether the defendant is competent or not.[4]

The defendant, on his recovery, may apply by motion, on notice to the plaintiff and to the guardian, that the order assigning the guardian may be discharged.[5] Where he had delayed applying, he had to pay his guardian's costs, although the motion was granted, but had liberty to add them to his own costs in the suit.[6]

The answer of an idiot or lunatic is expressed to be made by his committee as his guardian, or by the person appointed his guardian by the Court to defend the suit.[7] It was held in the case of *Leving* v. *Caverly*,[8] that the answer of a superannuated defendant, put in by his guardian, may be read against him; but this proposition appears to have been doubted: and it is conceived that, should the point now arise, it would be decided otherwise.[9]

Where the infirmity is the result of bad health, the practice is to allow time to file the answer, and not to put it in by guardian.[10]

The committee or guardian of a person of unsound mind, whether so found by inquisition or not, before he consents to any departure from the ordinary course of taking evidence or other procedure in the suit, should first obtain the sanction of the Court or of the Judge in Chambers.

All orders appointing guardians should be left at the Record and Writ Clerks' Office for entry.[11]

[1] See *Needham* v. *Smith*, 6 Beav. 130.
[2] *Ibid.*
[3] *Pidcocke* v. *Boultbee*, 2 De G. M. & G. 898.
[4] *Lee* v. *Ryder*, 6 Mad. 294; Seton, 1251.
[5] See *Frampton* v. *Webb*, 11 W. R. 1018, V. C. W.
[6] *Ibid.*
[7] Ld. Red. 315.
[8] Prec. Ch. 229.
[9] *Micklethwaite* v. *Atkinson*, 1 Coll. 173; *Percival* v. *Caney*, 4. De G. & S. 610, somewhat fuller reported on this point, 14 Jur. 1062; S. C. *nom. Stanton* v. *Percival*, 3 W. R. 391: 24 L. J. Ch. 369; H. L.
[10] *Williams* v. *Hodge*, 1 M'N. & G. 516; and see *Patrick* v. *Andrews*, 22 L. J. Ch. 240, M. R.; *Steel* v. *Cobb*, 11 W. R. 298, M. R.; *Newman* v. *Selfe*, *id.* 764, M. R.
[11] Braithwaite's Pr. 47.

Section X.—*Married Women.*

It is a rule, both of Law and of Equity, that where a suit is instituted against a married woman, her husband must also be a party,[1] unless he is an exile, or has abjured the country,[2] in which cases, the wife is considered in all respects as a *feme sole*,[3] and may be made a defendant, without her husband being joined;[4] which, it seems, she also may, if her husband is an alien enemy.[5] It appears also, that in certain cases a husband may, in equity, make his wife a defendant;[6] thus, where she has before marriage entered into articles concerning her own estate, she is considered to have made herself a separate person from her husband, and in such a case, upon a motion by the husband to commit her for not answering interrogatories, she was ordered to anwer.[7] A husband, however, cannot make his wife a defendant, in order to have from her a discovery of his own estate.[8]

But although a wife cannot, except in the cases which have been pointed out, be made a defendant to a suit without her husband being joined as a co-defendant, yet there are cases in which, although the husband and wife are both named as defendants, the suit may be proceeded with against the wife separately. Thus, if the suit relates to the wife's separate property, and the husband be beyond seas, and not amenable to the process of the Court, the wife may be served with, and compelled to answer, the bill.[9] In *Dubois* v. *Hole*,[10] a bill was filed against a man and his wife for a demand out of the separate estate of the wife, and the husband being abroad, the wife was served with a *subpœna*, and, upon non-appearance, was arrested upon an attachment; and she having stood out all the usual process of contempt, the bill was taken *pro confesso* against her.[11] It is to be observed, that in order to entitle the plaintiff to compel the wife to answer separately, the husband must be actually out of the jurisdiction; and the mere circumstance

[1] *Holmes* v. *Penney*, 3 K. & J. 90: 3 Jur. N. S. 80; and notwithstanding he is a bankrupt, *Beales* v. *Spencer*, 2 Y. & C. C. C. 651: 8 Jur. 236.

[2] Ld. Red. 30, 105; or is transported under a criminal sentence, Story Eq. Pl. s. 71; Calvert on Parties, 414; Broom's Com. 584, and cases cited, *ib.* n. (*b.*)

[3] *Countess of Portland* v. *Prodgers*, 2 Vern. 104.

[4] 1 Inst. 132 b, 133 a.

[5] *Deerley* v. *Duchess of Mazarine*, Salk. 116.

[6] *Brooks* v. *Brooks*, Prec. Ch. 24; but by making her a defendant, he admits that the property in question is her separate estate; and, therefore, a demurrer was allowed to a bill, by which he claimed to be entitled to the property himself, *Earl* v. *Ferris*, 19 Beav. 67: 1 Jur. N. S. 5.

[7] *Brooks* v. *Brooks*, *ubi sup.*

[8] *Ibid.*

[9] An order for leave to serve the bill seems, in such case, necessary: Hinde, 85; *Naylor* v. *Byland*, Seton, 1246. The order may be obtained on *ex parte* motion, supported by affidavit. For form of order, see Seton, 1246, No. 9.

[10] 2 Vern. 613.

[11] 2 Vern. 614, *in notis*; see also *Bell* v. *Hyde*, Prec. Ch. 328, and the cases there cited.

that he was a prisoner, was held not to be a sufficient ground for obtaining an order for a separate answer.[1]

The Court will compel a woman to appear and answer separately from her husband, where the demand is against her in respect of her separate estate, and the husband is only named for conformity, and cannot be affected by the decree; where there is no separate property belonging to the wife, she cannot be proceeded against without her husband, unless she has obtained an order to answer separately: in which case, she will be liable to the usual process of contempt, if she does not put in her answer in conformity with the order which she herself has obtained.[2]

It is to be observed here, that a *feme covert* executrix or administratrix is not considered as having a separate property in the assets of her testator or intestate; and upon this ground, Lord Eldon, in *Pannell* v. *Taylor*,[3] held, that a writ of *ne exeat regno*, against a married woman sustaining that character, could not be maintained. In that case, his Lordship had originally granted the writ, upon the authority of *Moore* v. *Meynell*,[4] and *Jernegan* v. *Glasse*;[5] but upon further argument, he was of opinion that it could not be maintained: observing, that if he had been apprised of the circumstances of the case of *Moore* v. *Meynell* (upon the authority of which Lord Hardwicke appears to have acted in *Jernegan* v. *Glasse*), he should not have granted the writ.

Where a married woman is living separate from her husband, and is not under his influence or control,[6] or where she obstinately refuses to join in a defence with him,[7] the Court will, upon the application of the husband, give him leave to put in a separate answer. The application is made by motion, of which notice must be given to the plaintiff,[8] and must be supported by an affidavit of the husband,[9] verifying the circumstances; and process of contempt will then be stayed against him for want of his wife's answer, and the plaintiff must proceed separately against the wife.

If the separate answer of the husband is received and filed at the Record and Writ Clerk's Office, before an order for him to answer

[1] *Anon.* 2 Ves. J. 332.

[2] *Powell* v. *Prentice*, Ridg. 258. Husband and wife may defend a suit *in forma pauperis*, and the order for leave to do so is, of course, *Pitt* v. *Pitt*, 17 Jur. 571, V. C. S.

[3] T. & R. 96, 103.

[4] 1 Dick 30.

[5] *Ibid.* 107: 3 Atk. 409: Amb. 62: and T. & R. 97, n. (b.); but see *Moore* v. *Hudson*, 6 Mad. 218: 2 C. P. Coop. t. Cott. 245.

[6] *Chambers* v. *Bull*, 1 Anst. 269; *Barry* v. *Cane*, 3 Mad. 472; *Garey* v. *Whittingham*, 1 S. & S. 163; *Gee* v. *Cottle*, 3 M. & C. 180; *Nichols* v. *Ward*, 2 M'N. & G. 140.

[7] Ld. Red. 105, *Pain* v. ———, 1 Ca. in Ch. 296; *Murriet* v. *Lyon*, Bunb. 175: *Pavie* v. *Acourt*, 1 Dick. 13.

[8] Whether notice should be given to the wife also, *Quære:* see 1 S. & S. 163; 2 M'N. & G. 143.

[9] See *Barry* v. *Cane*, 3 Mad. 472, n.

separately has been obtained, it is an irregular proceeding;[1] and the plaintiff may move, on notice to the husband, that the answer may be taken off the file for irregularity;[2] or he may sue out an attachment against the husband, for want of the joint answer;[3] or he may waive the irregularity, and move, on notice to the wife, and an affidavit of the facts, that she may answer separately.[4] The husband, if in custody for not filing the joint answer, cannot clear his contempt by putting in the separate answer of himself:[5] he should move, on notice to the plaintiff,[6] supported by his own affidavit[7] of the facts, for leave to answer and defend separately from her, and that, upon putting in his separate answer, he may be discharged from custody.[8]

Where a married woman claims an adverse interest,[9] or is living separate from her husband,[10] or he is mentally incompetent to answer,[11] or she disapproves of the defence he intends to make,[12] she may, on motion,[13] obtain an order to defend separately; and if a husband insists that his wife shall put in an answer contrary to what she believes to be the fact, and by menances prevails upon her to do it, this is an abuse of the process of the Court, and he may be punished for the contempt.[14]

Where a married woman is interested in an estate, and no joint answer is put in by herself and her husband within the time limited, application may be made to allow her to put in an answer separate from her husband; the defendants to state why her answer is required.[15]

If the husband has put in his answer separately from his wife, under an order so to do;[16] or without an order, and the plaintiff desires to waive the irregularity;[17] or an order has been made, exempting the husband from process for want of her answer;[18] or if she refuses to join with him in answering;[19] or if he is abroad;[20] or if the suit relates to

[1] *Gee* v. *Cottle*, 3 M. & C. 180; *Nichols* v. *Ward*, 2 M'N. & G. 140; and see *Garey* v. *Whittingham*, 1 S. & S. 163; *Lenaghan* v. *Smith*, 2 Phil. 539.
[2] *Gee* v. *Cottle*, and *Nichols* v. *Ward*, *ubi sup.*
[3] *Gee* v. *Cottle*, *upi sup.* *Garey* v. *Whittingham*, 1 S. & S. 163; *Nichols* v. *Ward*, 2 M'N. & G. 140.
[4] *Nichols* v. *Ward*, 2 M'N. & G. 143, n.
[5] *Gee* v. *Cottle*, 3 M. & C. 180.
[6] *Quære*, if the wife should be served: see 1 S. & S. 163; 2 M'N. & G. 143.
[7] *Barry* v. *Cane*, 3 Mad. 472, n.
[8] See *Nichols* v. *Ward*, 2 M'N. & G. 143; Seton, 1255, No. 5.
[9] Ld. Red. 104; *Anon.* 2 Eq. Ca. Ab. 66, pl. 2.
[10] Ld. Red. 104; *Rudge* v. *Weedon*, 7 W. R. 368, V. C. K., n.
[11] *Estcourt* v. *Ewington*, 9 Sim. 252, and cases there referred to: 2 Jur. 414.
[12] Ld. Red. 104; *Ex parte Halsam*, 2 Atk. 50.
[13] For form of order on motion, see Seton, 1254, No. 3.
[14] *Ex parte Halsam*, 2 Atk. 50.
[15] *Gordon* v. *Weaver*, 5 U. C. L. J. 67.
[16] *Bray* v. *Akers*, 15 Sim. 610: Seton, 1255, No. 4.
[17] See *Nichols* v. *Ward*, 2 M'N. & G. 140.
[18] *Ibid*, 143, n.
[19] *Woodward* v. *Conebear*, 8 Jur. 642, V. C. W.
[20] *Dubois* v. *Hole*, 2 Vern. 613; *Bunyan* v. *Mortimer*, 6 Mad. 278; *Lethley* v. *Taylor*, 9 Sim. 252.

her separate estate, and she is abroad,[1] or they live apart;[2] or if the husband, from mental incapacity, is unable to join with her in answering;[3] or if, after the joint answer is put in, the husband goes abroad, and the bill is amended, and an answer is required thereto;[4] or if the fact of marriage is in dispute between the husband and wife:[5] the plaintiff, where no order for her to answer separately has been obtained by her or her husband, may, on motion, supported by an affidavit of the facts, obtain an order[6] that she may answer separately from her husband. Notice of the motion should be given to the wife;[7] and if she is abroad, an order for leave to serve her there with the notice is necessary,[8] and may be obtained on an *ex parte* motion.

By our practice a bill cannot be taken *pro confesso* against a married woman unless an order for her to answer separate from her husband has been served upon her. But this rule applies only where the case is a proper one for a separate answer; for, where the plaintiff applies for an order against a married woman to answer separately, on the ground that the time for the joint answer of herself and husband had elapsed, and no answer had been filed, the order was refused, because it was not shown that the case was a proper one for a separate answer.[9] And before an order will be made for a married woman to answer separate from her husband, it must be shown that an office copy of the bill had been served upon her, and that she is in default for want of answer;[10] and it is not necessary to serve the bill on a married woman (her husband being a co-defendant) before obtaining an order to answer separately, service on the husband alone being sufficient.[11] The husband must be served before the wife will be ordered to answer separately; and it makes no difference that the husband cannot be found, for the orders of Court provide for such cases by advertizing the defendant.[12] Where service of an office copy of the bill had been accepted by a solicitor on behalf of the defendant Sharpe and his wife, and a written consent was given by such solicitor, that in the event of no answer being filed, the bill might be taken *pro confesso*, it was held, that this did not dispense with an order for the wife to answer separately, and apart from her husband, before proceeding to take the bill *pro confesso*.[13] The time within which

[1] *Nichols* v. *Ward*, 2 M'N. & G. 143, n.
[2] *Wickens* v. *Marchioness of Townsend*, cited, 1 Smith's Pr. 410, n.; Seton, 1256.
[3] *Estcourt* v. *Ewington*, 9 Sim. 252: 2 Jur. 414.
[4] *Carleton* v. *M'Enzie*, 10 Ves. 442.
[5] *Longworth* v. *Bellamy*, Seton, 1245.
[6] For forms of order, see Seton, 1255, No. 4, 6.
[7] *Nichols* v. *Ward*, 2 M'N. & G. 143, n; Seton, 1255, 1256; but see *Bray* v. *Akers*, 15 Sim. 610.
[8] See *Nichols* v. *Ward*, 2 M'N. & G. 143, n.
[9] *Wright* v. *Morrow*, 1 Cham. R. 286.
[10] Anonymous 1 Cham. R. 9.
[11] *Bunn* v. *Barclay*, 1 Cham. R. 254.
[12] *Brandon* v. *Wheeler*, *Ibid.*

she is to answer must be expressed in the order.[1] It is not necessary that the bill should be taken *pro confesso* against a husband before an order to answer separately can be obtained against his wife; it is sufficient that the time for the joint answer shall have elapsed. In a foreclosure suit to which a married woman is a defendant, it is not necessary that the bill be taken *pro confesso* against either husband or wife. The proper practice is, when the time for answering by both has elapsed, to apply in Chambers for a direction to draw up the decree on *precipe*.[2] A good deal of the obscurity surrounding the subject of separate answers by married women has been cleared up in a case decided by the present Chancellor,[3] where it was held that, until the time for answering has elapsed, the plaintiff is not at liberty to sue out an order for a married woman, defendant, to answer separately from her husband; and in such a case if the wife put in an answer jointly with her husband, it is binding upon her, whether the suit be in respect of the wife's separate estate or not. And where the husband and wife had jointly answered and demurred to a bill which demurrer was overruled, and the order drawn up allowing the same, extended the time for the husband to put in his answer, but was silent as to the answer of the wife, or the joint answer of husband and wife, it was held, notwithstanding, that under such order the husband and wife were at liberty to put in a joint answer. And in a prior case,[4] husband and wife being defendants in a suit of foreclosure in respect of property belonging to the wife, the husband put in an answer alone, and the plaintiff moved to take it off the files for irregularity, and to take the bill *pro confesso* against the husband, the motion was refused with costs. An order to take a bill *pro confesso* against a married woman who has been ordered to answer separately became unnecessary after Order 19, of February, 1865, which is incorporated in Order 104, of the Con. G. orders, of June, 1868.[5] And a similar decision was given on 24th March, 1865, by his lordship the Chancellor,[6] the ground of the decision being, that after an order to answer separately, a married woman is looked upon as a *feme sole* in regard to the suit. At the time of serving an order to answer separately on a married woman, the original order should be shown, and the fact should be sworn to in the affidavit of service, otherwise an order *pro confesso* will not be granted.[7] Before an order for a married woman to answer separately will be made, it must be shown that an office copy

[1] *Miller* v. *Gordon*, 5 Grant. 134.
[2] *Walker* v. *Tyler*, 1 Cham. R. 189.
[3] *Clerk* v. *M'Elroy*, 10 Grant. 210.
[4] *Elliott* v. *Hunter*, 1 Cham. R. 158.
[5] *Hare* v. *Smart*, *Ibid* 316.
[6] *Wallbridge* v. *Cochrane*. Note to *Hare* v. *Smart*.
[7] *Robinson* v. *Dobson*, 1 Cham, R. 302.

of the bill has been served on her.[1] An order will not be made to take a bill *pro confesso* against a married woman without her having an opportunity to answer separately.[2]

Where a woman was made a defendant to a bill filed for the purpose of establishing a will against her, and a man who pretended that he was her husband, but which the woman denied: on her making application to answer separately, Lord Hardwicke ordered, that she should be at liberty to put in a separate answer, but without prejudice to any question as to the validity of the marriage.[3]

In general, the separate answer of a *feme covert* ought to have an order to warrant it, and if put in without an order, it may be taken off the file;[4] but if a husband brings a bill against his wife, he admits her to be a *feme sole*,[5] and she must put in her answer as such, and no order is necessary to warrant her so doing;[6] and if she does not put in her answer, the husband may obtain an order to compel her to do so.[7]

But although, strictly speaking, the answer of a *feme covert*, if separate, ought to be warranted by an order, yet if her 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 plaintiff accepts it and replies to it, the Court will not, on the motion of the wife, or of her executors, set it aside.[8]

The separate answer of a married woman is put in by her in the same manner as if she were a *feme sole*, without joining any guardian or other person with her; and when put in under an order, she has the full time for answering from the date of the order.[9] Where an order to answer separately has been obtained, it should be produced to the Commissioner before whom the answer is sworn, and be referred to in the jurat; and the order must be produced at the Office of the Record and Writ Clerks, at the time of filing the answer.[10] If, however the married woman is an infant, she cannot answer, either separately or jointly, until a guardian has been appointed for her;[11] such appointment will be made by order, on motion, supported by affidavit of the fitness of the proposed guardian.

A married woman, obtaining an order to answer separately from her

[1] Anonymous, 1 Cham. R. 9.
[2] *White* v. *Church*, 2 Cham. R. 203.
[3] *Wybourn* v. *Blount*, 1 Dick. 155.
[4] Wyatt's P. R. 53; and see *Higginson* v. *Wilson*, 11 Jur. 1071, V. C. K. B.
[5] See *Earl* v. *Ferris*. 19 Beav. 67; 1 Jur. N. S. 5; *ante*.
[6] *Ex parte Strangeways*, 3 Atk. 478; Ld. Red. 105.
[7] *Ainslie* v. *Medlicott*, 13 Ves. 266.
[8] *Duke of Chandos* v. *Talbot*, 2 P. Wms. 371.
[9] *Jackson* v. *Haworth*, 1 S. & S. 161.
[10] Braithwaite's Pr. 45, 397.
[11] *Colman* v. *Northcote*, 2 Hare, 147; 7 Jur. 528; Braithwaite's Pr. 47.

husband, renders herself liable to process of contempt, in case she does not put in her answer pursuant to the order;[1] but an order for leave to sue out such process is necessary, and may be obtained by the plaintiff on an *ex parte* motion.[2]

Where husband and wife are defendants to a bill, the wife will not be compelled to answer to anything which may expose her to a forfeiture;[3] neither is she compellable to discover whether she has a separate estate, unless the bill is so framed as to warrant the Court in making a decree against such estate. Thus, where a bill was filed against a man and his wife, for the purpose of enforcing the specific performance of an agreement, alleged to have been entered into by an agent on their behalf for the purchase of an estate from the plaintiff, and in support of the plaintiff's case, it was alleged that the wife had separate monies and property of her own, and had joined with her husband in authorizing the agent to enter into the agreement, but the bill prayed merely that the husband and wife might be decreed specifically to perform the agreement, and did not seek any specific relief against her separate estate: the wife, having obtained an order to that effect, put in a separate demurrer as to so much of the bill as required from her a discovery whether she had not separate money and property of her own, and answered the rest. Upon argument, Sir Thomas Plumer, V. C., allowed the demurrer, on the ground that as the decree, in cases where a *feme covert* was held liable, had been uniformly against the separate estate, and not against the *feme covert* herself, and as the bill did not seek any decree against any trustees, or particular fund, but only against the wife, it could not be supported, and the interrogatory, if answered, would consequently be of no use.[4]

A wife cannot be compelled to make a discovery which may expose her husband to a charge of felony; and if called upon to do so, she may demur.[5]

In like manner, a married woman cannot be made a party to a suit, for the mere purpose of obtaining discovery from her, to be made use of against her husband; therefore, in *Le Texier* v. *The Margrave of Anspach*,[6] where a bill was filed against the Margrave to recover a balance due to the plaintiff upon certain contracts, to which bill the Margravine

[1] *Powell* v. *Prentice*, Ridgw. P. C. 253; *Lenaghan* v. *Smith*, 2 Phil. 537; *Bunyan* v. *Mortimer*, 6 Mad. 273; *Home* v. *Patrick*, 30 Beav. 405; 8 Jur. N. S. 351; *Bull* v. *Withey*, 9 Jur. N. S. 595, V.C.S.; *Graham* v. *Fitch*, 2 De G. & S. 246; 12 Jur. 833.

[2] *Taylor* v. *Taylor*, 12 Beav. 271; *Thicknesse* v. *Acton*, 15 Jur. 1052, V.C.T.; *Home* v. *Patrick*, *Bull* v. *Withey*, *ubi sup.* As to notice in other cases, see *Graham* v. *Fitch*, *ubi sup.*: *Bushell* v. *Bushell*, 1 S. & S. 164; *M'Kenna* v. *Everett*, Seton, 1256, No. 7.

[3] *Wrottesley* v. *Bendish*, 3 P. Wms. 235, 238.

[4] *Francis* v. *Wigzell*, 1 Mad. 258.

[5] *Cartwright* v. *Green*, 8 Ves. 405, 410.

[6] 5 Ves. 322, 329: and 15 Ves. 159, 164.

was made a party, as the agent of her husband, for the purpose of eliciting from her a discovery of certain vouchers, which were alleged to be in her possession: a demurrer by the Margravine separately, was allowed by Lord Rosslyn, and afterwards upon rehearing by Lord Eldon, after the Margrave's death. Upon the same principle, where a bill was filed against a man and his wife for discovery in aid of an action at Law, brought against him to recover a debt due from the wife *dum sola*, a separate demurrer put in by the wife was allowed.[1]

In *Rutter* v. *Baldwin*,[2] the Court agreed clearly, that a wife can never be admitted to answer, or otherwise as evidence, to charge her husband; and that where a man marries a widow executrix, her evidence will not be allowed to charge her second husband;[3] but in that case, the wife having held herself out as a *feme sole*, and treated with the plaintiff and other parties to the cause, who were ignorant of her marriage, in, that character, and it having been proved in the cause 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 the husband, and decreed accordingly.

It was supposed that the admission of a will, in the separate answer of a married woman, who was the heiress-at-law of the testator, was sufficient evidence to enable the Court to declare the will established;[4] but it has now been decided, that such evidence is not sufficient for that purpose, or to bind her inheritance.[5] As a general rule, however, the separate answer of a married woman may be read against her.[6]

Where a husband and wife are made defendants to a suit, relating to personal property belonging to the wife, and they put in a joint answer, such answer 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;[7] and the facts relied upon must be proved against them by other evidence. Thus, in *Merest* v. *Hodgson*,[8] the L. C. B. Alexander refused to permit the joint answer of the husband and wife to be read, but ordered the cause to stand over, to give the plaintiffs an opportunity of proving the facts admitted. And it has been held, that the joint answer of the husband and wife may be read against the wife with reference to her separate estate, as

[1] *Barron* v. *Grillard*, 3 V. & B. 165.
[2] 1 Eq. Ca. Ab. 227, pl. 15.
[3] See *Cole* v. *Gray*, 2 Vern, 79.
[4] *Codrington* v. *Earl of Shelburn*, 2 Dick. 475.
[5] *Brown* v. *Hayward*, 1 Hare, 432: 6 Jur. 847.
[6] Ld. Red. 104, 105.
[7] *Evans* v. *Cogan*, 2 P. Wms. 449.
[8] 9 Pri. 63; see also *Elston* v. *Wood*, 2 M. &. K. 678.

well as her separate answer, on the ground that in such a case she cannot be compelled to answer separately.[1]

From the report of the case of *Eyton* v. *Eyton*,[2] it appears, on first view, as if the separate answer of a husband had been admitted by the Master of the Rolls to be read as evidence against the wife in a matter relating to her inheritance; but upon closer attention it will be found, that in all probability, the reason of the decree in that case was, that his Honor conceived that the counterpart of the settlement, which appears to have been produced, was considered to be sufficient evidence of the settlement; at least, this appears to have been the ground upon which the case was decided on the appeal before the Lord Keeper Wright.

In *Ward* v. *Meath*,[3] a bill was exhibited against the husband and wife, concerning the wife's inheritance; the husband stood out all process of contempt, and upon its being moved that the bill might be taken *pro confesso*, it was opposed, because the wife, having in the interim obtained an order to that effect, put in an answer, in which she set forth a title in herself; and the Court decreed, that the bill should be taken *pro confesso* against the husband only, and that he should account for all the profits of the land which he had received since the coverture, and the profits which should be received during coverture.

It may be observed, in this place, that there is no case in which the Court has made a personal decree against a *feme covert* alone.[4] She may pledge her separate property, and make it answerable for her engagements; but where her trustees are not made parties to a bill, and no particular fund is sought to be charged, but only a personal decree is prayed for against her, the bill cannot be sustained. Upon this ground, in the case of *Francis* v. *Wigzell*,[5] before referred to, where a bill was filed against a husband and wife for the specific performance of an agreement for the purchase of an estate, charging that the wife had separate property sufficient to answer the purchase money, but without praying any specific relief against such separate estate, a demurrer put in by the wife, to so much of the bill as sought discovery from her whether she had a separate estate or not, was allowed.

It appears, however, that where a married woman, having a general power of appointment, by will, over real or personal estate, makes, by

[1] *Callow* v. *Howle* 1 De G. & S. 531; 11 Jur. 984; *Clive* v. *Carew*, 1 J. & H. 199, 207; 5 Jur. N. S. 487.

[2] Prec. Ch. 116.

[3] 2 Cha. Ca. 173; 1 Eq. Ca. Ab. 65, pl. 4.

[4] *Hulme* v. *Tenant*, 1 Bro. C. C. 16, 21; *Francis* v. *Wigzell*, 1 Mad. 258, 263; *Aylett* v. *Ashton*, 1 M. & C. 105, 111. See also *Jordan* v. *Jones*, 2 Phil. 170, 172, where the Court refused to compel a married woman to execute a conveyance of an estate not settled to her separate use.

[5] 1 Mad. 258.

her will, her separate property liable to the payment of her debts, a Court of Equity will lay hold of the estate so devised, and apply it in the payment of written engagements entered into by her, and in the discharge of her general debts. In the case of *Owens* v. *Dickenson*,[1] where a married woman had made her will in pursuance of a power, and thereby charged her real estate with the payment of debts, Lord Cottenham entered into the principles upon which Equity enforces the contracts of married women against her separate estate, and rejected the theory that such contracts are in the nature of executions of a power of appointment: he observed, "The view taken by Lord Thurlow, in *Hulme* v. *Tenant*, is more correct. According to that view, the separate property of a married woman being a creature of Equity, it follows, that, if she has power to deal with it, she has the other power incident to property in general, namely, the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at Law of compelling payment of those debts, a Court of Equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satisfied;" acting upon this principle, Lord Cottenham referred it to the Master, to inquire what debts there were to be paid under the provisions of the will. In order to bind her separate property, however, there must be a contract, fraud, or breach of trust; but the contract, it would seem, need not be in writing.[2]

Where the Court thought a married woman defendant ought to pay certain costs, and it did not appear that she had separate estate, the Court gave the plaintiff liberty to apply for payment of these costs, in case of any monies becoming payable to her separate use.[3]

If the equity of redemption of a mortgaged estate comes to a married woman, and a bill is brought against her and her husband to foreclose it, upon which a decree for foreclosure is pronounced; the wife is liable to be absolutely foreclosed, though during the coverture, and will not have a day given her to redeem after her husband's death;[4] and where a widow filed a bill to set aside a decree of foreclosure pronounced against her and her husband during coverture, and to be let in to redeem, and the mortgagee pleaded the proceedings and decree in the former cause, the plea was allowed.[5]

[1] C. & P. 48, 54: 4 Jur. 1151.

[2] *Vaughan* v. *Vanderstegen*, 2 Drew, 165, 363: *Hobday* v. *Peters*, (No. 2), 28 Beav. 354: 6 Jur. N. S. 794; *Wright* v. *Chard*, 4 Drew. 673: 5 Jur. N. S. 1334: 1 De G. F. & J. 567; 6 Jur. N. S. 476: *Clive* v. *Carew*, 1 J. & H. 199: 5 Jur. N. S. 487; *Johnston* v. *Gallager*, 7 Jur. N. S. 273; 9 W. R. 506, L. JJ.; *Bolden* v. *Nicholay*, Jur. N. S. 884, V. C. W.

[3] *Pemberton* v. *M'Gill*, 1 Jur. N. S. 1045, V. C. W.

[4] *Mallack* v. *Galton*, 3 P. Wms. 352; but the decree ought not to be made absolute at once, even by consent, on an affidavit vertifying the amount due, *Harrison* v. *Kennedy*, 10 Hare, App. 51.

[5] *Mallack* v. *Galton*, 3 P. Wms. 352.

Where an estate has been sold under a decree of the Court, a *feme covert* is as much bound by the decree as a *feme sole*, although it may be to her prejudice; as it would most ruinously depreciate the value of property sold under a decree in Equity, if, where there is neither fraud nor collusion in the purchaser, his title could be defeated. It is to be observed, however, that a decree obtained by fraud is invalid.[1]

It may be here mentioned, that a married woman defendant, in case she desires to appeal against a decree or order made in the suit, must appeal by her next friend.[2]

Where a suit has been instituted against a man and his wife, and the husband dies pending the proceedings, the suit will not be abated.[3] When a female defendant marries, no abatement takes place; but the husband's name should be introduced in all subsequent proceedings.[4]

But although, where a bill has been exhibited against a man and his wife, and the husband dies pending the suit, there is no abatement, and the wife will be bound by the former answer and proceedings in the cause, yet where, by the death of the husband, a new interest arises to the wife, it seems that she will not be bound by the former answer. Thus, where a bill was filed by the assignees of a husband to compel the specific performance of a contract for the sale of part of his estate, to which the wife was made a co-defendant in respect of certain terms of years which were vested in her as administratrix of a person to whom the terms had been assigned to protect the inheritance, and she had joined with her husband in putting in an answer, by which she claimed to be dowable out of the property; upon the death of her husband, an objection was taken to the suit being proceeded with till a supplemental bill had been filed against her, in order to give her an opportunity of making another defence in respect of the right of dower which had become vested in her, and Sir Thomas Plumer, M. R., said, that her former answer could not be pressed against her, because, in the former case she was made a party as administratrix; but the right to dower which she then had was not claimed by her as representative, but in her own character; and it was an interest that had devolved upon her since her answer was put in; his Honor, therefore, held the suit to be defective.[5] A supplemental bill was thereupon filed against the widow, in order to enable her to claim, in her separate character, what she had before claimed in her character of wife. Upon hearing the cause, however,

[1] *Burk* v. *Crosbie*, 1 Ball & B. 489; *Kennedy* v. *Daly*, 1 Sch. & Lef. 355.

[2] *Elliot* v. *Ince*, 7 De G. M. & G. 475; 3 Jur. N. S. 597.

[3] Ld. Red. 59; *Shelberry* v. *Briggs*, 2 Vern. 249; 1 Eq. Ca. Ab. 1, pl. 4; *Durbaine* v. *Knight*, 1 Vern. 318; 1 Eq. Ca. Ab. 126, pl. 7.

[4] Ld. Red. 58; *Wharan* v. *Broughton*, 1 Ves. S. 182; and see *Sapte* v. *Ward*, 1 Coll. 25.

[5] *Mole* v. *Smith*, 1 J. & W. 665, 668.

Lord Eldon, although he recognized the principle laid down by Sir Thomas Plumer, said, that he should have been inclined, in that case, to have come to a different decision, as he thought that it would have been difficult for the widow, in her answer to the supplemental bill, to state her case differently from the way in which it had been stated in her former answer.[1] It is conceived that under the present practice, however, it would not be held necessary for the plaintiff to take any step in the cause, in order to enable a widow to raise a new defence.

It follows, from what has been before stated, that where a man and his wife are defendants to a suit, if the wife dies there will be an abatement of the suit. Thus, where a man having married an administratrix the plaintiff obtained a decree against him and his wife, after which the wife died: it was held, that the suit was abated, and that the new administrator ought to be made a party, before any further proceedings could be had in the cause.[2]

CHAPTER V.

PARTIES TO A SUIT.

SECTION 1.—*Necessary Parties, in respect of the Concurrence of their Interests with that of the Plaintiff.*

IT is the constant aim of a Court of Equity to do complete justice by deciding upon, and settling, the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the Court perfectly safe to those who are compelled to obey it, and to prevent future litigation.[3] For this purpose, all persons materially interested in the subject ought generally to be made parties to the suit, either as plaintiffs or defendants, or ought, by service upon them of a copy of the bill, or notice of the decree, to have an opportunity afforded of making themselves active parties in the cause, if they should think fit.

[1] *Mole* v. *Smith*, Jac. 490, 495.

[2] *Jackson* v. *Rawlins*, 2 Vern. 195; *ib.* Ed. Raithby, n. (2).

[3] Ld. Red. 163; *Richardson* v. *Hastings*, 7 Beav. 323, 326; *Hare* v. *London and North-Western Railway Company*, 1 J. & H. 252. It seems, however, that, under the modern practic. the Court is less unwilling to relax the general rule in special cases, *Ford* v. *Tennant*, 29 Beav. 452; 7 Jur. N. S. 615, L. JJ.

The strict application of this rule, in many cases creates difficulties: which have induced the Court to relax it; and, as we shall see, it has long been the established practice of the Court, to allow a plaintiff to sue on behalf of himself and of all the others of a numerous class of which he is one, and to make one of a numerous class (as the members of a joint-stock company,) the only defendant, as representing the others, on the allegation that they are too numerous to be all made parties; and, in addition, the Court is now enabled, whenever it thinks fit, to adjudicate upon questions arising between parties, without making other persons who are interested in the property in question, or in other property comprised in the same instrument, parties to the suit.[1] When the Court acts on this power, the absent parties are not bound by the decree;[2] whereas, in the cases first alluded to, the absent parties are generally bound.[3]

Our Order No. 57, of the Con. G. Orders is taken from S. 51, of the Imp. Sta. 15 & 16 Vic., and declares that "Where questions arise between parties, who are some only of those interested in the property respecting which the question arises; or where the property in question is comprised with other property in the same settlement, will, or other instrument, or is the property of an intestate, the Court may adjudicate on the questions arising between such parties, without making the other parties interested in the property respecting which the question arises, or interested under the settlement, will, or other instrument, parties to the suit, and without requiring the whole trusts and purposes of the settlement, will, or instrument, or the whole estate of the intestate, to be executed or administered under the direction of the Court, and without taking the accounts of the trustees or other accounting parties, or ascertaining the particulars or amount of the property touching which the question or questions have arisen, or of the whole estate or assets; but where the Court is of opinion that the application is fraudulent or collusive, or that for some other reason the application ought not to be entertained, it may refuse to make the order prayed."

The application of the general rule above referred to, will be considered: *first*, with reference to those whose rights are concurrent with the rights of the party instituting the suit; and *secondly*, with reference to those who are interested in resisting the plaintiff's claim.

With respect to the first class, it is to be observed, that (subject to

[1] 15 & 16 Vic. c. 86, s. 51. The Court acted on this power in the case of *Parnell* v. *Hingston*, 3 Sm. & G. 337, which is believed to be the only reported case in which it has done so; see also *Swallow* v. *Binns*, 9 Hare. App. 47: 17 Jur. 295; *Lanham* v. *Pirie*, 2 Jur. N. S. 1201, V. C. S.; *Prentice* v. *Prentice*, 10 Hare, App. 22.

[2] *Doody* v. *Higgings*, Hare, App. 32.

[3] *Barker* v. *Walters*, 8 Beav. 92, 97.. This in England is done under the Imp. Sta. 15 & 16, Vic. C. 86. Our orders 53, 54, and 55, are taken from this Statute.

the provisions of the late Act above pointed out,) in all cases where a party comes to a Court of Equity to seek for the relief which the principles there acted upon entitle him to receive, he should bring before the Court all such parties as are necessary to enable it to do complete justice; and that he should so far bind the rights of all persons interested in the subject, as to render the performance of the decree which he seeks perfectly safe to the party called upon to perform it, by preventing his being sued or molested again respecting the same matter, either at Law or in Equity. For this purpose, formerly, it was necessary that he should bring regularly before the Court, either as co-plaintiffs with himself, or as defendants, all persons so circumstanced that, unless their rights were bound by the decree of the Court, they might have caused future molestation or inconvenience to the party against whom the relief was sought.

But now, a plaintiff is enabled, in many cases, to avoid the expense of making such persons active parties to the cause, by serving them with notice of the decree under our General Orders. The practice arising under these orders will be stated hereafter: for, as it does not affect the principle requiring all persons concurrently interested with the plaintiff to be bound by the decree, but only substitutes, in some cases, an easier mode of accomplishing that end, it will be convenient, in the first instance, to consider what is the nature of those concurrent rights and interests, which render it necessary that the persons possessing them should be made either active or passive parties to a suit.

In general, where a plaintiff has only an equitable right in the thing demanded, the person having the legal right to demand it should be a party to the suit: for, if he were not, his legal right would not be bound by the decree,[1] and he might, notwithstanding the success of the plaintiff, have it in his power to annoy the defendant by instituting proceedings to assert his right in an action at Law, to which the decree in Equity, being *res inter alios acta*, would be no answer, and the defendant would be obliged to resort to another proceeding in a Court of Equity, to restrain the plaintiff at Law from proceeding to enforce a demand which had been already satisfied under the decree in Equity. This complication of litigation it is against the principles of equity to permit; and it, therefore, requires that, in every suit, all the persons who have legal rights in the subject in dispute, as well as the persons having the equitable right, should be made parties to the proceedings.

Upon this ground it is, that in all suits by persons claiming under a trust, the trustee or other person in whom the legal estate is vested, is required to be a party to the proceeding. Thus, where an estate had

[1] Ld. Red. 179.

been limited by a marriage settlement to a trustee and his heirs, upon trust, during the lives of the plaintiff and his wife, to apply the profits to their use, with remainder to the children of the marriage, with remainders over, and a bill was brought by the persons interested under that settlement to set aside a former settlement, as obtained by fraud, it was held, that the plaintiff could have no decree: because the trustee was not a party;[1] and where it appeared that a mortgage had been made to a trustee for the plaintiff, it was determined that the trustee was a necessary party to a suit to foreclose the equity of redemption.[2]

The rule is the same whether the trust be expressed or only implied; as where the executor of a mortgage files a bill to foreclose a mortgage of freehold or copyhold estate, he should make the heir-at-law of the mortgagee a party:[3] because, although according to the principles upon which Courts of Equity proceed, money secured by mortgage is considered as part of the personal estate of the mortgagee, and belongs on his death to his personal representative, yet, as the legal estate is in the heir, he would not, unless he was before the Court when it was pronounced, be bound by the decree. Another reason why it is necessary to bring the heir before the Court, in a bill to foreclose a mortgage, is, that if the mortgagor should think proper to redeem the estate under the decree, he will be a necessary party to the reconveyance.[4] And so important is it considered, in such a case, that the heir should be a party, that where a mortgagee died without any heir that could be discovered, the Court restrained his executor from proceeding at Law to compel payment of the mortgage money, and ordered the money into Court till the heir could be found.[5]

The rule however in this Province is just the reverse, for it has been decided that the heirs of a deceased mortgagee, or the persons beneficially interested under his will, are not necessary parties to a suit for foreclosure;[6] the parties being to allow the real representative to be made a party in the Master's office; and as the only purpose for which he can be needed as a party, is that he may convey in case of redemption, he is thus made a party at as early a stage of the suit as is necessary.

[1] 9 Mod. 80.

[2] *Wood* v. *Williams*, 4 Mad. 186; *Hichens* v. *Kelly*, 2 Sm. & G. 264.

[3] *Scott* v. *Nicholl*, 3 Russ. 476.

[4] *Wood* v. *Williams*, 4 Mad. 186.

[5] *Schoole* v. *Sall*, 1 Sch. & Lef. 177. The result of this case was, that after the cause had remained some years in Court, it was thought worth while to get an Act of Parliament to revest the estate, on an allegation that the heir could not be found. See also *Stokoe* v. *Robson*, 3 V. & B. 51: 19 Ves. 385; *Smith* v. *Bicknell*, 3 V. & B. 51, n.; *Schelmardine* v. *Harrop*, 6 Mad. 39. The difficulty experienced in the case referred to is now met by the provision of the Trustee Act, 1850, s. 19, which enables the Court, in such a case, to vest the estate: and see *Re Boden's Trust*, 1 De G. M. & G. 57: 9 Hare, 820; *Re Lea's Trust*, 6 W. R. 482, V. C. W.; but see *Re Hewitt*, 27, L. J. Ch. 302. L. C. & L. JJ.

[6] *Lawrence* v. *Humphries*, 11 Grant, 209.

The heir, however, is only a necessary party where nothing has been done by the mortgagee to affect the descent of the legal estate upon him. If the descent of the legal estate has been diverted, it is necessary to have before the Court the person in whom it is actually vested; and therefore, where a mortgagee has devised his mortgage in such manner as to pass not only the money secured, but the legal estate in the property mortgaged, the devisee may foreclose, without making the heir-at-law of the original mortgagee a party.[1]

Upon the same principle, where a mortgagee in his lifetime actually assigns his whole interest in the mortgage, even though the assignment be made without the privity of the mortgagor, the assignee alone may foreclose, without bringing the original mortgagee before the Court;[2] and where there have been several *mesne* assignments of the mortgage, the last assignee, provided the legal estate is vested in him, will be sufficient, without its being necessary to bring the intermediate ones before the Court.[3] It is to be observed, however, that in order to justify the omision of the intermediate assignees in the case of an assignment of a mortgage, the conveyance must have been absolute, and not by way of sub-mortgage: for if there be several derivative mortgagees, they must all be made parties to a bill of foreclosure by one of them. Thus, where *A.* made mortgage for a term of years, for securing £350 and interest to *B.*, who assigned the term to *C.*, redeemable by himself on paying £300 and interest, and *B.* died, and *C.* brought a bill against *A.* to foreclose him, without making the representatives of *B.* the original mortgagee, parties, it was held by the Court, that there was plainly a want of proper parties.[4]

The principle that requires a trustee, or other owner of the legal estate, to be brought before the Court in suits relating to trust property, applies equally to all cases where the legal right to sue for the thing demanded is outstanding in a different party from the one claiming the beneficial interest. Thus, where a bill is filed for the specific performance of a covenant under hand and seal of one, for the benefit of another, the covenantee must be a party to a bill by the person for whose benefit the covenant was intended, against the covenantor.[5] And so, in *Cope* v. *Parry*,[6] which was a bill filed for the specific performance of a covenant for the surrender of a copyhold estate to *A.*, in trust for others, L. C. B. Richards, said, that as the effect of a surrender, if the Court

[1] *Renvoize* v. *Cooper*, 6 Mad. 371: 1 S. & S. 364.
[2] *Chambers* v. *Goldwin*, 9 Ves. 269.
[3] *Ibid.*
[4] *Hobart* v. *Abbot*, 2 P. Wms. 643.
[5] *Cooke* v. *Cooke*, 2 Vern. 36; 1 Eq. Ca. Ab. 73, pl. 8.
[6] 2 J. & W. 538; and see *Rolls* v. *Yate*, Yelv. 177; 1 Bulst. 25, b.

decreed it, would be to give the legal estate to *A.*, he ought to be a party: otherwise, another suit might become necessary against him.

The preceeding English cases arose upon covenants formally entered into under hand and seal; the same rule will not, however, apply to less formal instruments, such as ordinary agreements not under seal, where one party contracts as agent for the benefit of another. In such cases, it is not necessary to bring the agent before the Court; because, even at law, it is the undoubted right of the principle to interpose, and supersede the right of his agent, by claiming to have the contract performed to himself, although made in the name of his agent. This principle was acted upon by the Court of Queen's Bench in the case of the *Duke of Norfolk* v. *Worthy*;[1] and in *Bethune* v. *Farebrother*,[2] where the plaintiff, not wishing to appear as purchaser, procured *J. S.* to bargain for him, who signed the contract (not as agent), and paid the deposit by his own cheque: yet, inasmuch as it was the plaintiff's money, he was allowed to maintain an action for it, without showing any disclaimer by *J. S.* Upon the same principle, in Equity, if the plaintiff had filed a bill against the vendor for a specific performance, he would not have been under the necessity of making *J. S.* a party to the suit; because, if he had succeeded in his object, performance of the contract to the plaintiff might have been shown in answer to an action at Law by *J. S.*, whose title was merely that of agent to the plaintiff. It is, however, frequently the practice to join the auctioneer as co-plaintiff with the vendor, in suits for specific performance of contracts entered into at auctions;[3] but that is, because he has an interest in the contract, and may maintain an action upon it; he has also an interest in being protected against the legal liability which he may have incurred, in an action by the purchaser to recover the deposit.

In order to enable the plaintiff to dispense with the necessity for making the agent, entering into a contract for his employer in his own name, a party to a suit to enforce such contract, the plaintiff must state in his bill, and show by evidence, that the person entering into the contract was actually an agent, as appears to have been done in *Bethune* v. *Farebrother*,[4] by proving that, although the money was paid by the cheque of the agent, it was in fact the money of the purchaser. The fact of the person contracting being the agent of the plaintiff, may likewise appear from the contract itself; but if it does not appear from the contract and the plaintiff is not able to show the agency, by proving that the money was his own, or some equally conclusive fact, he must

[1] 1 Camp. 337; Sugd. V. & P. 237.
[2] Cited 5 M. & S. 385.
[3] See *Cutts* v. *Thodey*, 13 Sim. 206, 211; and see 7 Ves. 289.
[4] *Ante.*

make the agent a party, either as co-plaintiff with himself or as a defendant, in order to bind his interest: for otherwise, such agent would have a right to sue, either in Equity for a specific performance of the same contract, or to bring an action at Law for the recovery of the money paid to the defendant; and parol evidence on the part of the defendant would, in either case be inadmissable to show, in opposition to the written contract, that the purchase was made on behalf of another.[1] The same rule will apply, if the agent contracted, as well on his own behalf, as in the capacity of agent for another. In that event, the bill must be filed in his own name, and in that of the person on whose behalf he acted, or at least such a person must be a party to the suit; and upon this principle, in *Small* v. *Attwood*,[2] where a contract was entered into for the purchase of an estate, by certain persons in their own names, but in fact on their own account and also as agents for other parties, a bill to rescind the contract was filed in the names both of the agents and of the other parties for whom they contracted.

With respect to the effect of a sub-contract, in rendering it necessary to bring the party concerned in it before the Court, in a litigation between the original contracting parties, the following distinction has been made: *viz.*, if *A.* contracts with *B.* to convey to him an estate, and *B.* afterwards contracts with *C.*, that he, *B.*, will convey to him the same estate: in that case, *C.* is not a necessary party to a suit between *A.* and *B.* for a specific performance; but if the contract entered into by *B.* with *C*, had been, not that he, *B.*, should convey the estate, but that *A.* the original vendor should convey it to *C.*, then *C.* would have been a necessary party to a suit by *B.* against *A.* for a specific performance.[3]

Upon the principle above stated, it is presumed, that where a man enters into a contract which is expressed in the instrument itself to have been entered into by him as agent for another, he would not afterwards be allowed to sue for a performance of that contract on his own behalf, on the allegation that he was not authorized to act as agent, without bringing the party on whose behalf it was expressed to be made, before the Court.[4] At Law it has been held, that a plaintiff under such circumstances could maintain an action, by procuring from the party on whose behalf he appeared to have entertained the contract, a renunciation of his interest.[5]

It is to be observed here that, although an agent entering into a contract in his own name, may be joined in a suit as co-plaintiff with

[1] *Bartlett* v. *Pickersgill*, 1 Cox, 15; 1 Eden, 515.
[2] Younge, 407, 455.
[3] —— v. *Walford*, 4 Russ. 372; and *Nelthorpe*, v. *Holgate*, 1 Coll. 203, and the cases their cited.
[4] See Add. Cont. 600, 624.
[5] *Bickerton* v. *Burrell*, 5 M. & S. 383.

his principal, as in the case before referred to[1] of an auctioneer who is frequently joined with the vendor in a bill against a purchaser, because he has an interest in the contract, or may bring an action upon it, it is merely on the ground of the interest which he has in the contract; and that the rule is indisputable, that wherever an agent has no interest whatever in the property in litigation, or in the contract, and cannot be sued either at Law or in Equity respecting it, in such case he ought not to be made a party; and that if he was made a co-plaintiff in the suit, a demurrer upon that ground would formerly have been allowed;[2] though now, in such a case, the Court may grant such relief as the special circumstances of the case require.[3] Upon this principle, it has also been determined, that an agent who bids at an auction for an estate, and signs the memorandum in his own name, need not be made a co-defendant with his employer, in a bill for a specific performance of such agreement.[4]

Where the subject-matter in litigation is a legal *chose in action* which has been the subject of assignment, the assignor, or, if dead, his personal representative, should be a party: for, as an assignment of a *chose in action* is not recognized in a Court of Law, and is only considered good in Equity, the recovery in Equity by the assignee would be no answer to an action at Law by the assignor, in whom the legal right to sue still remains, and who might exercise it to the prejudice of the party liable; in which case, the party liable would be driven to the circuitous process of filing another bill against the plaintiff at Law, for the purpose of restraining his proceedings.

Upon this ground, where an obligee had assigned over a bond, and died, and the assignee sued for it in Equity, the cause was directed to stand over to make the personal representative of the obligee a party:[5] and in another case,[6] where the assignor of a bond was dead, and there was not a representative, it was held, on a bill filed by the assignee against the obligor for a *ne exeat*, that there was a want of parties. And in like manner, where a bill was filed by the assignees of a judgment, without the assignor being a party, it was held, that the plaintiffs could not go on with that part of their case which sought payment of the debt.[7]

[1] *Ante.*

[2] *King of Spain* v. *Machado*, 4 Russ. 225, 241; see also *Cuff* v. *Platell*, *ib.* 242; *Makepeace* v. *Haythorne*, *ib.* 244, 247.

[3] 15 & 16 Vic. c. 86, s. 49. This is the Imp. Sta. See our Orders 53 and 54.

[4] *Kingsley* v. *Young*, Rolls, July 30, 1807, Coop. Eq. Pl. 42; see also *Lissett* v. *Reave*, 2 Atk. 394; *Newman* v. *Godfrey*, 2 Bro. C. C. 332, cited Ld. Red. 160.

[5] *Brace* v. *Harrington*, 2 Atk. 235.

[6] *Ray* v. *Fenwick*, 3 Bro. C. C. 25.

[7] *Cathcart* v. *Lewis*, 1 Ves. J. 463; *Partington* v. *Bailey*, 6 L. J. N. S. Ch. 179, M. R.

For the same reason, where a bill was filed against the directors of an unincorporated joint-stock company by a holder of shares, of which some were original, and some were alleged to be derivative, without stating, with respect to the derivation of them, the manner in which he had become possessed of them, or whether they had been transferred to him, in the manner in which, according to the regulations of the company, such transfer ought to have been made, Lord Brougham appeared to think that the persons by whom the shares had been assigned to the plaintiffs ought to have been parties to the suit.[1]

The same principle appears to have been acted upon by the Court of Exchequer, in certain cases in which bills have been filed for tithes by lessees, under parol demises (which, in consequence of tithes being things lying in grant, are void at Law): in which cases, upon demurrers being put in and submitted to, the Court has permitted the plaintiffs to amend their bills by making the lessors parties to the suit.[2]

Although the assignor of a *chose in action* is sometimes made a party defendant to a suit, yet the more general practice is (especially where the assignment contains, as it almost always does, a power of attorney from the assignor to the assignee to sue in his name) to make the assignor and assignee co-plaintiffs, and if the assignment is stated upon the bill, and consequently there is an admission of the fact as between the co-plaintiffs, it seems to have been doubtful whether it was necessary to prove the assignment in order to show that there was no misjoinder of plaintiffs:[3] though now, it is conceived that such proof would certainly not be required.[4]

Upon the principle above laid down it is held, that although a creditor or legatee of a person deceased may, in some cases, under peculiar circumstances, such as an allegation of fraud or collusion, bring a bill against a debtor to the estate, for the purpose of augmenting the fund,[5] yet such a suit cannot be maintained without the personal representative being a party.[6] But it seems that a specific legatee, suing trustees for his legacy, need not make the executor a party, if he alleges that he has his assent.[7] Again, although an executor has actually released his

[1] *Walburn* v. *Ingilby*, 1 M. & K. 61, 78: C. P. Coop. t. Brough. 270; see, however, *Bagshaw* v. *Eastern Union Railway Company*, 7 Hare, 114: 13 Jur. 602; affirmed, 14 Jur. 491, L. C.

[2] *Henning* v. *Willis*, 3 Wood, 29; *Jackson* v. *Benson*, M'Lel. 62.

[3] *Sayer* v. *Wagstaff*, 2 Y. & C.C.C. 230; *Cholmondeley* v. *Clinton*, 4 Bligh, 123; *Ryan* v. *Anderson*, 3 Mad. 174; *Blair* v. *Bromley*, 5 Hare, 554; 11 Jur. 115; affirmed 2 Phil. 354: 11 Jur. 617.

[4] See No. 61 of our C. G. O.

[5] *Attorney-General* v. *Wynne*, Mos. 128; *Wilson* v. *Moore*, 1 M. & K. 126, 142; see also *Saunders* v. *Druce*, 3 Drew. 140; and this has been done in cases of partnership, *Bowsher* v. *Watkins*, 1 R. & M. 277; *Travis* v. *Milne*, 9 Hare, 141; and see *Stainton* v. *Carron Company*, 18 Beav. 146: 18 Jur. 137.

[6] *Rumney* v. *Mead*, Rep. t. Finch, 303; *Griffith* v. *Bateman*, *ib.* 334; *Attorney-General* v. *Twisden*, *ib.* 336: *Conway* v. *Stroud*, Freem. 188. If, however, the executor is an outlaw and cannot be found, the suit may proceed without him, *Heath* v. *Percival*, 1 P. Wms. 682, 684: 2 Eq. Ca. Ab. 167, pl. 14: 630, pl. 2.

[7] *Smith* v. *Brooksbank*, 7 Sim. 18, 21; see, however, *Moor* v. *Blagrave*, 1 Ch. Ca. 277; and observations on this case in *Smith* v. *Brooksbank*.

interest in the property sued for, it has been held that he must nevertheless be a party to the suit.[1] And so it has been held, that an administratrix of an intestate, although she had assigned his interest in a partnership concern to his next of kin, was the proper person to file a bill against the surviving partners to have the partnership accounts taken.[2]

One of several joint contractors having died during the progress of the work contracted for, and a bill afterwards filed by the survivors to enforce a claim under the terms of the contract. *Held*, that the personal representatives of the deceased partner should have been made parties; the rule respecting the right of surviving partners to sue alone not applying to suits in equity.[3] Where a mortgage is taken in the name of one partner to secure a partnership debt, and a bill is filed to enforce the security, the representatives, real or personal, of the deceased partner are not necessary parties.[4] A, who was domiciled in Scotland, died there intestate, leaving some personal property. Three of his next of kin, a brother and two sisters, concurred in appointing an Agent in Scotland to wind up the estate and transmit and account to them therefor. The Agent did so, and transmitted to the brother some money and personal chattels, as all that remained after paying the intestates debts and funeral expenses. The brother paid the sisters their shares of the money, but kept all the chattels. In a suit by the sisters for a division of these, an objection taken to the absence of any personal representative of the deceased in this Country was overruled.[5]

Where a testator, resident in India, where all his property was, died there, having made a will whereby he bequeathed the residue of his estate to persons residents in this country, but appointed persons in India his executors, who proved the will there, and remitted the proceeds to their agent in this country, it was said by Sir John Leach, V. C., that the residuary legatees could not maintain a suit against the agent, for administration, without having a representative to the testator in England before the Court; but he added, that the objection in that case occurred too late to be corrected; and no representative in England appears to have been appointed.[6]

Where a claim on property in dispute would vest in the personal representative of a deceased person, and there is no general personal representative of that person, an administration, limited to the object of the suit, was necessary to enable the Court to proceed to a decision

[1] *Smithby* v. *Hinton*, 1 Vern. 31.
[2] *Clegg* v. *Fishwick*, 1 M'N. & G. 294, 299: 12 Jur. 993.
[3] *Sykes* v. *O. & B. R. Cy.*, 9 Grant, 9.
[4] *Stephens* v. *Simpson*, 12 Grant, 493.
[5] *Sutherland* v. *Ross*, 13 Grant, 507.
[6] *Logan* v. *Fairlie*, 2 S. & S. 284, 292.

on the claim; but now the Court is empowered, by the 44th section of the Act 15 & 16 Vic. c. 86, if it thinks fit to appoint a person in such cases to represent the estate, or to proceed in the absence of any such representative.

No. 56 of our Consolidated G. Orders is taken from this Statute, and the English cases decided on the 44th Section will apply to this Order, which is as follows: "Where, in any suit or other proceeding, it is made to appear that a deceased person who was interested in the matters in question, has no legal personal representative, the Court may either proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent such estate for all the purposes of the suit, or other proceeding, on such notice to such person or persons, if any, as the Court may think fit, either specially, or by public advertisement; and the order so made, and any orders consequent thereon, shall bind the estate of the deceased person in the same manner in every respect, as if there had been a duly constituted legal personal representative of such person, and such legal personal representative had been a party to the suit or proceeding, and had duly appeared and submitted his rights and interests to the protection of the Court." This order is similiar to Order 30, of June 1853, under which it was held that the Court may proceed without any personal representative of a deceased person, where none has been appointed, or may appoint some person to represent the estate for the purpose of the suit; this does not apply to cases where parties have a beneficial or substantial interest, but applies only to cases of mere formal parties.[1] A life policy was assigned to one F. absolutely, who afterwards left the country. The insured died insolvent, and no one administered to his estate. The plaintiffs claimed the insurance money, alleging that the assignment had been made in trust for them to secure a large sum owing to them by the assignor. The insurance company declining to pay the amount to the plaintiffs, they filed a bill to compel payment, and moved under the General Order, No. 30, (June, 1853,) that they might be at liberty to proceed without a personal representative of the estate of the insured, but the Court held the case was not within the order.[2] The Court will not appoint an administrator *ad litem* of a deceased party, where the deceased party had a substantial interest in the suit.[3]

Where, however, the object of the suit is the general administration of the estate, a general personal representative is always necessary;[4]

[1] *Sherwood* v. *Freeland*, 6 Grant, 305.
[2] *Toronto Savings Bank* v. *Canada Life Ass. Cy.* 13 Grant, 171.
[3] *B. of Montreal* v. *Wallace*, 1 Cham. R. 261.
[4] *Penny* v. *Watts*, 2 Phil. 149, 153; *Donald* v. *Bather*, 16 Beav. 26.

and the Court will not proceed in such a suit, when the estate is only represented by an administrator *ad litem*;[1] nor appoint a person to represent the estate under the section above referred to.[2]

When the object of the suit is only to bind the estate, it is sufficiently represented by an administrator *ad litem*;[3] and, as a general proposition, it has been laid down, that an administrator *ad litem* represents the estate to the extent of the authority which the letters of administration purport to confer;[4] and when a limited administration has been granted, and general letters of administration are afterwards granted, the general administrator is bound by the proceedings in a cause in which the estate was represented by a limited administrator.[5]

It may not be out of place here to observe, that the Attorney-General does not represent the estate of a deceased illegitimate person, so as to dispense with the necessity of a personal representative.[6]

With regard to the power of the Court to appoint a person to represent the estate of a deceased person, Sir W. P. Wood, V.C., observed, in the case of *Long* v. *Storie*, that "the 44th section of the statute is only intended to apply to a case in which there is a difficulty, either from insolvency or some other cause, in obtaining representation to a deceased party;"[7] and the same learned Judge said, in another case, that it is always in the discretion of the Court whether it will act on the power conferred by this section;[8] and in the case of *Gibson* v. *Wells*,[9] Sir John Romilly, M. R., said, "The object of the statute is: where you have real litigating parties before the Court, but it happens that one of the class interested is not represented, then, if the Court sees that there are other persons present who *bona fide* represent the interest of those absent, it may allow that interest to be represented; but it will not allow the whole adverse interest to be represented." The observations of the learned judges above quoted show, generally, the cases in which the Court will exercise the power conferred upon it by the 44th section of the Act; and it will be useful now to refer, shortly, to some of the

[1] *Croft* v. *Waterton*, 13 Sim. 653; but see 2 Phil. 552; *Groves* v. *Levi*, or *Groves* v. *Lane*, 9 Hare, App. 47: 16 Jur. 1061. If necessary for the protection of the estate, a bill praying an injunction and receiver, may be filed, although there is no personal representative, *Steer* v. *Steer*, 13 W. R. 225, V. C. K.; but a bill filed before administration to protect the assets is demurrable, if it asks an account, *Rawlings* v. *Lambert*, 1 J. & H. 458.

[2] *Groves* v. *Levi*, *ubi sup.*: *Silver* v. *Stein*, 1 Drew, 295: 9 Hare, App. 82; see however, *Maclean* v. *Dawson*, 27 Beav. 21, 369: 5 Jur. N. S. 1091; *Williams* v. *Page*, 27 Beav. 373.

[3] *Ellice* v. *Goodson*, 2 Coll. 4; *Davis* v. *Chanter*, 2 Phil. 545, 549; *Devaynes* v. *Robinson*, 24 Beav. 97, 98: 3 Jur. N. S. 707, 708; *Maclean* v. *Dawson*, *ubi sup.*: *Williams* v. *Allen*, 10 W. R. 512, L. Js., overruling S. C. 29 Beav. 292: 8 Jur. N. S. 276.

[4] *Faulkner* v. *Daniel*, 3 Hare, 199, 207; *Davis* v. *Chanter*, *ubi sup.*

[5] *Davis* v. *Chanter*, *ubi sup.*: and *Harris* v. *Millburn*, 2 Hagg. 64, referred to, 2 Phil. 552.

[6] *Bell* v. *Alexander*, 6 Hare, 543, 545.

[7] Kay. App. 12.

[8] *Tarratt* v. *Lloyd*, 2 Jur. N. S. 371, V. C. W.

[9] 21 Beav. 620.

reported cases in which the Court has acted on this power, or has refused to do so. It has been determined, that the enactment extends to those cases where the estate to be represented is sought to be made liable;[1] and pending proceedings in the Probate Court, a representative has been appointed;[2] and, again, where the next of kin refused, or after notice neglected, to take out administration;[3] and where there was an executor, who had proved the will in India, but refused to prove it in England, the Court, appointed him to represent the estate.[4] Where there are other persons parties to the suit in the same interest as the deceased party, it is conceived that the Court will, generally, permit the suit to proceed, without any representative of the estate of such party;[5] so, also, when the deceased person was an accounting party, or without any beneficial interest, and died insolvent.[6]

Before the late Act, in some cases, when it has appeared at the hearing of a cause that the personal representative of a deceased person, not a party to the suit, ought to be privy to the proceedings under a decree, but that no question could arise as to the rights of such representative, the Court has, on the hearing, made a decree, directing proceedings before one of the Masters of the Court, without requiring the representative to be made a party by amendment or otherwise; and has given leave to the parties in the suit to bring a representative before the Master, on taking the accounts or other proceedings directed by the decree.[7]

Having now noticed the principal cases in which the Court has acted on the power given by the statute, those in which it has refused to do so will be shortly referred to. It has been held, that the enactment does not enable the Court to appoint a person to represent the estate, or to proceed without one, where he would have to be active in the execution of the decree which the Court is called upon to make;[8] nor where the whole adverse interest is unrepresented;[9] nor where as we have seen, the general administration of the estate to be represented

[1] *Dean and Chap. of Ely* v. *Gayford*, 16 Beav. 561.

[2] *Hele* v. *Lord Bexley*, 15 Beav. 340.

[3] *Tarratt* v. *Lloyd*, *ubi sup.*; *Ashmall* v. *Wood*, 1 Jur. N. S. 1130, V.C.S.; *Davies* v. *Boulcott*, 1 Dr. & Sm. 23; see also *Swallow* v. *Binns*, 9 Hare, App. 47; 17 Jur. 295.

[4] *Sutherland* v. *De Virenne*, 2 Jur. N. S. 301, V.C.S. See also *Bliss* v. *Putnam*, 29 Beav. 50; 7 Jur. N. S. 12; *Mortimer* v. *Mortimer*, 11 W. R. 740, M.R.

[5] *Abrey* v. *Newman*, 10 Hare, App. 58; 17 Jur. 153; *Cox* v. *Taylor*, 22 L. J. Ch. 910, V.C.K.; *Rucker* v. *Scholefield*, 7 L. T. N. S. 504, V. C. W. In *Tarratt* v. *Lloyd*, *ubi sup.*, however, the Court appointed a representative.

[6] *Chaffers* v. *Headlam*, 9 Hare, App. 46; *Rogers* v. *Jones*, 1 Sm. & G. 17; 16 Jur. 968; *Leycester* v. *Norris*, 10 Jur. N. S. 1173, V.C.K. See also *Ashmall* v. *Wood*, *ubi sup.*, where in a similar case a person was appointed to represent a deceased party; and see *Whittington* v. *Gooding*, 10 Hare, App. 29. In *Miles* v. *Hawking*, 1 C. P. Coop. t. Cott. 366, which was a similar case before the Act, an objection for want of parties was overruled; see also *Goddart* v. *Haslam*, 1 Jur. N. S. 251, V.C.W.; and *Madox* v. *Jackson*, 3 Atk. 406.

[7] Ld. Red. 178.

[8] *Fowler* v. *Bayldon*, 9 Hare, App. 78.

[9] *Gibson* v. *Wills*, 21 Beav. 620.

is sought;[1] nor will the Court direct money to be paid to a person appointed under this section.[2]

The 44th section of the Act expressly refers to other proceedings, as well as suits; and it has accordingly been held, that it applies to special cases and petitions.[3]

The proper person to be appointed under this section is the person who would be appointed administrator *ad litem*;[4] but the Court will not appoint a person against his will.[5]

It would seem, that the plaintiff may apply for, and obtain, an order under the 44th section on motion, without serving the other parties to the cause or proceeding;[6] but notice must be given to the persons entitled to take out administration to the deceased party;[7] the Court can, however, make the order at the hearing.[8]

The rule which requires that the trustees, or other persons having the legal estate in the thing demanded, should in all cases be before the Court, has, as we have seen, been adopted on account of the impossibility of otherwise preventing the assertion, of the legal rights, in Courts of Law; for it has been said, that in some cases, where the trustee has had no beneficial interest in the property, and was not possessed of a legal estate which he could set up at law to the annoyance of the defendant in Equity, the Court has permitted bills to be filed by the *cestui que trusts*, without making such trustee a party: the *cestui que trusts* undertaking for him that he shall conform to such decree as the Court shall make.[9] In a recent case, however, new trustees of a settlement, who had been duly appointed, but to whom the trust property had not been assigned or transferred, were held necessary parties to a suit for carrying the trusts of the settlement into execution.[10]

Again, where a bill was filed to carry the trusts of a will into execution, whereby, amongst other things, lands were limited to trustees for a term of years, to raise a sum of money by way of portions for younger children, two of which younger children had assigned their shares of

[1] For other cases where the Court has refused, see *Bruiton* v. *Birch*, 22 L. J. Ch. 911, V. C. K.; *Maclean* v. *Dawson*, 27 Beav. 21, 369: 5 Jur. N. S. 1091.

[2] *Byam* v. *Sutton*, 19 Beav. 646; *Rawlins* v. *M'Mahon*, 1 Drew. 225; 9 Hare, App. 82; *Jones* v. *Foulkes*, 10 W. R. 65, V. C. K.

[3] *Swallow* v. *Binns*, 9 Hare, App. 47; 17 Jur. 295; *Ex parte Cramer*, 9 Hare, App. 47.

[4] *Dean of Ely* v. *Gayford*, 16 Beav. 561; and see *Hele* v. *Lord Bexley*, 15 Beav. 340; *Ashmall* v. *Wood*, 1 Jur. N. S. 1130, V.C.S.; *Sutherland* v. *De Virenne*, 2 Jur. N. S. 301, V. C. S., where the Court appointed the executor who had not proved. See also *Mortimer* v. *Mortimer*, 11 W. R. 740, M. R.

[5] *Prince of Wales Association* v. *Palmer*, 25 Beav. 605; *Hill* v. *Bonner*, 26 Beav. 372; *Long* v. *Storie*, Kay. App. 12.

[6] Seton, 1179; *Davies* v. *Boulcott*, 1 Dr. & Sm. 23; see however, *contra*, *Chaffers* v. *Headlam*, 9 Hare, App. 46.

[7] *Davies* v. *Boulcott*, *ubi sup.*: *Tarratt* v. *Lloyd*, 2 Jur. N. S. 371, V.C.W.

[8] *Hewitson* v. *Todhunter*, 22 L. J. Ch. 76, V.C.S.

[9] *Kirk* v. *Clark*, Prec. Ch. 275.

[10] *Nelson* v. *Seaman*, 1 De G. F. & J. 368: 6 Jur. N. S. 258.

the sum to be raised to a trustee for the benefit of the others, but which last trustee was not before the Court: the only question was, whether he ought to be a party to the suit; and the Court was of opinion, that as the trustees of the term who had the legal estate, and all the children who had the beneficial interest, were parties, there was no occasion to make the other trustee a party.[1] Upon the same principle, where a man had executed a deed, providing, in case of his death, for a woman and her children, and had deposited it in the hands of an attorney for the benefit of all parties, but afterwards procured possession of it himself, it was held on demurrer, that the woman and her children could maintain a suit to compel him to deliver up the deed, without making the attorney with whom it was deposited, and against whom no breach of trust was alleged, a party.[2]

For the same reason it has been held, that although, as we have seen, the assignor of a *chose in action* is a necessary party to a suit by the assignee, yet the assignee of an equitable interest in the nature of a *chose in action* may maintain a suit for the assertion of that interest, without bringing the assignor before the Court.[3] Thus, where one of two joint executors and residuary legatees assigned his share of the residue and died, and afterwards his assignee brought a bill against the other executor for such share, the Court of Exchequer held, that the representatives of the assignor were not necessary parties, as the proof of the receipt of the purchase-money by the assignor would be sufficient evidence of the plaintiff's title.[4]

The principle of the Court, that the person having the legal right to sue for the same matter which he might enforce at Law against the defendant, should be before the Court at the time of its pronouncing its decision, applies to all persons who have legal demands against the defendant arising out of the same matter; thus, as it has been decided that, at Law, an assignee of a lease may be sued for non-performance of the covenants, both by the lessor and the original lessee from whom he derives title, Courts of Equity will not permit either the lessor or lessee to institute proceedings against him in respect of his covenants, without having the other before them, in order that the rights of both may be settled at the same time. Upon this ground, where a man granted a lease of houses for thirty years to *B.*, who covenanted to keep them in good repair, and died, having bequeathed the term to his wife; and afterwards, by *mesne* assignments, the term became vested in

[1] *Head* v. *Lord Teynham*, 1 Cox, 57.

[2] *Knye* v. *Moore*, 1 S. & S. 61, 64.

[3] *Cator* v. *Croydon Canal Company*, 4 Y. & C. Ex. 405, 419: 8 Jur. 277, L. C.; *Padwick* v. *Platt* 11 Beav. 503; *Fulham* v. *M'Carthy*, 1 H. L. Ca. 703; *Bagshaw* v. *Eastern Union Railway Company*, 7 Hare, 114: 13 Jur. 602; affirmed, 14 Jur. 491.

[4] *Blake* v. *Jones*, 3 Anst. 651.

a pauper, but the houses becoming out of repair and the rent in arrear, a bill was brought by the lessor against the assignee for repairs, and an account of the arrears of rent: upon an objection being taken, that the executors of the original lessee were not parties, the Lord Chancellor said, that to make the proceedings unexceptionable, it would be very proper to have them before the Court; for that it did not appear to him but that the plaintiff might have had a satisfaction at Law against the executors, and, if so, the plaintiff's equity would be their equity.[1] The same objection was allowed in the case of the *City of London* v. *Richmond*,[2] which was also the case of a bill against the assignee of a lease, for payment of rent and performance of covenants.

The rule which requires all persons, having similiar rights to sue at Law with that of the plaintiff, to be brought before the Court, does not apply to a bill filed by the last indorsee of a bill of exchange which has been lost, against the acceptor: in which case it has been held, that neither the drawer,[3] nor the prior indorsees[4] are necessary parties: because, in such cases, the ground of the application to a Court of Equity is the loss of the instrument; and the Court only relieves upon the terms of the plaintiff giving the defendant ample security against being called upon again by the drawer or indorsees, in case they should become possessed of the instrument. And it seems also, that the drawer is not a necessary party, where a suit is instituted by an acceptor against the holder of a bill of exchange which is forthcoming, for the purpose of having it delivered up.[5]

The principle, that persons have co-existent rights with the plaintiff to sue the defendant must be brought before the Court, in all cases where the subject-matter of the right is to be litigated in Equity, is not confined to cases where such co-existent rights to sue are at Law; it applies equally to cases where another person has a right to sue, for the same matter, in Equity: in such cases, the defendant is equally entitled to insist that the person possessing such right should be brought before the Court before any decree is pronounced, in order that such right may be bound by the decree. Thus, where a bill was filed by a vicar against a sequestrator, for an account of the profits of a benefice, received during its vacation, it appears to have been thought by the Court, that the bishop ought to have been a party to the suit, because the sequestrator was accountable to him for what he had received;[6]

[1] *Sainstry* v. *Grammar*, 2 Eq. Ca. Ab. 165, pl. 6.
[2] 2 Vern. 421: 1 Bro. P. C., ed. Toml., 516.
[3] *Davies* v. *Dodd*, 4 Pri. 176.
[4] *Macartney* v. *Graham*, 2 Sim. 285.
[5] *Earle* v. *Holt*, 5 Hare, 180; see however, *Penfold* v. *Nunn*, 5 Sim. 405.
[6] *Jones* v. *Barrett*, Bunb. 192.

and, on the other hand, where a bill was filed by a bishop and a sequestrator against an occupier, for an account of tithes during the lunacy of the incumbent, who had been found a lunatic under a commission, it was held that the incumbent or his committee ought to have been a party.[1] It seems, however, that where a living is under sequestration for debt, the incumbent may maintain a suit for tithes, without making the sequestator, or the bishop, a party. This appears to have been the opinion of the L. C. B., Lord Lyndhurst, in *Warrington* v. *Sadler*,[2] where a decree was made in a suit by a vicar for tithes, although the vicarage was under sequestration, and the occupiers had actually paid certain alleged moduses to the sequestrator. Upon the principle above stated it is held, that, in general, where a suit is instituted on behalf of a lunatic, either by the Attorney-General or his committee, the lunatic himself must be a co-plaintiff: because he may recover his senses, and would not be bound by the decree.[3]

In the above cases, the person required to be party, had a concurrent right with the plaintiff in the whole subject of the suit; the same rule, however, applies where he has only a concurrent right in a portion of it; thus, where there are two joint-tenants for life, and one of them exhibits a bill, the other must be a party, unless the bill shows that he is dead;[4] and where *A.*, *B.* and *C.* were joint lessees under the City of London, and *A.* and *B.* brought a bill against the lessors to have certain allowances out of the rent, and it appeared upon the hearing that *C.* was living, an objection, because he was not a party to the bill was allowed;[5] and so, where a bill is brought for a partition, either by joint-tenants or tenants in common: as mutual conveyances are decreed, all persons necessary to make such conveyances must be parties to the suit;[6] and where one tenant in common had granted a lease of his share for a long term of years, the lessee was held to be a necessary party to the suit, at the expense, nevertheless, of his lessor, who was to be responsible for his costs.[7] Where, however, a tenant in common had demised his share for a long term of years, it was held that the termor for years was entitled to file a bill for a partition against the other tenants in common, to endure during the term, without bringing the reversioner of the share demised before the Court;[8] and so, it seems, where one of the parties is only tenant for life, he may mantain a suit for a partition without

[1] *Bishop of London* v. *Nichols*, Bunb. 141.
[2] Younge, 283.
[3] See *ante*.
[4] *Haycock* v. *Haycock*, 2 Ch. Ca. 124; *Weston* v. *Keighley*, Rep. t. Finch. 82.
[5] *Stafford* v. *The City of London*, 1 P. Wms. 428; 1 Stra. 95.
[6] *Anon*, 3 Swanst. 139, n.
[7] *Cornish* v. *Gest*, 2 Cox. 27.
[8] *Baring* v. *Nash*, 1 V. & B. 551; *Heaton* v. *Dearden*, 16 Beav. 147.

the party entitled in remainder, who is not *in esse*,[1] Where the object of a suit is to ascertain boundaries, the Court will not entertain the bill, without having the remaindermen and all parties interested before it.[2]

It is not in general necessary, in questions relating to real property that the occupying tenants under leases should be parties. The tenant is, however, a necessary party where the object of the suit is to restrain an action of ejectment brought against him. Thus, in the case of *Lawley* v. *Waldon*,[3] Lord Hardwicke allowed a demurrer for want of parties to a bill by the owner of an estate, to restrain an action of ejectment against his tenant, on the ground that the latter was not a party; observing, however, that if the plaintiff in Equity had been made a defendant at Law, as he might have been, he should not have thought it necessary to make the tenant a party to the bill, notwithstanding his being a co-defendant; but that, as he was the only defendant at law, he must be a party to the bill.

But, although it is not usual, in suits relating to property, to make the occupying lessees of such property parties to the proceedings, yet, if such lessees, or other persons having only limited interests in the property, seek to establish any right respecting such property, it is necessary that they should bring the owners of the inheritance before the Court, in order that, in case the suit is unsuccessful, the decree of the Court dismissing the bill may be binding upon them. Thus, to a bill by the lessees of property in a parish, to establish a modus, the owner of the inheritance must be a party; and for the same reason, if there is a question concerning a right of common, though a leaseholder may enforce it at Law yet if he bring a bill in Equity to establish such right, he must bring the persons in whom the fee of his estate is vested before the Court;[4] and so, in a suit in Equity to establish a right to fees in an office, although in an action at Law for such fees it is not necessary to make any person a party but the one who has actually received such fees, yet, in Equity, it is necessary to have all persons before the Court who have any pretence to a right.[5]

Upon the same principle, where a bill was filed by a lessee against a lord of a manor, and the tenant of a particular house, to have the house which obstructed the plaintiff's way, pulled down, and to be quieted in the possession of the way for the future, and the defendant's counsel

[1] *Wills* v. *Slade*, 6 Ves. 498; *Gaskell* v. *Gaskell*, 6 Sim. 643; see, also, *Brassey* v. *Chalmers*, 4 De G. M. & G. 528.

[2] *Rayley* v. *Best*, 1 R. & M. 659; see also *Miller* v. *Warmington*, 1 J. & W. 484, 493; *Speer* v. *Crawter*, 2 Mer. 410; *Attorney-General*, v. *Stephens*, 1 K. & J. 724; 1 Jur. N. S. 1039; 6 De G. M. & G. 111; 2 Jur. N. S. 51.

[3] 3 Swanst. 142, n.; *Poole* v. *Marsh*, 8 Sim. 528.

[4] *Poore* v. *Clark*, 2 Atk. 515.

[5] *Pawlet* v. *Bishop of Lincoln*, 2 Atk. 296.

objected for want of parties, because the plaintiff's lessor was not before the Court, the objection was allowed.[1]

These cases all proceed upon the principle of preventing a defendant from being harassed by a multiplicity of suits for the same thing; and so it is held, that "if you draw the jurisdiction out of a Court of Law, you must have all persons parties before the Court who are necessary to make the determination complete, and to quiet the question."[2]

The application of this rule, however, is strictly confined to cases where the lessee seeks to establish a general right: where he only seeks that which is incidental to his situation as tenant, he need not make his landlord a party. Thus, a lessee of tithes may file a bill for tithes against an occupier, without making his lessor a party, because the claim to tithes abstracted is merely possessory; and, upon the same principle, where an occupier, who was sued for tithes by the lessee of an impropriate rector, filed a cross bill against such rector for a discovery of documents, a demurrer to such bill by the rector was allowed.[3]

In order to entitle a lessee to sue for tithes without his lessor, he must claim under a demise by deed; because tithes, being things which lie in grant, cannot be demised by parol, and a decree in favour of a plaintiff claiming under a verbal demise, would, therefore, be no bar to another suit for the same tithes by the lessor. Upon this ground, in *Henning* v. *Willis*,[4] the Court of Exchequer allowed a demurrer to the plaintiff's bill, because the impropriator, who was the lessor, was not a party: and the plaintiff having submitted to the demurrer, obtained leave to amend his bill, by making the impropriator a party.[5] A similar demurrer was put in to a bill for tithes by a lessee under a parol demise, in *Jackson* v. *Benson*,[6] and allowed; leave being also given to amend, by making the impropriator a party; and in *Williams* v. *Jones*,[7] the principle to be deduced from the foregoing cases was recognised by the L. C. B., Lord Lyndhurst. In that case, the vicar, who was the lessor, had been originally made a party to the suit, but as he had by his answer disclaimed all interest in the tithes in question, the plaintiff had dismissed the bill as against him, and brought the suit to a hearing against the occupier only; and Lord Lyndhurst held, that as the vicar had been originally a party, the circumstance of the bill having been

[1] *Poore* v. *Clark*, *ubi sup.*

[2] Per Lord Hardwicke, *Ibid.*

[3] *Tooth* v. *The Dean and Chapter of Canterbury*, 3 Sim. 49, 61.

[4] 3 Wood., 29; 2 Gwil. 898.

[5] The bill was amended, by making the lessor a defendant, and praying that the occupier might be decreed to account with the lessee, his co-defendant; and that what should be found due on the account might be paid into Court for the benefit of the plaintiff; see Lord Lyndhurst's judgment in *Williams* v. *Jones*, Younge 255.

[6] M'Lel. 62; 13 Pri. 131.

[7] Younge 252.

dismissed as against him made no difference: for although his disclamer could not be read against the other defendants, no inconvenience could arise: because the lessor, after such disclaimer, would never be allowed to set up any claim against the occupier for the same tithes.

The rule that persons claiming joint interests in an estate cannot sue without making their co-owners parties, applies equally whether the subject-matter of the suit be real or personal property; thus, it has been said, that where a legacy is given to two jointly, one cannot sue for it alone; though where there are several legacies, each may sue for his own.[1] And so, where there are several persons interested, as joint-tenants, in money secured by mortgage, they must all be made parties to a bill to foreclose such mortgage. This was decided to be the law of the Court by Lord Thurlow, in the case of *Lowe* v. *Morgan*,[2] where a mortgagee had assigned the money secured by the mortgage to a trustee, in trust for three persons as joint-tenants. In that case, his Lordship appears to have laid a stress upon the circumstance of the parties interested in the money being joint-tenants; from which it has been inferred, that a tenant in severalty or in common might foreclose as to his share, without making the other persons interested in the money parties; and a decree to this effect was actually made by Lord Alvanley, M. R., in a case where trustees of money belonging to several individuals had laid it out on a mortgage, and afterwards one of the persons entitled to part of the mortgage money filed a bill against the mortgagor and the trustees for his share of the mortgage money, or a foreclosure; although the parties interested in the rest of the money were not before the Court.[3] In a case before Sir John Leach, V. C. however, it was determined, that there can be no redemption or foreclosure unless all the parties interested in the mortgage money are before the Court; and, on this ground, a bill by a person entitled in severalty to one-sixth of the mortgage money, to foreclose one-sixth of the estate, was dismissed with costs;[4] but although all the persons entitled to the mortgage money should be parties to the suit, they need not be co-plaintiffs; and any one of them may file the bill, making the others defendants.[5]

The rule as laid down by Sir John Leach, in the case above cited, is now modified by the provision of the late Act enabling trustees, in suits relating to real or personal estates vested in them, to represent the persons

[1] *Haycock* v. *Haycock*, 2 Ch. Ca. 124. But it is conceived that now, the co-legatee need not be made a party in the first instance; but may be served with notice of the decree: the case, though not within the words, appearing to be within the spirit of the first and second rules of the 15 & 16 Vic. c. 86, s. 42. Rules 1 & 2 of No. 58 of our Con. G. O. are similar.

[2] 1 Bro. C. C. 368: and see *Stansfield* v. *Hobson*, 16 Beav. 190.

[3] *Montgomerie* v. *The Marquis of Bath*, 3 Ves. 560.

[4] *Palmer* v. *Lord Carlisle*, 1 S. & S. 423.

[5] *Davenport* v. *James*, 7 Hare, 249; 12 Jur. 827.

beneficially entitled,[1] unless the Court requires such persons to be parties; and the Court has, accordingly, in a redemption suit, dispensed with some of the beneficiaries; though it appears that it will not dispense with all.[2] In a foreclosure suit, however, the trustees of the debt, under an assignment for the benefit of creditors, were held sufficiently to represent all the creditors.[3]

To a bill of foreclosure brought by the trustees to whom a mortgage had been executed for the benefit of certain creditors of the mortgagor, such creditors are not necessary parties.[4] To a suit brought by or against a trustee of an insolvents' estate, in respect of a sum owing by one of the debtors of the insolvent, the creditors for whose benefit the trust deed was executed, are necessary parties.[5] Where a bill was filed by one of several creditors of a debtor, who had assigned his estate for the benefit of his creditors, against the debtor and the trustees, seeking an account of the estate and payment, without making any other creditor a party, the Court overruled an objection for want of parties, on the ground of the absence of such creditor.[6] To a bill by an execution creditor of two joint debtors, to set aside conveyances by one of them as fraudulent and void against creditors, the grantor was a defendant, *Held*, that if the grantor was a necessary party, his co-debtor should be a party also.[7]

As a person entitled to a part only of the mortgage money cannot foreclose the mortgage, without bringing the other parties interested in the mortgage money before the Court, so neither can a mortgagor redeem the mortgaged estate, without making all those who have an equal right to redeem with himself parties to the suit.

For this reason it was held, in *Lord Cholmondeley* v. *Lord Clinton*,[8] that where two estates are mortgaged to the same person for securing the same sum of money, and afterwards the equity of redemption of one estate becomes vested in a different party from the other, the owner of one cannot redeem his part separately. The mortgagee is entitled to insist that the whole of the mortgaged estate shall be redeemed together; and, for this purpose, that all the persons interested in the several estates

[1] 15 & 16 Vic. c. 86, s. 42, r. 9. No. 61 of our Con. G. O. is almost a copy of this rule 9. of the Imp. Sta.

[2] *Stanfield* v. *Hobson*, 16 Beav. 189.

[3] *Morley* v. *Morley*, 25 Beav. 253. In *Thomas* v. *Dunning*, 5 De G. & S. 618, before the Act, it was held, that scheduled creditors to an assignment of an equity of redemption by the mortgagor, were necessary parties; and in a late case, trustees of a mortgagor's creditors' deed were held not to represent judgment creditors, who had not acceded to it *Knight* v. *Pocock*, 24 Beav. 436; 4 Jur. N. S. 197; and see *Rolph* v. *U. C. B. Sy.*, 11 Grant., 275.

[4] *Fraser* v. *Sutherland*, 2 Grant, 442.

[5] *O'Connell* v. *Charles*, 2 Grant, 489.

[6] *Wood* v. *Brent*, 9 Grant, 78.

[7] *Pyper* v. *Cameron*, 13 Grant, 131.

[8] 2 J. & W. 1, 134.

or mortgages should be made parties to a bill seeking an account and redemption. The same rule prevailed in *Palk* v. *Lord Clinton*,[1] which differed from the case above cited, in the circumstance only of its being a bill by a second mortgagee of part of an estate to redeem a first mortgage, which embraced the whole property.

In the above cases, the mortgage of the two estates was for the same sum of money, and was part of the same transaction. The rule however, has been extended to cases where a mortgage has been of two distinct estates to the same mortgagee, for securing different sums of money; and it has been decided in many cases, that a mortgagee of two separate estates, upon distinct transactions, from the same mortgagor, is entitled to hold both mortgages till the amount due upon both be discharged, even against the purchaser of the equity of redemption of one of the mortgaged estates without notice; so that the mortgages, although for distinct sums, are in effect for one sum. Upon this principle, where the purchaser of the equity of redemption of a mortgaged estate filed his bill against the mortgagee, to redeem, and the defendant, by his answer, stated a subsequent mortgage made to him, by the same mortgagor, of a distinct estate for a distinct debt, it was held, that the persons interested in the equity of redemption of the second mortgage were necessary parties to the suit.[2] And this rule prevails, although one mortgage be a pledge of personalty, and the other a mortgage of realty.[3]

The rule which requires that, in a bill filed for the purpose of redeeming a mortgage, the plaintiff should bring before the Court all those who, as well as himself, have a right to redeem, has been held to apply to a second incumbrancer filing a bill to redeem a prior incumbrance, who must, in such case, bring the mortgagor, as well as the prior incumbrancer, before the Court.[4] This is a rule of long standing, and was followed by Lord Thurlow, in a case where his adherence to it was very inconvenient in consequence of the heir-at-law of the mortgagor being abroad; his Lordship there said that it seemed to him "impossible that a second mortgagee should come into this Court against the first mortgagee, without making the mortgagor, or his heir, a party. The natural decree is, that the second mortgagee shall redeem the first mortgagee, and that the mortgagor shall redeem him or stand foreclosed."[5] The same rule was

[1] 12 Ves. 48, 59.

[2] *Ireson* v. *Denn*, 2 Cox, 425; see however *Willie* v. *Lugg*, 2 Eden, 78.

[3] *Jones* v. *Smith*, 2 Ves. J. 372; reversed by House of Lords, see 6 Ves. 229 n.; see also *Watts* v. *Symes*, 1 De G. M. & G. 240; 16 Jur. 114; *Tassell* v. *Smith*, 2 De G. & J. 713; 4 Jur. N. S. 1090; *Vint* v. *Padget*, 2 De G. & J. 611; 4 Jur. N. S. 1122; *Selby* v. *Pomfret*, 1 J. & H. 336; 7 Jur. N. S. 860; *ib.* 835, L. C.

[4] *Thompson* v. *Baskerville*, 3 Ch. Rep. 215; *Farmer* v. *Curtis*, 2 Sim. 466; and see *Hunter* v *Macklew*, 5 Hare, 238.

[5] *Fell* v *Brown*, 2 Bro. C. C. 276, 278.

confirmed by Sir William Grant, M. R., in *Palk* v. *Lord Clinton*,[1] and has ever since been acted upon as the rule of the Court.

But although a second mortgagee, seeking to redeem a first mortgagee, must make the mortgagor or his heir a party, yet he may, if he please, foreclose the mortgagor and a third mortgagee, without bringing the first mortgagee before the Court: because by so doing he merely puts himself in the place of the mortgagor and subsequent mortgagee, and leaves the first mortgagee in the situation in which he stood before;[2] and if, in such a case, he makes the prior mortgagee a party, he must offer to redeem him.[3] For the same reason it has been held, that a third mortgagee buying in the first, need not make the second mortgagee a party to a bill to foreclose the mortgagor. Upon the same ground, it is unnecessary to make annuitants, or other prior incumbrancers parties to a bill by creditors or incumbrancers for the sale of an estate;[4] and so, in a suit for the execution of a trust, by those claiming the ultimate benefit of the trust after the satisfaction of prior charges, it is not necessary to bring before the Court the persons claiming the benefit of such prior charges; and therefore, to a bill for the application of a surplus after payment of debts or legacies, or other prior incumbrances, the creditors, legatees, or incumbrancers need not be parties.[5]

Under the provision of the late Act above referred to with regard to trustees representing their *cestui que trusts*,[6] it has been held, that when the mortgaged estate was vested in trustees, who also, as executors of a will or otherwise, were the persons who would be in possession of the funds for payment of the mortgage debt, they might properly represent the beneficiaries;[7] but that when this was not the case, the *cestui que trusts*, or some of them, must be before the Court.[8]

Rule 9 of Section 86, of the Imp. Sta. 15 & 16 Vic. C. 86, is similar in effect to our Order 61, which is taken from it. This Order declares that "In all suits concerning real or personal estate which is vested in trustees under a will, settlement or otherwise, the trustees shall

[1] 12 Ves. 48, 58,

[2] *Richards* v. *Cooper*, 5 Beav. 304; *Lord Hollis's* case, cited 3 Ch. Rep. 86; *Rose* v. *Page*, 2 Sim. 471; *Brisco* v. *Kenrick*, 1 C. P. Coop. t. Cott. 371; and see *Arnold* v. *Bainbrigge*, 2 De G. F. & J. 92; *Audsley v. Horn*, 26 Beav. 195: 6 Jur. N. S. 205.

[3] *Gordon* v. *Horsfall*, 5 Moore, 393: 11 Jur. 569.

[4] See judgment in *Rose* v. *Page*, 2 Sim. 472 and see *Parker* v. *Fuller*, 1 R. & M. 656.

[5] Ld. Red, 175.

[6] 15 & 16 Vic. c. 86, s. 42.

[7] *Hanman* v. *Riley*, 9 Hare, App. 40; *Sale* v. *Kitson*, 3 De G. M. & G. 119: 17 Jur. 170; 10 Hare, App. 50; *Wilkins* v. *Reeves*, 3 W. R. 305: 3 Eq. Rep. 494, V. C. W.; *Marriott* v. *Kirkham*, 3 Giff. 536: 8 Jur. N. S. 379.

[8] *Goldsmid* v. *Stonehewer*, 9 Hare, App. 38: 17 Jur. 199; *Young* v. *Ward*, 10 Hare, App. 58; *Cropper* v. *Mellersh*, 1 Jur. N. S. 299, V. C. S.; and see *Siffken* v. *Davis*, Kay, App. 21; *Wilkins* v. *Reeves*, *ubi sup.*; *Tuder* v. *Morris*, 1 Sm. & G. 503; *Watters* v. *Jones*, 6 Jur. N. S. 530, V. C. S.

represent the persons beneficially interested under the trust, in the same manner and to the same extent as executors or administrators, in suits concerning personal estate, represent the persons beneficially interested in such personal estate; and in such case it shall not be necessary to make the persons beneficially interested under the trust parties to the suit; but, on the hearing, the Court, if it thinks fit, may order such persons, or any of them, to be made parties."

When the mortgagor has become bankrupt, he is not a necessary party to a suit for foreclosure, even if the assignees disclaim:[1] though the last proposition appears to have been doubted by Sir James Wigram, V. C.[2]

The same principle which calls for the presence of all persons having an interest in the equity of redemption, in the case of bills to redeem a mortgage, requires that where a mortgagee seeks to foreclose the mortgagor, he should bring before the Court all persons claiming an interest in the mortgage; therefore, a derivative mortgagee must make the original mortgagee, or, if dead, his representative, a party to a bill against the mortgagor for foreclosure.[3]

If, however, a mortgagee has assigned or conveyed away from himself, not only the money due on the mortgage, but also the mortgaged premises, the assignee may, as we have seen,[4] foreclose, without making the original mortgagee a party; and upon the same principle, it may also be inferred from the case of *Renvoize* v. *Cooper*,[5] that where a mortgagee has devised his interest in the mortgage, in such a manner as to pass not only the mortgage money but the estate mortgaged, the devisee alone may foreclose, without making the heir-at-law of the original mortgagee a party, unless he claims to have the will established:[6] in which case, it would seem, he must be made a defendant; because a devisee and heir cannot join in the same suit, even upon an allegation that they have agreed to divide the matter in question between them.[7]

The rule which requires that all persons having concurrent interests with the plaintiff should be parties to the bill, applies to all cases in which an account is sought against a defendant. One person cannot exhibit a bill against an accounting party without bringing before the Court all persons who are interested in having the account taken, or in

[1] *Collins* v. *Shirley*, 1 R. & M. 638; *Kerrick* v. *Saffery*, 7 Sim. 317; see also *Cash* v. *Belcher*, 1 Hare, 310: 6 Jur. 190; *Ford* v. *White*, 16 Beav. 120.

[2] *Singleton* v. *Cox*, 4 Hare, 326.

[3] *Hobart* v. *Abbot*, 2 P. Wms. 643.

[4] *Ante*.

[5] 6 Mad. 371.

[6] *Lewis* v. *Nangle*, 2 Ves. S. 431.

[7] *Lord Cholmondeley* v. *Lord Clinton*, T. & R. 107, 116.

the result of it: otherwise, the defendant might be harassed by as many suits as there are parties interested in the account. Thus, in a suit for a partnership account, or for a share of a partnership adventure, it is in general necessary that all partners or persons having shares in the same adventure should be parties;[1] and a residuary legatee seeking an account and share of the residue, must make parties all other persons interested in that residue:[2] either active parties, by making them plaintiffs or defendants to the bill; or passive parties, by serving them with notice of the decree.[3] And so, where a moiety of a residue was given to one of the defendants for life, and upon her decease, to such persons as she should appoint, and, in default of appointment, to certain other persons for life, it was held, that the other persons, although their interests depended upon such a remote contingency, ought to be before the Court.[4]

As what are called "Rules"—being portions of S. 42 of the Inp. Sta. 15 & 16 Vic. c. 86, are frequently referred to in this work—it may be convenient here to mention that "rules" 1 to 7 inclusive of our Order 58, are copies of the corresponding "rules" of this Statute. Our Order declares that "It shall not be competent to a defendant to take an objection for want of parties in any case to which the seven rules next hereinafter set forth apply.

"RULE I.—A residuary legatee, or next of kin may have a decree for the administration of the personal Estate of a deceased person, without serving the remaining residuary legatees or next of kin.

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

"RULE III.—A residuary devisee or heir, may have the like decree, without serving any co-residuary devisee or co-heir.

"RULE IV.—One of several *cestui que trusts*, under a deed or instrument, may have a decree for the execution of the trusts of the deed or instrument, without serving any other of such *cestui que trusts*.

[1] *Ireton* v. *Lewis*, Rep. t. Finch, 96; *Moffat* v. *Farquharson*, 2 Bro. C. C. 338; but it is to be observed, that notwithstanding the decision in this case, they may be made *quasi* parties by the plaintiff suing on behalf of himself and on their behalf: *Good* v. *Blewitt*, 13 Ves. 397; and see *Hills* v. *Nash*, 1 Phil. 594: 10 Jur. 148; and see *Partridge* v. *McIntosh*, 1 Grant 50.

[2] *Parsons* v. *Neville*, 3 Bro. C. C., 365. In *Cockburn* v. *Thompson*, 16 Ves., 328, Lord Eldon said this admits of an exception, and that when, from great numbers, it was impracticable to make them all parties, some might sue on behalf of themselves and the others; and see *post*.

[3] 15 & 16 Vic. c. 86, s. 42, rr. 1, 8. See Rule 1 of our Con. G. O. No. 58, and Order No. 60, similar.

[4] *Sherrit* v. *Birch*, 3 Bro. C. C, 229; *Lenaghan* v. *Smith*, 2 Phil. 391; 11 Jur. 503; but not when the share has been ascertained and invested: *Smith* v. *Snow*, 3 Mad. 10; *Hares* v. *Stringer*, 15 Beav. 206; see also *Grace* v. *Terrington*, 1 Coll. 3.

"RULE V.—In all cases of suits for the protection of property pending litigation, and in all cases in the nature of *waste*, one person may move on behalf of himself, and of all persons having the same interest.

"RULE VI.—An Executor, Administrator, or Trustee, may obtain a decree against any one legatee, next of kin, or *cestui que trust*, for the administration of the estate, or the execution of the trusts.

"RULE VII.—An assignee of a *chose in action* may institute a suit in respect thereof without making the Assignor a party thereto."

Order 59, provides that "In all the above cases the Court, if it sees fit, may require any other person to be made a party to the suit, and may if it sees fit, give the conduct of the suit to such person as it deems proper; and may make such order in any particular case as it deems just for having the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matter in question." And Order 6, with a number of writs, pleadings and proceedings, abolishes the practice of "setting down a cause on an objection for want of parties merely." And Order 60, that "In all the above cases, the persons who, according to the practice of the Court, would be necessary parties to the suit, are to be served with an office copy of the decree (unless the Court dispenses with such service) endorsed with the notice set forth in Schedule A hereunder written, and after such service, they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit; and upon service of notice upon the plaintiff, they may attend the proceedings under the decree. Any party so served may apply to the Court to add to, vary or set aside the decree within fourteen days from the date of such service."

It may be here mentioned that Order 408 provides that the time of vacation is not to be reckoned in the computation of the time appointed or allowed for "moving to add to, vary, or set aside a decree, by any party served therewith."

Upon the same principle it is, that in suits by next of kin against a personal representative for an account, the Court requires that all the next of kin, should be parties to the suit,[1] in the same manner as in the case of residuary legatees: either as plaintiffs or defendants to the bill, or by being served with notice of the decree.[2] It is to be observed, that in cases where the parties claim under a general description, or as being some of a class of persons entitled, the Court would not formerly make a decree without being first satisfied that all the individuals of

[1] See *Hawkins* v. *Hawkins*, 1 Hare, 543, 546: 6 Jur. 638, explaining *Caldecott* v. *Caldecott*, C. & P. 183: 5 Jur. 212; and see *Shuttleworth* v. *Howarth*, C. & P. 230: 5 Jur. 499.

[2] 15 & 16 Vic. c. 86, s. 42, rr. 1, 8, and see our Orders, No. 58.

the class, or who come under the general description, were before it. For this purpose, the Court, in cases of this description, before directing an account, or other relief prayed by the bill, referred it to one of the Masters to inquire who the individuals of the class, or answering the general description, were; and then, if it turned out that any of them were not before the Court, it was necessary for the plaintiff to bring them before the Court before the cause was finally heard. And according to Sir James Wigram, V. C., in an administration suit, in which inquiries were necessary to ascertain who were the parties beneficially interested in the estate, it was irregular to direct the accounts to be taken until after the inquiries had been made, and the Master had made his report. But where the parties interested were the children of a party to the suit, or persons of a class in such circumstances that the Court might be reasonably satisfied, at the hearing, that all parties beneficially interested were parties to the record, the Court might, at the time of directing the inquiries, also order that, if the Master should find that all the persons beneficially interested were parties to the suit, he should then proceed to take the account; this was, however, an irregularity, and the Court would not make the order in that form, unless it were reasonably clear that all the persons interested were parties.[1] Under the present practice of the Court, however, it being no longer necessary to make all the residuary legatees or next of kin parties for the purpose of the decree, although it is usual still to direct such an enquiry as above-mentioned, yet it should not in terms be made preliminary to taking the accounts: in order that the Judge's discretion to proceed in the absence of the parties may not be fettered.[2]

Where the plaintiff, suing on behalf of himself and the other next of kin of an intestate, alleges in his bill, but does not prove, that the next of kin are too numerous to be made parties by name, the Court will either allow the cause to stand over, or will direct an enquiry by the Master as to the next of kin.[3]

In like manner, as in the case of residuary legatees and next of kin, one legatee interested in a legacy charged upon real estate, one of the persons interested in the proceeds of real estate directed to be sold, or one residuary devisee or heir, may have an administration decree, without making the others of the class parties in the first instance: though they must be served with notice of the decree.[4]

[1] *Baker* v. *Harwood*, 1 Hare, 327: 6 Jur. 552; see also *Hawkins* v. *Hawkins*, 1 Hare, 543; 6 Jur. 638; *Say* v. *Creed*, 3 Hare, 455: 8 Jur. 893; *Phillipson* v. *Gatty*, 6 Hare, 26: 12 Jur. 430.

[2] Seton 188; and as to evidence necessary to support such an inquiry, see *Miller* v. *Priddon*, 1 M'N. & G. 687. But the Master in this Province has not the power which a Judge in England has—and where a Master finds that a party interested in the fund is not before the Court, he should cause him to be served with notice of the Decree under Order 60; and he should, in no case, dispense with this without a special order of the Court, or a Judge.

[3] *Musselman* v. *Snider*, 3 Grant, 158.

[4] 15 & 16 Vic. c. 86, s. 42, rr. 2, 3, 8. And see our Orders No. 58.

The rule that all persons interested in an account should be made parties to a suit against the accounting party, will not apply where it appears that some of the parties interested in such account have been accounted with and paid; thus, in the case of a bill by an infant *cestui que trust* coming of age, for his share of a fund, it is the constant practice to decree an account, without requiring the other *cestui que trusts*, who have come of age before, and have received their shares, to be before the Court. And in the case of a partnership, where a bill was filed against factors by the persons interested in one moiety of a cargo of tobacco, for a discovery and account as to that moiety, without making the person interested in the other moiety a party, and it appeared that the defendants had distinguished in their accounts between him and the plaintiffs, and had divided the funds, and kept separate accounts, the Court held that the owner of the other moiety was not a necessary party to the suit.[1] And where *A.*, *B.* and *C.*, being partners together, *A.* agreed with *D.* to give him a moiety of his share in the concern, it was held, that an account might be decreed between *A.* and *D.*, without making *B.* and *C.* parties.[2] It is also held, that to a bill by a person entitled to a certain aliquot portion of an ascertained sum in the hands of trustees, the *co-cestui que trusts* are not necessary parties.[3] In some cases, where a party having a joint interest with the plaintiffs in the taking of an account has been abroad, the cause has been allowed to go on without him; thus, in the Exchequer, where a bill was filed by some of the children of a freeman of London, who was dead, for an account and division of his personal estate, and it appeared that one of the children was beyond sea, the Court was moved that they might hear the cause without him, and that if it appeared that he had any right, he might come before the deputy remembrancer on the account; and, though no precedent was produced of such an order, the Court gave liberty to hear the case without him.[4]

The question whether a trustee of an estate can be called upon by a purchaser of a portion of an estate, sold by the beneficiaries to different persons, to convey to him the legal estate in such portion, without bringing all the other persons interested in the same estate before the Court, was discussed before Lord Eldon, in the case of *Goodson* v. *Ellison*.[5] In that case, the persons beneficially interested in an estate vested in trustees had, many years before the commencement of the suit, pro-

[1] *Weymouth* v. *Boyer*, 1 Ves. J. 416, 422; see also *Anon.* 2 Eq. Ca. Ab. 166, pl. 7; *Hills* v. *Nash* 1 Phil. 594, 597: 10 Jur. 148.

[2] *Brown* v. *De Tastet*, Jac. 284; see also *Bray* v. *Fromont*, 6 Mad. 5.

[3] *Smith* v. *Snow*, 3 Mad. 10; *Hares* v. *Stringer*, 15 Beav. 206; see also *Perry* v. *Knott*, 5 Beav 293; *Lenaghan* v. *Smith*, 2 Phil. 301: 11 Jur. 503; *Hunt* v. *Peacock*, 6 Hare, 361: 11 Jur. 555.

[4] *Rogers* v. *Linton*, Bunb. 200.

[5] 3 Russ. 583, 593, 596.

ceeded to sell the entirety in various lots, one of which was purchased by the plaintiff, and all the persons beneficially interested joined in conveying it to him. The trustee, however, did not join, and upon his death the legal estate became vested in the defendants: upon whose refusal to convey without the sanction of the Court the bill was filed, and a decree for a conveyance by the defendants was pronounced by Lord Gifford, M. R., who directed that they should pay the costs of the suit. Upon appeal, however, Lord Eldon expressed considerable doubts whether a trustee could be called upon to divest himself of a trust, by conveying different parcels of the trust property at different times, and whether it was not, therefore, necessary to have all the other *cestui que trusts* before the Court; but, upon re-argument, he stated that he thought there were parties enough before the Court to enable him to make a decree: though as it was the case of an old trust, he thought the Court was bound to enquire into the facts, and that the trustees had a right to have the conveyance settled in the Master's office.

It was a general rule, arising out of the preceding principles, admitting, of very few exceptions, that a trustee could not, under ordinary circumstances, institute proceedings in Equity relating to the trust property, without making the *cestui que trusts* parties to the proceeding.[1] Thus, where a bill was filed by trustees for sale, against a purchaser, for a specific performance of the contract, the *cestui que trusts* of the purchase money were held to be necessary parties, unless there was a clause in the trust-deed declaring the receipt of the trustees to be a sufficient discharge: which was considered as a declaration by the author of the trust that the receipt of the persons beneficially interested in the produce of the sale should not be necessary;[2] and where a bill was filed by certain persons, describing themselves as trustees for a society consisting of a great number of persons, for the specific performance of an agreement entered into by themselves for the benefit of the society, and a demurrer was put in, because the members of the society were not parties to the suit, upon the argument of which, it was insisted that a trustee could not file a bill respecting the trust property, without making the *cestui que trust* a party, and that, although the members of the society were so numerous that it was not practicable to make all of them parties, the bill ought to have been filed by some of them on behalf of themselves and the others, and that it did not appear by the bill that the plaintiffs were even members of the society: the demurrer was upon these grounds allowed.[3] Upon the same principle, if a mortgagee

[1] *Kirk* v. *Clark*, Prec. Cha. 275; *Phillipson* v. *Gatty*, 6 Hare 26: 12 Jur. 430; see, however, *Alexander* v. *Cana*, 1 De G. & S. 415.

[2] Per Sir J. Leach, V. C., *Calverley* v. *Phelp*, 6 Mad. 232.

[3] *Douglas* v. *Horsfall*, 2 S. & S. 184.

dies, and his heir files a bill of foreclosure, the executor of the mortgagee must be a party: because, although at law the legal right to the estate is in the heir, yet in equity he is only considered as a trustee for the executor, who is the person entitled to the mortgage money;[1] and for this reason, where the heir of the mortgagee had foreclosed the mortgagor, without making the executor of the mortgagee a party, and a bill was filed by the executor against the heir, the land was decreed to the executor.[2] It seems, however, that although the personal representative is the person entitled to receive the money, the heir has a right to say that he will pay off the mortgage to the executor, and take the benefit of the foreclosure himself;[3] and for this reason, as well as that before stated, the heir of a mortgagee is a necessary party to a bill of foreclosure by the personal representative, unless the mortgagee has devised the mortgaged estate: in which case, as we have seen, his heir is not a necessary party to a bill by the devisee to foreclose the equity of redemption.[4]

There were instances, according to the former practice of the Court, in which, under peculiar circumstances, trustees were allowed to maintain a suit, without their *cestui que trusts;* as in the case before mentioned[5] of trustees under a deed, by which estates are vested in them, upon trust to sell, and to apply the produce amongst creditors or others, with a clause declaring the receipt of the trustees to be a good discharge to the purchasers.[6] And by the 30th Order of August, 1841, the cases in which the *cestui que trusts* were dispensed with, as parties to the suit, were greatly increased: for by that order it was provided that, in all suits concerning real estate which was vested in trustees by devise, and such trustees were competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees should represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors or administrators, in suits concerning personal estate, represent the persons beneficially interested in such personal estate; and in such cases, it should not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the Court might, upon consideration of the matter on the hearing, if it should so think fit, order such persons to be made parties. This order applied, not only to suits by persons

[1] *Freak* v. *Horsey*, Nels. 93; Freem. 180: 1 Cha. Ca. 51: 2 Eq. Ca. Ab. 77, pl. 2.
[2] *Gobe* v. *Carlisle*, cited 2 Vern. 67.
[3] *Clerkson* v. *Bowyer*, 2 Vern. 67.
[4] *Renvoize* v. *Cooper*, 6 Mad. 371: *ante*.
[5] *Ante*.
[6] See *Calverley* v. *Phelp*, 6 Mad. 229.

claiming adversely against the estate, but also to suits by some of the persons beneficially interested, seeking relief in respect of alleged misconduct of the trustees; and in such cases, it rendered it unnecessary that persons having charges on the estate should be parties.[1] It was necessary, however, that the trustees who were empowered to give discharges, should themselves be entitled to the legal estate: otherwise, the order did not apply, and the *cestui que trusts* were necessary parties to the suit.[2] And it appears that the order did not apply in cases of foreclosure of freeholds, devised in trust for sale.[3]

This order has now been abrogated:[4] the cases which it was intended to meet being included in the more comprehensive enactment above referred to,[5] whereby it is provided, that in all suits concerning real or personal estate, which is vested in trustees under a will, settlement, or otherwise, such trustees shall represent the persons beneficially interested under the trust, in the same manner, and to the same extent, as the executors or administrators, in suits concerning personal estate, represent the persons beneficially interested in such personal estate; and in such cases, it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit; but the Court may, upon consideration of the matter, on the hearing, if it shall so think fit, order such persons or any of them to be made parties.

We have already considered the application of this rule to redemption,[6] and foreclosure suits;[7] but it applies to all suits,[8] and is retrospective.[9] It has been held that, in an administration suit, the trustees of settled shares sufficiently represent their *cestui que trusts*.[10] It has also been held, that executors with a power of sale, and also devises in trust subject to payment of debts, are trustees within the rule;[11] but that an executor, with only an implied power of sale, is not.[12] The rule does not apply when the *cestui que trusts* have concurred in breaches of trust.[13] And where an estate is sold under a decree of the Court, as a general

[1] *Osborne* v. *Foreman*, 2 Hare, 656; 8 Jur. 55; *Ward* v. *Bassett*, 5 Hare, 179; see also, upon the construction of this order, *Cox* v. *Barnard*, *ib.* 253; *Lloyd* v. *Smith*, 13 Sim. 457: 7 Jur. 460; *Miller* v. *Huddlestone*, 13 Sim. 467: 7 Jur. 504; *Reeve* v. *Richer*, 1 De G. & S. 624: 11 Jur. 960; *Jones* v. *How*, 7 Hare, 270: 14 Jur. 145.

[2] *Turner* v. *Hind*, 12 Sim. 414.

[3] *Wilton* v. *Jones*, 2 Y. & C. C. C. 244; *Chamberlain* v. *Thacker*, 13 Jur. 785, V. C. W.; 14 Jur. 190, V. C. K. B. Our Order 61 is almost a counterpart of this English Order: and it is a copy of Rule 9, of Sec. 42, of the Imp. Sta. 15 & 16 Vic. c. 86.

[4] By Cons. Ord. Prel. Ord. r. 1.

[5] 15 & 16 Vic. c. 86, s. 42, r. 9.

[6] *Ante.*

[7] *Ante*, *Ibid.*

[8] *Fowler* v. *Bayldon*, 9 Hare, App. 78.

[9] *Ibid.*; and *Goldsmid* v. *Stonehewer*, *ib.* 38: 17 Jur. 199.

[10] *Densem* v. *Elworthy*, 9 Hare, App. 42.

[11] *Shaw* v. *Hardingham*, 2 W. R. 657, M. R.; *Smith* v. *Andrews*, 4 W. R. 353, V. C. K.

[12] *Bolton* v. *Stannard*, 4 Jur. N. S. 576, M. R.

[13] *Jesse* v. *Bennett*, 6 De G. M. & G. 609; 2 Jur. N. S. 1125.

rule (with a possible exception in some cases of extreme difficulty), the Court will, in the exercise of its discretion, require all the persons interested in the proceeds to be parties to the suit, or to be served with notice of the decree, in order to secure a proper and advantageous sale, and protect the title of purchasers from being open to inquiry or impeachment;[1] and wherever the trustees' personal interest may prevent them protecting the interest of the *cestui que trusts*, the Court will require the *cestui que trusts*, or some of them, to be made parties.[2]

Trustees cannot, however, represent some of the *cestui que trusts* in any contention *inter se;* but only where the contention is between all the *cestui que trusts* on the one hand, and a stranger on the other.[3]

Even before the passing of the late Act, or the orders of August, 1841, in cases where the interest of the *cestui que trusts* was collateral to the rights between the plaintiff and the defendant, a person standing in the place of trustee has been allowed to maintain a suit respecting the trust property, without making the persons for whom he is trustee parties; thus, the pawnee of a chattel, or his representative, may maintain a suit for the chattel without making the pawner a party. And so, in the case of *Saville* v. *Tankred*,[4] where a bill was brought for an account, and for the delivery of a strong box, in which were found jewels, and a note in these words: "Jewels belonging to the Duke of Devonshire, in the hands of Mr. Saville," whose representative the plaintiff was, and in whose possession they had been for fifty years, and an objection was taken that the Duke's representative ought to have been a party: it was held, that the plaintiff might sustain the suit without him. Upon the same principle, where one of two trustees had been prevailed upon by his co-trustee to transfer the trust fund into his name alone, and the co-trustee afterwards sold the stock and received the produce, and never replaced it, a demurrer, on the ground that the *cestui que trusts* were not made parties to a bill filed by the trustee against his co-trustee to compel him to replace the stock, was overruled.[5] And where a trustee filed a bill to foreclose a mortgage, it being a breach of trust to have lent the money upon such a security, it was held that the *cestui que trusts*, who had never authorized or adopted the mortgage, were unnecessary parties.[6] If, however, the *cestui que*

[1] *Doody* v. *Higgins*, 9 Hare, App. 32; *Piggott* v. *Piggott*, 2 N. R. 14, V. C. W.

[2] *Read* v. *Prest*, 1 K. & J. 183.

[3] *Hamond* v. *Walker*, 3 Jur. N. S. 686, V. C. W.

[4] 1 Ves. S. 101; 3 Swanst, 141, n.

[5] *Franco* v. *Franco*, 3 Ves. 75; *May* v. *Selby*, 1 Y. & C. C. C. 235: 6 Jur. 52; *Horsley* v. *Fawcett*, 11 Beav. 565; *Peake* v. *Ledger*, 8 Hare, 313: 4 De G. & S. 137 (which was the case of executors); *Baynard* v. *Woolley*, 20 Beav. 583; see, however, *Chancellor* v. *Morecraft*, 11 Beav. 262: and see *Bridget* v. *Hames*, 1 Coll. 72, where the bill was filed against one of the *cestui que trusts* to recover the trust property, and the other *cestui que trusts* were held unnecessary parties.

[6] *Allen* v. *Knight*, 5 Hare, 272, 277: 10 Jur. 943.

trusts have concurred in a breach of trust, one trustee cannot sue his co-trustee without making them parties.[1]

And here it may be observed, that the personal representative, in all cases, represents the personal estate of the deceased, and is entitled to sue for it in Equity as well as at law, without making the residuary legatees, or any of the other persons interested in it, parties to the suit. For this reason, where a woman by her will gave all her personal estate to her bastard child, and made *B.* and *C.* her executors, and died: and within a short time after, the bastard died intestate; upon a bill filed by the executor against a person in whose hands the property of the mother was, praying for an account, the defendant demurred, because the representative of the bastard and the Attorney-General were not parties, but the demurrer was overruled: it being held, that the executor was legally entitled to the estate of his testatrix; and though this may be in trust for another, yet, as the executor has the legal title, he can give a good discharge to the defendant.[2] Where, however, there has been a great lapse of time since the death of the testator, and it seems doubtful who are the persons beneficially interested under his will, the Court will not, as of course, order payment to a personal representative of funds recovered in the cause, but may direct them to be paid into Court.[3]

So also, assignees of bankrupts may either maintain or defend suits relating to the estates vested in them as such assignees, without the creditors for whom they are trustees being made parties to the suit.[4] Nor is it necessary, in such case, that the bankrupt, notwithstanding his interest in the residue, should be before the Court:[5] though, from a decision in Vernon's Reports, it appears to have been formerly considered requisite.[6]

The rule, that where the person by law entitled to represent the personal estate is party to the suit, legatees or other persons interested in the estate need not be parties, does not extend to the case of a residuary legatee suing for his share of the residue: in which case, as we have seen,[7] it is generally necessary that all the residuary legatees should be made parties to the suit, either as plaintiffs or defendants, or by being served with notice of the decree;[8] although, where the number of the

[1] *Jesse* v. *Bennett*, 6 De G. M. & G. 609: 2 Jur. N. S. 1125.

[2] *Jones* v. *Goodchild*, 3 P. Wms. 33; see also *Peake* v. *Ledger*, 8 Hare, 313.

[3] *Loy* v. *Duckett*, C. & P. 305, 313; *Ex parte Ram*, 3 M. & C. 25, 29; 1 Jur. 668; *Re Malony*, 1 J. & H. 249; *Pennington* v. *Buckley*, 6 Hare 451, 459; 11 Jur. 468; and see *Adams* v. *Barry*, 2 Coll. 285, where the Court required the residuary legatee to be made a party.

[4] *Spragg* v. *Binkes*, 5 Ves. 587.

[5] 3 P. Wms. 311 n. I.; *Kaye* v. *Fosbrooke*, 8 Sim. 28; *Dyson* v. *Hornby*, 7 De G. M. & G. 1; *ante*.

[6] *Sharpe* v. *Gamon*, 2 Vern. 32; 1 Eq. Ca. Ab. 72; Pl. 7.

[7] *Ante*.

[8] 15 & 16 Vic. c. 86, s. 42, rr. 1, 8; and our orders No. 58.

class is great, the Court has sometimes dispensed with the necessity of making them all parties, and allowed one to sue on behalf of the others.[1] And where legacies are charged upon real estate, one legatee suing for his legacy, must make all the other legatees parties, either as plaintiffs or defendants to the bill, or by serving them with notice of the decree.[2] It seems to have been doubtful whether, under the former practice, trustees of real estate for the payment of debts could sue without bringing before the Court the creditors for whom they are trustees;[3] but it is apprehended, that in such cases, the Court would now generally allow the trustees, under the 9th rule above referred to, to represent the creditors.[4]

And now, one of several *cestui que trusts*, under any deed or instrument, may be a plaintiff or defendant, as representative of his class, in a suit for the execution of the trusts of the deed or instrument, the others of the class being served with notice of the decree;[5] but any *cestui que trusts* who have concurred in a breach of trust, must be parties to a suit to make a trustee liable for the loss occasioned thereby.[6]

But although, in ordinary cases, the executor represents the whole personal estate, and no legatee need be a party, because the personal estate may be exhausted by the debts, and the interest of the legatee is therefore uncertain, it has been held, that the appointees under the will of a *feme covert* are in a different situation, and that they must be made parties; therefore, where the administrator with the will annexed of a married woman, filed a bill, praying that the defendants might pay over to him a sum of money, as to which a testamentary appointment had been executed by the testatrix, by virtue of a power in her marriage settlement, without making the appointees parties, the Court ordered the case to stand over, with leave for the plaintiff to amend by bringing the appointees before the Court.[7] It is apprehended, however, that the Court would not now require the *cestui que trusts* to be parties in such a case.[8] Where the appointees were very numerous, and the bill was filed by some of them on behalf of themselves and the others, the Court dispensed with the general rule which required them all to be parties.[9]

[1] *Harvey* v. *Harvey*, 4 Beav. 215, 220; see also *Smart* v. *Bradstock*, 7 Beav. 500: *Bateman* v. *Margerison*, 6 Hare, 496, 499; but see *Jones* v. *Howe*, 7 Hare, 267; 14 Jur. 145; see also *Doody* v. *Higgins*, 9 Hare, App. 32, particularly the observations of Sir Geo. Turner, V. C., at p. 38.

[2] *Morse* v. *Sadler*, 1 Cox 352; 15 & 16 Vic. c. 86, s. 42, rr. 2, 8; and our orders No. 58.

[3] Ld. Red 174; *Harrison* v. *Stewardson*, 2 Hare 530, 532; *Thomas* v. *Dunning*, 5 De G. & S. 618.

[4] *Morley* v. *Morley*, 25 Beav. 253. In *Knight* v. *Pocock*, 24 Beav. 436: 4 Jur. N. S. 197, it was held, that the trustees did not represent creditors who had not acceded to the deed.

[5] 15 & 16 Vic. c. 86, s. 42, rr. 4, 6; *M'Leod* v. *Annesley*, 16 Beav. 600; *Jones* v. *James*, 9 Hare, App. 80; and see rules 4 and 6 of our orders No. 58, which are copies of these English Rules.

[6] *Jessie* v. *Bennett*, 6 De G. M. & G. 609; 2 Jur. N. S. 1125; *Williams* v. *Allen*, 29 Beav. 292.

[7] *Court* v. *Jeffery*, 1 S. & S. 105.

[8] *Musters* v. *Wright*, 2 De G. & S. 777; and see *Sewell* v. *Ashley*, 3 De G. M. & G. 933; *Re Newbery*, 10 W. R. 378, V. C. K.

[9] *Manning* v. *Thesiger*, 1 S. & S. 106.

It is to be observed, that in *Craker* v. *Parrott*,[1] on a bill filed by one of four children who were appointees of their mother, to set aside the appointment on account of the unfairness of the distribution, it was held, that all the other children who were appointees need not be parties, because they might go in before the Master.

But although an executor or administrator, as representing the personal estate and all those interested in it, may sue for the recovery of any part of that estate, without making the persons beneficially interested parties to the proceeding, yet, where there are more than one executor or administrator, they must all be parties, though one of them be an infant.[2] Where, however, one executor of several has alone proved, it has been held that he may sue without making the other executors parties, although they have not renounced.[3] In this respect the rule of Courts of Equity is different from that of Courts of Law: as there, if there be several executors or administrators, they must all join in bringing actions, though some have not proved the will.[4] And where a person devises that his executors shall sell his land, and leaves two executors, who renounce, and administration is granted to *A.*, who brings a bill against the heir to compel a sale, it seems the renouncing executors, in whom the power of sale collateral to the executorship was vested, ought not to be made parties.[5] The rules adopted by Courts of Equity differ from those of Courts of Law in matters of this description, because at Law all persons having a joint interest must join in an action as plaintiffs; but in Equity it is sufficient that all parties interested in the subject of the suit should be before the Court, either as plaintiff's or defendants; therefore, one of two or more assignees of a bankrupt may sue in equity without his co-assignees, provided they are made defendants;[6] and so, one executor may sue without his co-executor joining, if the co-executor be made a defendant. It appears that in a case of this description, Lord Thurlow at first doubted whether the co-executor was entitled to his costs, but that he at length ordered them to be paid.[7]

It may be collected from several of the preceding cases, that although all persons claiming concurrent interests with the plaintiff are necessary

[1] 2 Cha. Ca. 228.

[2] *Offley* v. *Jenney*, 3 Cha. Rep. 92: Wms. Exors. 1692.

[3] *Davies* v. *Williams*, 1 Sim. 5, 8. It will be seen, on referring to the report of this case, that Sir John Leach, V. C., is reported to have said: "Where one executor has alone proved, he may sue in Equity, as well as at Law, without naming the others as parties;" but in *Cummins* v. *Cummins*, 3 Jo. & Lat. 92, Ld. St. Leonards, then L. C. of Ireland, speaking of this case, said: "This may be so as to suits in Equity, but certainly it is not the case as to actions at Law;" and see *Forsyth* v. *Drake*, 1 Grant, 223.

[4] See *Hensloe's case*, 3 Rep. 366; *Kilby* v. *Stanton*, 2 Y. & J. 77; and see Wms. Exors, 1692, and the cases there cited; Add. Cont. 960.

[5] *Yates* v. *Compton*, 2 P. Wms. 308.

[6] *Wilkins* v. *Fry*, 1 Mer. 244, 262.

[7] *Blount* v. *Burrow*, 3 Bro. C. C. 90.

parties, yet it is not requisite that such interests should be immediate; the rule will equally apply, whether the interest be in possession, remainder or reversion; and upon this principle it is held, that in all cases in which an estate is claimed by a person deriving title under a settlement, made either by deed or will, it is necessary to make all the persons claiming under such settlement parties to the suit, down to the person entitled to the first vested estate of inheritance, either in fee or in tail, inclusive. Thus, where a bill was filed for the execution of a trust for settling an estate on several branches of a family, it was held necessary to make the first person entitled to the inheritance a party.[1] And where *A.* was tenant for years, with remainder to *B.* for life, with remainder to *C.* in fee, and *B.* brought a bill against *A.* for an injunction to restrain his committing waste, it was held that the remainderman, or reversioner in fee, ought to be before the Court.[2] It will be borne in mind, however, that where the property is vested in trustees under the deed or will, the trustees now generally represent all the *cestui que trusts.*[3]

It is not necessary, in such cases, to bring before the Court any person entitled in remainder or reversion after the first vested estate of inheritanee, because such person is considered sufficient to support all those who are in remainder behind him; and where an exeeption was taken to a bill, for want of proper parties, for that a remainderman expectant upon an estate tail was not a party, the exeeption was overruled, because such a remainderman is not regarded in Equity.[4] And it has repeatedly been determined, that if there be a tenant for life, remainder to his first son in tail, remainder over, and the tenant for life is brought before the Court before he has issue, the contingent remaindermen are barred.[5]

Although, in cases of this description, the first person in existenee who is entitled to a vested estate of inheritanee is sufficient to represent all remainders behind him, yet, it is necessary that all persons entitled to intermediate estates, prior to the first vested estate of inheritance, should be before the Court; thus, where a marriage settlement was made of lands on the husband for life, remainder to the wife for life, with divers remainders over, and a bill was brought by the husband, in

[1] *Finch* v. *Finch*, 2 Ves. S. 492. Where the first tenant in tail was a lunatic, the person entitled to the next estate of inheritance was held a necessary party, *Singleton* v. *Hopkins*, 1 Jur. N. S. 2199, V. C. S.

[2] *Per* Lord King, in *Mollineux* v. *Powell*, cited 3 P. Wms. 268, n.; see 1 Dick. 197, 198, and Eden on Injunctions, 163.

[3] 15 & 16 Vic. c. 86, s. 42, r. 9, and our Order 61, which is a copy of Rule 9 of Sec. 42, of the Imp. Sta.

[4] *Anon.*, 2 Eq. Ca. Ab. 166, Pl. 8; *Lloyd* v. *Johnes*, 9 Ves. 37, 55.

[5] Per Lord Redesdale, in *Giffard* v. *Hort*, 1 Sch. & Lef. 408; see also, as to tenant for life representing persons contingently entitled in remainder, in a suit as to personalty, *Fowler* v. *James*, 1 C. P. Coop. t. Cott. 290: 1 Phil. 803; and see *Roberts* v. *Roberts*, 2 Phil. 534: 12 Jur. 148.

order to have the opinion of the Court whether a certain parcel of land was not intended to be included in the settlement, and the wife was not a party, the case was ordered to stand over, in order that she might be made a party: the Court being of opinion, that if a decree should be made against the husband, it would not bind her;[1] and so, where a bill was brought by a son, who was remainderman in tail under a settlement, against his father, who was tenant for life under the same settlement, to have the title-deeds brought into Court, that they might be forthcoming for the benefit of all parties interested, and objections were taken for want of parties, one of which was, that a daughter of the defendant, who was interested in a trust term for years, prior to the limitation to the plaintiff, was not before the Court, Lord Hardwicke held the objection good.[2]

Another objection in the same case was, because certain annuitants of the son, upon his reversion after the death of his father, were not parties; and Lord Hardwicke held, that he could not make the order prayed until the annuitants were first heard, and that, consequently, the objection must be allowed. From this it would seem, that although a remainderman in tail may maintain a suit, without bringing the persons entitled to subsequent remainders before the Court, yet, if he has charged or encumbered his estate in remainder, the persons interested in such charge or incumbrance must be parties; and it is held, that a person claiming under a limitation by way of executory devise, not subject to any preceding vested estate of inheritance by which it may be defeated, must be a party to a suit in which his rights are involved; but executory devisees not *in esse*, may be bound by a decree against the first estate of inheritance.[3]

Where the intermediate estate is contingent, and the person to take is not ascertained, it is sufficient to have before the Court the trustees to support the contingent remainder, together with the first person *in esse* entitled to the first vested estate of inheritance.[4] Lord Hardwicke, in *Hopkins* v. *Hopkins*,[5] states the practice upon this point thus: "If there are ever so many contingent limitations of a trust, it is an established rule, that it is sufficient to bring the trustees before the Court, together with him in whom the first remainder of the inheritance is vested; and all that may come after will be bound by the decree, though not *in esse*, unless there be fraud or collusion between the trustees, and the first person in whom a remainder of inheritance is vested." In

[1] *Herring* v. *Yoe*, 1 Atk. 290.
[2] *Pyncent* v. *Pyncent*, 3 Atk. 571.
[3] Ld. Red. 174.
[4] *Lord Cholmondeley* v. *Lord Clinton*, 2 J. & W. 1, 133.
[5] 1 Atk. 590; but as to the report of this case, see 2 J. & W. 18, 192.

Lord Cholmondeley v. *Lord Clinton*,[1] in which the estate which was the subject of litigation was settled upon Lord Clinton for life, and, after remainders to his children (who were unborn), and their heirs in tail, upon the person who should then be entitled to claim as Lord Clinton in tail, with the ultimate remainder to the existing Lord Clinton in fee, it was objected that the person presumptively entitled to the barony ought to have been a party; but Sir Thomas Plumer, M. R., overruled the objection upon the ground above stated.

If a person entitled to an interest prior in limitation to any estate of inheritance before the Court, should be born pending the suit, that person must be brought before the Court by a supplementary proceeding;[2] and if the first tenant in tail is plaintiff in a suit, and dies without issue before the termination of the suit, it has been held that the next remainderman in tail, although he claims by new limitation, and not through the first plaintiff as his issue, is entitled to continue the suit of the former tenant in tail by supplemental bill, and to have the benefit of the evidence and proceedings in the former suit.[3]

In all the preceding cases, the rights of the several parties to the subject-matter in litigation were consistent with each other, and were the result of the same state of facts: so that the same evidence which would establish those facts, would establish the rights of all the parties to maintain the litigation; the rules, therefore, of Equity require, that all those parties so deriving their right of litigation from the same facts, should, subject to the exceptions which we have noticed, be brought before the Court, in order that such their rights may be simultaneously disposed of. In cases, however, where the claims of the several parties to the subject-matter of the suit do not arise out of the same state of circumstances, but can only be supported upon grounds which are inconsistent with each other, so that, if the grounds upon which the plaintiff supports his claim be correct, the case relied upon by the other parties claiming the same thing cannot be supported, then such other parties need not be brought before the Court. And the reason of this is obvious; for if a plaintiff, resting his case upon a particular title which is inconsistent with the title set up by the other claimants, is able to establish the truth of his case by evidence, he will be entitled to a decree against the defendant whom he sues; if he is not in a situation to establish his case, his bill must of course be dismissed, and the circumstance of his having brought other parties claiming under a different title before the Court, would be of no advantage to the defen-

[1] 2 J. & W. 1, 133.
[2] Ld. Red. 174.
[3] *Lloyd* v. *Johnes*, 9 Ves. 37, 58.

dant principally sued; because, if the plaintiff fails in his claim, the bill must be dismissed as against them as well as against the principal defendant, and such dismissal can be no bar to prevent the other parties themselves from asserting their claim against the defendant.

Upon this principle, it would seem (though the question has been considered doubtful), that an impropriator of tithes is not a proper party to a suit by a Vicar against occupiers for tithes; nor a Vicar a proper party to such a suit by an impropriator.[1]

But whether it be or be not improper to make the impropriator a party to a bill for tithes by a vicar, yet, if he is made a party, improperly or not, and does not think fit to demur, or by his answer to insist that he ought not to be made a party, or enter into the discussion, but chooses to join in an answer with the occupiers, and to suggest and prompt their defence, the question becomes a very different one; and though no account can be decreed against him, yet, it would be difficult to say that he may not be made to pay the costs.[2]

And so, if a person, not being an impropriator, but merely a portionist of tithes, should join in the defence of a suit on the ground of his title, and the defence should fail, he may be ordered to pay the costs, although there can be no other decree against him.[3]

With respect to suits for specific performance, it is a general rule, that none but parties to the contract are necessary parties to the suit;[4] and where there are other persons so interested in the subject-matter of the contract as that their concurrence is necessary for the completion of the title, it is the duty of the vendor to bring them forward, to assist in giving effect to his contract, but as plaintiffs, they have no right to sue. If such persons should be infants, and it were attempted, by making them co-plaintiffs with the vendor, to bind their rights by a decree, the fact of their being so made parties would be a fatal objection to the suit; and whether the point was or was not raised by the other parties, the Court would refuse to pronounce a decree;[5] and as such persons cannot sue as plaintiffs, in suits for specific performance by vendors, so, in suits by purchasers, they cannot be made defendants.[6] It would appear,

[1] *Williamson* v. *Lord Lonsdale*, Dan. 171; 9 Pri. 187; *Williams* v. *Price*, Dan. 13; 4 Pri. 156; *Carte* v. *Bull*, 3 Atk. 500; *Petch* v. *Dalton*, cited 1 J. & W. 515; *Daws* v. *Benn*, *ib.* 513; Jac. 95; *Baily* v. *Worrall*, Bunb. 115; *Cooke* v. *Blunt*, 2 Sim. 417. *Tooth* v. *Dean and Chapter of Canterbury*, 3 Sim. 49.

[2] Per L. C. B. Alexander, in *Wing* v. *Morrell*, M'Cl. & Y. 625.

[3] *Ibid.*

[4] *Robertson* v. *Great Western Railway Company*, 10 Sim. 314; *Humphreys* v. *Hollis*, Jac. 75; *Paterson* v. *Long*, 5 Beav. 186; *Peacock* v. *Penson*, 11 Beav. 355; 12 Jur. 951; *Petre* v. *Duncombe*, 7 Hare 24; see however, *Daking* v. *Whimper*, 26 Beav. 568.

[5] *Wood* v. *White*, 4 M. & C. 483.

[6] *Tasker* v. *Small*, 3 M. & C. 63; 1 Jur. 936; but see *West Midland Railway Company*, v. *Nixon*, 1 H. & M. 176.

however, that in some cases, where, subsequently to the contract, another person has acquired an interest under the vendor, with notice of the rights of the purchaser, the latter has, in a suit for specific performance, been allowed to join such person with the vendor as a defendant to the suit.[1]

Formerly, it was the invariable practice to require the heir-at-law to be a party to the suit, in all cases where the trusts of a will of real estate were sought to be executed. This practice arose from the peculiar principle adopted in cases of wills relating to real estate: namely, that the Court would not carry into effect a will of real estate until the due execution had been either admitted by the heir, or proved against him; and for this purpose, it was necessary that the heir should be made an adverse party. The case of an heir-at-law was, therefore, an exception to the rule above laid down, that persons claiming under titles inconsistent with those of the plaintiff, need not be made parties to the suit.

Although, however, the heir-at-law was a necessary party to suits instituted for the purpose of making devised estates applicable to the payment of debts, he was not a necessary party to suits instituted by creditors, claiming under a deed whereby estates had been conveyed to trustees to sell for payment of debts: unless he was entitled to the surplus of the money arising from the sale.

Even before the last-mentioned order, there were some cases in which the Court would direct the execution of the trusts of a will, where the heir-at-law was not a party; thus, where a trustee had been dead several years, and freehold lands, subject to the trust, had been quietly enjoyed under the will, a sale was decreed without the heir being a party.[2] So, where the heir-at-law was abroad, or could not be found, or made default at the hearing, the trusts of a will have been executed in his absence, but without a declaration that the will was well proved;[3] and even upon some occasions the Court has, upon due proof of the execution of the will and of the sanity of the testator, declared the will well proved in the absence of the heir.[4]

As there is no provision in the General Order above referred to,[5] to make evidence of the execution of a will and the sanity of the testator, taken in the absence of the heir-at-law, admissible against him, or any one claiming under him, the Court still continues unable, by decree in

[1] *Spence* v. *Hogg*, 1 Coll. 225; *Collett* v. *Hover*, *ib.* 227; but see *Cutts* v. *Thodey*, 13 Sim. 206; 6 Jur. 1027: 1 Coll. 212 n. (*a*) 223 n.; see also *Leuty* v. *Hillas*, 2 De G. & J. 110; 4 Jur. N. S. 1166.

[2] *Harris* v. *Ingledew*, 3 P. Wms. 91, 94. There is no Order in this Province similar to the English one referred to, being Order 7. 1.

[3] *French* v. *Baron*, 1 Dick. 138: 2 Atk. 120; *Stokes* v. *Taylor*, 1 Dick. 349; *Cator* v. *Butler*, 2 Dick. 438; *Braithwaite* v. *Robinson*, *ib.* 439 n.

[4] *Banister* v. *Way*, 2 Dick. 599; *Williams* v. *Whinyates*, 2 Bro. C. C. 399; Seton, 224. *et seq.*; Ld. Red. 173.

[5] Ord. VII. 1.

his absence, to insure the title against his rights. It was formerly the practice, where the heir-at-law could not be found, to make the Attorney-General a party to a bill for carrying the trusts of a devise of real estates into execution, on the supposition that the escheat is in the Crown, if the will set up by the bill should be subject to impeachment. If any person should claim the escheat against the Crown, that person may be a necessary party.[1]

The rule which has been before noticed,[2] that persons claiming under titles which are inconsistent with that of the plaintiff should not be made parties to a suit, even though they are in a situation to molest the defendant in the event of the plaintiff being unsuccessful in establishing his claim, is equally applicable to prohibit their being made parties as co-plaintiffs or as defendants. Thus, in the case of the *Attorney-General* v. *Tarrington*,[3] where an information and bill were exhibited in the Exchequer by the King's Attorney-General, and the Queen-Dowager, and her trustees, as plaintiffs, against the lessees of the Queen, of certain lands which had been granted to her by the Crown for her jointure, in respect of the breach of the covenants in their leases: it was held, that the King and Queen-Dowager could not join, because their interests were several; and so, in the case of *Lord Cholmondeley* v. *Lord Clinton*,[4] where a bill was filed by two persons, one claiming as devisee, and the other as heir-at-law, and the question was, whether they could maintain a suit to redeem a mortgage, on the allegation that questions having arisen as to which of them was entitled to the estate, they had agreed to divide the estate between them, Sir Thomas Plumer, M. R., strongly expressed his opinion that the Court could not proceed on a bill so framed. In a subsequent case between the same parties, the title of the plaintiff was stated in the same way as in the first, and Lord Eldon, though he allowed a demurrer which was put in to the bill upon other grounds, expressed a very strong opinion, that two persons claiming the same thing by different titles, but averring that it is in one or the other of them, and each contending that it was in himself, could not join in a suit as co-plaintiffs. His Lordship said, "that the difficulty of maintaining a suit where there are two plaintiffs, *A.* and *B.*, each asserting the title to be in him, is this: that if the Court decides that *A.* is entitled, and the defendants do not complain, how is *B.*, as a co-plaintiff, to appeal from that decree?"[5]

[1] Ld. Red. 172.

[2] *Ante.*

[3] Hardres, 219.

[4] 2 J. & W. 1135; affirmed, 4 Bli. 1: Sugd. Law Prop. 61, 74; see also *Fulham* v. *M'Carthy*, 1 H. L. Ca. 703: 12 Jur. 757.

[5] *Lord Cholmondeley* v. *Lord Clinton*, T. & R. 107, 115.

And in the case of *Saumarez* v. *Saumarez*,[1] where the interests of a father and his children, who were joined as co-plaintiffs in the suit, were at variance one with another, Lord Cottenham said, that as the record was framed, it would be quite irregular to make any adjudication concerning their conflicting interests, and directed a new bill to be filed.

In a case before the same judge, when Master of the Rolls, where a bill had been filed by the settlor in a voluntary settlement, for the purpose of avoiding the settlement, in which another person claiming as a purchaser, under the 27 Eliz. c. 4, against the parties entitled under the voluntary settlement, was joined as a co-plaintiff, his Honor held, that as the settlement was of personal property it was not within the statute, and that, consequently, the purchaser not having the protection of the statute, could not have a better title than the settlor from whom he purchased; but that if he had shown a good title in himself, he could have had no relief in that suit, having associated himself as a co-plaintiff with the settlor: it having been decided, in several cases, that under such circumstances no decree could be made, although the plaintiff might, in a suit in which he was sole plaintiff, have been entitled to relief.[2]

Upon the same principle it has been held, that a person who is liable to account to the other plaintiffs, cannot be joined as co-plaintiff.[3]

It should be here observed, that the consequences of a misjoinder of plaintiffs, such as above considered, are no longer the same as formerly, for then the bill would have been dismissed; whereas now, the Court is empowered to grant such relief as the circumstances of the case require, to direct such amendments as it shall think fit, and to treat any of the plaintiffs as defendants.[4]

The rule, that persons claiming under different titles cannot be joined as plaintiffs in the same suit, does not apply to cases where their titles, though distinct, are not inconsistent with each other. Thus, all the creditors of a deceased debtor, although they claim under distinct titles, may be joined as co-plaintiffs in the same suit, to administer the assets of the debtor: although it is not necessary that they should be so joined, as one creditor may sue for his debt against the personal estate, without

[1] 4 M. & C. 336; see also *Robertson* v. *Southgate*, 6 Hare 536; but see *Griggs* v. *Staplee*, 2 De G. & S. 572: 13 Jur. 29, which was a suit to set aside a settlement, as a fraud on the marital right; Sir J. L. Knight Bruce, V. C., there said, that if the case had been proved, he should probably have relieved against the transaction, although the wife was a co-plaintiff: see De G. & S. 588.

[2] *Bill* v. *Cureton*, 2 M. & K. 503, 512.

[3] *Jacob* v. *Lucas*, 1 Beav. 436, 443; *Griffith* v. *Vanheythuysen*, 9 Hare, 85: 15 Jur. 421; but it would appear that the objection does not apply to a sole plaintiff uniting in himself two conflicting interests: *Miles* v. *Durnford*, 2 De G. M. & G. 641; *Carter* v. *Sanders*, 2 Drew. 248.

[4] 15 & 16 Vic. c. 86, s. 49. For cases of misjoinder since the Act, see *Clements* v. *Bowes*, 1 Drew. 684; *Evans* v. *Coventry*, 3 Drew. 75: 2 Jur. N. S. 557; 5 De G. M. & G. 911; *Beeching* v. *Lloyd*, 3 Drew. 227; *Williams* v. *Salmond*, 2 K. & J. 463: 2 Jur. N. S. 251; *Stupart* v. *Arrowsmith*, 3 Sm. & G. 176; *Barton* v. *Barton*, 3 K. & J. 512: 3 Jur. N. S. 808; *Carter* v. *Sanders*, 2 Drew. 248; and see our Orders 53, 54 and 55, which are a copy of S. 49 of the Imp. Sta. 15 & 16, Vic. C. 86.

bringing the other creditors before the Court.[1] The joining, however, of several creditors in the same suit, although it might save the expense of several suits by different creditors, might, nevertheless, where the creditors are numerous, be productive of great inconvenience and delay, by reason of the danger which would exist of continual abatements. Courts of Equity have, therefore, adopted a practice which, at the same time that it saves the expense of several suits against the same estate, obviates the risk and inconvenience to be apprehended from joining a great number of individuals as plaintiffs, by allowing one or more of such individuals to file a bill on behalf of themselves and the other creditors upon the same estate, for an account and application of the estate of the deceased debtor: in which case, the decree being made applicable to all the creditors, the others may come in under it, and obtain satisfaction for their demands, as well as the plaintiffs in the suit; and if they decline to do so, they will be excluded the benefit of the decree, and will yet be considered bound by acts done under its authority.[2] It is matter rather of convenience than indulgence, to permit such a suit by a few on behalf of all the creditors, as it tends to prevent several suits by several creditors, which might be highly inconvenient in the administration of assets, as well as burthensome to the fund to be administered: for if a bill be brought by a single creditor for his own debt, he may, as at Law, gain a preference by the judgment in his favor over the other creditors in the same degree, who may not have used equal diligence.[3]

In suits by one creditor, on behalf of himself and the others, for administration of the estate of a deceased debtor, the defendant may at any time before decree, have the bill dismissed, on payment of the plaintiff's debt and all the costs of the suit.[4]

In suits of this nature the plaintiff cannot waive an account against the estate of a deceased administrator of the debtor.[5]

If the debt of the plaintiff be admitted or proved, and the executor or administrator admits assets, the plaintiff is entitled at the hearing to

[1] *Anon.* 3 Atk. 572; *Peacock* v. *Monk*, 1 Ves. S. 131.

[2] Ld. Red. 166.

[3] *Ibid:* see *Attorney-General* v. *Cornthwaite*, 2 Cox, 45, where it was admitted at the bar, that where a single creditor files a bill for the payment of his own debt only, the Court does not direct a general account of the testator's debts, but only an account of the personal estate, and of that particular debt; which is ordered to be paid in a course of administration; and all debts of a higher or equal nature may be paid by the executor, and allowed him in his discharge. See also *Gray* v. *Chiswell*, 9 Ves. 123; but single creditor suits are much out of use. Seton, 117.

[4] *Pemberton* v. *Topham*, 1 Beav. 316: 2 Jur. 1009; *Holden* v. *Kynaston*, 2 Beav. 204; *Manton* v. *Roe*, 14 Sim. 353; As to costs, see cases above referred to, and *Penny* v. *Beavan*, 7 Hare, 133: 12 Jur. 936.

[5] *Wadeson* v. *Rudge*, 1 C. P. Coop. t. Cott. 369; but see *Symes* v. *Glynn*, and *Pease* v. *Cheesbrough*, cited, Seton, 115.

an immediate decree for payment, and not a mere decree for an account;[1] but an admission by the executor that he has paid the legacies given by the testator's will, is not an admission of assets for the payment of the plaintiff's debt, so as to entitle him to such an immediate decree.[2]

One creditor may also sue, where the demand is against the real as well as the personal assets;[3] but though one creditor may file a bill on his own behalf alone, for administration of the personal estate, he cannot have a decree for administration of the real estate, unless he sue on behalf of himself and all other the creditors.[4]

Again, in the case of creditors under a trust deed for payment of debts, a few have been permitted to sue on behalf of themselves and the other creditors named in the deed, for the execution of the trusts, although one creditor could not, in that case, have sued for his single demand without bringing the other creditors before the Court.[5]

A large body of creditors may be represented by one or more of the number, but in any such proceeding the bill must disclose a sufficient reason for this departure from the rule of practice requiring all persons interested to be parties to the suit. Where, therefore, a bill by one of the several creditors entitled under a deed of trust, was filed, and stated "that the creditors of the said L. entitled to the benefit of the said Indenture are two numerous to make it practicable to prosecute this suit if they were all made parties." *Held*, that such statement was too general to satisfy the Court that the rule could not be complied with. *Query.*—Whether necessary to furnish proof of the allegation, that parties are too numerous to be brought before the Court, and whether, in a creditor's suit, any decree can be made without previous proof of his debt?[6]

Upon the same principle, where the trust fund was to be distributed amongst the joint and separate creditors of a firm, a bill of this description was permitted by a separate creditor only, on behalf of himself and the other joint and separate creditors, although it was objected that

[1] *Woodgate* v. *Field*, 2 Hare, 211: 6 Jur. 871; see also *Owens* v. *Dickinson*, C. & P. 48, 56: 4 Jur. 1151; *Field* v. *Titmus*, 1 Sim. N. S. 218: 15 Jur. 121. For form of decree for payment, see Seton, 115, No. 3.

[2] *Savage* v. *Lane*, 6 Hare, 32; *Field* v. *Titmus*, *ubi sup.*; *Hutton* v. *Rossiter*, 7 De G. M. & G. 9.

[3] *Leigh* v. *Thomas*, 2 Ves. S. 312, 313.

[4] *Bedford* v. *Leigh*, 2 Dick. 707; *Johnston* v. *Compton*, 4 Sim. 47; *May* v. *Selby*, 1 Y. & C. C. C. 235 6 Jur. 52; *Blair* v. *Ormond*, 1 De G. & S. 428: 11 Jur. 665; *Ponsford* v. *Hartley*, 2 J. & H. 736 Seton, 117. See form of contingent prayer, in a bill by one creditor, *Tomlin* v. *Tomlin*, 1 Hare, 238. In such cases, leave to amend will generally be given at the hearing; see cases above cited.

[5] *Corry* v. *Trist*, Ld. Red. 167; see, however, *Harrison* v. *Stewardson*, 2 Hare, 530, where Sir J. Wigram, V. C., decided, that twenty creditors, interested in a real estate, were not so large a number as that the Court would, on the ground of inconvenience alone, allow a few of them to represent the others, and dispense with such others as parties, in a suit to recover the estate against the whole body of creditors; see also *Bainbridge* v. *Burton*, 2Beav. 539.

[6] *Michie* v. *Charles*, 1 Grant, 125; and see *Le Targe* v. *De Tuyle*, 1 Grant, 227.

one at least of each class ought to have been brought before the Court.[1]

It is to be observed, that in suits for marshalling assets, simple-contract creditors must be joined as plaintiffs, as well as creditors by specialty; for, upon a bill by specialty creditors only, the decree would be merely for the payment of the debts out of the personal estate, and if that should not prove sufficient for the purpose, for the sale and application of the real estate. The right to call for such an arrangement of the property as will throw upon the real estate those who have debts payable out of both descriptions of estate, in order that the personalty may be left clear for those whose demands are only payable out of the personal estate, belongs to the simple-contract creditors: who have an equity either to compel the payment of the specialty debts out of the real estate, or else to stand in the place of the specialty creditors, as against the real estate, for so much of the personal estate as they shall exhaust. It is proper, therefore, in bills of this nature, to file them in the names of a specialty creditor and of a creditor by simple contract, on behalf of themselves and of all others the specialty and simple-contract creditors.

By analogy to the case of creditors, a legatee is permitted to sue on behalf of himself and the other legatees: because, as he might sue for his own legacy only, a suit by one, on behalf of all the legatees, has the same tendency to prevent inconvenience and expense as a suit by one creditor on behalf of all creditors of the same fund.[2] For the same reason, where it has been sought to apply personal estate amongst next of kin, or amongst persons claiming as legatees under a general description, and it may be uncertain who are the persons answering that description, bills have been permitted by one claimant on behalf of himself and of others equally interested.[3]

So also, in the case of appointees under the will of a married woman, made in pursuance of a power, where they were very numerous, a bill was permitted by some on behalf of all.[4]

But the right of a few persons to represent the class is not confined to the instances of creditors and legatees;[5] and the necessity of the case has induced the Court, especially of late years, frequently to depart form the general rule in cases where a strict adherence to it would probably amount to a denial of justice, and to allow a few persons to sue on behalf of great numbers having the same interest;[6] thus, some of the proprietors

[1] *Weld* v. *Bonham*, 2 S. & S. 91, 93: and see *Richardson* v. *Hastings*, 7 Beav. 323; *Smart* v. *Bradstock*, *ib.* 500.

[2] Ld. Red. 167.

[3] *Ib* 169; see now 15 & 16 Vic. c. 86, s. 42, r. 1, and our Orders No. 58.

[4] *Manning* v. *Thesiger*, 1 S. & S. 106; *ante*.

[5] Per Lord Eldon, in *Lloyd* v. *Loaring*, 6 Ves. 779.

[6] Ld. Red. 169.

of a trading undertaking, where the shares had been split or divided into 800, were permitted to maintain a suit on behalf of themselves and others, for an account against some of their co-partners, without bringing the whole before the Court,[1] "because it would have been impracticable to make them all parties by name, and there would be continual abatement by death and otherwise, and no coming at justice, if they were to be made parties;" and so, where all the inhabitants of a parish had rights of common under a trust, a suit by one, on behalf of himself and the other inhabitants, was admitted;[2] and one owner of lands in a township has been permitted to sue on behalf of himself and the others, to establish a contributory modus for all the lands there.[3] Upon the same principle, a bill was allowed by the captain of a privateer, on behalf of himself and of all other the mariners and persons who had signed certain articles of agreement with the owners, for an account and distribution of the prizes made by the ship.[4] And in *Lloyd* v. *Loaring*,[5] Lord Eldon expressed his opinion, that some of the members of a lodge of Freemasons, or of one of the inns of Court, or of any other numerous body of persons, might sustain a suit on behalf of themselves and the others, for the delivery up of a chattel in which they were all interested.

In *Cockburn* v. *Thompson*,[6] which was the case of a bill filed by several persons on behalf of themselves, and of all other proprietors of the Philanthropic Annuity Institution, praying that the institution might be dissolved, and an account taken against the defendant: Lord Eldon overruled a plea, which objected that a great number of persons, whose names were stated, were proprietors of the institution, and ought to be parties to the suit. But where the bill seeks a dissolution of the partnership, all the partners must be parties: though where the business has ceased or become suspended, it is otherwise: and in *Cockburn* v. *Thompson*, it appears from the report, that the business could not be carried on for want of an Act, for which an application had failed.[7]

In suits of this nature, the plaintiff, as he acts upon his own mere

[1] *Chancey*, v. *May*, Prec. in Ch. 592.

[2] *Blackham* v. *The Warden and Society of Sutton Coldfield*, 1 Ch. Ca. 269, reported as *Anon.* It has been doubted whether the Attorney-General ought not to have been a party to that suit; see Ld. Red. 169; and see *Attorney-General* v. *Heelis*, 2 S. & S. 67; but see *Attorney-General* v. *Moses*, 2 Mad. 294.

[3] *Chaytor* v. *Trinity College*, 3 Anst. 841.

[4] *Good* v. *Blewitt*, 13 Ves. 397. In that case, the bill was originally filed by the captain in his own right, but was allowed to be amended by introducing the words, "on behalf of himself," &c.: *ib.* 398.

[5] 6 Ves. 773, 779.

[6] 16 Ves. 321, 325.

[7] *Long* v. *Young*, 2 Sim. 369, 385; *Beaumont* v. *Meredith*, 3 V. & B. 180; *Abraham* v. *Hannay*, 13 Sim. 581; *Deeks* v. *Stanhope*, 14 Sim. 57: 8. Jur. 349; *Wilson* v. *Stanhope*, 2 Coll. 629: 10 Jur. 421; *Richardson* v. *Larpent*, 2 Y. & C. C. C. 507: 7 Jur. 691; *Richardson* v. *Hastings*, 7 Beav. 301, 11 Beav. 17: 8 Jur. 72; *Van Sandau* v. *Moore*, 1 Russ. 441, 456; *Cooper* v. *Webb*, 15 Sim. 454, 463: on appeal, 11 Jur. 443; *Apperly* v. *Page*, 1 Phil. 779, 785; 11 Jur. 271; *Harvey* v. *Bignold*, 8 Beav. 343, 345.

motion, and at his own expense, retains (as in other cases) the absolute dominion of the suit until decree, and may dismiss the bill at his pleasure; after decree, however, he cannot by his conduct deprive other persons of the same class of the benefit of the decree, if they think fit to prosecute it.[1]

One of the objections which has been suggested to suits being framed in this manner, is, that if the bill is dismissed with costs, other members of the partnership or company may still file another bill for the same object; but in *Barker* v. *Walters*,[2] Lord Langdale, M. R., said, that where a company had authorised some of its members to enter into obligations for it, and they then came to the Court for relief against third parties, in the name and for the benefit of all, and the Court dismissed the suit, his impression was, that the Court would not allow other members to prosecute another suit for the same object.

The practice adopted by the Court of permitting one or more persons to represent in a suit all who have similar interests, has been frequently recognised and acted upon in a variety of instances; but it is not to be considered as a general principle, that this course may be acted upon, in all cases within the inconvenience which the adoption of this practice has been intended to avoid. Where a bill was filed by five persons, on behalf of themselves and the other shareholders in a Joint-Stock Association, not established by Act of Parliament, who had by deed assigned their shares to the plaintiffs, and constituted the plaintiffs their attornies to institute suits, in order to give effect to their claim, but upon trust for themselves, Sir John Leach, V. C., allowed a demurrer, because the assignors were not parties: although it was stated in the bill that they were very numerous, and that naming them as parties on the record would, in all probability, render it impossible for the plaintiffs to obtain a decree in the cause.[3]

It is, moreover, generally necessary, in order to enable a plaintiff to sue on behalf of himself and others, who stand in the same relation with him to the subject of the suit, that it should appear that the relief sought by him is beneficial to those whom he undertakes to represent;[4] and where it does not appear that all the persons intended to be represented are necessarily interested in obtaining the relief sought, such a suit cannot be maintained.[5] Thus, where the plaintiffs, being three of

[1] See *Hanford* v. *Storie*, 2 S. & S. 196; *York* v. *White*, 10 Jur. 168, M. R.; *Armstrong* v. *Storer*, 9 Beav. 277; see also *Brown* v. *Lake*, 2 Coll. 620; *Johnson* v. *Hammersley*, 24 Beav. 498; *Whittington* v. *Edwards*, 7 W. R. 72, L. C.; *Inchley* v *Alsop*, 7 Jur. N. S. 1181: 9 W. R. 649, M. R.

[2] 8 Beav. 97; 9 Jur. 73.

[3] *Blain* v. *Agar*, 1 Sim. 37, 43.

[4] *Gray* v. *Chaplin*, 2 S. & S. 267, 272; *Attorney-General* v. *Heelis*, *ib.* 67, 75; *Colman* v. *Eastern Counties Railway Company*, 10 Beav. 1, 13: 11 Jur. 74; *Carlisle* v. *South-Eastern Railway Company*, 1 M'N. & G. 689, 698: 14 Jur. 535; *Mullock* v. *Jenkins*, 14 Beav. 628.

[5] *Van Sandau* v. *Moore*, 1 Russ. 441, 465; *Lovell* v. *Andrew*, 15 Sim 581, 584: 11 Jur. 485; *Bainbridge* v. *Burton*, 2 Beav. 539.

the subscribers to a loan of money to a foreign state, filed a bill on behalf of themselves and all other subscribers to that loan, to rescind the contracts of subscription, and to have the subscription monies returned, Lord Eldon held, that the plaintiffs were not entitled, in that case, to represent all the other subscribers, because it did not necessarily follow that every subscriber should, like them, wish to retire from the speculation, and every individual must, in that respect, judge for himself.[1] And upon the same principle, one of the inhabitants of a district, who claims a right to be served with water by a public company, cannot file a bill on behalf of himself and the other inhabitants, to compel that company to supply water to the district upon particular terms: because, what might be reasonable with respect to one, might not be so with regard to the others.[2] Where, however, it is perfectly clear that the object of the suit is for the benefit of all the parties interested, a few may maintain a bill on behalf of themselves and the others, even though the majority disapprove of the institution of the suit. Thus, where an act complained of was necessarily injurious to the common right, Sir John Leach, V. C., suffered a few of a large number of persons to maintain a suit on behalf of themselves and the others for relief against it: although the majority approved of the act, and disapproved of the institution of the suit.[3] Upon the same principle, in *Small* v. *Attwood*,[4] a few shareholders of a Joint-Stock Company were permitted to maintain a suit on behalf of themselves and other shareholders, for the purpose of rescinding a contract: it being manifest from the evidence, that it was for the benefit of all the shareholders that the contract should be rescinded.

The great increase in the number of Joint-Stock Companies, and trading associations, in which large classes of persons are jointly interested, has had the effect, in modern times, of extending the practice which allows a few persons to sue in Equity, on behalf of themselves and others similarly interested. In the case of *Walworth* v. *Holt*,[5] the bill was filed by the plaintiffs, on behalf of themselves and all other the shareholders and partners in the banking company, called the Imperial Bank of England, except those who were made defendants. It did not, in terms, pray a dissolution, or a final winding-up of the affairs of the company, but it prayed the assistance of the Court in the reali-

[1] *Jones* v. *Garcia Del Rio*, T. & R. 297, 300: in which case, the plaintiffs had each a separate right to sue; and Lord Eldon also held, that as the plaintiffs could not support their bill, suing on behalf of themselves and others having similar rights, they could not, having three distinct demands, file one bill, *ib.* 301. See also *Croskey* v. *The Bank of Wales*, 4 Giff. 314: 9 Jur. N. S. 595.

[2] *Weale* v. *West Middlesex Waterworks*, 1 J. & W. 358, 370.

[3] *Bromley* v. *Smith*, 1 Sim. 8.

[4] Younge, 407, 456.

[5] 4 M. & C. 619.

sation of the assets of the company, and in the payment of its debts, and that for that purpose a receiver might be appointed, and authorised to sue for calls unpaid and other debts due to the company, in the name of the registered officer, who was one of the defendants. To this bill a demurrer was put in: upon the argument of which, the two most important objections to the bill were, 1st, that it was not the practice of the Court to interfere between partners except upon a bill praying a dissolution; and, 2ndly, that all the parties interested in the concern were necessary parties to the bill. Lord Cottenham overruled the demurrer, and in his judgment observed,[1] that the result of the two rules—the one binding the Court to withhold its jurisdiction, except upon bills praying a dissolution, and the other requiring that all the partners should be parties to a bill praying it—would be, "that the door of this Court would be shut, in all cases in which the partners or shareholders are too numerous to be made parties: which, in the present state of the transactions of mankind, would be an absolute denial of justice to a large portion of the subjects of the realm, in some of the most important of their affairs. This result is quite sufficient to show that such cannot be the law: for, as I have said upon other occasions,[2] I think it the duty of this Court to adapt its practice and course of proceeding to the existing state of society, and not, by too strict an adherence to forms and rules established under different circumstances, to decline to administer justice and to enforce rights for which there is no other remedy. This has always been the principle of this Court, though not at all times sufficiently attended to. It is the ground upon which the Court has, in many cases, dispensed with the presence of parties who would, according to the general practice, have been necessary parties." In the case of *Taylor* v. *Salmon*,[3] the plaintiff and three other persons, described as directors and co-partners of a certain mining company, on behalf of themselves and all other the co-partners of the company, obtained a decree for the specific performance of a lease to the plaintiffs, according to the terms of an agreement entered into between the two defendants, one of whom was a shareholder in the company, and was proved to have acted as agent for the plaintiffs in negotiating the lease with his co-defendant; and an objection that such defendant was a shareholder, and that therefore the plaintiffs could not sue on his behalf, was overruled.[4]

A suit for the purpose of setting aside an election of directors of a

[1] 4 M. & C. 635.

[2] See *Mare* v. *Malachy*, 1 M. & C. 559, 579; *Taylor* v. *Salmon*, 4 M. & C. 34, 141.

[3] 4 M. & C. 134, 138.

[4] See also *Milligan* v. *Mitchell*, 3 M. & C. 72: 1 Jur. 888; *Hichens* v. *Congreve*, 4 Russ. 562, 574; *Gordon* v. *Pym*, 3 Hare, 223, 227; *Apperly* v. *Page*, 1 Phil. 779, 785: 11 Jur. 271; *Richardson* v. *Hastings*, 7 Beav. 323, 326, 11 Beav. 17: 8 Jur. 72; *Beeching* v. *Lloyd*, 3 Drew, 227.

Corporation, on the alleged ground of fraud, may be brought by some of the shareholders on behalf of all, and need not be in the name of the Corporation itself.[1] A suit will lie by an individual corporator complaining of an illegal diversion of the funds which the Corporation holds as trustees, though the plaintiff may himself have no pecuniary interest in the funds so alleged to have been diverted, but he must sue on behalf of himself, and all other Corporators.[2] Where the directors of an incorporated company misappropriated the funds of the Corporation, a bill against them and the company in respect of such misappropriation, cannot be sustained by some of the stockholders on behalf of all except the directors; the company must be made plaintiffs, whether the acts of the directors are void or only voidable, and the stockholders have a right to make use of the name of the company as plaintiffs in such proceedings.[3] A bill will lie by some of the inhabitants of a municipality. Alleging an illegal application of the funds by the Mayor, which the Council refused to interfere with.[4] A bill was filed by a corporator of the Church Society of the Diocese of Toronto, on behalf of himself, and all other members of the Society, to correct and prevent alleged breaches of trust by the Corporation.[5]

In *Mozley* v. *Alston*,[6] Lord Cottenham said, that this form of suit is "subject to this restriction: that the relief which is prayed must be one in which the parties whom the plaintiff professes to represent have all of them an interest identical with his own; for if what is asked may by possibility be injurious to any of them, those parties must be made defendants; because each and every of them may have a case to make, adverse to the interests of the parties suing. If, indeed, they are so numerous that it is impossible to make them all defendants, that is a state of things for which no remedy has yet been provided." It is apprehended, however, that, according to the present practice, the Court will, in such cases, permit the suit to proceed, upon one or several of such parties having interests not identical with the plaintiff, or of each class of them, if there are several classes, being made a defendant to represent the others: unless indeed the object of the suit is to have the partnership or company wound up.[7]

It does not appear, moreover, that the fact of a company being incor-

1 *Davidson* v. *Grange*, 4 Grant 377.
2 *Armstrong* v. *Church Society of Toronto*, 13 Grant 552.
3 *Hamilton* v. *Desjardines Canal Company*, 1 Grant 1.
4 *Paterson* v. *Bowes*, 4 Grant 170.
5 *Boulton* v. *Church Society*, 14 Grant 123.
6 1 Phil. 790, 798: 11 Jur. 315.
7 *Richardson* v. *Larpent*, 2 Y. & C. C. 507, 514: 7 Jur. 691; *Pare* v. *Clegg*, 29 Beav. 589, 602: 7 Jur. N. S. 1136; see, however, *Carlisle* v. *South Eastern Railway Company*, 1 M'N. & G. 689, 699; 14 Jur. 535; *Fawcett* v. *Lawrie*, 1 Dr. & S. 192, 203; as to making the Corporation a defendant in its corporate character, see *Bagshaw* v. *Eastern Union Railway Company* 7 Hare, 114: 13 Jur. 602; 2 M'N. & G. 389: 14 Jur. 491.

porated by Act of Parliament necessarily prevents individual members of the corporation suing on behalf of themselves and the other members of the company. In *Foss* v. *Harbottle*,[1] Sir James Wigram, V. C., observed: "Corporations of this kind are in truth little more than private partnerships; and in cases which may easily be suggested, it would be too much to hold, that a society of private persons associated together in undertakings, which, though certainly beneficial to the public, are nevertheless matters of private property, are to be deprived of their civil rights, *inter se*, because, in order to make their common objects more obtainable, the Crown or the legislature may have conferred upon them the benefit of a corporate character. If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such a character the protection of those rights to which in their corporate character they were entitled, I cannot but think that the principle so forcibly laid down by Lord Cottenham in *Walworth* v. *Holt*,[2] and other cases, would apply, and the claims of justice would be found superior to any difficulties arising out of technical rules, respecting the mode in which corporations are required to sue." In the case last referred to, the Vice Chancellor allowed a demurrer, on the ground that, upon the case as stated in the bill, there was nothing to prevent the company from obtaining redress in respect of the matters complained of in its corporate character, and that, therefore, the plaintiffs could not sue in a form of pleading which assumed the practical dissolution of the corporation.[3]

In adopting this form of suit, care must be taken in selecting the plaintiff; for as, on the one hand, a plaintiff who has a right to complain of an act done to a numerous society of which he is a member, is entitled effectually to sue on behalf of himself and all others similarly interested, though no other may wish to sue: so, although there are a hundred who wish to institute a suit and are entitled to sue, still, if they sue by a plaintiff only, who has personally precluded himself from suing, the suit cannot proceed.[4]

[1] 2 Hare, 491; see also *Preston* v. *Grand Collier Dock Company*, 11 Sim. 327, 344: S. C. *nom. Preston* v. *Guyon*, 5 Jur. 146; *Bagshaw* v. *Eastern Union Railway Company* and *Carlisle* v. *South Eastern Railway Company*, *ubi sup.*; *Graham* v. *Birkenhead Railway Company*, 2 M'N. & G. 146, 156: 14 Jur. 494; *Colman* v. *Eastern Counties Railway Company*, 10 Beav. 1, 12: 11 Jur. 74; *Salomons* v. *Laing*, 12 Beav. 339: 14 Jur. 279; *Fraser* v. *Whalley*, 2 H. & M. 10; *East Pant Du Company* v. *Merryweather*, 10 Jur. N. S. 1231: 13 W. R. 216, V. C. W.

[2] 4 M. & C. 635.

[3] See also *Mozley* v. *Alston*, 1 Phil. 790, 797: 11 Jur. 315; *Lord* v. *The Governor and Company of Copper Miners*, 2 Phil. 740, 749; 12 Jur. 1059; *Yetts* v. *Norfolk Railway Company*, 3 De G. & S. 293: 13 Jur. 249. But where the acts complained of are *ultra vires*, or such that they cannot be confirmed by the company, such suits will be permitted: *Hodgkinson* v. *The National Live Stock Insurance Company*, 26 Beav. 473: 5 Jur. N. S. 478; 4 De G. & J. 422: 5 Jur. N. S. 969.

[4] *Per* L. J. Knight Bruce, *Burt* v. *The British Nation Life Assurance Association*, 4 De G. & J. 158, 174.

In all cases, where one or a few individuals of a large number, institute a suit on behelf of themselves and the others, they must so describe themselves in the bill; otherwise, a demurrer or plea for want of parties will lie. Thus, where a part of a ship's crew appointed two of their number to be agents, and a bill was filed by such agents in their own name, and not on behalf of themselves and the others, a demurrer was allowed for not having made the whole crew parties;[1] and where a bill was filed by three partners in a numerous trading company, against the members of the committee for managing the trading concerns of the company, it was dismissed, because it was not filed by the plaintiffs "on behalf of themselves and the other partners, not members of the committee."[2] And the Court is bound to ascertain by strict proof, that the parties by whom the bill is filed have the interests which they say they have.[3]

It is to be observed, that the Court will generally 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 that the bill may be amended, so as to make such individual sue on behalf of himself and the rest of the class.[4]

Section II.—*Parties to a Suit, in respect of their interest in resisting the Demands of the Plaintiff.*

A person may be affected by the demands of the plaintiff in a suit either immediately or consequentially. Where an individual is in the actual enjoyment of the subject-matter, or has an interest in it, either in possession or expectancy, which is likely either to be defeated or diminished by the plaintiff's claims; in such cases, he has an immediate interest in resisting the demand, and all persons who have such immediate interests are necessary parties to the suit; but there may be other persons who, though not immediately interested in resisting the plaintiff's demands, are yet liable to be affected by them consequentially; because the success of the plaintiff against the defendants who are immediately interested, may give those defendants a right to proceed

[1] *Leigh* v. *Thomas*, 2 Ves. S. 312.

[2] *Baldwin* v. *Lawrence*, 2 S. & S. 18, 26; and see *Douglas* v. *Horsfall*, *ib.* 184.

[3] *Clay* v. *Rufford*, 8 Hare, 231, 288; 14 Jur. 803. A plaintiff so suing must be a *bona fide* shareholder and sue *bona fide* for the benefit of the company; therefore, where a director in another company took shares for the purpose of filing a bill, and was indemnified by such company, the bill was dismissed, *Forrest* v. *Manchester, Sheffield and Lincolnshire Railway Company*, 30 Beav. 40; 7 Jur. N. S. 749; *ib.* 887; 9 W. R. 813, L. C.; see, also, *Colman* v. *Eastern Counties Railway Company*, 10 Beav. 1; 11 Jur. 74.

[4] *Lloyd* v. *Loaring*, 6 Ves. 779; see, also, *Milligan* v. *Mitchell*, 1 M. & C. 433; *Gwatkin* v. *Campbell*, 1 Jur. N. S. 131, V. C. W.

against them, for the purpose of compelling them to make compensation, either in the whole or in part, for the loss sustained. The persons who are consequentially liable to be affected by the suit, must frequently also be parties to it. The question, therefore, of who are necessary parties to a suit in respect to their interest in resisting the plaintiff's demands, resolves itself into two, namely: who are necessary parties, *first*, in respect of their immediate interest? and *secondly*, in respect of their consequential interest?

The reader's attention will be first directed to the question who are necessary parties to a suit, in respect of their immediate interest in resisting the plaintiff's demand. And here it is to be observed, that where parties are spoken of as having an interest in the question, it is not intended to confine the definition to those only who are beneficially interested, but it is to be considered as extending to all persons who have any estate, either legal or equitable, in the subject-matter, whether such estate be beneficial to themselves or not.

Under this definition are included all persons who fill the character of trustees of the property in dispute. But where the trustee is a mere bare trustee, without any estate vested in him, he need not, in general, be made a party. Thus, a broker or agent signing a contract in his own name for the purchase or sale of property, is not considered a necessary party to a bill for a specific performance of such contract against his principal.[1] And so, where a person having no interest in the matter joins with another who has, in a contract for sale: as where a man, having gone through a fictitious ceremony of marriage with a woman, joins with her as her husband, in an agreement to sell her property, he is not a necessary party to the suit to enforce the contract.[2]

In all cases, however, in which any estate is vested in an individual filling the character of trustee, or, if he has no estate, where the circumstances are such that, in the event of the plaintiff succeeding in his suit, the defendant may have a demand over against him, he is a necessary party. Thus, in *Jones* v. *Jones*,[3] where a plaintiff sought to set aside a lease on the ground of forgery, without bringing before the Court the trustees who were parties to the lease, and to whom fraud was imputed, the objection for want of parties was allowed: because, if the plaintiff prevailed, the defendant might have a remedy over against the trustees. Upon the same principle, where the trustees of real estates had conveyed them over to purchasers, it was determined that, to a bill by the *cestui*

[1] *Kingsley* v. *Young*, Coop. Eq. Pl. 42; *ante*.
[2] *Sturge* v. *Starr*, 2 M. & K. 195; and see *Forsyth* v. *Drake*, 1 Grant 223.
[3] 3 Atk. 110.

que trusts against the purchasers to set aside the conveyances, the trustees were necessary parties.[1]

A trustee, however, who is named in a will, but has never acted, and has released all his interest to his co-trustee, ought not to be made a party to a bill to set aside the will on the ground of fraud.[2]

Where a trustee has assigned his interest in the trust-estate to another, it is necessary to have, not only the trustee who has assigned, but the assignee before the Court.[3]

It is improper, however, to make the agent of a trustee a party;[4] and a person who had assumed to act as a trustee, though not duly appointed, was held to be an agent for this purpose.[5]

It was, formerly, generally necessary, where there were more trustees than one, that they should all be parties, if amenable to the process of the Court;[6] but this rule has been, in some respects, modified by the General order of the Court,[7] which enables a plaintiff who has a joint and several demand against several persons, to proceed against one or more of the several persons liable, without making the others parties;[8] and even before this Order, in some cases where they were merely accounting parties, one might be sued for an account of his own receipts and payments, without bringing the others before the Court. Thus, where a bill was filed against the representative of one of several trustees who where dead, for an account of the receipts and payments of his testator, who alone managed the trust, without bringing the representatives of the other trustees before the Court, and an objection was taken on that ground, the objection was overruled: because the plaintiff insisted only upon having an account of the receipts and disbursements of the trustee, whose representative was before the Court, and not of any joint receipts or transactions by him with the other trustees.[9] And so, where a bill was filed by *A.*, on behalf of himself and other creditors, against *B.* and *C.*, two trustees of estates conveyed in trust to pay debts, for an account of the produce of the sales and payment of their debts, and the representatives of *B.* alleged, by their answer, that not only *C.* but *D.* also were trustees, and that *D.* had acted in the trust, although they did not know whether he had received any of the produce, Lord

[1] *Harrison* v. *Pryse*, Barn. 324.
[2] *Richardson* v. *Hulbert*, 1 Anst. 65.
[3] *Burt* v. *Dennet*, 2 Bro. C. C. 225.
[4] *Attorney-General* v. *Earl of Chesterfield*, 18 Beav. 596; 18 Jur. 686; *Maw* v. *Pearson*, 28 Beav. 196. See, however, *Attorney-General* v. *Corporation of Leicester*, 7 Beav. 176, 179.
[5] *Ling* v. *Colman*, 10 Beav. 370, 373.
[6] 16 Vin. Ab., Party, B. 257, pl. 68.
[7] Ord. VII. 2. Our Order No. 62 is similar.
[8] *Post.*
[9] *Lady Selyard* v. *The Executors of Harris*, 1 Eq. Ca. Ab. 74, pl. 20.

Kenyon, M. R., and afterwards Lord Alvanley, M. R., held *D.* to be an unnecessary party.[1] The reporter in this case adds a query: because, at the bar, the general opinion was that *D's* representatives ought to have been parties, nor could one creditor suing, waive, on behalf of absent parties in joint interest with himself, the benefit or possible benefit of any part of the trust fund. This query seems to be in accordance with the principles laid down in *Williams* v. *Williams*.[2] Where a *cestui que trust* seeks a general account, he must bring all the accounting parties before the Court, notwithstanding the Order.[3]

Our Order 62, taken from the English order VII. 2, declares that "Where the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable."

The rule which requires the trustees of property in litigation to be brought before the Court, renders necessary the presence of the committees of the estates of idiots and lunatics, in suits against the idiots or lunatics committed to their care:[4] because, by the grant to them of the estates of such idiots or lunatics, they are constituted the trustees of such estates. Upon the same ground, the assignees of bankrupts are necessary parties to suits relating to the bankrupt's property.

For the like reason, wherever a demand is sought to be satisfied out of the personal estate of a deceased person, it is necessary to make the personal representative a party to the suit. Thus, although as we have seen, a creditor or legatee may bring a bill against a debtor to the testator's estate upon the ground of collusion between him and the executor,[5] yet, in all cases of this description, the personal representative must be before the Court. And so, where to a bill for an account of the estate of a person deceased, and to have the same applied to satisfy a debt alleged to be due from him to the plaintiff, the defendants pleaded that they were not executors or administrators of the person whose estate was sought to be charged, nor so stated in the bill, and demurred, for that the executors or administrators were the proper parties to contest the debt, who might probably prove that it had been discharged: the Court allowed both the plea and demurrer, but gave the plaintiff

[1] *Routh* v. *Kinder*, 3 Swanst. 144, n.; from Lord Colchester's MSS.

[2] 9 Mod. 299. See also *Wadeson* v. *Rudge*, 1 C. P. Coop. t. Cott. 369: but see *Masters* v. *Barnes*, 2 Y. & C. C. C. 616; 7 Jur. 1167; and *Symes* v. *Glynn*, and *Pease* v. *Cheesbrough*, cited Seton, 115; and *post*.

[3] *Coppard* v. *Allen*, 10 Jur. N. S. 622; 12 W. R. 943, L. JJ.

[4] Ld. Red. 30.

[5] *Attorney-General* v. *Wynne*, Mos. 126, *Ante*.

leave to amend his bill as he might be advised:[1] but to a suit concerning a specific legacy, the executor is no longer a necessary party after he has assented to the bequest; thus, where a bill was filed by the reversioner against the legatee of a term, praying that the lease might be declared void, and the defendant insisted that, if the lease was set aside, the plaintiff ought to repay the money expended by the testator in the improvement of the premises, the executor of the testator, who had assented to the bequest, was not considered a necessary party to the suit.[2]

Where an executor had been outlawed, and a witness proved that he had inquired after but could not find him, it was thought to be a full answer to the objection that he was not a party to a suit which had been instituted by a creditor of the deceased testator, against the residuary legatee.[3]

Moreover, in some cases, where the fund, the subject of the suit, has been ascertained and appropriated, the Court has dispensed with the appearance of the personal representative of the testator, by whose will the fund was bequeathed.[4]

The rule which requires the executor to be before the Court, in all cases relating to the personal estate of a testator, extends to an executor *durante minore ætate*, even though the actual executor has attained twenty-one, and has obtained probate thereon; thus, where there had been an executor during the minority of the daughter and executrix of a testator, and after she attained twenty-one an administration bill was filed against her, without making the executor *durante minore ætate* a party: although it was insisted that the daughter, being of full age, was complete executrix *ab initio*, and had the whole right of representation in her, yet it was held, that the representative *durante minore ætate* was a necessary party, and that for want of him the cause must stand over.[5] It is to be observed, however, that if in the last case the daughter had received all the testator's personal estate from the hands of the executor *durante minore ætate*, upon an account between them, the objection for want of parties would have been overruled.

The personal representative required, is one appointed in England; and where a testator appointed persons residing in India and Scotland

[1] *Griffith* v. *Bateman*, Rep. t. Finch, 334; *Rumney* v. *Mead*, *ibid.* 303; *Attorney-General* v. *Twisden*, *ibid.* 336. For a case where, under special circumstances, the executors of the settlor of a trust fund would be necessary parties to a suit for administering it, see Judgment of Sir J. Wigram, V. C., in *Gaunt* v. *Johnson*, 7 Hare, 154, 156: 12 Jur. 1067.

[2] *Malpas* v. *Ackland*, 3 Russ. 273, 277; and see *Smith* v. *Brooksbank*, 7 Sim. 18, 21; *Moor* v. *Blagrave*, 1 Ch. Ca. 277.

[3] *Heath* v. *Percival*, 1 P. Wms. 684.

[4] *Arthur* v. *Hughes*, 4 Beav. 506; *Beasley* v. *Kenyon*, 3 Beav. 544; *Bond* v. *Graham*, 1 Hare, 482, 484: 6 Jur. 620.

[5] *Glass* v. *Oxenham*, 2 Atk. 121.

his executors, and the will was not proved in England, but the plaintiff, a creditor, filed a bill against the agent of the executors, to whom money had been remitted, praying an account and payment of the money to the Accountant-General for security: a demurrer, because no personal representative of the testator resident within the jurisdiction of the Court was a party, was allowed.[1]

And so, where an executor proved the will of his testator in India, and afterwards came to this country, where a suit was instituted against him for an account of an unadministered part of the testator's estate, which had been remitted to him from India by his co-executor there, it was held necessary that a personal representative should be constituted in England, and made a party to the suit.[2]

It seems, that where an administration was disputed in the Ecclesiastical Court, the Court of Chancery would entertain a suit for a receiver to protect the property, till the question in the Ecclesiastical Court was decided, although an administration *pendente lite* might have been obtained in the Ecclesiastical Court.[3] And where a party entitled to administer refuses to take out administration himself, and prevents any one else from doing so, he will not be allowed to object to a suit being proceeded with because a personal representative is not before the Court. Thus, in *D'Aranda* v. *Whittingham*,[4] where the heir of an obligor demurred to a bill by the obligee, because the administrator of the obligor was not a party, the demurrer was overruled: because it appeared that he would not administer himself, and had opposed the plaintiff in taking out administration as the principal creditor; and in a case where the person entitled by law to administration did not take it out, but acted as if she had, receiving and paying away the intestate's property, an objection for want of parties, on the ground that there was no administrator before the Court, was overruled.[5] In the case of *Creasor* v. *Robinson*,[6] however, the Court declined to follow the case last referred to; and refused to make an order for an account against an administrator *de son tort*, unless a legal personal representative duly constituted was a party.

Where there are several executors or administrators, they must all be made parties, even though one of them be an infant;[7] but this rule

[1] *Lowe* v. *Fairlie*, 2 Mad. 101, 105; see also *Logan* v. *Fairlie*, 2 S. & S. 284.

[2] *Bond* v. *Graham*, 1 Hare, 482: 6 Jur. 620; *Tyler* v. *Bell*, 2 M. & C. 89, 105: 1 Jur. 20; but see *Anderson* v. *Caunter*, 2 M. & K. 763; and see observation of Ld. Cottenham on this case, 2 M. & C. 110.

[3] *Atkinson* v. *Henshaw*, 2 V. & B. 85, 92; *Ball* v. *Oliver*, *ibid.*, 96; see also, *Watkins* v. *Brent*, 1 M. & C. 97, 102; *Whitworth* v. *Whyddon*, 2 M'N. & G. 52: 14 Jur. 142; *Cumming* v. *Fraser*, 28 Beav. 614; *Dimes* v. *Steinberg*, 2 Sm. & G. 75.

[4] Mos. 84.

[5] *Cleland* v. *Cleland*, Prec. Ch. 64.

[6] 14 Beav. 589: 15 Jur. 1049; see also *Cooke* v. *Gillings*, 21 Beav. 497.

[7] *Scurry* v. *Morse*, 9 Mod. 89; *Offley* v. *Jenney*, 3 Ch. Rep. 92; *ante*.

may be dispensed with, if any of them are not amenable to the process of the Court,[1] or if they have stood out process to a sequestration; and if an executor has not proved, he need not be a party.[2] Thus, where there were four executors, one of whom alone proved and acted, and a bill was brought against that one, and he in his answer confessed that he had alone proved the will and acted in the executorship, and that the others never intermeddled therein, it was said to be good.[3] Where, however, the executor who had proved died, it was held not sufficient to bring his executor before the Court; because, as the law then stood, the other executors had still the right to prove, even though they had renounced probate.[4] The record, therefore, would not have been complete without a new representative of the original testator. And it has been determined, that the General Order enabling a plaintiff to proceed against one or more persons severally liable,[5] does not apply to a general administration suit.[6]

Wherever an executor has actually administered, he must be made a party to a suit, although he has released and disclaimed.[7] But where a plaintiff filed a bill against one of two executors, and alleged in his bill that he knew not who was the other executor, and prayed that the defendant might discover who he was and where he lived, a demurrer for want of parties was overruled.[8] And in the case before referred to, where one of two joint executors was abroad, an account was decreed against the other of his own receipts and payments.[9]

The cases do not seem to afford a very clear answer to the question, under what circumstances, in a suit to administer the assets of a deceased testator or intestate, the plaintiff ought to join, with the existing personal representatives, such parties as fill the position of administrators or executors, of a former representative of the original estate.[10] It is conceived, however, that the practice in this respect is now settled, *viz.*, to make the personal representatives of a deceased executor parties, where he has received assets of the testator for which he has not accounted with the surviving executor, and in respect of which it is

[1] *Cowslad* v. *Cely*, *ubi sup.*; but if they are all out of the jurisdiction, an administrator *durante absentia* must be appointed: *Donald* v. *Bather*, 16 Beav. 26.

[2] Went. Off. Ex. 95; *Strickland* v. *Strickland*, 12 Sim. 463; but the plaintiff may make him a party if he has acted as executor: *Vickers* v. *Bell*, 10 Jur. N. S. 376, L. JJ.

[3] *Brown* v. *Pitman*, Gilb. Eq. R. 75; 16 Vin. Ab. Party, B. 251, Pl. 19; and see *Dyson* v. *Morris*, 1 Hare, 413, 421: 6 Jur. 297.

[4] *Arnold* v. *Blencowe*, 1 Cox. 426.

[5] Ord. VII. 2; similar to our Order No. 62.

[6] *Hall* v. *Austin*, 2 Coll. 570: 10 Jur. 452.

[7] *Smithby* v. *Hinton*, 1 Vern. 31.

[8] *Bowyer* v. *Covert*, *ib.* 95.

[9] *Cowslad* v. *Cely*, Prec. Ch. 83.

[10] *Williams* v. *Williams*, 9 Mod. 299; *Phelps* v. *Sproule*, 4 Sim. 318, 321; *Holland* v. *Prior*, 1 M. & K. 237; *Masters* v. *Barnes*, 2 Y. & C. C. C. 616: 7 Jur. 1167; *Ling* v. *Colman*, 10 Beav. 370, 374; *Hall* v. *Austin*, 2 Coll. 570: 10 Jur. 452; *Clark* v. *Webb*, 16 Sim. 161: 12 Jur. 615.

sought to charge his estate: but where this is not the case, to introduce into the bill an allegation that the deceased executor fully accounted with the survivor, and that nothing is due from his estate to the estate of the testator, and not to make his representative a party to the suit.[1] The fact of such deceased executor having died insolvent, or without having received assets, would in all cases probably prevent his executors being proper parties.[2]

If a bill is filed against a married woman who is an executrix, or administratrix, her husband must also be a party, unless he has abjured the realm.[3] In *Taylor* v. *Allen*,[4] however, Lord Hardwicke granted an injunction to restrain a wife executrix from getting in the assets, her husband being in the West Indies, and not amenable to the process of the Court, on the ground that, if she wasted the assets, or refused to pay, a creditor could have no remedy, inasmuch as her husband must be joined as a party to the suit against her.

Where a bill had been filed for an account of a testator's estate, and it was objected that one of the executors was not a party, he was ordered to be introduced into the decree as a party, and to account without putting off the cause to add parties;[5] but this can only be done where the person appears, and submits to be bound as if originally a party.[6]

It seems, that where a power of sale is given, by a will, to executors, and they renounce probate, they will not be considered necessary parties to the suit; thus, where a testator had devised that his executors should sell his land, and be possessed of the money arising from the sale upon certain trusts mentioned in his will, and made *B.* and *C.* his executors, who renounced, whereupon administration with the will annexed, was granted to one of the plaintiffs: upon a bill brought by the *cestui que trusts* of the purchase money, under the will, against the heir, to compel him to join in a sale of the lands, it was objected that there wanted parties, in regard that the executors ought to have been made defendants, for notwithstanding they had renounced, yet the power of sale continued in them; and the objection was overruled, there being only a power and no estate devised to them.[7] It should be noticed, that a query has been added to the decision upon this point by the reporter; and the doubt suggested appears to be justified by the opinion

[1] See *Whittington* v. *Gooding*, 10 Hare, App. 29; *Pease* v. *Cheesbrough*, Seton, 115. For form of decree, where plaintiff does not, by his bill, seek to charge a deceased co-executor's estate, see *ib.*

[2] See *Symes* v. *Glynn*, Seton, 115.

[3] Ld. Red. 30.

[4] 2 Atk. 213.

[5] *Pitt* v. *Brewster*, 1 Dick. 37. And so, as to the husband of an accounting party, *Sapte* v. *Ward* 1 Coll. 24.

[6] Seton, 1116.

[7] *Yates* v. *Compton*, 2 P. Wms. 308.

expressed both by Lord St. Leonards and Mr. Preston, *viz.*, that where a power is given to executors, they may exercise it, although they renounce probate of the will.[1] It is to be observed, however, that in the case of *Keates* v. *Burton*,[2] referred to by Lord St. Leonards (which was a case of a discretionary power given by a testator over the application of the interest of a money fund to his trustees and executors, one of whom died, and the others renounced), Sir William Grant, M. R., remarked, "that the power is given to the executors, but they have not exercised it, and they have renounced the only character in which it was competent to them to exercise it:" and in the case of *Earl Granville* v. *M'Neill*,[3] were it was held that the two executors who had proved, could exercise a power of appointment given to their testator, his executors, administrators, and assignees, although a third executor, who had renounced, was also named in the will, Sir James Wigram, V. C., said "I have referred to Sir Edward Sugden's book on Powers, but find nothing to make me doubt the sufficiency of the appointment. The question in all such cases is, whether the confidence is reposed in the individuals named, or in the persons who, *de facto*, fill the given office."[4]

It is right, in this place, to recall the attention of the reader to the rule which has been before noticed, that the executor or the administrator of a deceased person is the person constituted by law to represent the personal property of that person, and to answer all demands upon it; and that, therefore, where the object of a suit is to charge such personal estate with a demand, it is sufficient to bring the executor or administrator before the Court;[5] thus, it has been held, that in a bill to be relieved touching a lease for years, or other personal duty against executors, though the executors be executors in trust, yet it is not necessary to make the *cestui que trusts*, or the residuary legatees parties.[6] And so, where a bill was filed against an executor, to compel the transfer of a sum of stock belonging to his testatrix, and the executor, by his answer, stated that the residuary legatees claimed the stock, an objection for want of parties was held to be untenable.[7]

In like manner, where a testator gave different legacies to three persons, and they were to abate or increase, according to the amount of the personal estate: to a bill against the executor by one legatee,

[1] Sugd. Pow. 118; but see *ib.*, 886; 2 Prest. Ab. 264.

[2] 14 Ves. 434, 437.

[3] 7 Hare, 156: 13 Jur. 253.

[4] See Wms. Exors. 251, 858.

[5] Ld. Red. 165; *Micklethwaite* v. *Winstanley*, 13 W. R. 210, L. J. J. *ante*.

[6] *Anon.* 1 Vern. 261: 1 Eq. Ca. Ab. 73, Pl. 13: *Lawson* v. *Barker*, 1 Bro. C. C. 303; *Love* v. *Jacomb*, *ib.* n.

[7] *Brown* v. *Dawthwaite*, 1 Mad. 446; and see *Jones* v. *How*, 7 Hare, 267: 12 Jur. 257, and *Harrison* v. *Shaw*, 2 Cham. R. 44.

the executor pleaded that the other legatees ought to be parties, because the account made with the plaintiff would not conclude them, and he should be put to several accounts, and double proof and charge, but the plea was overruled.[1] It seems, however, that where a person has a specific lien upon the property in dispute, he must be brought before the Court; and upon this ground, in the case of *Langley* v. *The Earl of Oxford*, which was a bill by the specific legatee of a mortgagee against the representative of the mortgagor, for foreclosure, and the defendant pleaded a settled account with the executors of the mortgagee, and a release, it was said by Lord Hardwicke, that he could not see how the private account between the executor of the mortgagee, and the debtor, could discharge the lien on the land;[2] however, the bill in that case was afterwards dismissed.[3] And so, where a husband had specifically disposed of his wife's paraphernalia to other persons: on a bill by the wife against the executor, for a delivery thereof to her, the specific legatees were considered necessary parties.[4]

The assignees of a bankrupt are also, as has been before stated, the proper parties to represent the estate vested in them under the bankruptcy; and, therefore, in all cases where claims are sought to be established against the estate of a bankrupt, it is necessary to bring only the assignees before the Court; and the bankrupt himself, or his creditors, are unnecessary parties.[5] Thus, it has been held, that a bankrupt is not a necessary party to a bill of foreclosure against his assignees;[6] and Sir John Leech, V. C., allowed a demurrer put in by a bankrupt, who was made a party to a bill against his assignees to foreclose a copyhold estate, even though there had been no bargain and sale executed by the commissioners.[7] To a suit of foreclosure against the assignees of a bankrupt mortgagor, the bankrupt is not a necessary party.[8] A mortgagor who has made a mortgage on lands in this Province, and who afterwards became a bankrupt in England, is not a necessary party to a bill to foreclose by foree of the English Statute relating to bankruptcy.[9] It is to be observed, however, that where fraud and collusion are charged between the bankrupt and his assignees, the bankrupt may be made a party, and he cannot demur, although

[1] *Haycock* v. *Haycock*, 2 Ch. Ca. 124; *Jennings* v. *Paterson*, 15 Beav. 28. There may, however, be cases where pecuniary legatees are proper parties, as where there is a question of ademption; *Marquis of Hertford* v. *Count de Zichi*, 9 Beav. 11, 15.

[2] Amb. 17; but see Serjeant Hill's note of this case, in Blunt's ed. of Amb. App. C. p. 795.

[3] Reg. Lib. B. 1747, fo. 300.

[4] *Northey* v. *Northey*, 2 Atk. 77.

[5] *Collet* v. *Wolleston*, 3 Bro. C. C. 228.

[6] *Adams* v. *Holbrook*, Harr. by Newl. 30; *Bainbridge* v. *Pinhorn*, 1 Buck. 125.

[7] *Lloyd* v. *Lander*, 5 Mad. 282, 288.

[8] *Torrance* v. *Winterbottom*, 2 Grant 487.

[9] *Goodhue* v. *Whitmore*, 7 U. C. L. J. 124.

relief be prayed against him. Thus, where a creditor, having obtained execution against the effects of his debtor, filed a bill against the debtor, against whom a commission of bankruptcy had issued, and the persons claiming as assignees under the commission, charging that the commission was a contrivance to defeat the plaintiff's execution, and that the debtor having, by permission of the plaintiff, possessed part of the goods which had been taken in execution for the purpose of sale, instead of paying the produce to the plaintiff, had paid it to his assignees; a demurrer by the alleged bankrupt, because he had no interest and might be examined as a witness, was overruled.[1]

Subject to the above and certain other exceptions, the rule formerly was, that all *cestui que trusts* were necessary parties to the suits against their trustees, by which their rights were likely to be affected. Thus, on a bill for redemption, where the defendant in his answer set forth that he was trustee for *A.*; an objection was made at the hearing, that the *cestui que trust* should have been made a party; and because it was disclosed in the answer, and the plaintiff might have amended, the bill was dismissed.[2] Now, however, as we have seen, in suits concerning real or personal estate, which is vested in trustees, such trustees represent the persons beneficially interested, in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate, represent the persons beneficially interested in such personal estate; and in such cases, it is not necessary to make the persons beneficially interested parties to the suit.[3]

In some cases, however, even before the late Act, where the *cestui que trusts* were very numerous, the necessity of bringing them all before the Court has been dispensed with. Thus, where upon a bill brought against an assignee of a lease, to compel him to pay the rent, and perform the covenants, it appeared that the assignment was upon trust for such as should buy shares, the whole being divided into 900 shares, and an objection was taken because the shareholders were not parties: the objection was overruled, as the assignees by dividing the shares, had made it impracticable to have them all before the Court.[4] Formerly, the general rule, in cases where real estates were either devised or settled upon trust for payment of debts or legacies, was, that if the persons to be benefited by the produce of the estate were either named or sufficiently indicated, then that they must be all parties to any suit affecting the estate; if, however, the bill alleged their great number

[1] *King* v. *Martin*, 2 Ves. J. 641, cited Ld. Red. 162.
[2] *Whistler* v. *Webb*, Bunb. 53.
[3] 15 & 16 Vic. c. 86, s. 42, r. 9, and our Order No. 61.
[4] *City of London* v. *Richmond*, 2 Vern. 421.

as a reason for not making them all parties, and if the Court was satisfied that the absentees were sufficiently represented by those who were made parties to the record, the presence of all the persons interested would be dispensed with.[1] And upon the same principle, where the trusts were for the payment of debts or legacies generally, the trustees alone were allowed to sustain the suit, either as plaintiffs or defendants, without bringing before the Court the creditors or legatees for whom they were trustees;[2] and now, it is conceived that the Court would, in such cases, generally allow the suit to proceed without any of the *cestui que trusts* being made parties, considering their interests to be sufficiently represented by the trustees;[3] except where it might require some of the *cestui que trusts* to be parties, in order to secure the due application of the trust money.[4]

It was held in 1851, and before the promulgation of our Orders just referred to, that until a deed alleged to have been obtained by fraud is declared void, it must be deemed a valid and subsisting instrument; therefore, where at the hearing of a foreclosure suit it appeared that after the execution of the conveyance to the mortgagee a voluntary deed had been executed by him purporting to vest all his property in trustees; that he alleged and had gone into evidence to show this deed void as obtained from him fraudulently; that some of the *cestuis que trustent* had relinquished their interest under the deed, and that the others had not any part in obtaining the deed, and had not executed it; *Held*, that such other *cestuis que trustent* must, notwithstanding, be made parties to the suit, and leave was given to the plaintiff to amend for that purpose.[5] Where a trustee commits a breach of trust, the person participating in it is not a necessary party to a suit for the general administration of the trust estate. One devisee of a trustee against whose estate a suit is brought, sufficiently represents those interested in the estate.[6] A municipality in proceeding to a sale of land for taxes is in the position of a trustee; and if it is afterwards sought to impeach the sale on the ground of any irregularity in directing such sale, and it is sought to make the municipality answerable to the purchaser for the purchase money paid, or the costs of the suit, the municipality must be made a party to the cause.[7] To a bill filed by one Co-partner against another seeking to set aside a marriage settlement as having been made by the

[1] *Holland* v. *Baker*, 3 Hare, 68, 74: 6 Jur. 1011; *Harrison* v. *Stewardson*, 2 Hare, 530.

[2] Ld. Red. 174.

[3] 15 & 16 Vic. c. 86, s. 42, r. 9; *Morley* v. *Morley*, 25 Beav. 253; and see *Knight* v. *Pocock*, 24 Beav. 436; and No. 61 of our C. G. O.

[4] *Stansfield* v. *Hobson*, 16 Beav. 189.

[5] *Rogers* v. *Rogers*, 2 Grant 137.

[6] *Tiffany* v. *Thomson*, 9 Grant, 244.

[7] *Ford* v. *Proudfoot*, 9 Grant, 472.

settlor at a time when he was insolvent, the trustees and *cestui que trust* of the settlement are necessary parties; as they are entitled to have the accounts of the partnership taken, and the assets thereof applied in exoneration of the settled lands.[1] In a suit by trustees to reduce into possession the trust estate, and in which the existence of the trust estate, is called in question by the defendant, the *cestuis que trustent* are necessary parties.[2] Where a bill is filed against a trustee by parties claiming adversity to his *cestuis que trustent* without making them parties to the bill, it is the duty of the trustees to object that the owners of the estate are not before the Court; where, therefore, a trustee under such circumstances, neglected to object to their not being made parties, the cause was, notwithstanding, ordered to stand over with leave to amend by adding parties, without costs.[3] Where a mortgagor had conveyed his equity of redemption to the trustees of his marriage settlement in trust for his wife for life, the remainder to his children, and a bill of foreclosure was filed after his death against the trustees and widow, to which bill the children, being infants, were not made parties, the Court granted a decree containing the usual reference to enquire whether a sale or foreclosure would be more beneficial to the infants, and gave liberty to the Master to make the infants parties in his office, if he should see fit.[4]

We have already seen, that the English 30th Order of August, 1841, of which our Order 61 is almost a copy, did not apply to cases where a mortgagee sought to foreclose the equity of redemption of estates vested in trustees,[5] but that under the rule of the late Act above referred to, where the trustees are the persons who would be in possession of funds to redeem, they may properly represent their *cestui que trusts*;[6] though, when this is not the case, the *cestui que trusts*, or some of them, ought to be parties.[7]

Formerly, in such cases, the *cestui que trusts* were necessary parties;[8] but to a suit for the execution of a trust by or against those claiming the ultimate benefit of such trust, after the satisfaction of prior charges, it was not even then necessary to bring before the Court the persons claiming the benefit of such prior charges; and, therefore, to a bill for the application of a surplus, after payment of debts and legacies, or

[1] *Thomas* v. *Torrance*, 1 Cham. R. 46.
[2] *Houlding* v. *Poole*, 1 Grant, 206.
[3] *Cleveland* v. *McDonald*, 1 Grant, 415.
[4] *Dickson* v. *Draper*, 11 Grant, 362.
[5] *Ante.*
[6] *Hannan* v. *Riley*, 9 Hare, App. 40; *Sale* v. *Kilson*, 3 De G. M. & G. 119: 17 Jur. 170.
[7] *Goldsmid* v. *Stonehewer*, 17 Jur. 199; 9 Hare, App. 38; and the other cases cited, *ante.*
[8] *Osbourn* v. *Fallows*, 1 R. & M. 741; *Calverley* v. *Phelp*, 6 Mad. 229; *Faithful* v. *Hunt*, 3 Anst. 751; *Newton* v. *Earl of Egmont*, 4 Sim. 574. 584: 5 Sim. 130, 135; *Coles* v. *Forrest*, 10 Beav. 552, 557.

other incumbrances, the creditors, legatees, or other incumbrancers, need not be made parties.[1] According to the former practice of the Court, where money secured by mortgage was subject to a trust, the mortgagor, or any person under him, seeking to redeem the mortgage, was obliged to make all persons claiming an interest in the mortgage money parties to the suit;[2] and the general rule was considered to be, that there could be no foreclosure or redemption unless all the parties entitled to the mortgage money were before the Court.[3] Now, however, it has been held, that in a redemption suit, where the mortgage money is vested in trustees, the trustees represent the *cestui que trusts* sufficiently to protect the mortgagor; but that some of the *cestui que trusts* ought also to be parties, in order to secure the due application of the trust property.[4]

It was said by Lord Hardwicke, that where a mortgagee, who has a plain redeemable interest, makes several conveyances upon trust, in order to entangle the affair, and to render it difficult for a mortgagor, or his representatives, to redeem: it is not necessary that the plaintiff should trace out all the persons who have an interest in such trust, to make them parties;[5] the persons having the legal estate, however, must be before the Court; and where a mortgagee in fee has made a conveyance in strict settlement, the first tenant in tail and all those having intermediate estates are necessary parties.[6] It seems that where a mortgage is forfeited, and the mortgagee exercises the legal rights he has acquired by disposing of, or encumbering the estate, and the mortgagor comes for the redemption, which a Court of Equity gives him, it must be upon the terms of indemnifying the mortgagee from all costs arising out of his legal acts. Upon this principle, Sir John Leach, V. C., in the case of *Wetherell* v. *Collins*,[7] above referred to, ordered the mortgagor to pay the costs of the trustees, and *cestui que trust*, who were necessarily brought before the Court, in consequence of the assignment of the mortgagee.

It seems formerly to have been considered necessary, that a mortgagee, who had assigned his mortgage, should be made a party to a bill of redemption;[8] but the law upon the point appears now to be otherwise;

[1] Ld. Red. 175.

[2] *Drew* v. *Harman*, 5 Pri. 319.

[3] *Palmer* v. *Earl of Carlisle*, 1 S. & S. 423; *Wetherell* v. *Collins*, 3 Mad. 255; *Osbourn* v. *Fallows*, 1 R. & M. 741.

[4] *Stansfield* v. *Hobson*, 16 Beav. 189; see, however, *Morley* v. *Morley*, 25 Beav. 253; and *Emmet* v. *Tottenham*, 10 Jur. N. S. 1090: S. C. *nom. Tottenham* v. *Emmet*, 13 W. R. 123, M. R. where a person interested in part of the mortgage was held not to be a necessary party.

[5] *Yates* v. *Hambly*, 2 Atk. 257.

[6] *Ibid*, 238.

[7] 3 Mad. 255.

[8] *Anon.* in the Duchy, 2 Eq. Ca. Ab. 594, Pl. 3.

and it has been determined, that where there has been an assignment, even though it was made without the previous authority of the mortgagor, or his declaration that so much is due, the assignee is the necessary party:[1] for whatsoever the assignee pays without the intervention of the mortgagor, he can claim nothing under the assignment but what is actually due between the mortgagor and the mortgagee.[2] Where a mortgagor is a party to an assignment of a mortgage by the mortgagee, then it is in fact a new mortgage between the mortgagor and the assignee, and of course the original mortgagee is not a necessary party to a bill to redeem. A mortgagor, however, cannot be bound by any transaction which may take place between a mortgagee and his assignee without his privity; if, therefore, the mortgagee, before assignment, has been in possession, and has received more on account of the rents and profits than the principal and interest due upon the mortgage, and a bill is filed by the mortgagor against the assignee to have an account of the overplus, he may make the mortgagee a party to the bill, because he is clearly accountable for the surplus rents and profits received by himself. But it seems to be doubtful whether, upon the principles laid down by Lord Eldon,[3] the assignee would not be sufficient: on the ground that, having contracted to stand in the place of the original mortgagee, he has rendered himself liable to have the account taken from beginning to end, and must be answerable for the result. From the same case it appears, that although there may have been twenty *mesne* assignments, the person to whom the last has been made is the only necessary party to a redemption suit.[4]

Where a mortgagee institutes proceedings to foreclose against the mortgagor, and the estate of a deceased *mesne* incumbraneer, the real representatives of such deceased incrumbrancer are not necessary parties.[5] It is not proper to make a person entitled to a part of the equity of redemption in a mortgage estate a party in the Master's office, but he should be made defendant by bill.[6]

Where, however, there are several derivative mortgages, if the last mortgagee seeks to foreclose the mortgagor, he must make all the intermediate mortgagees parties, because they are all interested in the account.[7]

The rules regulating the practice of the Court as to *cestui que trusts*

[1] *Chambers* v. *Goldwin*, 9 Ves. 269.
[2] *Ibid.* 264.
[3] *Chambers* v. *Goldwin*, 9 Ves. 268, 269.
[4] *Ibid.* 268.
[5] *Taylor* v. *Stead* 1 Cham. R. 74.
[6] *Whan* v. *Lucas* 1 Cham. R. 58.
[7] *Hobart* v. *Abbot*, 2 P. Wms. 643; *ante*.

being parties to suits relating to trust property, apply to resulting, as well as other trusts. Upon this principle it has been held, that in cases of charities, where a private founder has appointed no visitor, his heir at law is considered a necessary party to an information for the regulation of the charity; because, in such case, the heir at law of a private founder is considered as the visitor; but in a case of this description, the Court refused to dismiss the information because of his absence, and directed an inquiry for him to be made by the Master;[1] and so, in the case of a charity, wherever it is doubtful whether the heir is disinherited or not, he must be a party.[2]

Wherever real estate is to be recovered, or a right is sought to be established, or a charge raised against real estate, it is necessary that the person or persons entitled to the inheritance should be before the Court. Upon this principle it is, that in a bill by a specialty creditor, to obtain payment of his demand out of the real estate of his debtor, the devisee or heir, as well as the executor, is a necessary party. Where, however, the arrears of an annuity, charged upon real estate, are sought to be recovered, if the arrears are such only as were due in the lifetime of the ancestor, it will be sufficient to make his personal representative a party; but for any arrears after his death, the devisee or heir must be a party.[3]

Where a vendee before obtaining a conveyance, assigned to *A.* half of the land purchased, and to *B.* the other half; and the vendor afterwards executed a conveyance to each, by which it was intended to convey to *A.* and *B.* their respective portions of the land; but by a mistake in the respective descriptions, the conveyance to *A.* comprised *B.'s* land, and did not comprise *A.'s* own, nor did the conveyance to *B.* comprise *A.'s* land, but each took and kept possession of the land actually intended for him. *Held*, (*Spragge V. C.* dissenting) that to a bill afterwards filed by *B.* against *A.* for a conveyance of *B.'s* land to him, the heir of the original vendor in whom the legal estate in *A.'s* land was still vested, was a necessary party.[4] To a suit for a foreclosure of a mortgage, in which the wife of the mortgagor has joined to bar her dower, the wife is not a necessary party, and if made a defendent, the bill as against her will be dismissed with costs.[5] Where a suit to enforce by sale, a vendor's lien, is instituted against the heirs-at-law of the purchaser, the widow of the vendee is a necessary party in respect of her right of dower.[6] In a suit to administer the estate of a testator, the heir-at-law

[1] *Attorney-General* v. *Gaunt*, 3 Swanst. 148, n.
[2] *Attorney-General* v. *Green*, 2 Bro. C. C. 497; see *ante*.
[3] *Weston* v. *Bowes*, 9 Mod. 309.
[4] *Rowsell* v. *Hayden*, 2 Grant, 557.
[5] *Moffatt* v. *Thompson*, 3 Grant, 111 overruling *Sanderson* v. *Caston*, 1 Grant 349.
[6] *Paine* v. *Chapman*, 7 Grant, 179.

ought to be a party, but where the personal representative filed such a bill against the devisee, alleging that no lands had descended, as to which the answer was silent, and the objection was not raised at the hearing, the Court made a decree in the absence of the heir.[1] A bill having been filed by the assignee of the right to certain lands against the trustee thereof, without making the heir of the assignor a party; and the trustee set up a defence impeaching the assignment, and insisting that such heir was the party entitled to the conveyance, the Court at the hearing, ordered the case to stand over with liberty to amend by adding the heir as a party defendent.[2]

The heirs of a deceased mortgagee of an equity of redemption are not necessary parties to a suit of foreclosure by the prior mortgagee, the proper party being the personal representative of such mortgagee.[3] Where in a bill for partition it was stated that certain infants residing with or near their father, out of the jurisdiction of the court, not parties, were interested in the land sought to be partitioned, their father being a party defendant, a demurrer for the want of parties was allowed.[4] In a creditor's bill against two devisees of a debtor, it is not indispensable that the heir-at-law should be a party.[5]

The same rule applies to all cases where the jurisdiction is drawn from the Courts of Common Law, in order to establish a right against a person having a limited estate in land or other hereditaments; and it is, in such cases, always held necessary to have the owner of the inheritance before the Court. Thus, where a bill was filed to establish a custom, whereby the owners and occupiers of certain lands were obliged to keep a bull and a boar for the use of the inhabitants of the parish, it was held, that a custom which binds the inheritance of lands can never be established in a Court of Equity, unless the owners of the inheritance are parties, and that the masters and fellows of Queen's College, who were the owners, ought to have been there.[6] And so, where a man prefers a bill to establish a modus against a lessee of an impropriator, he must make the owner of the impropriation a party.[7] Upon the same principle, where a bill was filed to establish a modus against an ecclesiastical rector or a dean and chapter, as impropriators, the ordinary and patron were considered necessary parties.[8]

[1] *Tiffany* v. *Tiffany*, 9 Grant 158.
[2] *Miller* v. *Ostrander*, 12 Grant 349.
[3] *Grimshaw* v. *Parks*, 6 U. C. L. J. 142.
[4] *Tyron* v. *Peer*, 13 Grant, 311.
[5] *Jenny* v. *Priestman*, 1 Grant, 133.
[6] *Spendler* v. *Potter*, Bumb. 181.
[7] *Glanvil* v. *Trelawney*, *ib.* 70.
[8] *Gordon* v *Simpkinson*, 11 Ves. 509; *Cook* v. *Butt*, 6 Mad. 53; *Hales* v. *Pomfret*, Dan. 142; *De Whelpdale* v. *Milburn*, 5 Pri. 485: see *ante*.

It is to be observed, that to render the owner of the inheritance necessary, the object of the suit must be to bind the inheritance; if that is not the case, and the relief sought is merely against the present incumbent, the owner of the inheritance, if made a party, may demur.[1]

In the case of *Penn* v. *Lord Baltimore*,[2] which was a suit for a specific performance of an agreement respecting the boundaries of two provinces in America, it was considered unnecessary to make the planters, tenants, or inhabitants within the districts, parties to the suit. The objection taken was upon the ground that their privileges, and the tenure and law by which they held, might not be altered without their consent; but Lord Hardwicke overruled the objection, saying: "Consider to what this objection goes: in lower instances, in the case of manors and honors in England, which have different customs and by-laws frequently, yet though different, the boundaries of these manors, may be settled in suits between the lords of these manors, without making the tenants parties; or may be settled by agreement, which this Court will decree, without making the tenants parties; though in case of fraud, collusion, or prejudice to the tenants, they will not be bound."

And in general, it may be stated as a rule, that occupying tenants under leases, or other persons claiming under the possession of a party whose title to real property is disputed, are not deemed necessary parties: though, if he had a legal title, the title which they may have gained from him cannot be prejudiced by any decision on his rights in a Court of Equity in their absence; and though, if his title was equitable merely, they may be affected by a decision against that title. Sometimes, however, if the existence of such rights is suggested at the hearing, the decree is expressly made without prejudice to those rights, or otherwise qualified according to circumstances; if, therefore, it is intended to conclude such rights by the same suit, the persons claiming them must be made parties to it; and where the right is of a higher nature, as a mortgage, the person claiming is usually made a party.[3] And where a tenant in common had demised his undivided share for a long term of years, the lessee was held a necessary party to a bill for a partition: because he must join in the conveyance, and his lessor was ordered to pay his costs.[4]

The same principle which renders it necessary that the owner of the inheritance should be before the Court, in all cases in which a right is

[1] *Williamson* v. *Lord Lonsdale*, Dan. 171; *Markham* v. *Smith*, 11 Pri. 126; and see further, as to suits relating to tithes, *Day* v. *Drake*, 3 Sim. 64, 82; *Petch* v. *Dalton*, 8 Pri. 9; *Leathes* v. *Newit*, *ib.* 562; *Bennett* v. *Skeffington*, 4 Pri. 143; *Tooth* v. *The Dean and Chapter of Canterbury*, 3 Sim. 49; *Cuthbert* v. *Westwood*, Gilb. Eq. Rep. 230; 16 Vin. Ab. Party, B. 255, Pl. 58.

[2] 1 Ves. S. 444, 449.

[3] Ld. Red. 175.

to be established against the inheritance, requires that, in cases where there is a dispute as to whether land in the occupation of a defendant is freehold or copyhold, the lord of the manor should be a party. Thus, where a plaintiff, by his bill, pretended a title to certain lands as freehold, which lands the defendant claimed to hold by copy of court roll to him and his heirs, and prayed in aid the lord of the manor, but nevertheless the plaintiff served the defendant with process to rejoin, without making the lord of the manor a party; it was ordered, that the plaintiff should proceed no more against the defendant before he should have called the lord in process.[1]

For a similar reason it is held, that where a bill is brought for the surrender of a copyhold for lives, the lord must be made a party; because, when the surrender is made, the estate is in the lord, and he is under no obligation to re-grant it; but it is otherwise in the case of copyholders of inheritance: there the lord need not be a party.

It may be observed in this place, that the same rule which has been before laid down,[2] with regard to the persons to be made parties as being interested in the inheritance of an estate, prevails equally in the case of adverse interests, as in that of concurrent interests with the plaintiffs. This rule is, that wherever the inheritance to real estate is the subject-matter of the suit, the first person in being who is entitled to an estate of inheritance in the property, and all others having intermediate interests, must be defendants. Thus it is held necessary, in order to obtain a complete decree of foreclosure, in cases where the equity of redemption is the subject of an entail, that the first tenant in tail of the equity of redemption should be before the Court.[3]

It appears to have been held formerly, that a decree of foreclosure against a tenant for life would bar a remainderman;[4] but it is now settled, that not only the tenant for life, but the person having the next vested estate of inheritance, must be parties;[5] and the same rule applies to all cases where a right is to be established, or a charge raised against real estates which are the subject of settlement.

A plaintiff, however, has no right to bring persons in the situation of remaindermen before the Court in order to bind their rights, upon a discussion whether a prior remainderman, under whom he claims, had a title or not, merely to clear his own title as between him and a purchaser. This was decided in *Pelham* v. *Gregory*,[6] before Lord Northington; in

[1] Cited in *Lucas* v. *Arnold*, Cary. Rep. 81; 16 Vin. Ab. Party, B. 253, Pl. 46.

[2] *Ante.*

[3] *Reynoldson* v. *Perkins*, Amb. 564; and see *Pendleton* v. *Booth*, 1 Giff. 35; 5 Jur. N. S. 840.

[4] *Roscarrick* v. *Barton*, 1 Ch. Ca. 217; but it may be doubted whether, is this case, it was intended to lay down such rule.

[5] *Sutton* v. *Stone*, 2 Atk. 101

[6] 1 Eden 518.

which case, the question arose on the title, to certain leasehold estates, which were limited in remainder, after limitations to the Duke of Newcastle and his sons, to the first and other sons of Henry Pelham in tail, and to which the plaintiff, Lady Catherine Pelham, claimed to be absolutely entitled on the death of the duke, as administratrix of Thomas Pelham the son of Henry Pelham, the first tenant in tail who had come into being. The plaintiff, in order to have this question decided against Lord Vane and Lord Darlington, who were subsequent remaindermen in tail, contracted to sell the estate, subject to the Duke's life estate, and to the contingency of his having sons, to the defendant Gregory, and brought a bill against him for a specific performance, to which she made Lord Vane and Lord Darlington parties; but Lord Northington dismissed the bill with respect to Lord Vane and Lord Darlington, on the ground "that they being remaindermen after the death of the Duke of Newcastle, if he should die without issue, their claims were not within his cognizance to determine, and the plaintiff had no right to bring them into discussion in a Court of Equity." From this decree there was an appeal to the House of Lords, and although the House decreed Gregory to perform his contract, they affirmed the dismissal against Lord Vane and Lord Darlington.[1] In *Devonsher* v. *Newenham*,[2] Lord Redesdale, after stating the above case and decision, says, "I take this to be a decisive authority: and, if the books were searched, I have no doubt many other cases might be found were bills have been dismissed on this ground."

The owner of the first estate of inheritance, however, is sufficient to support the estate, not only of himself, but of everybody in remainder behind him;[3] therefore, where a tenant in tail, is before the Court, all subsequent remaindermen are considered unnecessary parties. This is by analogy to the rule at Law, according to which there is no doubt, that a recovery in which a remainderman in tail was vouched, would bar all remainders behind.[4]

But although, where there is a clear tenancy in tail, there is no occasion for a subsequent remainderman being a party to a bill of foreclosure, yet, where it is doubtful whether a particular person has an estate tail or not, the person who has the first undoubted vested estate of inheritance ought to be a party;[5] and so, where the first tenant in tail was a lunatic, the remainderman was held to be a proper party.[6]

[1] 3 Bro. P. C. Ed. Toml. 204.

[2] 2 Sch. & Lef. 210.

[3] *Renoldson* v. *Perkins*, Amb. 564; but this rule does not apply to a Scotch entail: *Fordyce* v. *Bridges*, 2 Phil. 497, 506; 2 C. P. Coop. t. Cott. 326, 334; and as to the effect of a decree against an infant tenant in tail, see S. C. in the Court below, 10 Beav. 101: 10 Jur. 1020.

[4] Per Lord Eldon in *Lloyd* v. *Johnes*, 9 Ves. 64; see also *Giffard* v. *Hort*, 1 Sch. & Lef. 386.

[5] Powell. Mort. 975 a.

[6] *Singleton* v. *Hopkins*, 1 Jur. N. S. 1199, V.C.S.

It is necessary, however, in cases of this sort, not only that he who has the first estate of inheritance should be before the Court, but that the intermediate remaindermen for life should be parties.[1] The same rule will, as we have seen before,[2] apply, where the intermediate estate is contingent or executory, provided the person to take is ascertained; although, where the person to take is not ascertained, it is sufficient to have before the Court the trustees to support the contingent remainders, and the person *in esse* entitled to the first vested estate of inheritance.[3] Executory devises to persons not in being may, in like manner, be bound by a decree against a vested estate of inheritance; but a person claiming under limitations by way of executory devise, not subject to any preceding vested estate of inheritance by which it may be defeated, must be a party to a bill affecting his right;[4] and in general, where a person is seised in fee of an estate, and his seisin is liable to be defeated by a shifting use, conditional limitation, or executory devise, the inheritance is not represented in Equity merely by the person who has the fee liable to be defeated, but the persons claiming in contingency, upon the defeat of the estate in fee, are necessary parties.[5]

If, after a cause has proceeded a certain length, an intermediate remainderman comes into being, he must be brought before the Court by a supplementary proceeding;[6] and so, if the first tenant in tail, who is made a party to a suit, dies without issue before the termination of the suit, according to the constant practice of the Court, the suit is proceeded with against the next tenant in tail, as if he had been originally a party; and this is now done by means of a supplemental order.[7] It seems also clear, that if a tenant in tail is plaintiff in a suit, and dies without issue, the next remainderman in tail, although he claim by new limitation, and not through the first plaintiff as his issue, is entitled to continue the suit of the former tenant in tail, and to have the benefit of the evidence and proceedings in the former suit; but in this case, it would seem that a supplemental bill is necessary.[8]

The general rule requiring all persons interested in resisting the plaintiff's demands to be brought before the Court as defendants, in

[1] Per Lord Eldon, in *Gore* v. *Stacpoole*, 1 Dow, 18, 31.

[2] *Ante*.

[3] *Lord Cholmondeley* v. *Lord Clinton*, 2, J. & W. 7, 133; *Hopkins* v. *Hopkins*, 1 Atk. 590.

[4] Ld. Red. 174.

[5] *Goodess* v. *Williams*, 2 Y. & C. C. C. 595, 598: 7 Jur. 1123.

[6] Ld. Red, 174; *Lloyd* v. *Johnes*, 9 Ves. 59; *Fullerton* v. *Martin*, 1 Drew. 238; *Pickford* v. *Brown*, 1 K. & J. 643; *Jebb* v. *Tugwell*, 20 Beav, 461.

[7] *Cresswell* v. *Bateman*, 6 W. R. 220, V. C. K.

[8] *Dendy* v. *Dendy*, 5 W. R. 221, V. C. W.; *Williams* v. *Williams*, 9 W. R. 296, V. C. K.; *Ward* v. *Shakeshaft*, 7 Jur. N. S. 1227: 10 W. R. 6, V. C. K.; see however, *Lowe* v. *Watson*, 1 Sm. & G. 123; *Jackson* v. *Ward*, 1 Giff. 30: 5 Jur. N. S. 782.

order to give them an opportunity of litigating the claim set up, formerly rendered it imperative, wherever more than one person was liable to contribute to the satisfaction of the plaintiff's claim that they should all be made parties to the suit.[1] This application, however, of the general rule has been materially modified by the General Order,[2] which provides that, in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

It will, however, be necessary shortly to state what was the practice previous to this Order, inasmuch as it will still apply to all cases not brought precisely within its terms. In the case of *Madox* v. *Jackson*,[3] Lord Hardwicke said, "The general rule of the Court is: where a debt is joint and several, the plaintiff must bring each of the debtors before the Court, because they are entitled to the assistance of each other in taking the account; another reason is that the debtors are entitled to a contribution, where one pays more than his share of the debt; a further reason is, if there are different funds, as where the debt is a specialty, and he might at Law sue either the heir or executor for satisfaction, he must make both parties, as he may come in the last place upon the real assets; but there are exceptions to this, and the exception to the first rule is, that if some of the obligators are only sureties, there is no pretence for the principal in the bond to say, that the creditor ought to bring the surety before the Court, unless he has paid the debt." It may here be observed, that by the terms of the Order, no distinction is made between principals and sureties; so that it would appear as if the plaintiff might file his bill against one or more of the sureties, without making the principal a party to the suit. In *Allan* v. *Houlden*,[4] however, where one of two sureties who had joined the principal debtor in a bond, filed a bill to set aside the transaction on the ground of fraud, and prayed an account of the payments made in respect of the bond, Lord Langdale, M. R., held, that notwithstanding the Order, the principal debtor and co-surety were necessary parties. And so, in *Pinkus* v. *Peters*,[5] where the plaintiff alleged that he had accepted bills of exchange without consideration, and that he had been sued upon them, and by his bill prayed relief against the drawer and the holder, without making a

[1] *Jackson* v. *Rawlins*, 2 Vern. 195.

[2] Ord. VII. 2. Same as our Order 62.

[3] 3 Atk. 406; *Bland* v. *Winter*, 1 S. & S. 246; *Collins* v. *Griffith*, 2 P. Wms. 313.

[4] 6 Beav. 148; see also *Lloyd* v. *Smith*, 13 Sim. 457; 7 Jur. 460; *Pierson* v. *Barclay*, 2 De G. & S. 746. But it seems that one of the makers of a joint and several promissory note may be sued without the others, *McIntyre* v. *Connell*, 1 Sim. N. S. 225, 241.

[5] 5 Beav. 253, 260: 6 Jur. 431.

person to whom the drawer had endorsed the bill a party, Lord Langdale held, that as there was an allegation that the holder of the bills was a trustee as well for the drawer as also for the indorsee, such intervening indorsee was a necessary party to the suit.

Before this Order it was held, that all trustees implicated in a breach of trust were necessary parties to a suit complaining of the breach of trust;[1] but since the Order it has been held, that where a breach of trust had been committed by several trustees, the *cestui que trusts* may proceed against one trustee, in the absence of the others.[2] But it must not be supposed that, in every case in which a breach of trust has been committed, the *cestui que trusts* can arbitrarily select any one trustee, and charge him as for a breach of trust, whatever the nature of the complaint may be. "Take, for example," said Sir James Wigram, V. C., in the case of *Shipton* v. *Rawlins*,[3] "the case of one of two trustees acting alone, and receiving the whole trust monies, and investing them in his own name: that might be a breach of trust *per se*; for the *cestui que trusts* had a right to require each trustee to have a hold upon the trust fund; and, if a loss resulted, the non-acting trustee might be liable for it. But if the fund were safe, though irregularly standing in the name of the trustee only, I cannot think this Order would entitle the plaintiff to sue the trustee who had not acted, separately from the other. The case of *Walker* v. *Symonds*,[4] as explained in *Munch* v. *Cockerell*,[5] shows, that all trustees are *prima facie*, necessary parties to a suit complaining of a breach of trust, although execution might be taken out against one only." There is no clear principle laid down in the cases, determining when all the trustees are necessary parties, and when one may be proceeded against without the others. The Court appears rather to have exercised a discretion, and to have allowed the Order to apply or not as, under the circumstances, the justice of the case required.[6]

It is to be observed, however, that the order does not apply to cases where the general administration of the estate is sought;[7] nor where accounts of the trust fund have to be taken:[8] and it has been held, that

[1] *Walker* v. *Symonds*, 3 Swanst. 75: C. P. Coop. 509—512, 674; *Munch* v. *Cockerell*, 8 Sim. 219, 231: C. P. Coop. 78, n. (*d*); *Perry* v. *Knott*, 4 Beav. 179, 181.

[2] *Perry* v. *Knott*, 5 Beav. 293; *Kellaway* v. *Johnson*, *ib.*, 319: 6 Jur. 751; *Attorney-General* v. *Corporation of Leicester*, 7 Beav. 176; *Strong* v. *Strong*, 18 Beav. 408; *Attorney-General* v. *Pearson*, 2 Coll. 581: 10 Jur. 651; *Norris* v. *Wright*, 14 Beav. 310

[3] 4 Hare, 623.

[4] *Ubi sup.*

[5] *Ibid.*

[6] For cases in which all the trustees were required to be parties, see *Shipton* v. *Rawlins*, 4 Hare, 619; *Fowler* v. *Reynal*, 2 De G. & S. 749: 13 Jur. 650, n.; and see Reporter's note, 24 Beav. 99; *Lewin* v. *Allen*, 8 W. R. 603, V. C. W.

[7] *Hall* v. *Austin*, 2 Coll. 570; 10 Jur. 452; *Biggs* v. *Penn*, 4 Hare. 469; 9 Jur. 368; *Chancellor* v. *Morecraft*, 11 Beav. 262; *Penny* v. *Penny*, 9 Hare, 39; 15 Jur. 445.

[8] *Devaynes* v. *Robinson*, 24 Beav. 86; 3 Jur. N. S. 707: *Coppard* v. *Allen*, 10 Jur. N. S. 622; 12 W. R. 943, L.JJ.; and see *Fletcher* v. *Gibbon*, 23 Beav. 212.

where one trustee files a bill against a co-trustee who has been guilty of a breach of trust, in which some of the *cestui que trusts* have concurred, they are necessary parties notwithstanding the order.[1] So also, in a suit for the recovery of a partnership debt, against the executors of a deceased partner, the surviving partner is a necessary party.[2] And it is also to be observed, that where the plaintiff has made several persons jointly liable parties, he cannot afterwards waive the relief against some, and take a decree at the hearing against others.[3]

The order does not apply to any case where the demand is not joint and several: and therefore, where there is only a joint demand, the old practice continues, and all the persons liable must be made parties. Thus, if there be a demand against a partnership firm, all the persons constituting that firm must be before the Court; and if any of them are dead, the representatives of the deceased partners must be likewise made parties.[4] And where a bill was filed by the captain of a ship, against the personal representative of the survivor of two partners, who were joint owners of the ship, for an account and satisfaction of his demand, it was held that the suit was defective, because the representatives of the other partner, who might be interested in the account, were not before the Court: although, as the demand would have survived at Law, the case there might have been different.[5]

Although, even before the Order, it was not generally necessary, in a suit against the principal, to make the surety a party, yet, where a person had executed a conveyance, or created a charge upon his own estate, as a collateral security for another, he became a necessary party to a suit against the principal. This appears to have been the result of the determination in *Stokes* v. *Clendon*,[6] which was the case of a mortgage by a principal of one estate and by the surety of another, as a collateral security; and Lord Alvanley, M. R., determined, that a bill of foreclosure against the principal could not be sustained, without making the other mortgagor a party: because the other had a right to redeem, and be present at the account to prevent the burthen ultimately falling upon his own estate, or at least falling upon it to a larger amount than the other estate might be deficient to satisfy.

[1] *Jesse* v. *Bennett*, 6 De G. M'N. & G. 609; 2 Jur. N. S. 1125; *Williams* v. *Allen*, 29 Beav. 592; *Roberts* v. *Tunstall*, 4 Hare, 261.

[2] *Hills* v. *M'Rae*, 9 Hare, 297.

[3] *Fussell* v. *Elwin*, 7 Hare, 29: 13 Jur. 333; *The London Gas Light Company* v. *Spottiswoode*, 14 Beav. 264.

[4] *Cox* v. *Stephens*, 9 Jur. N. S. 1144: 11 W. R. 929, V. C. K.

[5] *Pierson* v. *Robinson*, 3 Swanst, 139, n.; *Scholefield* v. *Heafield*, 7 Sim. 667.

[6] 3 Swanst. 150 n.; see also *Payne* v. *Crompton*, 2 Y. & C. Ex. 457, 461; *Gedye* v. *Matson*, 25 Beav. 310.

To a suit by a surety against the creditor for an assignment by him of a judgment recovered against the debtor, the debtor is a necessary party.[1]

In *Stokes* v. *Clendon*, it is to be observed, the surety had conveyed his own estate by way of security to the mortgagee. Where, however, he merely enters into a personal covenant as surety for the principal, but does not convey any estate or interest to the mortgagee, he will not be considered as a necessary party, unless the surety has paid part of the debt:[2] and where *A.* having a general power of appointment over an estate, in the event of his surviving his father, joined with two other persons as his sureties, in a covenant to pay an annuity to the plaintiff, and also covenanted that he would create a term in the estate, if he survived his father, and upon the death of his father a bill was filed by the plaintiff against *A.*, and other parties interested in the estate, to have the arrears of his annuity raised and paid: it was held, upon demurrer, that the sureties were not necessary parties.[3]

In a bill by one surety against another, to make him contribute, it was held, that the executor of a third surety who was dead ought to be a party, though he died insolvent.[4] In that case, the principal had given a counter-bond of indemnity to the plaintiff, who had taken him in execution upon it, and he had been discharged under an Insolvent Act; and though he appears not to have been made a party, yet no objection was taken;[5] and it seems from this circumstance, and also from the case of *Lawson* v. *Wright*,[6] that if the principal is clearly insolvent, and can be proved to be so (as by his having taken advantage of an Act for the Relief of Insolvent Debtors), he need not be a party to the suit. It will, however, be necessary, if the principal be not a party, that the fact of his insolvency should be proved; whereas, if he be a party to the suit, such proof will be unnecessary. In *Hole* v. *Harrison*,[7] the insolvency of the principal was apparent, from the fact of his having taken advantage of the Insolvent Act; but it is presumed that the insolvency of the co-surety was not so capable of proof, and that it was upon that ground held necessary to have his personal representative before the Court, in order to take an account of his estate. Where the fact of the insolvency of one of the sureties was clear, and admitted by the answers, Lord Hardwicke held, that there was no necessity to bring

[1] *Cockburn* v. *Gillespie*, 11 Grant, 465.
[2] *Gedye* v. *Matson*, *ubi sup.*
[3] *Newton* v. *Earl of Egmont*, 4 Sim. 574, 581.
[4] *Hole* v. *Harrison*, Rep. t. Finch, 15.
[5] *Ibid.*
[6] 1 Cox, 275; but see *Cox* v. *Stephens*, 9 Jur. N. S. 1144: 11 W. R. 929, V. C. K.
[7] Rep. t. Finch, 15.

his representatives before the Court.[1] It seems, however, that the plaintiff has his election, whether he will bring the insolvent co-obligor or his representative before the Court or not.[2] And in all cases coming under the Order above referred to, the plaintiff has the option to sue all the persons jointly and severally liable, if he shall think fit. Independently of this Order, a plaintiff is allowed, in a case where there are several persons who are each liable to account for his own receipts, to file a bill against one or more of them for an account of their own receipts and payments, without making the others parties to the suit. Thus, where a residuary legatee brought his bill against one of two executors, without his co-executor, who was abroad, to have an account of his own receipts and payments, the Lord Chancellor said: "The cause shall go on, and if upon the account anything appear difficult, the Court will take care of it; the reason is the same here as in the case of joint factors, and the issuing out of process in this case is purely matter of form."[3]

The same rule will, it appears, be adopted, where there are joint factors, and one of them is out of the jurisdiction. And in the case of *Lady Selyard* v. *The Executors of Harris*,[4] before referred to, where it did not appear that the parties were out of the jurisdiction, the Court permitted the representatives of one of several trustees, who were dead, to be sued for an account of the receipts and disbursements of his testator, who alone managed the trust, without bringing the representatives of the other trustees before the Court. And now, under the Order above referred to, it is not always necessary to make all the persons committing a breach of trust parties to a suit instituted for redress of the wrong.[5]

The rule, that all the parties liable to a demand should be before the Court, was a rule of convenience, to prevent further suits for a contribution, and not a rule of necessity; and therefore might be dispensed with, especially where the parties were many, and the delays might be multiplied and continued. Thus, where there were a great number of obligors, and many of them were dead, some leaving assets, and others leaving none, the Court proceeded to a decree, though all of them were not before it.[6]

The general rule, requiring the presence of all parties interested in resisting the plaintiff's demand, has also been dispensed with in a variety

[1] *Madox* v. *Jackson*, 3 Atk. 406.

[2] *Heywood* v. *Ovey*, 6 Mad. 113; *Hitchman* v. *Stewart*, 3 Drew. 271: 1 Jur. N. S. 830.

[3] *Cowstad* v. *Cely*, Prec. Ch. 83: 1 Eq. Ca. Ab. 73, Pl. 18: 2 Eq. Ca. Ab. 165, Pl. 3; but see *Devaynes* v. *Robinson*, 24 Beav. 98: 3 Jur. N. S. 707; and *ante*.

[4] 1 Eq. Ca. Ab. 74, Pl. 20; *ante*.

[5] *Kellaway* v. *Johnson*, 5 Beav. 319: 6 Jur. 751; *Perry* v. *Knott*, 5 Beav. 293; and see *Shipton* v. *Rawlins*, 4 Hare, 622; *Hall* v. *Austin*, 2 Coll 570: 10 Jur. 452, cited *ante*.

[6] *Lady Cranburne* v. *Crispe*, Rep. t. Finch, 105.

of cases, where the parties were numerous, and the ends of justice could be answered by a sufficient number being before the Court to represent the rights of all. Thus, where *A.* agreed with *B.* and *C.* to pave the streets of a parish, and *B.* and *C.* on behalf of themselves and the rest of the parish, agreed to pay *A.*, and the agreement was lodged in the hands of *B.*. it was held that *A.* should have his remedy against *B.* and *C.*, and that they must resort to the rest of the parish.[1] And so, where a bill was filed by a tradesman against the committee of a voluntary society called "The Ladies' Club," for money expended and work done under a contract entered into by the defendants, on behalf of themselves and the other subscribers, and it was objected that all the members who had subscribed should be parties, the objection was overruled, and a decree made for the plaintiff.[2]

The same rule was acted upon by Sir Thomas Plumer, M. R., in a bill for the specific performance of an agreement for a lease, against the treasurer and directors of a Joint-Stock Company established by Act of Parliament, who had purchased the fee of the premises from the person who had entered into the agreement, although the rest of the proprietors, whose concurrence in the conveyance would be necessary, were not before the Court.[3] The Master of the Rolls, on that occasion, came to the conclusion, that although the bill required an act to be done by parties who were absent, yet, as they were so numerous that they could not be brought before the Court, he would go as far as he could to bind their right, and made a decree declaring the plaintiffs entitled to a specific performance, and restraining the treasurer of the company from bringing any action to disturb the plaintiffs in their possession.[4]

From the case of *Horsley* v. *Bell*,[5] cited in the above case of the Ladies' Club, it appears that in cases of this description the acting members of the committee are all liable, though some of them may not have been present at all the meetings which have taken place respecting the contract. In that case, the defendants were all the acting commissioners, under a Navigation Act, and the plaintiff had been employed on their behalf, and it appeared that the orders had been given at different meetings by such of the defendants as were present at these meetings; but none of the defendants were present at all the meetings,

[1] *Meriel* v. *Wymondsold*, Hardres, 205; see also *Anon.* 2 Eq. Ca. Ab. 166, Pl. 7.

[2] *Cullen* v. *Duke of Queensberry*, 1 Bro. C. C. 101: 1 Bro. P. C. ed. Toml. 396.

[3] *Meux* v. *Maltby*, 2 Swanst. 277; *Parsons* v. *Spooner*, 5 Hare, 102: 10 Jur. 423; and see *Douglas* v. *Horsefall*, 2 S. & S. 184. The following cases illustrate the mode of pleading, in actions by and against Joint-Stock Companies, and will be useful in framing suits in Equity: *Steward* v. *Dunn*, 12 M. & W. 655; *Davidson* v. *Cooper and Brassington*, 11 M. & W. 778; *Smith* v. *Goldsworthy*, 4 Q. B. 430.

[4] 2 Swanst. 286; and see *ibid.* 287, and the cases there cited.

[5] See Amb. 770, 772: and 1 Bro. C. C. 101, n., where the case is more fully reported; and see *Attorney General* v. *Brown*, 1 Swanst. 265; *Apperly* v. *Page*, 1 Phil. 779, 785: 11 Jur. 271.

or joined in all the orders: though every one of them was present at some of the meetings, and joined in making some of the orders; and one of the questions in the cause was, whether all the acting commissioners were liable on account of all the orders; or only as to those which they had respectively signed. Upon this point, the Court was of opinion, that all the acting commissioners were liable *in toto;* every one who comes in afterwards approves the former acts; and if any one of the commissioners who had acted before disapproved the subsequent acts, he might have gone to a future meeting and protested against them.

In the preceding cases the decision was made upon the ground that, if the plaintiff succeeded in his demands against the individuals sued, they would not be injured, as they had a remedy over against the others for a contribution, which, under their own regulations, they might enforce: although the enforcement of it on the part of the plaintiffs, against so numerous a body, would be nearly impossible. There are, however, other cases in which suits are permitted to proceed against a few of many individuals of a certain class, without bringing the rest before the Court, although their interests may in some degree be affected by the decision: as in the case of bills of peace, brought to establish a general legal right against a great many distinct individuals. Thus, for instance, the Corporation of London has been allowed to exhibit a bill for the purpose of establishing their right to a duty, and to bring only a few persons before the Court, who dealt in those things on which the duty was claimed.[1] And so, bills are frequently entertained by lords of manors against some of the tenants, on a question of common affecting them all; and a parson may maintain a bill for tithes against a few of the occupiers within the parish, although they set up a modus to which the whole are jointly liable.[2]

The principle upon which the Courts have acted in these cases, has been very clearly laid down by Lord Eldon in *Adair* v. *The New River Company.*[3] In that case, a bill was filed by a person entitled, under the Crown, to a rent reserved out of a moiety of the profits of the New River Company, to which moiety the Crown was entitled under the original charter of that company, but had subsequently granted it to Sir Hugh Middleton, the original projector, reserving the rent in question. By a variety of *mesne* assignments, the King's moiety of the profits had become vested in a hundred persons, or upwards; and the bill was filed against the company and eight of those persons for an account, and it charged, that there was not any tangible or corporeal property upon

[1] *City of London* v. *Perkins*, 3 Bro. P. C. ed. Toml. 602.
[2] *Hardcastle* v. *Smithson*, 3 Atk. 245.
[3] 11 Ves. 429, 443.

which the plaintiff could distrain, and that the parties were so numerous, and thus liable to so many fluctuations, that it was impossible, if the plaintiff could discover them, to bring them all before the Court, and that these impediments were not occasioned by the plaintiff or those under whom he claimed, but by the defendants. To this bill an objection was taken for want of parties, because all the persons interested in the King's share were not before the Court; but Lord Eldon said, that there was no doubt that it is generally the rule, that wherever a rent-charge is granted, all persons who have to litigate any title with regard to that rent-charge, or with each other, as being liable to pay the whole or to contribute amongst themselves, must be brought before the Court;[1] but that it was a very different consideration whether it was possible to hold, that the rule should be applied to an extent destroying the very purpose for which it was established, *viz.*, that it should prevail where it is actually impracticable to bring all the parties, or where it is attended with inconvenience almost amounting to that, as well as where all can be brought without inconvenience. It must depend upon the circumstances of each case.[2] His Lordship also said, that there were authorities to show that, where it was impracticable, the rule should not be pressed; and in such a case as the one before him, the King's share being split into such a number that it was impracticable to go on with a record attempting to bring all parties having interest in the subject to be charged, he should hesitate to determine, that a person having a demand upon the whole, or every part of the moiety, did not do enough if he brought all whom he could bring.[3] His Lordship then goes on to say: "There is one class of cases very important upon this subject, *viz.*, where a person having at Law a general right to demand service from the individuals of a large district, to his mill for instance, may sue thus in Equity: his demand is upon every individual not to grind corn for their own subsistence, except at his mill: to bring actions against every individual for subtracting that service, is regarded as perfectly impracticable; therefore, a bill is filed to establish that right, and it is not necessary to bring all the individuals. Why? Not that it is inexpedient, but that it is impracticable to bring them all. The Court, therefore, has required so many that it can be justly said they will fairly and honestly try the legal right between themselves, all other persons interested, and the plaintiff; and when the legal right is so established at Law, the remedy in Equity is very simple: merely a bill, stating that the right has been established in such a proceeding;

[1] See 1 Eq. Ca. Ab. 72, Pl. 1.
[2] See observations of Lord Langdale, in *Powell* v. *Wright*, 7 Beav. 444, 449.
[3] 11 Ves. 444.

and upon that ground, a Court of Equity will give the plaintiff relief against the defendants in the second suit, only represented by those in the first. I feel a strong inclination that a decree of the same nature may be made in this case."[1]

In the above case of *Adair* v. *The New River Company*, Lord Eldon laid it down as a rule, that wherever a rent-charge is granted, all persons whose estates are liable must be brought before the Court.[2] This rule, however, is liable to an exception in the case of charities, which are considered entitled to greater indulgence, in matters of pleading and practice, than ordinary parties.[3] Thus, in *Attorney-General* v. *Shelly*,[4] it was held that, in the case of a charity, it is not necessary that all the *terre-tenants* should be brought before the Court: because every part of the land was liable, and the charity ought not to be put to this difficulty. The same exception to the general rule was admitted in the case of *Attorney-General* v. *Wyburgh*.[5]

It is to be observed, that the rule laid down by Lord Eldon, in *Adair* v. *The New River Company*, applies only to cases where there is one general right in all the parties concerned; that is, where the character of all the parties, so far as the right is concerned, is homogeneous, as is the case in suits to establish a modus, or a right of suit to a mill; and that, notwithstanding the inconvenience arising from numerous parties, there are some cases in which they cannot be dispensed with: as in the case of a bill filed to have the benefit of a charge on an estate, in which case all persons must be made parties who claim an interest in such estate. Thus, where estates had been conveyed to trustees, in trust for such creditors of the grantor as should execute the conveyance, and one incumbrancer, some of whose incumbrances were prior and some subsequent to the trust-deed, filed a bill praying that his rights and interests under his securities might be established, and the priorities of himself and the other incumbrancers declared, and alleging that the deed was executed by thirty creditors of the grantor, and amongst others by two individuals who were named as defendants, and charging that such creditors were too numerous to be all made parties to the suit, and that he was ignorant of the priorities and interests of such parties, and of their residences, and whether they were living or dead, save as to the two who were named: a plea by some of the defendants, setting out the names and residences of the persons who had executed the

[1] *Ibid.*; and see *Biscoe* v. *The Undertakers of the Land Bank*, cited in *Cuthbert* v. *Westwood*, 16 Vin. Ab. tit. Party, B. 255, Pl. 58; see also *Ante*.

[2] 11 Ves. 444.

[3] *Attorney-General* v. *Jackson*, *ib.* 367.

[4] 1 Salk. 163.

[5] 1 P. Wms. 599; and see *Attorney-General* v. *Jackson*, *ubi sup.*; *Attorney-General* v. *Naylor*, 1 H. & M. 809: 10 Jur. N. S. 231.

deed, and alleging that they were living and necessary parties to the suit, was allowed.[1]

With reference to this decision it may be observed, that it is the general and almost universal practice of the Court, in suits for establishing charges upon estates, to make all persons entitled to incumbrances subsequent to the plaintiff's charge, parties to the suit. Thus, in the case of a bill to foreclose a mortgage, all persons who have incumbrances upon the estate posterior in point of time to the plaintiff's mortgage, must be made defendants: for although, if there are many incumbrancers, some of whom are not made parties to a bill of foreclosure, the plaintiff may, notwithstanding, foreclose such of the defendants as he has brought before the Court,[2] yet, such decree will not bind the other incumbrancers who are not parties, even though the mortgagee at the time of foreclosure had no notice of the existence of such incumbrancers.[3] This rule may at first appear to be inconsistent with the usual principles of a Court of Equity, but the justice of it is very clearly shown in the report of Lord Chancellor Nottingham's judgment in *Cockes* v. *Sherman*.[4] His Lordship there says: "Although here be a great mischief on one hand that a mortgagee, after a decree against the mortgagor to foreclose him of his equity of redemption, shall never know when to be at rest, for if there be any other incumbrances, he is still liable to an account, yet the inconvenience is far greater on the other side: for if a mortgagee that is a stranger to this decree should be concluded, he would be absolutely without remedy, and lose his whole money, when, perhaps, a decree may be huddled up purposely to cheat him, and in the meantime (he being paid his interest,) may be lulled asleep and think nothing of it; whereas, on the other hand, there is no prejudice but being liable to the trouble of an account, and if so be that were stated *bona fide* between the mortgagor and mortgagee in the suit wherein the decree was obtained, that shall be no more ravelled into, but for so long shall stand untouched."[5]

Upon the same ground it was that Lord Alvanley, M. R., in the *Bishop of Winchester* v. *Beavor*,[6] ordered a bill of foreclosure to stand

[1] *Newton* v. *Earl of Egmont*, 5 Sim. 130, 137; and see *Harrison* v. *Stewardson*, 2 Hare, 530; *Holland* v. *Baker*, 3 Hare, 68: 6 Jur. 1011; *Thomas* v. *Dunning*, 5 De G. & S. 618; *ante*.

[2] *Draper* v. *Lord Clarendon*, 2 Vern. 518; *Audsley* v. *Horn*, 26 Beav. 195: 4 Jur. N. S. 1267, 1268.

[3] *Godfrey* v. *Chadwell*, 2 Vern. 601: 1 Eq. Ca. Ab. 318, Pl. 7; *Morret* v. *Westerne*, 2 Vern. 663: 1 Eq. Ca. Ab. 164, Pl. 7.

[4] Freem. 14. But in this Province, the encumbrancers are made parties in the Master's Office.—See chapter on Mortgages.

[5] What is here said by the Lord Chancellor on the subject of the account, as well as the case of *Needler* v. *Deeble*, 1 Cha. Ca. 299, appears to be at variance with the decision in *Morret* v. *Westerne*, *supra*. It seems to be in consequence of the rule above laid down, that in a foreclosure suit an interrogatory is customary, inquiring whether there are any and what incumbrances affecting the estate besides that of the plaintiff, in order that, if the answer states any, the owners of such incumbrances may be made parties. In this Province our system of registration meets these difficulties.

[6] 3 Ves. 314.

over, for the purpose of making a judgment creditor a party. From the marginal note to that case, a doubt appears to arise as to whether the Master of the Rolls intended to adopt the general rule, that all incumbrancers must be parties to a bill of foreclosure; but the decision rests upon the rule of practice which has been stated, and it cannot after that decision be doubted, that all subsequent incumbrancers whose liens appear upon the answer, must be made parties, and if the defendants have been interrogated as to incumbrancers, and the answer be a sufficient one and true, it must appear from it who such incumbrancers are. At all events, it is evident from the cases of *Godfrey* v. *Chadwell*, and *Morret* v. *Westerne*, above referred to, that a mortgagee, wishing to obtain a title to an estate by foreclosure, should make all subsequent incumbrancers upon the estate of whose liens he has notice, whether appearing upon the answer or not, parties to his suit.[1]

The rule which requires all incumbrancers up on the equity of redemption to be brought before the Court in cases of foreclosure, extends to cases in which the subject of the litigation has been sold, or charged, subsequently to the date of the plaintiff's claim, whether such sale or charge has been by legal instrument, or only by agreement, or whether it extends to the whole or only partial interests. Therefore, where an estate had been sold in lots subject to an equitable charge in favour of the plaintiff, it was held that all the purchasers were necessary parties to a bill by him to realise his security.[2] And where a bill was filed by a lessee, to compel a landlord to give his licence to the assignment of a lease to a purchaser, on the ground that he had by certain acts waived the right to withhold it which had been reserved to him by the original lease, the purchaser was held to be a necessary party.[3] And so, if a man contracts with another for the purchase of an estate, and afterwards, before conveyance, enters into a covenant with a third person that the vendor shall convey the estate to such third person; the vendor, if he have notice of the subsequent contract, cannot with safety convey the estate to the vendee without the concurrence of the third person, who in that case will be a necessary party to a bill by the purchaser against the vendor for a specific performance; but if *A.* contracts with *B.* to convey to him an estate, and *B.* enters into a sub-contract with *C.*, that

[1] This includes judgment creditors; *Rolleston* v. *Morton*, 1 Dr. & War. 171; *Governors of Grey-Coat Hospital* v. *Westminster Improvement Commissioners*, 1 De G. & J. 531; 3 Jur. N. S. 1188; *Knight* v. *Pocock*, 24 Beav. 436; 4 Jur. N. S. 197; although the year mentioned in the 13th sect. of 1 & 2 Vic. c. 110, has not expired; *Harrison* v. *Pennell*, 4 Jur. N. S. 682, V. C. S. Since 23 & 24 Vic. c. 38. a judgment creditor is not a necessary party to a suit by a mortgagee for a sale, unless a writ of execution on the judgment is issued before the completion of the sale; *Wallis* v. *Morris*, 10 Jur. N. S. 741; 12 W. R. 997, M. R.; see also, as to judgments since 29th July, 1864, 27 & 28 Vic. c. 112. A judgment does not now form a lien in this province though a Fi. Fa. against lands in the Sheriff's hands does. See Chap. on Mortgages.

[2] *Peto* v. *Hammond*, 29 Beav. 91.

[3] *Maule* v. *Duke of Beauford*, 1 Russ. 349.

he, *B.*, will convey to him the same estate, there, if *B.* files a bill against *A.*, *C.* will not be a necessary party, because *A.* is, in that case, in no manner affected by the sub-contract, which his conveyance to *B.* would rather promote than injure.[1] And where a bill was filed by creditors, to set aside a purchase on the ground of fraud, and it appeared that the purchaser had, since his purchase, executed a mortgage of the estate, the mortgagee was considered a necessary party.[2] But where, since his purchase, judgments had been entered up against the purchaser, the judgment creditors were held to be unnecessary parties to a bill for specific performance.[3]

The rule which requires all subsequent incumbrancers to be parties, extends only to cases in which the subsequent charges or incumbrances are specific; and we have before seen, that in most cases where estates have been conveyed to trustees to pay debts or legacies, the trustees may sustain suits respecting the trust property, without those claiming under the trust being parties to it.[4] It is also unnecessary that persons having prior mortgages or incumbrances should be parties, because they will have the same lien upon the estate after a decree as they had before;[5] for this reason it has been held, that in a bill for a partition, a mortgagee upon the whole estate is not a necessary party, though a mortgagee of one of the undivided portions would be.[6] And so, where a bill was brought by a mortgagee against a mortgagor, praying a sale of the mortgaged estate, persons who had annuities prior to the mortgage were held unnecessary parties: and notwithstanding they appeared at the hearing, and consented to a sale, Lord Kenyon, M. R., dismissed the bill as to them with costs, and said that the estate must be sold subject to their annuities.[7] It must have been upon the same principle that the case of *Lord Hollis*,[8] wherein it was held that a third mortgagee, buying in the first, need not make a second mortgagee a party, was decided; otherwise, it is not easy to reconcile that case with the other principles which have been laid down. It cannot be supposed that it was meant to be decided, that a third mortgagee, buying in the first mortgage, could, by that process, acquire the right to foreclose the second, without bringing him before the Court, and giving him an opportunity to redeem.

It is right to remark here, that in all cases where a mortgagee is made a party to a suit by the mortgagor or those claiming under him,

[1] —— v. *Walford*, 4 Russ. 372; see also *Alexander* v. *Cana*, 1 De G. & S. 415: *Chadwick* v. *Maden*, 9 Hare, 188.
[2] *Copis* v. *Middleton*, 2 Mad. 410, 423.
[3] *Petre* v. *Duncombe*, 7 Hare, 24.
[4] *Ante.*
[5] *Rose* v. *Page*, 2 Sim. 471.
[6] *Swan* v. *Swan*, 8 Pri. 518.
[7] *Delabere* v. *Norwood*, 3 Swanst. 144, n.
[8] Cited 3 Ch. Rep. 86.

he is entitled to be redeemed; and that, therefore, unless a second mortgagee or other incumbrancer is prepared to redeem him, he will be an improper party to a suit by such mortgagee or incumbrancer, where the object is merely to foreclose the equity of redemption.[1]

It is also to be observed, that a second incumbrancer may file a bill to redeem the first, without making a subsequent incumbrancer a party; and that if he brings him before the Court for the mere purpose of having his incumbrance postponed, and not to foreclose him, the bill will be dismissed against him with costs.[2] But a bill for redemption cannot be sustained by a party having a partial interest in the equity of redemption, in the absence of the other parties interested in it.[3]

With respect to incumbrancers or purchasers becoming such after a bill has been filed and served,[4] and registered as a *lis pendens*,[5] they will be bound by the decree, and need not be made parties to the suit, whether the plaintiff have notice of them or not: for an alienation pending a suit is void, or rather voidable.[6] If, therefore, after a bill filed by the first mortgagee to foreclose, the mortgagor confesses a judgment, executes a second mortgage, or assigns the equity of redemption, the plaintiff need not make the incumbrancer, mortgagee, or assignee parties, for they will be bound by the suit; and where a purchaser took an exception to a title because two mortgagees, who became such after the bill was filed, were no parties to the foreclosure, the exception was overruled with costs;[7] and it has been held, that where one of several plaintiffs assigns his equitable interest *pendente lite*, the suit might be heard as if there had been no such assignment.[8] Where, however, a sole plaintiff assigned all his equitable interest absolutely,[9] and where all the adult plaintiffs assigned their equitable interest by way of mortgage,[10] the assignees were held necessary parties. But in cases where a change in the ownership of the legal estate takes place pending the suit, by alienation or otherwise, the new owner must be brought before the Court in some shape or other, in order that he may execute a conveyance of the legal estate.[11]

[1] *Drew* v. *O'Hara*, 2 Ba. & Be. 562, n.; *Cholmley* v. *Countess of Oxford*, 2 Atk. 267.

[2] *Shepherd* v. *Gwinnet*, 3 Swanst. 151, n.

[3] *Henley* v. *Stone*, 3 Beav. 355; *Chappel* v. *Rees*, 1 De G. M. & G. 393: 16 Jur. 415.

[4] *Powell* v. *Wright*, 7 Beav. 444; *Humble* v. *Shore*, 3 Hare, 119; see, however, *Drew* v. *Earl of Norbury*, 3 Jo. & Lat. 267; Sugd. V. & P. 758.

[5] 2 Vic. c. 11, s. 7. Imp. Sta.

[6] *Walker* v. *Smalwood*, Amb. 676; *Gaskell* v. *Durdin*, 2 Ba. & Be. 167; *Moore* v. *M'Namara*, 1 Ba. & Be. 309; *Garth* v. *Ward*, 2 Atk. 174; *Metcalfe* v. *Pulvertoft*, 2 V. & B. 207; and see *Massy* v. *Batwell*, 4 Dr. & War. 68; *Long* v. *Bowring*, 10 Jur. N. S. 668: 12 W. R. 972, M. R.

[7] *Bishop of Winchester* v. *Paine*, 11 Ves. 197.

[8] *Eades* v. *Harris*, 1 Y. & C. C. C. 230.

[9] *Johnson* v. *Thomas*, 11 Beav. 501.

[10] *Solomon* v. *Solomon*, 13 Sim 516: 7 Jur. 806.

[11] *Daly* v. *Kelly*, 4 Dow, 435; *Bishop of Winchester* v. *Paine*, *ubi sup.*; and as to the effect of a *lis pendens* generally, see *Bellamy* v. *Sabine*, 1 De G. & J. 566: 3 Jur. N. S. 943; *Tyler* v. *Thomas* 25 Beav. 47; Sugd. V. & P. 759.

If a person, *pendente lite*, takes an assignment of the interest of one of the parties to the suit, he may if he pleases, make himself a party to the suit by supplemental proceedings, but he cannot, by petition, pray to be admitted to take a part as a party defendant: all that the Court will do is to make an order, that the assignor shall not take the property out of Court without notice.[1]

We come now to the consideration of those cases in which it is necessary to make persons defendants to a suit, not because their rights may be directly affected by the decree, if obtained, but because, in the event of the plaintiff succeeding in his object against the principal defendant, that defendant will thereby acquire a right to call upon them either to reimburse him the whole or part of the plaintiff's demand, or to do some act towards reinstating the defendant in the situation he would have been in but for the success of the plaintiff's claim. In such cases the Court, in order to avoid a multiplicity of suits, requires that the parties so consequentially liable to be affected by the decree, shall be before the Court in the first instance, in order that their liabilities may be adjudicated upon and settled by one proceeding. Thus, where a defendant in his answer insisted that he was entitled to be reimbursed by *A.* what he might be decreed to pay to the plaintiff, and therefore that *A.* was a necessary party, the Court, at the hearing, directed the cause to stand over, with liberty to the plaintiff to amend by adding parties.[2] And so, where an heir at law brought a bill against a widow, to compel her to abide by her election, and to take a legacy in lieu of dower, it was held that the personal representative was a necessary party: because, in the event of the plaintiff succeeding, she was entitled to satisfaction for her legacy out of the personal estate; and the plaintiff had leave to amend, by making the executor a party.[3]

Upon the same principle it is, that in suits by specialty creditors, for satisfaction of their demands out of the real estate of a person deceased, it is required that the personal as well as the real representative should be brought before the Court:[4] because the personal estate, being the primary fund for payment of debts, ought to go in ease of the land, and the heir has a right to insist that it shall be exhausted for that purpose before the realty is charged; so that, if a decree were to be made in the first instance against the heir, he would be entitled to file a bill

[1] *Foster* v. *Deacon*, 6 Mad. 59; see, however, *Brandon* v. *Brandon*, 3 N. R. 287, V. C. K., where a supplemental order was made to bring before the Court mortgagees of shares after decree; and *Toosey* v. *Burchell*, Jac. 159, where, on petition, the Court ordered that the purchaser should be at liberty to attend inquiries in the Master's Office, and have notice of all proceedings, on paying the incidental costs. The Court will usually now, on motion, give the purchaser liberty to attend the proceedings at his own expense.

[2] *Greenwood* v. *Atkinson*, 5 Sim. 419; see also *Green* v. *Poole*, 5 Bro. P. C. ed. Toml. 504.

[3] *Lesquire* v. *Lesquire*, Rep. t. Finch, 134; see also *Wilkinson* v. *Fowkes*, 9 Hare, 193.

[4] *Madox* v. *Jackson*, 3 Atk. 406.

against the personal representative to reimburse himself.[1] The Court, therefore, in order to avoid a multiplicity of suits, requires both the executor and heir to be before it, in order that it may, in the first instance, do complete justice, by decreeing the executor to pay the debt, as far as the personal assets will extend: the rest to be made good by the heir out of the real assets.[2] Upon this principle it was, that where a man covenanted for himself and his heirs that a jointure house should remain to the uses in a settlement, and the jointress brought a bill against the heir to compel him to rebuild and finish the jointure house, and to make satisfaction for the damage which she had sustained for want of the use thereof, Lord Talbot allowed a demurrer, on the ground that the executor ought to be a party: because the Court would not, in the first instance, decree against the heir to perform his covenant, and then put the heir upon another bill against the personal representative to reimburse himself out of the personal assets.[3]

A bill of discovery of real assets might, however, be brought against the heir, in order to preserve a debt, without making the administrator a party, where it was suggested that the representation was contested in the Ecclesiastical Court;[4] and where the heir of an obligor would not himself administer, and had opposed the plaintiff, who was a principal creditor, in taking out administration, a demurrer by him, because the administrator was not a party, was overruled.[5]

Where the nature of the relief prayed is such that the heir-at-law has no remedy over against the personal estate, the personal representative is an unnecessary party; thus, in the case of a bill filed by a mortgagee against the heir of a mortgagor, to foreclose, the executor of the mortgagor is an unnecessary party: because, in such a case, the mortgagee has a right to the land pledged, and is not in any way bound to intermeddle with the personal estate, or to run into an account thereof; and if the heir would have the benefit of any payment made by the mortgagor or his executor, he must prove it.[6] And it makes no difference if the mortgage be by demise for a term of years, provided the mortgagor was seized in fee: in such case, the executor is an unnecessary party, and if made one, the bill against him will be dismissed with costs.[7] And where a term of 1000 years had been granted, but conditioned to

[1] *Knight* v. *Knight*, 3 P. Wms. 333.

[2] *Ibid.*; and see *Galton* v. *Hancock*, 2 Atk. 434.

[3] *Knight* v. *Knight*, 3 P. Wms. 333; and see *Bressenden* v. *Decreets*, 2 Ch. Ca. 197.

[4] *Plunket* v. *Penson*, 2 Atk. 51.

[5] *D'Aranda* v. *Whittingham*, Mos. 84; *ante*.

[6] *Duncombe* v. *Hansley*, 3 P. Wms. 333, n.; *Fell* v. *Brown*, 2 Bro. C. C. 276, 279.

[7] *Bradshaw* v. *Outram*, 13 Ves. 234. If the mortgage was of a chattel interest, of course the executor, and not the heir, would be the proper party: and if freehold and leasehold estates are both comprised in the same mortgage, both the heir and executor will be necessary parties to a bill of foreclosure: *Robins* v. *Hodgson*, Rolls, 15 Feb. 1794.

sink and be extinguished upon payment of an annuity for forty-two years, and at the expiration of the time a bill was brought by the heir of the grantor, for a surrender of the residue of the term: it was held, that the personal representative of the grantor need not be a party.[1]

Where, however, the mortgagee mixes together his characters of mortgagee and general creditor, and seeks relief beyond that to which his position of mortgagee by itself would strictly entitle him, then it would appear that the personal representative of the mortgagor must be a party to the bill, and there must be an account of the personal estate. It may here be observed, that the doubt which formerly existed whether, when the mortgaged estate is insufficient to satisfy the amount charged upon it, and the personalty is also inadequate to pay all the debts, the mortgagee was entitled to prove against the personalty for the whole of his debt, or only for the residue, after deducting what he has received from his security,[2] has now been removed by the decision of Lord Cottenham, in the case of *Mason* v. *Bogg*,[3] where it was determined, that a mortagee may prove for the whole debt, and then realise his security, and afterwards take a dividend on the whole debt: provided, of course, that the amount of the dividend is not more than the unpaid balance. In suits of this description, the Court will decree, not a foreclosure, but a sale of the estate,[4] a decree to which a mortgagee is not ordinarily entitled upon a bill filed by him, without reference to his rights as a general creditor.

Where the bill is filed to redeem a mortgage against the heir of a mortgagee, the personal representative must also, as the party entitled to the money, be made a party to the suit; because, although the mortgagor, upon paying the principal money and interest, has a right to a reconveyance from the heir, yet the heir is not entitled to receive the money; and, if it were paid to him, the personal representative would have a right to sue him for it.

Where a man contracts for the purchase of an estate, and dies intestate as to the estate contracted for, before the completion of the contract, the vendor has a right to file a bill against his personal representative for payment of the purchase money; but if he does, he must make the heir at law a party, because the heir is the person entitled to the estate. And for the same reason, where the vendee, after the cause was at issue, died, having devised the estate which was the subject of the suit to

[1] *Bampfield* v. *Vaughan*, Rep. t. Finch, 104.

[2] *Greenwood* v. *Taylor*, 1 R. & M. 185; *Greenwood* v. *Firth*, 2 Hare, 241, n.; *Tipping* v. *Power*, 1 Hare, 405; 6 Hare, 434; *Marshall* v. *McAravey*, 3 Dr. & War. 232.

[3] 2 M. & C. 443; 1 Jur. 330; *Armstrong* v. *Storer*, 14 Beav. 535, 538: *Tuckley* v. *Thompson*, 1 J. & H. 126, 130; *Rhodes* v. *Moxhay*, 10 W. R. 103. V.C.S.; *Dighton* v. *Withers*, 31 Beav. 423.

[4] *Daniel* v. *Skipwith*, 2 Bro. C. C. 155: see also *Cristopher* v. *Sparke*, 2 J. & W. 229; *King* v. *Smith*, 2 Hare, 239, 242; 7 Jur. 694; Seton, 289, *et seq.*

infant children, and the plaintiff revived against the personal representatives only: it was held, that the infant devisees were necessary parties, and the suit was ordered to stand over, in order that they might be brought before the Court.[1]

Upon the same principle, if a vendor where to file a bill against the heir, the heir would have a right to insist upon the personal representative being brought before the Court: because the purchase-money, is, in the first instance, payable out of the personal estate. But where a bill stated that an estate, purchased in the defendant's name, was so purchased in trust for the plaintiff's ancestor who paid the purchase-money, and prayed a reconveyance, a demurrer, on the ground that the executor of the ancestor was not a party, was overruled; because the purchase-money having been paid, it was quite clear that no decree could have been made against the personal representative.[2]

It has been held in our own Court, that in proceeding against the heir-at-law of a purchaser in order to obtain a specific performance or rescission of the contract, the personal representative of the deceased, is a necessary party to the suit, and without one a suit is defective: though an executor *de son tort* is a defendant, and though no administration had been taken out before the filing of the bill.[3] It appears that the Court will entertain a bill for the purpose of compelling a sheriff to convey property sold under an execution; but to such a bill the execution debtor whose property has been sold must be made a party.[4] In a suit to enforce a lien for an annuity secured upon real estate, it is not necessary to make the personal representation of the person bound to pay a party, unless an account of the personal estate of the deceased is asked.[5] Where several tenants in common, and the husband of one of them, in order to secure a debt due by another of them, executed a mortgage which conveyed a life lease only to the mortgagee; and on default of paying the mortgage money, the mortgagee had sued and obtained judgment and execution against all the mortgagors for the amount of the debt, and under the execution so obtained had sold the reversion, and the mortgage was thereby satisfied: but the purchaser went into possession during the lifetime of the mortgagee. *Held*, that the personal representative was a necessary party to a suit by the mortgagor for a re-conveyance of the mortgagee's life estate, and an account of the rents and profits.[6] The representatives of a deceased

[1] *Townshend* v. *Champernowne*, 9 Pri. 130.
[2] *Astley* v. *Fountain*, Rep. t. Finch, 4.
[3] *O'Neil* v. *McMahon*, 2 Grant. 145.
[4] *Witham* v. *Smith*, 5 Grant, 203.
[5] *Paine* v. *Chapman*, 7 Grant, 179.
[6] *Nelson* v. *Robertson*, 1 Grant, 530.

tenant for life of an equity of redemption, are not necessary parties to a bill to foreclose, though the interest on the mortgage fell in arrear during the lifetime of the deceased. And the representatives of the survivor of several joint mortgagees, cannot merely as such, sustain a suit to foreclose, without making the representatives of the other mortgagees parties.[1] To a bill by a mortgagee for a sale, after the mortgagor's death, the personal representative of the mortgagor is a necessary party; but not to a bill of foreclosure.[2] Where a testator devised his real and personal estate to *A.* subject to a charge of $200 in favor of *B.*, and *A.* after the testator's death, mortgaged the real estate to *B.* to secure a further sum; a bill by *B.* for payment of the two sums, praying in default a foreclosure or sale was held not to be multifarious. And in such a case the personal representative of the testator was held to be a necessary party; and an allegation that the defendant had been appointed executor by the will was held insufficient in the absence of any allegation that he had proved the will, or had acted as executor.[3]

Upon the same principle, formerly, the Courts, in the case of sureties, and of joint obligors in a bond, compelled all who were bound or their representatives to be before the Court, in order to avoid the multiplicity of suits, which would be occasioned if one or more were to be sued without the others, and left to seek contribution from their co-sureties, or co-obligors in other proceedings; but we have seen that, in this respect, the General Order of the Court has altered the practice.[4]

Section III.—*Objections for want of Parties.*

Having endeavoured, in the preceeding sections of this Chapter, to point out the parties who ought to be brought before the Court by the plaintiff, in order that complete justice may be done in the suit: the next step is to show in what manner an objection, arising from the omission of any of these parties in a bill, is to be taken advantage of by the defendant, and how the defect arising from such omission is to be obviated or remedied by the plaintiff.

A defect of parties in a suit may be taken advantage of, either by demurrer, plea, answer, or at the hearing. Pleas are abolished in this Province by our Con. G. O. No. 6, and the answer is used in its stead. And wherever the word "plea" is mentioned the reader will understand that with us, "answer" is to be substituted.

[1] *Forsyth* v. *Drake*, 1 Grant, 223.
[2] *White* v. *Haight*, 11 Grant, 420.
[3] *Kelly* v. *Ardell*, 11 Grant, 579.
[4] Ord. VII. 2; and our Order 62.

Whenever the deficiency of parties appears on the face of a bill, the want of proper parties is a cause of demurrer. There appears to be some doubt whether a demurrer of this nature can be partial, and whether it must not extend to the whole bill; and in the case of *The East India Company* v. *Coles*,[1] Lord Thurlow was inclined to think, that there could not be a partial demurrer for want of parties; but upon Mr. Mitford mentioning some cases,[2] wherein such partial demurrers had been allowed, the case was ordered to stand over to the next day of demurrers; in the meantime, however, the plaintiff's counsel, thinking it better for his client, amended the bill.

It is to be observed, that if a sufficient reason for not bringing a necessary party before the Court is suggested by the bill, as if the bill seeks a discovery of the persons interested in the matter in question, for the purpose of making them parties, and charges that they are unknown to the plaintiff, a demurrer for want of the necessary parties will not hold.[3] Upon the same principle, where it was stated in a bill that the defendant, who was the next of kin of an intestate, had refused to take out letters of administration, and that the plaintiff had applied to the Prerogative Court, but having been opposed by the defendant, was denied administration, because he could not prove that the intestate had left *bona notabilia;* and that he had afterwards applied to the Consistory Court of Bath and Wells, where he likewise failed, because he could not prove that the intestate had died in the diocese; and that the defendant had refused to discover where the intestate had died: a demurrer for want of proper parties, because the personal representative of the intestate was not before the Court, was overruled.[4]

A demurrer for want of parties must show who are the proper parties; not indeed by name, for that might be impossible;[5] but in such a manner as to point out to the plaintiff the objection to his bill, so as to enable him to amend by adding the necessary persons.[6] Some doubt has been thrown upon the correctness of this rule, in consequence of an observation by Lord Eldon in *Pyle* v. *Price*.[7] His Lordship is there reported to have said, that, beside the objection which had been mentioned at the bar to the rule which required the party to be stated, it

[1] 3 Swanst. 142 n.; see also *Lumsden* v. *Fraser*, 1 M. & C. 589, 602.

[2] *Astley* v. *Fountain*, Rep. t. Finch, 4; *Attwood* v. *Hawkins*, *ib.* 113; *Bressenden* v. *Decreets*, 2 Cha. Ca. 197.

[3] Ld. Red. 180. As to discovery, see Con. G. O. Nos. 63, 64, 85.

[4] *D'Aranda* v. *Whittingham*, Mos. 84.

[5] *Tourton* v. *Flower*, 3 P. Wms. 369.

[6] Ld. Red. 180; *Attorney-General* v. *Jackson*, 11 Ves. 369; *Lund* v. *Blanshard*, 4 Hare, 23; and see *Pratt* v. *Keith*, 10 Jur. N. S. 305: 12 W. R. 394, V. C. K., where the defendant was allowed, by demurrer *ore tenus*, to specify the parties.

[7] 6 Ves. 781; and see *Attorney-General* v. *Corporation of Poole*, 4 M. & C. 17, 32: 2 Jur. 934, 1089.

might appear upon the bill that the plaintiff knows the party, and then to have observed, that perhaps there is not a general rule either way. It is submitted, however, that this observation of Lord Eldon does not at all shake the rule which has been laid down, as to the necessity of pointing out who the necessary party is, but merely refers to the observation made at the bar, that there was no rule requiring a demurrer to state the parties, by name, as it might be out of the power of the defendant to do so; and that it does not refer to the necessity of calling the plaintiff's attention to the description or character of the party required, in order to enable him to amend his bill, without putting him to the expense of bringing his demurrer on for argument; which he might otherwise be obliged to do, in order to ascertain who the party required by the defendant is.

Where a demurrer for want of parties is allowed, the cause is not considered so much out of Court but that the plaintiff may afterwards have leave to amend, by bringing the necessary parties before the Court.[1] And where the addition of the party would render the bill multifarious, the plaintiff will be allowed to amend generally.[2] And where the demurrer has been *ore tenus*, such leave will be granted to him 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.[3]

Upon the allowance, however, of a demurrer for want of parties, the plaintiff is not entitled as of course to an order for leave to amend. When it is said that a bill is never dismissed for want of parties, nothing more is meant than that a plaintiff, who would be entitled to relief if proper parties were before the Court, shall not have his bill dismissed for want of them, but shall have an opportunity afforded of bringing them before the Court; but if, at the hearing, the Court sees that the plaintiff can have no relief under any circumstances, it is not bound to let the cause stand over that the plaintiff may add parties to such a record.[4]

If the defect of parties is not apparent upon the face of the bill, the defect may be brought before the Court by plea, which must aver the matter necessary to show it.[5] A plea for want of proper parties is a plea in bar, and goes to the whole bill, as well to the discovery as to

[1] *Bressenden* v. *Decreets*. 2 Ch. Ca. 197; see also *Lloyd* v. *Loaring*, 6 Ves. 773, 779.

[2] *Lumsden* v. *Fraser*, 1 M. & C. 589, 602; *Attorney-General* v. *Merchant Tailors' Company*, 1 M. & K. 189, 194.

[3] *Newton* v. *Lord Egmont*, 4 Sim. 574, 585.

[4] *Tyler* v. *Bell*, 2 M. & C. 89, 110; and see *Lund* v. *Blanshard*, 4 Hare, 9, 23: 1 C. P. Coop. t. Cott. 39; *Lister* v. *Meadowcroft*, *ib.* 372.

[5] Ld. Red. 280; *Hamm* v. *Stevens*, 1 Vern. 110.

the relief, where relief is prayed:[1] though the want of parties is no objection to a bill for discovery merely.[2]

Where a sufficient reason to excuse the defect is suggested by the bill, as where the party is resident out of the jurisdiction of the Court, and the bill alleges that fact,[3] or where the bill seeks a discovery of the necessary parties:[4] a plea for want of parties will not, any more than a demurrer for the same cause, be allowed, unless the defendant controverts the excuse made by the bill, by pleading matter to show it false.[5]

Upon arguing a plea of this kind, the Court, instead of allowing it, generally gives the plaintiff leave to amend the bill, upon payment of costs; a liberty which 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 a plea.[6]

The defendant may also raise the objection that the bill is defective for want of parties, by answer, or at the hearing,[7] in which case, the rule with respect to costs is: that if the objection for want of parties has been taken by the defendant's answer, or if it arises upon a statement of the bill, then the liberty to amend is not given to the plaintiff, except upon the terms of his paying to the defendant the costs of the day; but if the objection depended upon a fact within the defendant's knowledge, and he has not raised it by answer, the order will be made without payment of costs of the day.[8]

P. being a debtor to the plaintiff, deposited with him certain mortgages to secure such indebtedness; the plaintiff filed a bill against the parties entitled to the equity of redemption of one of those mortgages for payment of the money due thereon, and praying in default foreclosure; the defendants at the hearing objected that *P.* was a necessary party, but the Court overruled the objection as it had not been taken by answer, and *P.* might be ordered to be made a party in the Master's office.[9]

Under the present practice of the Court, objections for want of parties are of comparatively rare occurrence: in the first place, because, as we

[1] *Plunket* v. *Penson*, 2 Atk. 51; *Hamm* v. *Stevens*, *ubi sup.*

[2] *Sangosa* v. *East India Company*, 2 Eq. Ca. Ab. 170, pl. 28.

[3] *Cowslad* v. *Cely*, Prec. Ch. 83; *Darwent* v. *Walton*, 2 Atk. 510.

[4] *Bowyer* v. *Coverl*, 1 Vern. 95.

[5] Ld. Red. 281.

[6] *Ibid.*

[7] *Cox* v. *Stephens*, 9 Jur. N. S. 1144, 11 W. R. 929, V. C. K. For cases in which the defect in parties has been remedied by a voluntary appearance at the hearing, see *ante*.

[8] *Mitchell* v. *Bailey*, 3 Mad. 61; *Furze* v. *Sharwood*, 5 M. & C. 96; *Attorney-General* v. *Hill*, 3 M. & C. 247; *Mason* v. *Franklin*, 1 Y. & C. C. C. 239, 242; *Kirwan* v. *Daniel*, 7 Hare, 347, 351. No costs are given where the defect arises from an event occurring after the cause is at issue: see *Fussell* v. *Elwin*, 7 Hare, 29: 13 Jur. 333. For form of order, on cause standing over with leave to amend on payment of costs of the day, see Seton, 1113. No. 1.

[9] *Jones* v. *B. U. C.*, 12 Grant, 429.

have seen, in many cases persons who were formerly necessary parties are now no longer so; and secondly, because the Court is now enabled to make a decree between the parties before it, although there are other parties not before it who are interested in the question to be determined;[1] and is also enabled, by the General Order,[2] where the defendant at the hearing of a cause objects that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, if it thinks fit, to make a decree saving the rights of the absent parties.[3]

The discretion given to the Court by this Order will only be exercised in cases where the rights of the absent party can be protected by the decree as if he were present; or at all events, where the rights cannot be prejudiced by a decree made in his absence. Consequently, in a suit for the execution of a trust created for the benefit of creditors, against the trustees, Sir James Wigram, V. C., refused to make a decree in the absence of the person who created the trust, or his personal representative.[4]

The Court will not, at the hearing, give leave to the plaintiff to amend by adding parties, if by so doing the nature of the case made by the bill will be changed.[5] In *Milligan* v. *Mitchell*,[6] an order was made at the hearing, giving the plaintiffs leave 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.[7]

The proper time for taking an objection for want of parties is upon opening the pleadings, and before the merits are discussed; but it frequently happens that, after a cause has been heard, the Court has felt itself compelled to let it stand over for the purpose of amendment by adding parties.[8]

After witnesses had been examined, and the cause heard at Sandwich, the cause was re-argued in Toronto. *Held*, that the defendant could not insist as a matter of right on an objection for want of parties not taken at the hearing at Sandwich.[9] The proper practice is to bring all ne-

[1] 15 & 16 Vic. c. 86, s. 51; and our Con. G. O. No. 57.

[2] Ord. XXIII. 11. Our Order No. 65 is similar.

[3] *Meddowcroft* v. *Campbell*, 13 Beav. 184; see also *May* v. *Selby*, 1 Y. & C. C. C. 235, 238: 6 Jur. 52; *Faulkner* v. *Daniel*, 3 Hare, 199, 213; *Daubuz* v. *Peel*, 1 C. P. Coop. t. Cott. 365; *Maybery* v. *Brooking*, 7 De G. M. & G. 673: 2 Jur. N. S. 76; *Feltham* v. *Clark*, 1 De G. & S. 307. Assignees of a bankrupt were directed to be served with a copy of a decree made in their absence, *Dorsett* v. *Dorsett*, 8 Jur. N. S. 146, 147.

[4] *Kimber* v. *Ensworth*, 1 Hare, 293, 295; 6 Jur. 165.

[5] *Deniston* v. *Little*, 2 Sch. & Lef. 11 n.; and see *Watts* v. *Hyde*, 2 Phil. 406, 411: 11 Jur. 979; *Bellamy* v. *Sabine*, 2 Phil. 425, 427

[6] 1 M. & C. 511, 512.

[7] 1 M. & C. 511, 512.

[8] *Jones* v. *Jones*, 3 Atk. 111. An objection for want of parties may be taken on the hearing of an appeal; *Holdsworth* v. *Holdsworth*, 2 Dick. 799; and see *Magdalen College* v. *Sibthorp*, 1 Russ. 154.

[9] *King* v. *Keating*, 12 Grant, 29.

cessary parties before the Court at the hearing, and not to add them in the Master's office.[1]

The objection for want of parties ought to proceed from a defendant; and it has been held that the plaintiff, bringing his cause to a hearing without proper parties, cannot put it off without the consent of the defendant. Cases of exception may occur, where, for instance, the plaintiff was not aware of the existence of persons whose claims could touch the interests of those who were upon the record; but this ought to be clearly established, and the plaintiff ought to apply as soon as he has obtained the knowledge.[2]

A plaintiff may, at the hearing, obviate an objection for want of a particular party, by waiving the relief he is entitled to against such party;[3] and where the evident consequence of the establishment of the rights asserted by the bill, might be the giving to the plaintiff a claim against persons who are not parties, the plaintiff, by waiving that claim, may avoid the necessity of making those persons parties.[4] This, however, cannot be done to the prejudice of others.[5]

In some cases, the defect of parties has been cured at the hearing by the undertaking of the plaintiff to give full effect to the utmost rights which the absent party could have claimed: those rights being such as could not effect the interest of the defendants. Thus, where a bill was filed to set aside a release which had been executed in pursuance of a family arrangement, in consequence of which a sum of stock was invested in the names of trustees for the benefit of the plaintiff's wife and unborn children, which benefit would be lost if the release were set aside: Sir John Leach, M. R., held, that the trustees of the settlement were necessary parties, in order to assert the right of the children; but upon the plaintiff's counsel undertaking that all the monies to be recovered by the suit should be settled upon the same trusts for the benefit of the plaintiff's wife and children, his Honor permitted the cause to proceed without the trustees, and ultimately, upon this undertaking of the plaintiff, declared that the plaintiffs were not bound by the release.[6]

The mode of adding parties is by amendment of the original bill; and the Court will suffer the plaintiff to amend his bill, by adding parties, at any time before the hearing.

An order to amend by adding parties allows of the introduction of apt words to charge them; but it seems that the plaintiff, if it is

[1] *Paterson* v. *Holland*, 8 Grant, 238.

[2] *Innes* v. *Jackson*, 16 Ves. 356, 361; *Campbell* v. *Dickens*, 4 Y. & C. Ex. 17.

[3] *Pawlet* v. *The Bishop of Lincoln*, 2 Atk. 296.

[4] Ld. Red. 179.

[5] *Ibid.* 180.

[6] *Harvey* v. *Cooke*, 4 Russ. 34, 54, 58; and see *Walker* v. *Jefferies*, 1 Hare, 341, 356; *ib.* 296: 6 Jur. 336.

necessary, should apply for liberty to add allegations applicable to the case of the proposed new parties, as this is not included in the liberty to amend by adding parties;[1] and under an order giving liberty to add parties by amendment or supplemental bill, a plaintiff may do both.[2] A plaintiff is not obliged, in adding parties by amendment, to make them defendants: he may, if he pleases, apply for leave to make them co-plaintiffs, and he has been permitted to do so by special motion, after the defendants have answered the original bill.[3]

SECTION IV.—*Joinder of Parties who have no Interest in the Suit.*

It has been before stated, that no one should be made a party to a suit against whom, if brought to a hearing, there can be no decree;[4] thus, an agent for the purchase of an estate, is not a necessary party to a bill against his employer for a specific performance, although he signed the memorandum for the purchase in his own name;[5] and so, a residuary legatee need not be made a party to a bill against an executor for a debt or legacy; and for the same reason, to a bill brought by or against the assignees of a bankrupt in respect of the property vested in them, under the bankruptcy, the bankrupt should not be a party;[6] and in a suit to ascertain the property in a certain share in a banking company, litigated between two claimants, the company is not a necessary party.[7] Upon the same principle, persons who are mere witnesses, and may be examined as such, ought not to be made defendants;[8] and it was so held even where the object of the bill was to obtain a discovery in aid of an action at Law, in which their discovery would be more effectual than their examination.[9]

This rule is, however, liable to exceptions; thus, in cases where under certain circumstances a discovery upon oath is desirable from individual members of a corporation aggregate, or from the officers of a corporation, such members or officers may be made defendants.[10] With respect to this exception from the general rule, it has been

[1] *Palk* v. *Lord Clinton*, 12 Ves. 48, 64, 66; *Mason* v. *Franklin*, 1 Y. & C. C. C. 239, 242; *Gibson* v. *Ingo*, 5 Hare, 156; *Bateman* v. *Margerison*, 6 Hare, 502; and cases referred to 1 C. P. Coop. t. Cott. 35, 36, 37: and see form of order in Seton, 1113. No. 1.

[2] *Minn* v. *Stant*, 15 Beav. 129: 15 Jur. 1095.

[3] *Hichens* v. *Congreve*, 1 Sim. 500.

[4] *De Golls* v. *Ward*, 3 P. Wms. 311, n. (I.); *ante*.

[5] *Kingsley* v. *Young*, Coop, Eq. Pl. 42; see *ante*.

[6] See *ante*.

[7] *Scawin* v. *Scawin*, 1 Y. & C. C. C. 65, 68.

[8] *Plummer* v. *May*, 1 Ves. S. 426; *How* v. *Best*, 5 Mad, 19; *Saunders* v. *Saunders*, 3 Drew, 387: 1 Jur. N. S. 1008.

[9] *Fenton* v. *Hughes*, 7 Ves. 288.

[10] See *ante*. This rule has been altered in this Province by Con. G. O. No. 63.

observed by Lord Eldon, that "the principle is very singular; it originated with Lord Talbot,[1] who reasoned thus upon it: that you cannot have a satisfactory answer from a corporation; therefore, you make the secretary a party, and get from him the discovery you cannot be sure of having from them; and, it is added, that the answer of the secretary may enable you to get better information. The first of these principles is extremely questionable, if it were now to be considered for the first time; and as to the latter, it is very singular to make a person a defendant in order to enable yourself to deal better, and with more success, with those whom you have a right to put upon the record; but this practice has so universally obtained without objection, that it must be considered established."[2]

Other persons are mentioned by Lord Eldon as affording exceptions to the rule before laid down, that mere witnesses cannot be made parties to a suit: *viz.*, agents to sell, auctioneers, &c., who have been made defendants without objection;[3] his Lordship, however, appears to have thought, that the practice of making such persons parties arose originally from their having some interest, such as holding deposits, which might entitle the plaintiff to relief against them; and it has been since held, that an agent who bids at an auction for an estate, and signs the memorandum in his own name for the purchase, need not be made a co-defendant with his employer, to a bill for the specific performance of such agreement.[4]

In *Dummer* v. *The Corporation of Chippenham*,[5] Lord Eldon also mentions, as cases of exception to the general rule above referred to, those of arbitrators and attornies. With respect to arbitrators, however, it is a rule, that in general an arbitrator cannot be made a party to a bill for the purpose of impeaching an award, and that if he is, he may demur to the bill, as well to the discovery as to the relief.[6] In some cases, nevertheless, where an award has been impeached on the ground of gross misconduct in the arbitrators, and they have been made parties to the suit, the Court has gone so far as to order them to pay the costs.[7] In such cases, Lord Redesdale considers it probable that a demurrer to the bill would not have been allowed;[8] and in *Lord Lonsdale* v. *Littledale*,[9]

[1] *Wych* v. *Meal*, 3 P. Wms. 310.

[2] 7 Ves. 289. The officer so joined as defendant cannot shelter himself from giving discovery on the ground that he cannot inspect the document, without the leave of the governing body of the Corporation: *Attorney-General* v. *Mercers' Company*, 9 W. R. 83, V. C. W.

[3] 7 Ves. 289.

[4] *Kingsley* v. *Young*, Coop. Eq. Pl. 42, *ante*.

[5] 14 Ves. 252.

[6] *Steward* v. *East India Company*, 2 Vern. 380; Ld. Red. 160.

[7] *Chicot* v. *Lequesne*, 2 Ves. S. 315; *Lingood* v. *Croucher*, 2 Atk. 395; *Hamilton* v. *Bankin*, 3 De G. & S. 782: 15 Jur. 70.

[8] Ld. Red. 161.

[9] 2 Ves. J. 451.

a demurrer by an arbitrator to a bill of this nature was in fact overruled: though not expressly upon the ground of the propriety of making an arbitrator a party, but because the bill charged certain specific acts which showed combination or collusion between him and one of the parties, and made him the agent for such party, and which the Court therefore thought required an answer. But although arbitrators may be made parties to a bill to set aside their award, they are not bound to answer as to their motives in making the award, and they may plead to that part of the bill in bar of such discovery;[1] but it is incumbent upon them, if they are charged with corruption and partiality, to support their plea by showing themselves incorrupt and impartial, or otherwise the Court will give a remedy against them by making them pay costs.[2]

From the preceding cases it may be collected, that arbitrators can only be made parties to a suit where it is intended to fix them with the payment of costs, in consequence of their corrupt or fraudulent behaviour, and in such cases the bill ought specifically to pray that relief against them.

The same rule also applies to the other case of exception before alluded to, as having been mentioned by Lord Eldon, namely, that of attornies: who can only be made parties to a suit in cases where they have so involved themselves in fraud, that a Court of Equity, although it can give no other relief against them, will order them to pay the costs. Thus, where a solicitor assisted his client in obtaining a fraudulent release from another, he was held to be properly made a party, and liable to costs if his principal was not solvent.[3]

The same rule applies to any other person acting in the capacity of agent in a fraudulent transaction, as well as to an attorney or solicitor;[4] and it was said by Sir James Wigram, V. C., in *Marshall* v. *Sladdon*,[5] that "as far as his researches had gone, the Court had never made a decree against a mere agent except upon the ground of fraud."

It is to be observed, that in such cases, if an attorney or agent is made a party, the bill must pray that he may pay the costs, and must distinctly allege the circumstances constituting the fraud, and that the defendant was a party concerned, and had a knowledge of the fraudulent intention;[6] otherwise a demurrer will lie.

[1] *Anon.* 3 Atk. 644.

[2] *Lingood* v. *Croucher*, 2 Atk. 395; *Padley* v. *Lincoln Water Works Company*, 2 M'N. & G. 68: 14 Jur. 299; *Ponsford* v. *Swaine*, 1 J. & H. 433.

[3] *Bowles* v. *Stewart*, 1 Sch. & Lef. 227.

[4] *Bulkeley* v. *Dunbar*, 1 Anst. 37.

[5] 7 Hare, 428, 442: 14 Jur. 106; *Reynell* v. *Sprye*, 8 Hare, 222, 271; *Innes* v. *Mitchell*, 4 Drew. 57; 3 Jur. N. S. 756.

[6] *Kelly* v. *Rogers*, 1 Jur. N. S. 514, V. C. W.: *Gilbert* v. *Lewis*, 1 De G. J. & S. 39, 49, 50; 9 Jur. N. S. 187; and see *Attwood* v. *Small*, 6 Cl. & Fin. 352; Sugd. Law. Prop. 630, 632.

In *Le Texier* v. *The Margravine of Anspach*,[1] one of the questions before the Court was, whether a married woman could be made a party to a suit on the allegation that, in certain contracts which were the subject of litigation, she had acted as the agent of her husband, and that she had vouchers in her possession, the discovery of which might assist the plaintiff in his case. The bill, which did not pray any relief against the wife, had been demurred to; and Lord Eldon allowed the demurrer on the ground that she was merely made a defendant for the purpose of discovery, and that no relief was prayed against her. His Lordship said: "I give no judgment what would have been the effect if the bill had prayed a delivery to the plaintiff of those vouchers which are charged to be in the hands of the wife; it is, however, simply, as far as relief goes, a bill against the husband only, and against the wife a bill of discovery only. The consequence is, that independent of her character as wife, the case must be considered as one of those in which the Court does sometimes allow persons to be made parties against whom no relief is prayed, and the only case of that kind is that of the agent of a corporation."

With respect to the propriety of making an attorney or agent a party, merely because he has deeds or other documents in his possession, Lord Eldon, in *Fenwick* v. *Reed*,[2] observed, that generally speaking, and *prima facie*, it is certainly not necessary to make an attorney a party to a bill seeking a discovery and production of title-deeds, merely because he has them in his custody; because the possession of the attorney is the possession of his client; but cases may arise to render such a proceeding advisable, as if he withholds the deeds in his possession, and will not deliver them to his client on his applying for them.

Where a person who has no interest in the subject-matter of the suit, and against whom no relief is prayed, is made a party to a suit for the mere purpose of discovery, the proper course for him to adopt, if he wishes to avoid the discovery, is to demur.[3] If, however, the bill states that the defendant has or claims an interest, a demurrer, which admits the bill to be true, will not of course hold, though the defendant has no interest, and he can then only avoid answering the bill by disclaimer.[4]

The question whether a party who is a mere witness can, by answer, protect himself from the discovery required, appears to have given rise to some difference of opinion. In *Cookson* v. *Ellison*,[5] the plaintiff made

[1] 15 Ves. 164.

[2] 1 Mer. 114, 123; and see *Attorney-General* v. *Earl of Chesterfield*, 18 Beav. 596; 18 Jur. 686, which was the case of the agent of a charity, who had the deeds in his possession.

[3] Ld. Red. 188.

[4] *Ibid.*: *Plumer* v. *May*, 1 Ves. S. 426.

[5] 2 Bro. C. C. 252.

a person defendant who was merely a witness, and might have been examined as such, and therefore should have demurred to the bill. Instead of demurring, however, the defendant put in an answer, to which, not having satisfied the plaintiff as to one interrogatory, an exception was taken, and the Master reported the answer sufficient; but upon the case coming before Lord Thurlow, upon exceptions to the Master's report, his Lordship held that, as the defendant had submitted to answer, he was bound to answer fully. In a subsequent case of *Newman* v. *Godfrey*,[1] however, Lord Kenyon, M. R., appears to have entertained a different opinion. In that case, the defendant, who was a mere clerk, was alleged in the bill to be a party interested in the property in litigation, and in support of such allegation various statements were made, showing in what manner his interest arose: he put in an answer, denying all the statements upon which the allegation of his being interested was founded, and disclaiming all personal interest in the subject-matter; and to this answer exceptions were taken by the plaintiff, because the defendant had not answered the subsequent parts of the bill, which exceptions were disallowed by the Master; and upon the question coming on before Lord Kenyon, upon exceptions to the Master's report, he thought the Master was right in disallowing the exceptions; because the defendant had reduced himself to a mere witness by denying his interest and disclaiming; so that, even supposing he had an interest, he could not, having disclaimed, have availed himself of it. These contradictory decisions have been remarked upon by Lord Eldon in two subsequent cases;[2] and his Lordship's observations in those cases have been considered as approving of Lord Thurlow's decision in *Cookson* v. *Ellison*. Nothing, however, can be collected from what Lord Eldon has said, in either of these cases, as indicating an opinion either one way or the other; and at the period when they were before him, the doctrine that a party answering must answer fully does not appear to have been so strictly adhered to as it has been subsequently;[3] but that doctrine is now well established, and, it is conceived, includes the case above discussed.[4]

When a plaintiff finds that he has made unnecessary parties to his bill, he may either dismiss his bill as against them, or apply to the Court for leave to amend his bill by striking out their names: in either case, however, the order will, if the defendants have appeared, only be

[1] *Ibid.* 332.

[2] *Fenton* v. *Hughes*, 7 Ves. 288; *Baker* v. *Mellish*, 11 Ves. 75, 76.

[3] *Dolder* v. *Lord Huntingfield*, 11 Ves. 283, 293; *Faulder* v. *Stuart*, *ib.* 296; *Shaw* v. *Ching*, *ib.* 303.

[4] *Lancaster* v. *Evors*, 1 Phil. 349: 8 Jur. 133; *Swinborne* v. *Nelson*, 16 Beav. 416; *Great Luxembourg Railway Company* v. *Magnay*, 23 Beav. 646: 4 Jur. N. S. 839; *Reade* v. *Woodroffe*, 24 Beav. 421.

made on payment of their costs, because by striking them out as defendants the plaintiff deprives them of the opportunity of applying for their costs at the hearing.[1]

It may here be mentioned that after a bill has been dismissed against one defendent the style of the cause as it originally was, should be continued. It is not necessary to omit the name of the defendant against whom the bill has been dismissed, and the retention of the name is not irregular. *Sed quære*, would it be irregular if the name was omitted.[2]

The preceding observations, with regard to the joinder in the suit of persons who have no interest, beneficial or otherwise, in the subject-matter, refer to cases where they are made parties defendants. The rule, however, that persons who have no interest in the litigation, cannot be joined in a suit with those who have, applies equally to prevent their being joined as co-plaintiffs;[3] and upon the same principle, persons whose interests in the subject-matter of the suit are distinct and several, cannot sue as co-plaintiffs.[4] Formerly, the misjoinder of plaintiffs, if it appeared upon the bill, was a ground of demurrer to the whole bill; and if it did not appear upon the bill, it might be pleaded in bar[5] to the whole bill; and the objection might also be taken at the hearing.[6] Now, however, the consequences of a misjoinder are by no means so serious as they were formerly, for by the Chancery Amendment Act of 1852, it has been provided that "no suit in the said Court shall be dismissed by reason only of the misjoinder of persons as plaintiffs therein, but wherever it shall appear to the Court that, notwithstanding the conflict of interest in the co-plaintiffs, or the want of interest in some of the plaintiffs, or the existence of some ground of defence affecting some or one of the plaintiffs, the plaintiffs, or some or one of them, are or is entitled to relief, the Court shall have power to grant such relief, and to modify its decree according to the special circumstances of the case, and for that purpose to direct such amendments, if any, as may be necessary, and at the hearing, before such amendments are made, to treat any one or more of the plaintiffs as if he or they was or were a defendant or defendants in the suit, and the remaining or other plaintiff or plaintiffs, was or were the only plaintiff or plaintiffs on the record; and where

[1] *Wilkinson* v. *Belsher*, 2 Bro. C. C. 272.

[2] *Upper Canada Mining Co.* v. *Attorney-General*, 2 Cham. R. 185.

[3] *Mayor and Aldermen of Colchester* v. ——, 1 P. Wms. 595; *Troughton* v. *Gelley*, 1 Dick. 382; *Cuff* v. *Platell*, 4 Russ. 242; *Makepeace* v. *Haythorne*, *ib.* 244; *King of Spain* v. *Machado*, *ib.* 225; *Page* v. *Townsend*, 5 Sim. 395; *Delondre* v. *Shaw*, 2 Sim. 237; *Glyn* v. *Soares*, 3 M. & K. 450, 468; *Griggs* v. *Staplee*, 2 De G. & S. 572: 13 Jur. 29; *Griffith* v. *Vanheythuysen*, 9 Hare, 85: 15 Jur. 421.

[4] *Hudson* v. *Maddison*, 12 Sim. 416: 5 Jur. 1194; and see *Powell* v. *Cockerell*, 4 Hare, 557, 562: 10 Jur. 243, where the objection was disallowed; and *Miles* v. *Durnford*, 2 Sim. N. S. 234: 21 L. J. Ch. 667, L. JJ.; where the plaintiff filled two characters, in one of which he could not sue.

[5] *Doyle* v. *Muntz*, 5 Hare, 509: 10 Jur. 914.

[6] *Padwick* v. *Platt*, 11 Beav. 503; *Fulham* v. *M'Carthy*, 1 H. L. Ca. 703; see also *Blair* v. *Bromley* 5 Hare, 542, 553; but it seems not on a rehearing, *Fowler* v. *Raynald*, 3 M'N. & G. 500, 511: 15 Jur. 1019, 1021.

there is a misjoinder of plaintiffs, and the plaintiff having an interest shall have died, leaving a plaintiff on the record without an interest, the Court may, at the hearing of the cause, order the cause to stand revived as may appear just, and proceed to a decision of the cause, if it shall see fit, and to give such directions as to costs or otherwise as may appear just and expedient."[1]

The provision of the Act is imperative, and does not leave it to the discretion of the Court whether to dismiss the bill or not.[2]

The act applies to the case where a plaintiff sues on behalf of himself and the others of a class;[3] thus, where a bill was filed by one member of a company on behalf of himself and all others, except the defendants, praying an account of the receipts and payments of the defendants on behalf of the company, and payment of what should be found due to the plaintiff, and it appeared that there were circumstances which made the interest of some of the persons purporting to be represented by the plaintiff different from his, it was held that the Court could, under the above mentioned section, treat the absent plaintiffs as defendants, and determine whether a decree should be made; and accordingly the Court decreed an account giving liberty to some of the shareholders whose interest differed from the plaintiff's to attend the proceedings in Chambers.

The following are our Orders taken from this Act: Order 53, of the Con. G. Orders, declares that "No suit is to be dismissed by reason only of the misjoinder of persons as plaintiffs therein."

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

[1] 15 & 16 Vic. c. 86, s. 49. For form of order under this section, see Seton, 1113. No. 2. Orders 53, 54, and 55, of our Con. G. O. are similar in effect to this Section, and are with unimportant differences, a copy.

[2] *Clements* v. *Bowes*, 1 Drew. 684, 694. See also, for cases of misjoinder since the act, *Carter* v. *Sanders*, 2 Drew. 248; *Upton* v. *Vanner*, 10 W. R. 99, V. C. K. In *Barton* v. *Barton*, 3 K. & J. 512: 3 Jur. N. S. 808, the bill was not dismissed for misjoinder, but for want of interest in the plaintiffs; and the marginal note in 3 K. & J. 512, appears to be incorrect in this respect.

[3] *Clements* v. *Bowes*, 1 Drew. 684; and see *Williams* v *Page*, 24 Beav, 669: 4 Jur. N. S. 102; *Evans* v. *Coventry*, 5 De G. M. & G. 911: 2 Jur. N. S. 557; see also *Stupart* v. *Arrowsmith*, 3 Sm. & G. 176; *Williams* v. *Salmond*, 2 K. & J. 463: 2 Jur. N. S. 251; *Gwatkin* v. *Campbell*, 1 Jur. N. S. 131, V. C. W.

Order 55, that "Where there is a misjoinder of plaintiffs, and the plaintiff who has an interest has died, leaving a plaintiff on the record without any interest, the Court may, at the hearing of the cause, order such an amendment of the record as may appear just, and proceed to a decision of the cause, if it shall see fit, and give such directions as to costs or otherwise as may appear just and expedient."

It has been held that a misjoinder of plaintiffs is now no objection to a motion for an injunction and receiver, to protect property in danger of being lost pending litigation.[1]

CHAPTER VI.

THE BILL.

SECTION I.—*The different sorts of Bills.*

IT has been before observed, that a suit in the Court of Chancery is generally commenced, on behalf of a subject, by preferring what is termed a bill: and that if commenced by the Attorney-General on behalf of the Crown, or of those partaking of its prerogatives, or under its protection, the suit is instituted by information.[2] The form of this bill and information is now regulated by statute and by the orders of the Court, but the mode of commencing proceedings in Chancery has been by bill since the earliest times.[3]

Bills, if they relate to matters which have not previously been brought before the consideration of the Court, are called original bills, and form the foundation of most of the proceedings before, what is termed, the extraordinary or equitable jurisdiction of the Court of Chancery. The same form of instituting a suit is also in use in all other equitable jurisdictions in England.

Besides original bills, there are other bills in use in Courts of Equity, which were formerly always, and are still sometimes necessary to be preferred, for the purpose of supplying any defects which may exist in the form of the original bill, or 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

[1] *Evans* v. *Coventry*, 5 De G. M. & G. 911; 2 Jur. N. S. 557.
[2] *Ante.*
[3] Ld. Red. 8

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 the reversal of the decision which has been made in it. The bill which he prefers for this purpose is styled a bill in the nature of an original bill.

Besides the different divisions of bills here enumerated, original bills are usually divided into:—1. Original bills praying relief; and 2. Original bills not praying relief.[1]

Original bills praying relief are again subdivided into three heads:—1. Original bills, praying the decree of the Court touching some right claimed by the person exhibiting the bill, in opposition to rights claimed by the person against whom the bill is exhibited; 2. Bills of interpleader; and, 3. Certiorari bills.[2] Original bills not praying relief, are of two kinds:—1. Bills to perpetuate the testimony of witnesses; and, 2. Bills of discovery.[3] The simplicity of modern proceedings, however, renders the foregoing subdivision of bills in Chancery comparatively unimportant.

As original bills of the first kind are those most usually exhibited, the reader's attention will, in the present chapter, be principally directed to them. The other descriptions of bills will be more particularly considered, when we come to treat of the practice of the Court applicable to the particular suits of which they are the foundation. Bills which are not original, or which are merely in the nature of original bills, will be separately considered in a future part of the work; but it may be here observed, that simple and economical modes of supplying the defects of original bills have been provided, which will be stated in the proper place, and which have rendered bills which are not original of rare occurrence.

SECTION II.—*The Authority to file the Bill.*

THE first step to be taken by a party who proposes to institute a suit in Chancery, unless he intends to conduct the suit in person, is to authorise a solicitor practising in the Court to commence and conduct it on his behalf. It does not seem to be necessary that such authority should be in writing,[4] although it would, perhaps, be better that a solicitor,

[1] Ld. Red. 34, 37, 51.

[2] Ld. Red. 34, 37, 48, 50.

[3] *Ib.*, 51, 53, 54.

[4] *Lord* v. *Kellett*, 2 M. & K. 1. As to revocation of the authority, see *Freeman* v. *Fairlie*, 8 L. J. Ch. 44, V. C. E. For the authority required in the case of a bill by a public company, see *East Pant Mining Company* v. *Merryweather*, 10 Jur. N. S. 1231: 13 W. R. 216, V. C. W.

before he commences a suit, should be in possession of some written authority for that purpose; as if he is not, the onus of the proof of the authority will be cast on him.[1] In order to warrant a solicitor in filing a bill, the authority, be it in writing or by *parol*, ought to be special; and it has been held that a general authority to act as solicitor for a party, will not be sufficient to warrant his commencing a suit on his behalf:[2] although, under a general authority, a solicitor may defend a suit for his client.[3]

The rule which requires a solicitor to be specially authorised to commence a suit on behalf of his client, applies as well to cases where the party sues as a co-plaintiff, as to cases where he sues alone; and even to cases where his name is merely made use of *pro forma*. In *Wilson* v. *Wilson*,[4] Lord Eldon said, "I cannot agree that making a person a plaintiff is only *pro forma*, and I am disposed to go a great way in such cases: for it is too much for solicitors to take upon themselves to make persons parties to suits without a clear authority; there are very great mischiefs arising from it."

If a solicitor files a bill in the name of a person without having a proper authority for so doing, the course for such person to pursue, if he wishes to get rid of the suit, and is the sole plaintiff, is to move that the bill may be taken off the file,[5] or dismissed[6] with costs, to be paid by the plaintiff; and that the solicitor who filed the bill without authority may be ordered to pay to the defendants their costs of the suit, or to repay such costs to the plaintiff in case he pays them; and may be also ordered to pay the plaintiff's costs of the application, and his incidental expenses, as between solicitor and client.[7] The same course should be pursued where there are several plaintiffs, and all repudiate the suit. But where one or more of several plaintiffs desire to withdraw from the suit, they should move that their names may be struck out of the bill, and that the solicitor who has unauthorisedly used their names may be ordered to pay their costs of the suit, and the costs of the application.[8]

[1] *Pinner* v. *Knights*, 6 Beav. 174; *Hood* v. *Phillips*, *ib.* 176; *Maries* v. *Maries*, 23 L. J. Ch. 154, V. C. W.

[2] *Wilson* v. *Wilson*, 1 J. & W. 457. See also *Dundas* v. *Dutens*, 1 Ves. J. 196, 200; *Bligh* v. *Tredgett*. 5 De G. & S. 74: 15 Jur. 1101; *Bewley* v. *Seymour*, 14 Jur. 213, V. C. E.; *Re Manby*, 3 Jur. N. S. 259; S. C. *nom. Norton* v. *Cooper*, 3 Sm. & G. 375; and see *Solley* v. *Wood*, 16 Beav. 370, where it was held that an authority given to a country solicitor is sufficient to warrant his town agent in filing a bill.

[3] *Wright* v. *Castle*, 3 Mer. 12.

[4] 1 J. & W. 458.

[5] *Jerdein* v. *Bright*, 10 W. R. 380, V. C. W.

[6] *Wright* v. *Castle*, 3 Mer. 12; *Allen* v. *Bone*, 4 Beav. 493; *Crossley* v. *Crowther*, 9 Hare, 384; *Atkinson* v. *Abbot*, 3 Drew. 251.

[7] *Ib.*: and see the order in *Allen* v. *Bone*, Seton, 852, No. 1.

[8] *Tabbernor* v. *Tabbernor*, 2 Keen, 679. For the order in that case, see Seton, 853, No. 2. And see *Wilson* v. *Wilson*, 1 J. & W. 457; *Pinnier* v. *Knights*, 6 Beav. 174; *Hood* v. *Phillips*, *ib.* 176; see also *Mallins* v. *Greenway*, 10 Beav. 564: 12 Jur. 66, 319, where a solicitor was ordered to pay the costs of unauthorised proceedings in the Master's office, on behalf of creditors.

The motion in either case must be supported by an affidavit of the respective applicants themselves, that the bill has been filed without any authority from them. 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 moving to institute the suit; and it will not be sufficient to assert generally, in opposition to the plaintiff's affidavit, that authority had been given. In *Wright* v. *Castle*,[1] the affidavit of the plaintiff was met by another on the part of the solicitor, stating, that an action had been brought by the defendant against the plaintiff, on certain promissory notes: to restrain proceedings in which action the bill had been filed, although not by the express directions of the plaintiff, yet in the course of business, and by virtue of a general authority, as the plaintiff's solicitor; but Lord Eldon did not consider such authority sufficient.

Notice of the intended motion must be given to the solicitor who filed the bill; and where one or more, but not all, the plaintiffs move, notice must also be served on the co-plaintiffs, and on the defendants, whose costs of appearance are usually ordered to be paid by the solicitor, if the motion succeeds.[2] Where the sole plaintiff applies, service on the defendants is unnecessary, at least before decree; and in a recent case their costs of appearing, where improperly served, had to be borne by the plaintiff personally.[3]

The motion should be made as soon as possible after the plaintiff has become acquainted with the fact of the suit having been instituted in his name: for although, as between him and the solicitor, the mere fact of the plaintiff having neglected to move that his name should be struck out from the record will not exonerate the solicitor;[4] yet, as between the plaintiff and the other parties, the Court, if there has been delay on his part in making such application, will not generally dismiss the bill, but will so frame the order as not to prejudice any of the parties to the cause.[5] The last observation applies more especially to cases where the person whose name has been used without due authority, is co-plaintiff with others: for it can scarcely happen, where he is sole plaintiff, that defendants should have an interest in resisting an application to dismiss the bill with costs (except indeed after decree); but where he is co-plaintiff, it frequently happens that dismissing the bill would interfere with the interest of the other plaintiffs, or diminish the security of the

[1] 3 Mer. 12.

[2] *Tabbernor* v. *Tabbernor*, 2 Keen, 679; Seton, 853; *Hood* v. *Philips*, 6 Beav. 176; *Pinner* v. *Knights*, *ib.* 174.

[3] *Jerdein* v. *Bright*, 10 W. R. 380, V. C. W.

[4] *Hall* v. *Laver*, 1 Hare, 571: 5 Jur. 241; see also *Burge* v. *Brutten*, 2 Hare, 373; 7 Jur. 988; as to the lien of a solicitor upon a fund recovered in the cause.

[5] *Titterton* v. *Osborne*, 1 Dick. 350; and see *Tarbuck* v. *Tarbuck*, 6 Beav. 134; *Pinner* v. *Knights*, *ib.* 174; *Hood* v. *Phillips*, *ib.* 176; *Bligh* v. *Tredgett*, 5 De G. & S. 74: 15 Jur. 1101.

defendants for costs: in such cases, the motion will usually be saved to the hearing, and then the solicitor will be ordered to pay all the costs and expenses of the party whose name has been used without authority.[1] And further than that, the solicitor was, in the case of *Dundas* v. *Dutens*,[2] ordered to pay to the defendants the difference between taxed costs and their costs and expenses.

Where a co-plaintiff was not apprised that his name had been made use of without his authority till after the bill had been dismissed with costs, and he was served with a *subpœna* to pay them, Lord Eldon, upon motion, ordered the solicitor to pay to the defendant the costs, which had been ordered to be paid by the plaintiffs to the defendants; and also to pay to the plaintiff who made the application his costs of the application, as between solicitor and client.[3] By the order made upon that occasion, the solicitor was ordered to pay the whole costs to be paid by all the plaintiffs to the defendants; but he was to be at liberty to make any application as to those costs, as against the other plaintiffs, as he should be advised.[4]

As connected with this subject, it may be noticed here that in certain cases it is necessary, before a suit is commenced, to obtain the sanction of the Court to its institution. The cases in which this is most usually done, are those in which the suit contemplated is for the benefit of an estate which is already the subject of a proceeding in Court, and the expenses of which are to be paid out of such estate. Thus, where there is a suit pending for the administration of assets, and it becomes necessary, in order to get in the estate, that a suit should be instituted against a debtor to the estate, it is usual for the personal representative, previously to filing a bill, to apply, in the administration suit, for the leave of the Court to exhibit a bill for that purpose. And so, where a suit has been instituted for winding up partnership accounts upon a dissolution, and a receiver has been appointed to collect the outstanding effects: if it is necessary, in order to recover a debt due to the partnership, that the receiver should institute a suit for that purpose, application should be made to the Court, on the part of some of the parties, that the receiver may be at liberty to file the necessary bill in the names of the partners. It is to be observed that, in all such cases, the Court would not formerly direct the institution of such a suit upon motion, although supported by

[1] See *Dundas* v. *Dutens*, 2 Cox, 235, 241: 1 Ves. J. 196.

[2] 1 Ves. J. 200.

[3] *Wade* v. *Stanley*, 1 J. & W. 674.

[4] S. C. Reg. Lib. B. 1819, fo. 1835. For other cases where a plaintiff, or a next friend, has applied to be relieved from orders for payment by them of money or costs, without their knowledge of the suit, see *Hood* v. *Phillips*, 6 Beav. 176; *Ward* v. *Ward*, *ib.* 251; *Bligh* v. *Tredgett*, 5 De G. & S. 74: 15 Jur. 1101; *Re Manby*, 3 Jur. N. S. 259; S.C. *nom. Norton* v. *Cooper*, 3 Sm. & G. 375. In *Hall* v. *Bennett*, 2 S. & S. 78, where the bill had been dismissed with costs for want of prosecution, the plaintiff's solicitor was ordered to pay the defendant's costs: the plaintiff having absconded before suit, and never authorised or sanctioned it.

affidavits, without previously referring it to the Master to inquire whether it would be for the benefit of the parties at whose joint expense it was to be: unless the other parties interested, being of age, and competent to consent, chose to waive such reference.[1] Now, however, the proper mode of application for orders of this description is by motion in Chambers, supported by affidavit or other evidence of the facts from which the Judge can determine whether the proposed suit is proper to be instituted; and the opinion of an Equity barrister, in actual practice, is usually required, that there is a good ground of suit.

In the same manner, where the property of an infant is the subject of a suit already depending, and it becomes necessary that another suit should be instituted on behalf of the infant, it is usual, before any steps are taken in it, to obtain in chambers, on motion, an order sanctioning such contemplated proceedings as being for the benefit of the infant.[2] It is to be observed, however, that such order can only be made where the property of the infant is already subject to the control and disposition of the Court in another suit; and that in ordinary cases, where a person commences an original proceeding on behalf of an infant as his next friend, he is considered as taking upon himself the whole responsibility of it; nor will the Court, either before or after the commencement of the proceeding, direct an inquiry whether it will be for the infant's benefit, at the instance of the next friend himself (unless in cases where there are two or more suits brought by different next friends for the same object): although, as we have seen, it will sometimes do so at the instance of other parties.[3]

It has been before stated, that the committee of the estate of an idiot or lunatic ought, previously to instituting a suit on his behalf, to obtain the sanction of the Court to the proceeding.[4]

It is to be observed that, with respect to all the above-mentioned cases, in which it is stated to be right, previously to the institution of a suit, to obtain the proper sanction, the omission to obtain such sanction is not a ground upon which a defendant to the suit can object to its proceeding.

Section III.—*By whom Prepared.*

The solicitor being duly authorised, the next step in the institution of a suit is to have the bill properly prepared. The duty of drawing

[1] *Musgrave* v. *Medex*, 3 V. & B. 167.
[2] See *ante* e.
[3] *Ante.*
[4] *Ante.*

the bill ought, strictly, to be performed by the solicitor, who is allowed a fee for so doing; and in England the draft must be signed by counsel, but our Order No. 76, renders this unnecessary.

Section IV.—*The Matter of the Bill.*

An original bill in Chancery is in the nature of a declaration at Common Law,[1] or of a libel and allegation in the Spiritual Courts.[2] It was, in its origin, nothing but a petition to the King, which, after being presented, was referred to the Lord Chancellor, as the keeper of his conscience;[3] and a bill still continues to be framed in the nature and style of a petition, addressed "To the Honourable the Judges of the Court of Chancery."

Where a bill prays the decree of the Court, touching rights claimed by the persons exhibiting it, in opposition to rights claimed by the person against whom it is exhibited, it must contain a statement showing the rights of the plaintiff or person exhibiting the bill, by whom and in what manner he is injured, or in what he wants the assistance of the Court: and in all cases, the bill must contain, as concisely as may be, a narrative of the material facts, matters, and circumstances on which the plaintiff relies, and must pray specifically for the relief the plaintiff may conceive himself entitled to, and also for general relief. This statement and prayer form the substance and essence of every bill; and before entering more in detail into the consideration of the form of a bill, the reader's attention should first be drawn to certain general rules and principles by which persons framing bills ought to be guided in the performance of their task.

In the first place, it is to be observed, that every bill must show clearly that the plaintiff has a right to the thing demanded, or such an interest in the subject-matter as gives him a right to institute a suit concerning it.[4] It would be foreign to the purpose of this work to attempt the enumeration of the various cases in which bills have been dismissed, because filed by parties having no interest in the subject-matter, or no right to institute proceedings concerning it: to do so, indeed, would necessarily lead to the consideration of the general principles of Equity, and would be more fitting for a treatise upon the

[1] 3 Bla. Com. 442.

[2] *Ibid.*; Gilb. For. Rom. 44.

[3] See 1 Spence, Eq. Jur. 335, *et seq.*: 1 Ld. Camp. Chancellors, Intro.: *Ib.* 266, 342.

[4] Ld. Red. 154; and see *Jerdein* v. *Bright*, 2 J. & H. 325; *Nokes* v. *Fish*, 3 Drew. 735; *Columbine* v. *Chichester*, 2 Phil. 27; 1 C. P. Coop. t. Cott. 295: 10 Jur. 626.

equitable jurisdiction of the Court than for a book upon its practice. All that need now be said upon this subject is, that if it is not shown by the bill that the party suing has an interest in the subject-matter, and a proper title to institute a suit concerning it, the defendant may demur;[1] thus, where a plaintiff claims under a will, and it appears upon the construction of the instrument, that he has no title, a demurrer will be allowed. In *Brownsword* v. *Edwards*,[2] which is the case referred to in Lord Redesdale, in support of the above proposition, Lord Hardwicke is reported to have said, upon the argument of a demurrer, that if the Court had not been satisfied, and had, therefore, been desirous that the matter should be more fully debated at a deliberate hearing, the demurrer would have been overruled, without prejudice to the defendant's insisting on the same matter by way of answer; but in a note to his treatise,[3] Lord Redesdale observes, that "perhaps this declaration fell from the Court rather incautiously: as a dry question upon the construction of a will may be as deliberately determined upon argument of a demurrer, as at the hearing of a cause in the ordinary course, and the difference in expense to the parties may be considerable." Of the truth of this observation there can be no doubt; and it is much to be wished that, in cases of this description, where the right of the plaintiff in the subject-matter of the suit depends upon a simple point, such as that of the construction of a will, the practice of demurring to the bill were more frequently resorted to, as by such means considerable expense might frequently be saved: for if it appears at the hearing that the party filing the bill is not right in the construction he puts upon the instrument, the bill must be dismissed: which, if the plaintiff's bill had been demurred to in the first instance, would have been the result, without the additional expense caused by the other proceedings.[4]

The rule, that a plaintiff should show by his bill an interest in the subject-matter of the suit, applies not to one plaintiff only, but to all the plaintiffs; and if several persons joined in filing a bill, and it appeared that one of them had no interest, the bill was formerly open to demurrer: though it appeared that all the other plaintiffs had an interest in the matter, and a right to institute a suit concerning it. This, as we have seen, is no longer so; but the Court may make such order,

[1] Ld. Red. 154.

[2] 2 Ves. S. 243, 247. And see *Mortimer* v. *Hartley*, 3 De G. & S. 316; *Evans* v. *Evans*, 18 Jur. 666. L.JJ.; *Cochrane* v. *Willis*, 10 Jur. N. S. 162, L.JJ.; *Collingwood* v. *Russell*, 10 Jur. N. S. 1062: 13 W. R. 63, L.JJ.; *Lautour* v. *Attorney-General*, 11 Jur. N. S. 48: 13 W. R. 305, L.JJ.

[3] Ld. Red. 154, n. (*p*). See *Ferguson* v. *Kelty*, 10, Grant 102.

[4] But where the defendant allows the cause to be brought to a hearing in such a case, the practice is to dismiss the bill without costs: *Hill* v. *Reardon*, 2 S. & S. 431, 439; *Jones* v. *Davids*, 4 Russ. 278; *Hollingsworth* v. *Shakeshaft*, 14 Beav. 492; *Webb* v. *England*, 29 Beav. 44: 7 Jur. N. S. 153; *Ernest* v. *Wise*, 9 Jur. N. S. 145: 11 W. R.; 206, V. C. K.; *Nesbitt* v. *Berridge*, 9 Jur. N. S. 1045: 11 W. R. 446, M. R.; *Godfrey* v. *Tucker*, 9 Jur. N. S. 1188: 12 W.R. 33, M. R. And see *Sanders* v. *Benson*, 4 Beav. 350, 357.

on the hearing, as justice requires:[1] it must not however, be supposed that it is not still important to avoid joining a plaintiff who has no interest in the bill.

The plaintiffs in a suit must not only show an interest in the subject-matter, 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;[2] therefore, where a plaintiff, claiming as a devisee in the will of a person who was living, but a lunatic, brought a bill to perpetuate the testimony of witnesses to the will, against the presumptive heir-at-law,[3] and where persons who would have been entitled to the personal estate of a lunatic, if he had been then dead intestate, as his next of kin, supposing him legitimate, brought a bill in the lifetime of the lunatic to perpetuate the testimony of witnesses to his legitimacy, against the Attorney-General, as supporting the rights of the Crown,[4] demurrers were allowed. For the parties in these cases had no interest which could be the subject of a suit: they sustained no character under which they could afterwards sue; and therefore the evidence, if taken, would have been wholly nugatory. Upon the same principle, it has been held that a bill cannot be sustained by a purchaser from a contingent remainderman of his interest in the property, against a tenant for life, for inspection of title-deeds: although a bill would lie for that purpose by a person entitled to a vested remainder.[5] But it must not be supposed that contingent remaindermen can, in no case, be plaintiffs: for in many cases (such as suits for the administration of, or to secure, the trust property to which they are contingently entitled), such persons may properly be plaintiffs;[6] and orders have been made, at the suit of such persons, for the payment of trust funds into Court.[7]

A bill filed by a person who filled the character of tenant in tail in remainder, and his children, to perpetuate testimony to the marriage of the tenant in tail, could not be supported; because the father, being confessedly tenant in tail in remainder, could have no interest whatever in proving the fact of his own marriage, the remainder in tail being vested in him; and the other plaintiffs (the children) were neither tenants in tail nor remaindermen in tail, but the issue of a person who was *de facto* and *de jure* tenant in remainder in tail, having the whole

[1] 15 & 16 Vic. c. 86, s. 49, *ante*. Our Orders 53, 54, 55.

[2] Ld. Red. 156; and see observations of Lord Cottenham, in *Fynden* v. *Stephens*, 2 Phil. 148: 1 C. P. Coop. 329: 10 Jur. 1019; *Davis* v. *Angel*, 31 Beav. 223: 8 Jur. N. S. 709, 1024.

[3] *Sackvill* v. *Aylesworth*, 1 Vern. 105: 1 Eq. Ca. Ab. 234, pl. 3; see also 2 Prax. Alm. 500, where the form of demurrer is set out.

[4] *Smith* v. *Attorney-General*, cited Ld. Red. 157: 1 Vern. 105, n. ed. Raithby: 6 Ves. 255, 260; 15 Ves. 136.

[5] *Noel* v. *Ward*, 1 Mad. 322, 329; and see *Davis* v. *Earl of Dysart*, 20 Beav. 405: 1 Jur. N. S. 743, and cases there cited, for instances of vested remaindermen.

[6] *Roberts* v. *Roberts*, 2 De G. & S. 29: 2 Phil. 534.

[7] *Ross* v. *Ross*, 12 Beav. 89: *Governesses' Benevolent Institution* v. *Rusbridger*, 18 Beav. 467.

interest in him; and consequently, the children had no interest in them, in respect of which they could maintain their bill.[1] Upon the same principle, where the dignity of Earl was entailed upon an individual who died, leaving two sons, the eldest of whom inherited the dignity: upon a bill filed by his eldest son, in his lifetime, against the second son of the first Earl, and the Attorney-General, to perpetuate testimony as to his father's marriage, a demurrer was allowed.[2]

Where the plaintiff does not show an existing interest by his bill, the disclaimer or waiver of one defendant in his favour will not sustain the bill against the other defendants.[3]

Where, however, a party has an interest, "it is perfectly immaterial how minute the interest may be, or how distant the possibility of the possession of that minute interest, if it is a present interest. A present interest, the enjoyment of which may depend upon the most remote and improbable contingency, is, nevertheless, a present estate; and, as in the case upon Lord Berkeley's will,[4] though the interest may, with reference to the chance, be worth nothing, yet it is in contemplation of law an estate and interest, upon which a bill may be supported."[5]

But, although a plaintiff may have a present estate or interest, yet, if his interest is such that it may be barred or defeated by the act of the defendant, he cannot support a bill; as in the case put by Lord Eldon, in *Lord Dursley* v. *Fitzhardinge*,[6] of a remainderman filing a bill to perpetuate testimony against a tenant in tail. To such a bill it seems the tenant in tail might demur, upon the ground that he may at any time bar the entail, and thus deprive the plaintiff of his interest.

A plaintiff must not only show in his bill an interest in the subject-matter of the suit, but he must also make it appear that he has a proper title to institute a suit concerning it;[7] for it very often happens, that a person may have an interest in the subject-matter, and yet, for want of compliance with some requisite forms, he may not be entitled to institute a suit relating to it. Thus, for instance, the executor of a deceased person has an interest in all the personal property of his testator; but, till he has proved the will, he cannot assert his right in a Court of justice; if, therefore, a man files a bill as executor, and does not state in it that he has proved the will, the bill will be liable to demurrer.[8]

[1] *Allan* v. *Allan*, 15 Ves. 130, 135.

[2] *Earl of Belfast* v. *Chichester*, 2 J. & W. 439, 449, 452.

[3] *Griffith* v. *Ricketts*, 7 Hare, 305: 14 Jur. 166, 325; *Hollingsworth* v. *Shakeshaft*, 14 Beav. 492.

[4] *Lord Dursley* v. *Fitzhardinge*, 6 Ves. 251.

[5] Per Lord Eldon, in *Allan* v. *Allan*, 15 Ves. 135; see also *Davis* v. *Angel*, 31 Beav. 223: 8 Jur. N. S. 709, 1024.

[6] 6 Ves. 262; see, however, *Butcher* v. *Jackson*, 14 Sim. 444, and the observations of Sir L. Shadwell, V. C., at p. 455.

[7] Ld. Red. 155.

[8] *Humphreys* v. *Ingledon*, 1 P. Wms. 752.

An executor may, however, it seems, pending an application for probate, file a bill to protect the estate, by obtaining an injunction or otherwise: although he alleges in the bill that he has not yet obtained probate.[1]

Formerly it was necessary to allege, that the will was proved in the proper Ecclesiastical Court, though it was not necessary to mention in what Court;[2] and this still applies to all wills proved before the constitution of the Court of Probate;[3] but since that date, it is conceived that it is sufficient simply to allege that the will has been proved: though in pactice it is usual to allege that it has been proved in Her Majesty's Court of Probate, or that it has been duly proved.

If an executor, before probate, file a bill, alleging that he has proved the will, such allegation will obviate a demurrer;[4] he must, however, prove the will before the hearing of the cause, and then the probate will be sufficient to support the bill, although it bear date subsequently to the filing of it.[5]

In like manner, a plaintiff may file a bill as administrator before he has taken out letters of administration, and it will be sufficient to have them at the hearing.[6]

It is to be observed that, although an executor or administrator may, before probate or administration granted, file a bill relating to the property of the deceased, and such bill will not, on that account, be demurrable, provided the granting of probate or of letters of administration be alleged in the bill, yet a defendant may take advantage of the fact not being as stated in the bill, by answer: thus, in *Simons* v. *Milman*,[7] where letters of administration had been granted to the defendant under the idea that the deceased had died intestate, whereas, in fact, he had made a will and appointed the plaintiff his executor, who, before probate filed a bill, for the purpose of recovering part of the assets of the testator from the defendant, alleging that probate of the will had been granted to him, to which bill the defendant put in an answer stating that such was not the fact; Sir Lancelot Shadwell, V. C., allowed the plea.

But, although an executor, filing a bill before probate, must, as we have seen, allege in it that he has proved the will, it is not necessary that in a bill against an executor such a statement should be made; for if executors elect to act, they are liable to be sued before probate, and

[1] *Newton* v. *Metropolitan Railway Company*, 1 Dr. & Sm. 583: 8 Jur. N. S. 728; see *Rawlings* v. *Lambert*, 1 J. & H. 458; *Steer* v. *Steer*, 13 W. R. 225, V. C. K.

[2] *Humphreys* v. *Ingledon*, 1 P. Wms. 752.

[3] 20 & 21 Vic. c. 77.

[4] *Humphreys* v. *Ingledon*, 1 P. Wms. 752.

[5] *Humphreys* v. *Humphreys*, 3 P. Wms.

[6] *Fell* v. *Lutwidge*, Barn. 320; *Humphreys* v. *Humphreys*, 3 P. Wms. 351; *Horner* v. *Horner*, 23 L. J. Ch. 10 V.C.K.

[7] 2 Sim. 241.

cannot afterwards renounce.[1] It also seems, that if a party entitled by law to take out administration to a deceased person, does not do so, but acts as if he were administrator, and receives and disposes of the property, he will be liable to account as administrator; but in both cases it is necessary to have a duly constituted legal personal representative before the Court.[2]

Where it appears that, in order to complete the plaintiff's title to the subject of the suit or to the relief he seeks, some preliminary act is necessary to be done, the performance of such preliminary act ought to be averred upon the bill, and the mere allegation that the title is complete, without such averment, will not be sufficient; thus, where a plaintiff claimed as a shareholder by purchase, of certain shares in a Joint-Stock Company or Association, alleging in his bill, that he had purchased such shares for a valuable consideration, and had ever since held the same, but it appeared in another part of the bill, that, by the rules of the company or association, no transfer of shares could be valid in Law or Equity unless the purchaser was approved by a board of directors, and signed an instrument binding him to observe the regulations; Lord Brougham allowed a demurrer, on the ground that the performance of the rule above pointed out was a condition precedent, and ought to have been averred upon the bill, and that the allegation of the plaintiff having purchased the shares and being a shareholder, although admitted by the demurrer, was not sufficient to cure the defect.[3]

When a plaintiff claims as heir-at-law, it was formerly considered that he must state in his bill how his title arose;[4] but it is now settled that an allegation that he is heir is sufficient.[5]

Where there is a privity existing between the plaintiff and defendant, independently of the plaintiff's title, which gives the plaintiff a right to maintain his suit, it is not necessary to state the plaintiff's title fully in the bill: thus, where a plaintiff's claim against the defendant arises under a deed or other instrument, executed by the defendant himself, or by those under whom he claims, which recites, or is necessarily founded upon, the existence, in the plaintiff, of the right which he asserts, it is sufficient to allege the execution of the deed by the parties. In like manner, in the case of a bill, by a mortgagor in fee,

[1] *Blewitt* v. *Blewitt*, Younge, 541.

[2] *Creasor* v. *Robinsor*, 14 Beav. 589; 15 Jur. 1049, and the cases there referred to.

[3] *Walburn* v. *Ingilby*, 1 M. & K. 61, 77: see also *Morris* v. *Kelly*, 1 J. & W. 481 *Colburn* v. *Duncombe*, 9 Sim. 151, 154; 2 Jur. 654; *Richardson* v. *Gilbert*, 1 Sim. N. S. 336; 15 Jur. 389: and *Cassell* v. *Stiff*, 2 K. & J. 279, as to the title to be shown to copyright.

[4] *Lord Digby* v. *Meech*, Bunb. 195; *Baker* v. *Harwood*, 7 Sim. 373.

[5] *Barrs* v. *Feukes*, 10 Jur. N. S. 466; 12 W. R. 666, V. C. W.; and see *Delorne* v. *Hollingsworth*, 1 Cox. 421, 422; *Ford* v. *Peering*, 1 Ves. J. 72.

against a mortgagee, to redeem the mortgage, it is sufficient merely to state the mortgage-deed, without alleging that the mortgagor was seized in fee; or if the mortgagor has only a derivative title, it is not necessary to show the commencement of such derivative title, or its continuance: because the right of the plaintiff to redeem, as against the defendant, does not depend upon the title under which he claims, but upon the proviso for redemption in the mortgage-deed. Upon the same principle, where a defendant holds under a lease from the plaintiff, the plaintiff need not set out his title to the reversion; the fact of the defendant having accepted a lease from the plaintiff being sufficient to preclude his disputing the title under which he holds.[1] In like manner, where a man employs another as his bailiff or agent, to receive his rents or tithes, the right to call upon the bailiff or agent for an account does not depend upon the title of the employer to the rents or tithes, but to the privity existing between him and his bailiff or agent; the employer may, therefore, maintain a bill for an account, without showing any title to the rents or tithes in question.

Where, however, the plaintiff's right does not depend upon any particular privity between him and the defendant, existing independently of his general title to the thing claimed, there it will be necessary to show his title in the bill. Thus, where a bill is filed by the lessee of a lay impropriator against an occupier, for an account of tithes, there the right of the plaintiff to the account depends solely upon his title: he must therefore, deduce his title regularly, and show not only the existence of the lease, but that the person from whom it is derived had the fee.[2]

In like manner, where a plaintiff in a bill for specific performance intends to rely on a waiver of title by the defendant, it is not sufficient to allege upon his pleadings the facts constituting the waiver; he must show how he means to use the facts, by alleging that the title has been waived thereby.[3]

The same precision which is required in stating the case of a plaintiff, is not necessary in showing the interest of the defendant against whom the relief is sought; because a plaintiff cannot always be supposed to be cognizant of the nature of the defendant's interest, and the bill must frequently proceed with a view to obtain a discovery of it: thus, where a bill was filed by a lessee for years for a partition, and the plaintiff, after stating his own right to one undivided tenth part, with precision, alleged

[1] If the plaintiff claims as heir, or under a derivative title from the mortgagor or lessor, he must, as in other cases, show how he makes out his title.

[2] *Penny* v. *Hoper*, Bunb. 115; *Burwell* v. *Coates*, *ib.* 129. See *Gordon* v. *Gordon*, 10 Grant. 466.

[3] *Clive* v. *Beaumont*, 1 De G. & S. 397: 13 Jur, 226.

that the defendant was seized in fee simple of, or otherwise well entitled to seven other tenth parts, a demurrer, on the ground that the plaintiff had not set out the defendant's title with sufficient certainty, was overruled.[1] And even where it is evident, from the nature of the case, that a plaintiff 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. Thus, where a bill was filed to redeem a mortgage, but the conveyance was so stated that it did not show that any legal estate had passed to the defendant, a demurrer was overruled: because the defendant could not be permitted to dispute his own title, which was admitted by the plaintiff to be good.[2]

In all cases, however, a bill must show that a defendant is in some way liable to the plaintiff's demand,[3] or that he has some interest in the subject of the suit;[4] otherwise it will be liable to demurrer. Thus, where a bill was brought by the obligee in a bond, against the heir of the obligor, alleging that the heir, having assets by descent, ought to satisfy the bond, a demurrer was allowed, because the plaintiff had not expressly alleged in the bill that the heir was bound in the bond: although it was alleged that the heir ought to pay the debt;[5] so, where a bill was brought against an assignee touching a breach of covenant in a lease, and the covenant, as stated in the bill, appeared to be collateral, and not running with the land, and did not, therefore, bind assignees, and was not stated by the bill expressly to bind assignees, a demurrer by the assignee was allowed.[6] Upon the same principle, where, a bill against *A.* and *B.*, the plaintiff stated a circumstance which was material in order to charge *B.*, not as a fact, but as an allegation made by *A.*, a demurrer by *B.* was allowed.[7]

And here it may be observed that, although it is generally necessary to show that the plaintiff has some claim against a defendant, or that a defendant has some interest in the subject-matter in litigation, yet there are cases in which a bill may be sustained against defendants who have no interest in the subject, and who are not in any manner liable to the demands of the plaintiff. With respect to the persons who are generally included amongst the exceptions to the rule, that persons who have no interest, or against whom no decree can be pronounced, cannot be made parties to a suit, namely, arbitrators, attornies or agents, it will be seen, upon reference to what has been before stated upon this

[1] *Baring* v. *Nash*, 1 V. & B. 551, 552.
[2] *Roberts* v. *Clayton*, 3 Anst. 715.
[3] Ld. Red. 163.
[4] *Ibid.* 160; *Plumbe* v. *Plumbe*, 4 Y. & C. Ex. 345, 350.
[5] *Crosseing* v. *Honor*, 1 Vern. 180.
[6] *Lord Uxbridge* v. *Staveland*, 1 Ves. S. 56.
[7] *White* v. *Smale*, 22 Beav. 72.

subject,[1] that the right to make them parties is confined to cases where relief is, in fact, prayed against them, viz., where they are implicated in fraud or collusion, and it is specifically asked that they may pay the costs: or where they are the holders of a particular instrument, which the plaintiff is entitled to have delivered up.[2]

A bill must not only show that the defendant is liable to the plaintiff's demands, or has some interest in the subject-matter, but it must also show that there is such a privity between him and the plaintiff as gives the plaintiff a right to sue him:[3] for it is frequently the case, that a plaintiff has an interest in the subject-matter of the suit which may be in the hands of a defendant, and yet, for want of a proper privity between them, the plaintiff may not be the person entitled to call upon the defendant to answer his demand. Thus, though an unsatisfied legatee has an interest in the estate of his testator, and a right to have it applied in a due course of administration, yet he has no right to institute a suit against the debtors to his testator's estate for the purpose of compelling them to pay their debts in satisfaction of his legacy:[4] for there is no privity between the legatee and the debtors, who are answerable only to the personal representative of the testator. Upon the same principle, where a bill was filed by the creditors of a person, who was one of the residuary legatees of a testator, against the personal representative, for an account of his personal estate, it was held to be impossible to maintain such a bill.[5] And so, where a creditor of a testator, who had previously been a bankrupt, and had obtained his certificate, brought a bill against the executors for an account, and made the assignees under the testator's bankruptcy parties, for the purpose of compelling them to account to the executor for the surplus of the bankrupt's estate, a demurrer by the assignees was allowed.[6]

It is to be observed, however, that, in cases of collusion between the debtor and the executor, or of the insolvency of the executor, bills by creditors or residuary legatees against debtors to a testator's estate will be entertained;[7] and in the case of *Barker* v. *Birch*,[8] which was a bill by universal legatees under a will, for an account against a debtor to

[1] *Ante.*

[2] *Ante.*

[3] Ld. Red. 158.

[4] *Bickly* v. *Dorrington*, cited Ld. Red. 158, n. (*h.*): Barn. 32: 6 Ves. 749; *Monk* v. *Pomfret*, cited Ld. Red. 158, n. (*h*).

[5] *Elmsley* v. *M'Aulay*, 3 Bro. C. C. 624, 626.

[6] *Utterson* v. *Mair*, 4 Bro. C. C. 270, 276: 2 Ves. J. 95, 97: 6 Ves. 749; *Bickly* v. *Dorrington*, cited Ld. Red. 158. n. (*h*): Barn. 32: 6 Ves. 749.

[7] *Ibid.*; see also *Doran* v. *Simpson*, 4 Ves. 651, 665; *Alsager* v. *Rowley*, 6 Ves. 748; *Troughton* v. *Binkes*, *ib.* 573, 575; *Benfield* v. *Solomons*, 9 Ves. 86; *Burrowes* v. *Gore*. 6 H. L. Ca. 907: 4 Jur. N. S. 1245; *Jerdein* v. *Bright*, 2 J. & H. 325, where the bill was filed against a trustee of a creditor's deed, and a purchaser from him.

[8] 1 De G. & S. 376: 11 Jur. 881.

the testator's estate, Sir J. L. Knight Bruce, V. C., under the circumstances, made a decree for an account, although collusion was not established between the debtor and the personal representative, and there was not any evidence of insolvency on the part of the personal representative, or of his refusal to sue for the debt, other than his omission to institute proceedings for a considerable period.[1]

It seems also, that when persons other than the personal representative of the testator have possessed specific assets of the testator, such persons may be made parties to a suit by a creditor.[2] So also, where it is desirable to have the account of the personal estate entire, a creditor may make the surviving partner of a deceased debtor a defendant to his bill, though no fraud or collusion is alleged;[3] and it seems that a joint creditor may maintain a suit against the representatives of a deceased partner, for satisfaction of his entire demand out of the assets, although the surviving partner is not alleged to be insolvent, and is made a party to the bill.[4] In *Bowsher* v. *Watkins*,[5] it was determined, that residuary legatees may sustain a bill for an account against the executor and surviving partners of the testator, though collusion between the executor and the surviving partners is neither charged nor proved; but it must be shown that the executors have neglected their duty of themselves suing.[6]

It seems, that where it is necessary to allege fraud or collusion, a general allegation of it in the bill will not be sufficient to shut out a demurrer; but that the facts upon which such allegation is founded must be stated, as there is great inconvenience in joining issue upon such a general charge, without giving the defendant a hint of any fact from which it is to be inferred.[7]

With reference to the subject of privity between the plaintiff and defendant, it is to be observed, that the employment of agents or brokers in a transaction does not interfere with the privity between the principals, so as to deprive them of their right to sue each other immediately. Thus, where a principal transmits goods to a factor, he may sue the

[1] See *Bolton* v. *Powell*, 14 Beav. 275; 2 De G. M. & G. 1: 16 Jur. 24; *Saunders* v. *Druce*, 3 Drew. 140.

[2] *Newland* v. *Champion*, 1 Ves. S. 105; see also the report of this case, 2 Coll. 46; and see *Consett* v. *Bell*, 1 Y. & C. C. C. 569: 6 Jur. 869.

[3] *Ibid.*; see also *Gedge* v. *Traill*, 1 R. & M. 281, n.

[4] *Wilkinson* v. *Henderson*, 1 M. & K. 582, 588; *Hills* v. *M'Rae*, 9 Hare, 297: 15 Jur. 766.

[5] 1 R. & M. 277, 283; see also *Law* v. *Law*, 2 Coll. 41: 9 Jur. 745, on appeal 11 Jur. 463; *Travis* v. *Milne*, 9 Hare, 141; *Stainton* v. *Carron Company*, 18 Beav. 146: 18 Jur. 137; and see *Davies* v. *Davies*, 2 Keen, 534, and the observations of Lord Langdale, p. 539, on *Bowsher* v. *Watkins*.

[6] *Stainton* v. *Carron Company*, and *Travis* v. *Milne*, *ubi sup.* Where an executrix neglected to defend a suit, leave was given to the plaintiff, in a suit for the administration of the estate, to do so in her name, *Olding* v. *Poulter*, 23 Beav. 143.

[7] *Benfield* v. *Solomons*, 9 Ves. 86; *Munday* v. *Knight*, 3 Hare, 497, and cases cited in note, p. 501: 8. Jur. 904; *Bothomley* v. *Squire*, 1 Jur. N. S. 694, V. C. K.; *Moss* v. *Bainbrigge*, 3 Jur. N. S. 58, V. C. W.; *Gilbert* v. *Lewis*, 1 De G. J. & S. 38, 49, 50: 9 Jur. N. S. 187.

person who buys of the factor; and where a bill was brought by some merchants against the defendants, to discover what quantity of straw hats he had purchased of their agents, and for payment to them, and not to the agents, a demurrer was overruled:[1] and so, where a merchant, acting upon a *del credere* commission, became bankrupt, having sold goods of his principals for which he had not paid them, and, shortly before his bankruptcy, drew bills on the vendees, which he delivered to some of his own creditors to discharge their demands, they knowing his insolvency, a suit by the principals against the persons who had received the bills, for an account and payment of the produce, was sustained.[2]

A bill must not only show that the plaintiff is entitled to or interested in the subject-matter of the litigation, and is clothed with such a character as entitles him to maintain the suit, and that the defendant is also liable to the relief sought against him, or is in some manner interested in the dispute, and that there is such a privity between him and the plaintiff as gives the plaintiff a title to sue him, but it 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 plaintiff is not entitled to the relief he prays, either in the whole or in part, the defendant may demur. In some of the most ancient bills, as appears by the records, the complainant does not expressly ask any relief, nor any process, but prays the Chancellor to send for the defendant and to examine him; in others, where relief is prayed, the prayer of process is various: sometimes a *habeas corpus cum causa*, sometimes a *subpœna*, and sometimes other writs.[3] Afterwards, the bill appears to have assumed a more regular form, and not only to have prayed the *subpœna* of the Court, but also suitable relief adapted to the case contained in the statement:[4] which is the general form of all bills in modern use; except that, since the late Act, the prayer for *subpœna* is omitted. But although it was the general practice, previously to the late Act, in all cases where relief was sought, to specify particularly the nature of such relief, yet, it seems that such special prayer was not absolutely necessary, and that praying general relief was sufficient:[5] and, in *Partridge* v. *Haycraft*,[6] Lord Eldon said, that he had seen a bill with a simple prayer that the defendant might answer all the matters aforesaid, and then the general prayer for relief.

[1] *Lissett* v. *Reave*, 2 Atk. 394.
[2] *Neuman* v. *Godfrey*, cited Ld. Red. 160: 2 Bro. C. C. 332.
[3] Jud. Auth. M. R. 91, 92; see 1 Spence Eq. Jur. 368, *et seq.*
[4] Jud. Auth. M. R. 91, 92; see 1 Spence Eq. Jur. 368, *et seq.*
[5] *Cook* v. *Martyn*, 2 Atk. 3; *Grimes* v. *French*, *ib.* 141.
[6] 11 Ves. 574.

By the Act to amend the practice of the Court of Chancery it is now provided, that the plaintiff shall pray specifically for the relief which he may conceive himself entitled to, and also for general relief.[1]

The requisites above set out are necessary in every bill which is filed in a Court of Equity for the purpose of obtaining relief. There are other requisites appertaining to bills adapted to particular purposes, which will be hereafter pointed out, as well as those distinctive properties which belong to bills not filed for the purposes of relief. But besides those points which are generally necessary to be attended to in the frame of all bills, as each case must depend upon its own particular circumstances, matters must be introduced into every bill which will occasion it to differ from others, but which it is impossible to reduce under any general rules, and must be left to the discretion of the draftsman. Care, however, must be taken in framing the bill that everything which is intended to be proved be stated upon the face of it: otherwise, evidence cannot be admitted to prove it.[2] This is required, in order that the defendant may be aware of what the nature of the case to be made against him is. The necessity of observing this rule was strongly insisted on by the L. C. B. Richards, in the case of *Hall* v. *Maltby*.[3] And in *Montesquieu* v. *Sandys*,[4] the principle upon which it is founded is strongly illustrated; in that case, a bill was filed to set aside a contract entered into by an attorney for the purchase of a reversionary interest from his client, on the ground of fraud and misrepresentation; the evidence adduced in support of the allegation of fraud, did not, in Lord Eldon's opinion, substantiate the case as laid in the bill: a transaction, however, was disclosed in the evidence which his Lordship appeared to think would have raised a question of considerable importance in favor of the plaintiff, if it had been properly represented upon the pleadings; but as it had not been stated in the bill, he thought it would be far too much to give relief upon circumstances which were not made a ground of complaint upon the record.

It is to be observed in this place, that not only will it be impossible to introduce evidence as to facts which are not put in issue by the bill, but that even an inquiry will not be directed, unless ground for such inquiry is laid in the pleadings.[5] Thus, where a bill was filed for a

[1] 15 & 16 Vic. c. 86, s. 10. Our Order 74 is to the same effect.

[2] *Gordon* v. *Gordon*, 3 Swanst. 472. It is no longer necessary to charge the evidence relied on, except for the purpose of procuring admissions: per Sir W. P. Wood, V. C., *Mansell* v. *Feeney*, 2 J. & H. 313, 318.

[3] 6 Pri. 240, 259.

[4] 18 Ves. 302, 314; see also *Powys* v. *Mansfield*, 6 Sim. 565.

[5] *Holloway* v. *Millard*, 1 Mad. 414, 421; *Scarf* v. *Soulby*, 1 McN. & G. 364, 375; see, however, *Baker* v. *Bradley*, 7 De G. M. & G. 597: 2 Jur. N. S. 99: 2 Sm. & G. 531: 1 Jur. N. S. 489; and see, for cases where enquiries have been directed on suggestions in answer, *M'Mahon* v. *Burchell*, 2 Phil. 127, 132; *Barrett* v. *Stockton and Darlington Railway Company*, 1 H. L. Ca. 34: 11 Cl. & F. 590.

foreclosure, and a motion was made for a reference to the Master, under the 7th Geo. II. c. 20, to inquire into the amount due upon the mortgage, and it was insisted that the Master ought to be directed to take an account of the costs incurred by the plaintiff in certain proceedings in an ejectment at Law which were not alluded to in the bill, the Court held that no such inquiry could be directed, but gave the plaintiff leave to amend his bill in that respect.[1]

It is, moreover, an established doctrine of the Court, that where the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff is not, in general, entitled to a decree by establishing some one or more of the facts, quite independent of fraud, but which might of themselves create a case under a distinct head of Equity from that which would be applicable to the case of fraud, originally stated.[2]

It is right here to observe that, independently of the qualities which have been above pointed out as necessary to bills in general, it is requisite that the object for which a bill is brought should not be beneath the dignity of the Court: for the Court of Chancery will not entertain a suit where the subject-matter of the litigation is under the value of £10; except in cases of charities,[3] or of fraud,[4] or of bills to establish a general right, as in the case of tithes,[5] or other special circumstances.[6] It is said, that the Court will not entertain a bill for land under the yearly value of 40*s.*:[7] but instances occur in the books where bills have been entertained for the recovery of ancient quit-rents, though very small, *viz.*, 2*s.* or 3*s.* per annum.[8] It seems, that if a bill is brought for a demand which, by the rule of the Court, cannot be sued for, the defendant may either demur to it, on the ground that the plaintiff's demand, if true, is not sufficient for the Court to ground a decree upon,[9] or he may (which is the most usual course), move to have the bill dismissed, as below the dignity of the Court.[10] But even if the defendant should take neither of these courses, yet, when the cause comes to a hearing, if it appears that, on an account taken, the balance due to the plaintiff will not amount to the sum of £10, the Court will dismiss the

[1] *Millard* v. *Magor*, 3 Mad. 433.

[2] *Price* v. *Berrington*, 3 M'N. & G. 486: 15 Jur. 999; *Macquire* v. *O'Reilly*, 3 Jo. & Lat. 234; *Ferraby* v. *Hobson*, 2 Phil. 255, 258; *Glascott* v. *Lang*, *ib.* 310, 322; *Wilde* v. *Gibson*, 1 H. L. Ca. 605: Sugd. Law Prop. 632; *Baker* v. *Bradley*, *ubi sup.*

[3] *Parrot* v. *Paulet*, Cary, 103; *Anon.* 1 Eq. Ca. Ab. 75, margin.

[4] Bunb. 17, n.

[5] *Griffith* v. *Lewis*. 2 Bro. P. C. ed. Toml. 407.

[6] Ord. IX. 1. We have no order on this subject. The only provisions relating to it are those of the County Court Equity Act.

[7] 1 Eq. Ca. Ab. 75, margin; *Almy* v. *Pycroft*, Cary, 103.

[8] *Cocks* v. *Foley*, 1 Vern. 359.

[9] *Fox* v. *Frost*, Rep. t. Finch, 253.

[10] Mos. 47, 356; Bunb. 17.

bill.[1] Thus, where, upon a bill being brought relating to tithes, it was clearly admitted that the plaintiff had a right to some tithes of the defendant, but the tithes which were due appeared to be only of the value of £5, Lord Harcourt dismissed the bill at the hearing;[2] and in *Brace* v. *Taylor*,[3] a similar objection was taken, at the hearing, and allowed. But in *Beckett* v. *Bilbrough*,[4] the suit was held to be sustainable, although the sum recovered was only £9, on the ground that the plaintiff, when he filed his bill, must have been justified in supposing that a larger sum would be recovered; and the defendant, who knew the amount, had not given any information respecting it.[5]

A bill must not only be for a subject which it is consistent with the dignity of the Court to entertain, but it must also be brought for the whole subject. The Court will not permit a bill to be brought for part of a matter only,[6] so as to expose a defendant to be harrassed by repeated litigations concerning the same thing; it, therefore, as a general rule, requires that every bill shall be so framed as to afford ground for such a decision upon the whole matter, at one and the same time, as may, as far as possible, prevent future litigations concerning it. It is upon this principle that the Court acts, in requiring in every case, with such exceptions as we have noticed above, the presence, either as plaintiffs or defendants, of all parties interested in the object of the suit. And upon the same principle, it will not allow a plaintiff who has two distinct claims upon the same defendant, or to which the same defendant may eventually prove liable, to bring separate bills for each particular claim, or to bring a bill for one and omit the other, so as to leave the other to be the subject of future litigation. Thus, in *Purefoy* v. *Purefoy*,[7] where an heir, by his bill, prayed an account against a trustee of two several estates, that were conveyed to him for several and distinct debts, and afterwards would have had his bill dismissed as to one of the estates: and have had the account taken as to the other only, the Court decided that an entire account should be taken of both estates: "for that it is allowed as a good cause of demurrer in this Court, that a bill is brought for part of a matter only, which is proper for one entire account, because the plaintiff shall not split causes and make a multiplicity of suits." And so, where there are two mortgages, and more money has been lent upon one of them than the estate is worth, the

[1] Coop. Eq. Pl. 166.

[2] Cited 2 Atk. 253.

[3] 2 Atk. 253.

[4] 8 Hare, 188: 14 Jur. 238.

[5] In *Smith* v. *Matthews*, M. R., 2 July, 1859, the usual decree was made to administer real and personal estate on a bill by a creditor, suing on behalf of all the creditors of the deceased debtor: though his individual debt, as alleged in the bill, was under £5.

[6] Ld. Red. 183.

[7] 1 Vern. 29.

heir of the mortgagor cannot elect to redeem one and leave the heavier mortgage unredeemed, but shall be compelled to take both.[1] Upon the same principle it is held, that "where there is a debt secured by mortgage, and also a bond debt: when the heir of the mortgagor comes to redeem, he shall not redeem the mortgage without paying the bond debt too, in case the heir be bound."[2] The ground of this rule is the prevention of circuity of remedy: for, as the bond of the ancestor, where the heir is bound, becomes, upon the death of such ancestor, the heir's own debt, and is payable out of the real estate descended, it is but reasonable that, where the heir comes to redeem the estate by payment of the principal money and interest, he should at the same time be called upon to pay off the bond; as otherwise, the obligee would be driven to sue him for the recovery of the bond, which in the result might be payable out of the same property that the heir has redeemed.

When it is laid down as a rule, that the Court will not entertain a suit for part of a matter, it must be understood as subject to this limitation, *viz.*, that the whole matter is capable of being immediately disposed of: for if the situation of the property in dispute is such, that no immediate decision upon the whole matter can be come to, the Court will frequently lend its assistance to the extent which the actual state of the case, as it exists at the time of filing the bill, will warrant. Upon this principle Courts of Equity act, in permitting bills for the preservation of evidence *in perpetuam rei memoriam:* which it does upon the ground that, from the circumstances of the parties, the case cannot be immediately the subject of judicial investigation; and if it should appear upon the bill, that the matter to which the required testimony is alleged to relate can be immediately decided upon, and that the witnesses are resident in England, a demurrer would hold.[3] It is upon the same principle that the Court proceeds, in that class of cases in which it acts as ancillary to the jurisdiction of other Courts, by permitting suits for the preservation of property pending litigation in such Courts; or by removing the impediments to a fair litigation before tribunals of ordinary jurisdiction. In all these cases, it is no ground of objection to a bill that it embraces only part of the matter, and that the residue is, or may be, the subject of litigation elsewhere. The preservation of the property, or the removal of the impediments, is all that the Court of Equity can effect; the bill, therefore, in seeking this description of relief, seeks the whole relief which, in such cases, a Court of Equity can give: but if a bill, praying only this description of relief,

[1] *Ibid.*; *Margrave* v. *Le Hooke*, 2 Vern. 207.

[2] *Shuttleworth* v. *Laycock*, 1 Vern. 245; *Anon.* 2 Ch. Ca. 164; and see *Jones* v. *Smith*, 2 Ves. J. 376; see also *Elvy* v. *Norwood*, 5 De G. & S. 240: 16 Jur. 493; *Sinclair* v. *Jackson*, 17 Beav. 405; Fisher on Mort. 381.

[3] Ld. Red. 150.

should disclose a case in which a Court of Equity is capable of taking upon itself the whole decision of the question: in such a case, it is apprehended, the bill would be defective, in not seeking the relief which the plaintiff is entitled to.

With reference to this part of the subject may be noticed the much litigated question, to what extent a person engaged in trade in co-partnership can have relief in Equity against his partners, without praying a dissolution of the partnership; upon this point the decisions were very conflicting. In *Forman* v. *Homfray*,[1] Lord Eldon said he did not recollect an instance of a bill filed by one partner against another, praying an account merely, and not a dissolution: proceeding on the foundation that the partnership was to continue; and observed upon the inconvenience that would result if a partner could come here for an account merely, pending the partnership, as there seemed to be nothing to prevent his coming annually;[2] and in *Loscombe* v. *Russell*,[3] Sir Lancelot Shadwell, V. C., allowed a demurrer to a bill praying the account of a partnership, because it did not pray for a dissolution. In *Harrison* v. *Armitage*,[4] however, a contrary opinion was expressed by Sir John Leach, V. C.; and in *Richards* v. *Davies*,[5] which was a bill by one partner against another, praying for an account of what was due to the plaintiff respecting past partnership transactions, and that the partnership might be carried on under the decree of the Court, His Honor decreed an account of past partnership transactions, but said that he could make no order for carrying on the partnership concerns, unless with a view to a dissolution. In pronouncing his judgment upon that case, the learned Judge observed, that a partner, during the partnership, has no relief at Law for monies due to him on a partnership account; and that, if a Court of Equity refuses him relief, he is wholly without remedy: which would be contrary to the plain principles of justice, and cannot be the doctrine of equity. With respect to the objection that the defendant might be vexed by a new bill, whenever new profits accrued, his Honor said: "What right has the defendant to complain of such new bill, if he repeats the injustice of withholding what is due to

[1] 2 V. & B. 329; and see *Marshall* v. *Colman*, 2 J. & W. 268; Collyer on Partnership, 197; Lindley on Partnership, 752.

[2] It is said by one of the learned reporters, in a note to 2 V. & B. 330, that, in the case of theatres, the Court has refused to take jurisdiction upon any other principle than a dissolution of partnership; *Waters* v. *Taylor*, 15 Ves. 10. But it is to be observed, that theatres are property of a very peculiar description, and that any interference with the management of them by the Court might be productive of irreparable damage and ruin to the parties concerned, and that it is upon this principle that, in *Waters* v. *Taylor*, the Court hesitated to interfere during the existence of the partnership: see 15 Ves. 20. It was said by the Solicitor-General, *arguendo* in *Loscombe* v. *Russell*, that it appeared from the brief in *Forman* v. *Homfray*, that the plaintiff there prayed for an account, which was to be continued until the end of the term of the partnership: 4 Sim. 9.

[3] 4 Sim 8, 10.

[4] 4 Mad. 143, cited in *Loscombe* v. *Russell*, *ubi sup.*

[5] 2 R. & M. 347; and see observations of Lord Cottenham in *Walworth* v. *Holt*, 4 M. & C. 639, *ante*.

the plaintiff? Would not the same objection lie in a suit for tithes, which accrue *de anno in annum?*" It is to be observed, that in the last quoted case of *Richards* v. *Davies*, the case of *Chapple* v. *Cadell*[1] was cited in argument, and is referred to by the reporters as an authority for the position that a decree may be made for partnership accounts without the bill having prayed a dissolution; but, upon reference to the case itself, it will be found that it was one of a very peculiar nature, and that the principal object of the suit was, not an account of the partnership transactions, but, to have a declaration as to the effect of a sale of some shares in a partnership undertaking (the *Globe* newspaper); and that the account of the profits which was decreed was merely the consequence of the declaration of the Court upon that point. The same observation applies to *Knowles* v. *Haughton*,[2] which is also referred to in *Richards* v. *Davies*:[3] there, the bill was filed to establish a partnership in certain transactions, and the sole question in the case was, partnership or no partnership; and the Court being of opinion that a partnership did exist in part of the transactions referred to, as a necessary consequence decreed an account of these transactions.

In *Roberts* v. *Eberhardt*,[4] Sir W. P. Wood, V. C., said: "It is certainly not the ordinary practice of this Court to direct an account between partners, except upon a bill for the dissolution of the partnership concern. It is true that it is not now necessary to ask for a dissolution in every case in which relief is sought respecting partnership affairs; but I apprehend that when a bill seeks an account, that is one of the cases in which a dissolution must be prayed: unless some special ground is raised the general accounts cannot be taken, without asking for the dissolution of the firm." It is conceived that it is now settled that, where the general accounts of the partnership are sought, the bill must pray for a dissolution, except in special cases; but that there are cases in which the Court will interpose, to support as well as to dissolve a partnership: as by appointing a receiver, where the conduct of the defendant is such as to endanger the existence of the partnership concern.[5]

In endeavouring to avoid the error of making a bill not sufficiently extensive to answer the purpose of complete justice, care must be taken not to run into the opposite defect, *viz.*, that of attempting to embrace in it too many objects: for it is a rule in Equity, that two or

[1] Jac. 537.
[2] 11 Ves. 168.
[3] 2 R. & M. 347.
[4] Kay 148, 158.
[5] *Fairthorne* v. *Weston*, 3 Hare, 387, 391: 8 Jur. 353; *Hall* v. *Hall*, 3 M'N. & G. 79, 83: 15 Jur. 363, and cases cited in note to S. C. 12 Beav. 419; *Bailey* v. *The Birkenhead Railway Company*, *ib.* 433, 440: 6 Rail Ca. 256: 14 Jur. 119.

more distinct subjects cannot be embraced in the same suit. The offence against this rule is termed multifariousness, and will render a bill liable to a demurrer.

According to Lord Cottenham, it is utterly impossible, upon the authorities, to lay down any rule or abstract proposition as to what constitutes multifariousness, which can be made universally applicable. The cases upon the subject are extremely various; and the Court, in deciding them, seems to have considered what was convenient in particular cases, rather than to have attempted to lay down an absolute rule. The only way of reconciling the authorities upon this subject is, by adverting to the fact, that although the books speak generally of demurrers for multifariousness, yet in truth such demurrers may be divided into two distinct kinds. Frequently the objection raised, though termed multifariousness, is in fact more properly misjoinder;[1] that is to say, the cases or claims united in the bill are of so different a character, that the Court will not permit them to be litigated in one record. It may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit, and nevertheless those transactions may be so dissimilar, that the Court will not allow them to be joined together, but will require distinct records. But what is more familiarly understood by the term multifariousness, as applied to a bill, is where a party is able to say he is brought as a defendant upon a record, with a large portion of which, and of the case made by which, he has no connection whatever.[2] Thus, where a bill was exhibited by trustees under a trust for sale, against several persons, who were the purchasers of the trust estates, which had been sold to them by auction in different lots, Sir Thomas Plumer, V. C., allowed a demurrer which had been put in by one of the defendants, on the ground that the bill was multifarious. His Honor said: "This Court is always averse to a multiplicity of suits, but certainly a defendant has a right to insist that he is not bound to answer a bill containing several distinct and separate matters, relating to individuals with whom it has no concern."[3] In a subsequent case, where an information and bill were filed for the purpose of setting aside leases, granted by the same trustees at different times to different persons, the same learned Judge held, that if the case had been free from other objections it would have

[1] By the 15 & 16 Vic. c. 86, s. 49, *ante*, objections for misjoinder of plaintiffs are abolished: but this section applies to misjoinder of parties, and not to the misjoinder of subjects mentioned in the text. Our Orders 53, 54, 55.

[2] *Campbell* v. *Mackey*, 1 M. & C. 618; *Crow* v. *Cross*, 7 Jur. N. S. 1298, V. C. S. *Crooks* v. *Smith*, 1 Grant. 356; *Nelson* v. *Robertson*, 1 Grant, 530.

[3] *Brooks* v. *Lord Whitworth*, 1 Mad. 86, 89; see also *Rayner* v. *Julian*, 2 Dick. 677; 5 Mad. 144, n. The marginal note to 2 Dick. 677 is wrong; and see *Rump* v. *Greenhill*, 20 Beav. 512; 1 Jur. N. S. 123; *Aberystwith &c. Railway Company* v. *Piercy*, 12 W. R. 1000, V. C. W.: *Bent* v. *Yardley*, 4 N. R. 50, V. C. W.; *Pyper* v. *Cameron*, 13 Grant 131.

been liable to the charge of multifariousness.[1] The same principle was afterwards acted upon by Lord Eldon, in *Salvidge* v. *Hyde*,[2] where a bill had been filed for an account of a testator's estate, and also to set aside certain sales which had been made by the executor and trustee to himself and another person of the name of Laying, a demurrer to which bill, put in by Laying, had been overruled by Sir John Leach, V. C.[3] The case came on before the Lord Chancellor, by appeal: when his Lordship reversed the judgment of the Vice-Chancellor, and allowed the demurrer: observing, that "when there are trustees to sell, and a bill is filed against them, it is not usual to make the purchasers parties, but to state the contracts and pray an inquiry." His Lordship, however, added, that "there may be cases which cannot be delayed till those inquiries can be made, on account of injury that may be done in the meantime."

It is to be remarked that Sir John Leach, in pronouncing his judgment upon the above demurrer, observed with reference to multifariousness, that "in order to determine whether a suit is multifarious, or in other words contains distinct matters, the inquiry is not whether each defendant is connected with every branch of the cause but whether the plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct. If the object of the suit be single, but it happens that different persons have separate interests in distinct questions which arise out of that single object, it necessarily follows that such different persons must be brought before the Court, in order that the suit may conclude the whole subject."[4] There is no doubt that, in the above observation, the learned judge stated the principle correctly: though in his application of it, he went, in the opinion of Lord Eldon, too far.[5]

Although the administration of the estates of two different persons cannot, in general, be joined in the same suit, where the parties interested in such estates are different, yet, where the same parties claim the benefit of both estates, and they are so connected that the account of one cannot be taken without the other, the joinder of them in the same suit is not multifarious.[6]

[1] *Attorney-General* v. *Moses*, 2 Mad. 294, 305. See *Connor* v. *B. U. C.* 12 Grant. 43.

[2] Jac. 151, 153; and see *Lund* v. *Blandshard*, 4 Hare, 9, 19; *Thomas* v. *Rees*, 1 Jur. N. S. 197, M. R. *Norris* v. *Jackson*, 1 J. & H. 319; 7 Jur. N. S. 540. See *Glass* v. *Munson*, 12 Grant 77.

[3] 5 Mad. 138.

[4] *Salvidge* v. *Hyde*, 5 Mad. 146.

[5] See *Turner* v. *Robinson*, 1 S. & S. 313, 315: S. C., *nom. Turner* v. *Doubleday*, 6 Mad. 94; *Dunn* v. *Dunn*, 2 Sim. 329; *Marcos* v. *Pebrer*, 3 Sim. 466; *Jerdein* v. *Bright*, 2 J. & H. 325. See *Loucks* v. *Loucks*, 12 Grant, 43.

[6] *Campbell* v. *Mackay*, 1 M. & C. 603, 623; *Lewis* v. *Edmund*, 6 Sim. 251, 254; *Rump* v. *Greenhill*, 20 Beav. 512: 1 Jur. N. S. 123; *Attorney-General* v. *Cradock*, 3 M. & C. 85. 93; 1 Jur. 556; *Young* v. *Hodges*, 10 Hare, 158.

This observation leads us to a distinction pointed out by Lord Eldon in the case of *Salvidge* v. *Hyde*,[1] and which has perhaps been extended by later cases. The bill in that case was filed by persons interested under a will, and by creditors of the testator, to set aside two contracts, one of which had been entered into by the trustees for sale of an estate to one of their own number, and the other for the sale of another estate to the defendant Laying; and Lord Eldon, although he thought that the object of setting aside the contract entered into with Laying could not be embraced in a bill to set aside the contract entered into with the trustee, yet held, that if the trustee had purchased for himself, and then Laying had bought the same estate of him, the case would have been different.[2]

From this it may be inferred, that an objection for multifariousness will not be allowed, where the person making the objection has united his case with that of another defendant, against whom the suit is entire and incapable of being separated. And so, in *Benson* v. *Hadfield*,[3] where the plaintiffs had appointed *A.*, *B.*, and *C.* their foreign agents, and *A.* had retired, whereupon the plaintiffs had appointed *B.*, *C.*, and *D.* their agents, and then filed a bill for an account of the two agencies, *A.*, the retiring party, demurred for multifariousness. In giving judgment upon the demurrer, Lord Langdale, M. R., observed: "I can very well conceive a case properly stated, in which it would be quite necessary and it may ultimately be quite necessary in this case, to continue any person who was a partner in one of those agency firms, a party to the cause by which the accounts are to be taken;" but, upon perusal of the bill, he did not find any such allegations as appeared to render it necessary to continue, as parties to the suit, the different persons parties to the transactions, and consequently he allowed the demurrer. In the case of the *Attorney-General* v. *The Corporation of Poole*,[4] where the case against one defendant was so entire as to be incapable of being prosecuted in several suits, but yet another defendant was a necessary party in respect of a portion only of that case, it was decided, that such other defendant could not object to the suit on the ground of multifariousness. And in *Campbell* v. *Mackay*,[5] Lord Cottenham held, that where the plaintiffs have a common interest against all the defendants in a suit as to one or more of the questions raised by it, so as to make them all

[1] Jac. 151.

[2] *Salvidge* v. *Hyde*, Jac. 153.

[3] 5 Beav. 546, 553.

[4] 4 M. & C. 17, 31; 2 Jur. 1080; 8 Cl. & Fin. 409, *nom. Parr* v. *Attorney-General*; see also *Inman* v. *Wearing*, 3 De G. & S. 729, which was a case of foreclosure of three distinct estates, and a prayer to set aside a sale by a prior mortgagee of one of them, as improvident.

[5] 1 M. & C. 603; and see *Attorney-General* v. *Cradock*, 3 M. & C. 85, 95: 1 Jur. 556: *Walsham* v. *Stainton*, 9 Jur. N. S. 1261; 12 W. R. 63, L.JJ. overruling, S. C. 1 H. & M. 323.

necessary parties for the purpose of enforcing that common interest, the circumstance of some of the defendants being subject to distinct liabilities, in respect to different branches of the subject-matter, will not render the bill multifarious. The facts of that case were as follows: Sir James Campbell, by a deed of settlement executed on his marriage with Lady D. L. Campbell, had vested a fund in two trustees, *A.* and B., upon trust for his wife for life, and after her decease in trust for the sons of the marriage who should attain the age of twenty-one years, and daughters who should attain twenty-one years or marry: with a proviso that the persons to be appointed guardians of the children by his will, together with the trustees of the settlement, should have authority to apply the interest, and also, in certain cases, part of the capital, of the children's presumptive shares, towards their maintenance and advancement during their respective minorities. By a second deed, executed after marriage, Sir James Campbell vested another fund in two other trustees, *C.* and *D.*, but upon similar trusts as those of the first settlement: and by his will, after making some specific bequests to his wife, he bequeathed his property to *A.*, *B.*, and *C.*, upon certain trusts for the benefit of his children, and appointed *A.*, *B.*, and *C.*, his executors and guardians of his infant children, in conjunction with their mother. After the death of Sir James Compbell, Lady D. L. Campbell, the wife, together with the children of the marriage, filed a bill against *A.*, *B.*, *C.*, and *D.*, for the accounts and administration of the property comprised in the two deeds and will, to which bill a joint demurrer was put in by *A.*, *B.*, and *C.*, on the ground of multifariousness. The demurrer was, however, overruled, upon argument, by Sir Lancelot Shadwell, V. C., and afterwards by Lord Cottenham upon appeal; his Lordship being of opinion, that the result of the principles to be extracted from the cases was, that where there is a common liability and a common interest, the common liability being in the defendants, and the common interest in the plaintiffs, different grounds of property may be united in the same record.[1]

It should be noticed here, that where the right of a person to call upon the Court for specific relief against another is so encumbered that he cannot assert his own right till he has got rid of that incumbrance, he cannot include the object of getting rid of the incumbrance, in a suit for the specific relief which, but for that incumbrance, he would be entitled to; and that if he attempt to do so by the same suit, his bill will be multifarious. Thus, it was held by Lord Eldon that, when a bill is filed for specific performance, it should not be mixed up with a

[1] See 1 M. & C. 623.

prayer for relief against other persons claiming an interest in the estate; and that, if there is a title in other persons which the plaintiff is bound to get in, he should file a bill for specific performance only, and should fortify the defect in his title, by such means as he can, so as to be enabled to complete it by the time when the contract will have to be enforced.[1]

The principle which renders it improper to mix up, in the same bill, demands against different persons arising out of distinct transactions, renders it improper to include, in one suit, separate infringements of the same patent, by different defendants;[2] and for the same reason, where a copyright has been infringed, bills must be filed against each bookseller taking spurious copies for sale.[3] And so, joint and separate demands cannot be united in the same bill;[4] and although the defendants may be liable in respect of every one of the demands made by the bill, yet they may be of so dissimilar a character as to render it improper to include them all in one suit. The objection, in these cases, is more strictly called misjoinder, and has been before alluded to in the quotation from Lord Cottenham's judgment in *Campbell* v. *Mackay;* where his Lordship observes, that the distinction between misjoinder and multifariousness is clearly exhibited in the case of *Ward* v. *The Duke of Northumberland.*[5] "In that case," said his Lordship, "the plaintiff had been tenant of a colliery under the preceding Duke of Northumberland, and continued also to be tenant under his son and successor, the then Duke; and he filed a bill against the then Duke and Lord Beverley, who were the executors of their father, seeking relief against them in respect of transactions, part of which took place in the lifetime of the former Duke, and part between the plaintiff and the then Duke after his father's decease. To this bill the defendants put in separate demurrers, and the forms of the two demurrers, which were very different, clearly illustrate the distinction above adverted to. The Duke could not say there was any portion of the bill with which he was not necessarily connected; because he was interested in one part of it as owner of the mine, in the other as representing his father. But his defence was, that it was improper to join in one record a case against him as representative of his father, and a case against him arising out

[1] *Mole* v. *Smith*, Jac. 494; *Mason* v. *Franklin*, 1 Y. & C. C. C. 239, 241; see also *Whaley* v. *Dawson*, 2 Sch. & Lef. 367, and *ante*.

[2] The plaintiff should not, however, file an unnecessary number of bills; if he does, the Court will consolidate the suits, or make some equivalent order; see *Foxwell* v. *Webster*, 10 Jur. N. S. 137; 12 W. R. 186, L. C.; 2 Dr. & Sm. 250; 9 Jur. N. S. 1189.

[3] *Dilly* v. *Doig*, 2 Ves. J. 486.

[4] *Harrison* v. *Hogg*, *ib.* 323, 328; as to suing co-executors, separately liable, for contribution, see *Singleton* v. *Selwyn*, 9 Jur. N. S. 1149; 12 W. R. 98, V.C.W.; *Micklethwait* v. *Winstanley*, 13 W. R. 210. L.JJ.

[5] 2 Anst. 469, 476.

of transactions in which he was personally concerned. The form of his demurrer was, that there was an improper joinder of the subject-matters of the suit. Lord Beverley's demurrer again was totally different; it was in the usual form of a demurrer for multifariousness, and proceeded on the ground that, by including transactions which occurred between the plaintiff and the other defendant with transactions between the plaintiff and the late Duke (with the latter of which only Lord Beverley could have any concern), the bill was drawn to an unnecessary length, and the demurring party exposed to improper and useless expense. Both demurrers were allowed, and both, it may be said in a sense, for multifariousness; but it is obvious that the real objection was very different in the two cases. In *Harrison* v. *Hogg*,[1] which was also more properly a case of misjoinder, the plaintiffs endeavoured to unite in one record a demand in which all the plaintiffs jointly had an interest, with a demand in which only one of them had an interest; and the demurrer was allowed upon the ground that the subject-matters were such as, in the opinion of the Court, ought not, according to the rules of pleading, to be included in one suit. In *Saxton* v. *Davies*,[2] the suit prayed an account against the representatives of a bankrupt's assignees and against Davis, a person who claimed through those assignees, and also against a person who had been his assignee under the Insolvent Debtor's Act; and there also the bill was held to be bad for multifariousness."[3]

It is to be observed, that this objection will only apply where a plaintiff claims several matters of different natures by the same bill; and that where one general right only is claimed by the bill, though the defendants have separate and distinct interests, a demurrer will not hold.[4] As where a person, claiming a general right to the sole fishery of a river, files a bill against a number of persons claiming several rights in the fishery, as lords of manors, occupiers of lands or otherwise;[5] so, in a bill for duties, the city of London was permitted to bring several of the persons before the Court, who dealt in those things whereof the duty was claimed, to establish the plaintiff's right to it;[6] and where the lord of a manor filed a bill against more than thirty tenants of the manor, freeholders, copyholders, and leaseholders, who owed rents to the lord, but had confused the boundaries of their several tenements, praying a commission to ascertain the boundaries, and it

[1] 2 Ves. J. 323, 328.
[2] 18 Ves. 72, 80.
[3] 1 M. & C. 619.
[4] Ld. Red. 182.
[5] *Mayor of York* v. *Pilkington*, 1 Atk. 282, cited Ld. Red. 182.
[6] *City of London* v. *Perkins*, 3 Bro, P. C. ed. Toml. 602.

was objected, at the hearing, that the suit was improper, as it brought before the Court many parties having distinct interests, it was answered that the lord claimed one general right, for the assertion of which it was necessary to ascertain the several tenements; and a decree was made accordingly.[1] Upon the same principle it is, that one suit is entertained for tithes against several parishioners. Suits of this kind, however, must all be for objects of the same nature: and if a bill is filed against several defendants for objects of a different nature, although the plaintiff claims them all in the same character, it will be multifarious; thus, if a parson should prefer a bill against several persons, *viz.*, against some for tithes and against others for glebe, it would be liable to demurrer; and so, if the lord of a manor were to prefer one bill against divers tenants for several distinct matters and causes, such as common, waste, several piscary, &c., this would be wrong: though the foundation of the suit, *viz.*, the manor, be an entire thing.[2]

It is to be remarked, that Lord Redesdale appears to confine the meaning of multifariousness to cases where a plaintiff demands several matters of different natures of several defendants by the same bill;[3] but in *Attorney-General* v. *The Goldsmiths' Company*,[4] Sir Lancelot Shadwell, V. C., said: "I apprehend that, besides what Lord Redesdale has laid down upon the subject, there is a rule arising out of the constant practice of the Court, that it is not competent, where *A.* is sole plaintiff, and *B.* is sole defendant, for *A.* to unite in his bill against *B.* all sorts of matters wherein they may be mutually concerned. If such a mode of proceeding were allowed, we should have *A.* filing a bill against *B.*, praying to foreclose one mortgage, and, in the same bill, praying to redeem another, and asking many other kinds of relief with respect to many other subjects of complaint." In that case, the information against the Company stated, that there was a charity for the benefit of young men, being free of the Company, and then alleged that divers other bequests had been made to the Company for the purpose of making loans to young men for their advancement in business or life, and prayed that the first-mentioned charity, and all other (if any) like gifts and bequests to the Company might be established, and that the due performance of the charitable trusts might be enforced for the future; and the Vice-Chancellor, upon a demurrer being put in to the information, because it was exhibited for several and distinct matters which ought not to be joined together in one information, held the information to be multifarious, and allowed the demurrer.

[1] *Magdalen Coll.* v. *Athill*, cited Ld. Red. 183.

[2] *Berke* v. *Harris*, Hardre, 337.

[3] Ld. Red. 181.

[4] 5 Sim. 670, 675; and see *Attorney-General* v. *The Corporation of Carmarthen*, G. Coop. 30; *Attorney-General* v. *St. Cross Hospital*, 17 Beav. 435.

It should be noticed that, in the above case, there was nothing in the information to show that the character of the bequest was *homogeneous*, and that his Honor held, that if there had been any allegation to show that they were of that character, although there might be minute differences between the bequests, they might all have been comprised in the same information.[1] Thus, in the case of *Attorney-General* v. *The Merchant Tailors' Company*,[2] where the information prayed the establishment or regulation of a great number of different charitable gifts, which were stated in the information to have been made to the Company, by way of bequest or otherwise, on trust to lend out the same to freemen of the Company, or upon some other like or corresponding trust, for the benefit or advancement of freemen in trade or business: the number of charities in respect of which the relief was sought by the information was eight; but as they were to be applied mainly and substantially for the same objects, and it appeared upon the information that, owing to the minuteness of the sums, each of them could not be administered as the donors pointed out, Sir Lancelot Shadwell, V. C., thought that the Court ought, at the hearing, to deal with them conjointly, and that the information was not multifarious. On appeal, Lord Brougham concurred with this decision, as to seven of the charities, and gave leave to amend the bill by adding parties or waiving relief as to the eighth.[3]

From the above cases it may be deduced, that a plaintiff cannot join in his bill, even against the same defendant, matters of different natures, although arising out of the same transaction; yet, when the matters are *homogeneous* in their character, the introduction of them into the same bill will not be multifarious: and it is to be observed, that this distinction will not be affected by the circumstance of the plaintiff claiming the same thing under distinct titles, and that the statement of such different titles in the same bill will not render it multifarious. Thus, where a bill was filed for tithes by the rector of a parish in London, in which the title was laid under a decree made pursuant to the 37th Hen. VIII. c. 12, by which payment of tithes was decreed in London at the rate of 2*s.* 9*d.* in the pound on the rents, with a charge that, in case such decree should not be deemed binding, the plaintiff was entitled to a similar payment, under a previous decree, made in the year 1535, and confirmed by the same Act; and in case neither of the said decrees were binding, the bill charged that the plaintiff was entitled, by ancient usage and custom from time immemorial, to certain

[1] See 5 Sim. 676.
[2] 5 Sim. 288.
[3] 1 M. & K. 189, 192.

dues and oblations calculated according to rent at 2*s.* 9*d.* in the pound: a demurrer for multifariousness was overruled.[1]

As a bill by the same plaintiff against the same defendant for different matters would be considered multifarious, so, *a fortiori*, would a bill by several plaintiffs, demanding distinct matters, against the same defendants.[2] Thus, if an estate is sold in lots to different purchasers, the purchasers cannot join in exhibiting one bill against the vendor for a specific performance; for each party's case would be distinct, and there must be a distinct bill upon each contract.[3] Upon the same principle, where the heir and next of kin of an intestate, who was an infant, was joined with his sister, who was the other next of kin, as plaintiff in a bill against the widow, who had taken out administration to the intestate's effects, and had also taken possession of the real estate, as guardian to the infant heir, for an account both of the real and personal estate, Sir Lancelot Shadwell, V. C., allowed a demurrer for multifariousness, on the ground that the interests in the real and personal estate were distinct from each other.[4] But it has been decided, that a bill does not become multifarious because all the plaintiffs are not interested to an equal extent; as in *Knye* v. *Moore*,[5] where a bill was filed by a woman and her children to compel the delivery up of a deed, by which the defendant had made a provision for the woman (with whom he had cohabited), and her children, and which had been executed in pursuance of an agreement, whereby he was bound, besides the execution of the deed, to pay to the woman an annuity for her life, an account of which was also sought by the bill: it was objected, upon demurrer, that the bill was multifarious, because, besides seeking the performance of the agreement under which the mother alone was entitled, it joined to that the claim for the deed, in which she was interested jointly with her children: but Sir John Leech, V. C., thought that, the whole case of the mother being properly the subject of one bill, the suit did not become multifarious because all the plaintiffs were not interested to an equal extent.[6]

And so, where several persons claim under one general right, they may file one bill for the establishment of that right, without incurring

[1] *Owen* v. *Nodin*, M'Lel. 238: 13 Pri. 478; and see *Boyd* v. *Moyle*, 2 Coll. 316, 323, where a bill to restrain two actions relating to the same matter was held not to be multifarious; see also *Davis* v. *Cripps*, 2 Y. & C. C. C. 430, 434.

[2] *Jones* v. *Garcia del Rio*, T. & R. 297, 301.

[3] *Hargreaves* v. *Wright*, 10 Hare, App. 56; and see *Hudson* v. *Maddison*, 12 Sim. 416, 418: 5 Jur. 1194, which was the case of a bill by several persons to restrain a nuisance. See, however, *Pollock* v. *Lester*, 11 Hare, 266, where it was held that, in a similar case, it was no misjoinder, and within the provisions of 15 & 16 Vic. c. 86, s. 49. And see our Orders 53, 54, 55.

[4] *Dunn* v. *Dunn*, 2 Sim. 329; *Maud* v. *Acklom*, *ib.* 331; *Exeter College* v. *Rowland*, 6 Mad. 94. See, however, *Sanders* v. *Kelsey*, 10 Jur. 833, V. C. E.; *Innes* v. *Mitchell*, 4 Drew. 57: 3 Jur. N. S. 756; *Thomas* v. *Rees*, 1 Jur. N. S. 197, M. R.

[5] 1 S. & S. 61, 64.

[6] See observations on this case in *Dunn* v. *Dunn*, 2 Sim. 331.

the risk of a demurrer for multifariousness, although the title of each plaintiff may be distinct; thus, in *Powell* v. *The Earl of Powis*,[1] where the freehold tenants of a lordship having rights of common over certain lands, the lord approved parts of the common lands and granted them to other persons, but the tenants prostrated the fences, upon which actions of trespass were brought against them, and they filed a bill in the Court of Exchequer, in the nature of a bill of peace, against the lord and his grantees, to be quieted in the enjoyment of their commonable rights, a general demurrer was overruled: the Court being of opinion, that the objection that the plaintiffs might each have a right to make a separate defence to the actions at Law, was not valid, as there was one general question to be settled, which pervaded the whole.

The proper way in which to take advantage of multifariousness in a bill is by demurrer: and it is too late to object to a suit, on that ground, at the hearing.[2] It seems, however, from the report of the judgment of Sir John Leach, M. R., in *Greenwood* v. *Churchill*,[3] that the objection may be taken by answer, and that though the defendants are precluded from raising the objection at the hearing, the Court itself will take the objection, if it thinks fit to do so, with a view to the order and regularity of its proceedings.

Great care must be taken, in framing a bill, that it does not contain statements or charges which are scandalous or impertinent: for, if it does, it may be objected to by the defendant.[4] Any proceeding before the Court may be objected to for scandal or impertinence, and the scandalous matter expunged: with costs to the party aggrieved.[5]

Scandal consists in the allegation of anything 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:[6] to which may be added, that any unnecessary allegation, bearing cruelly upon the moral character of an individual, is also scandalous.[7]

There are many cases, however, in which, though the words in the record are very scandalous, yet, if they are material to the matter in dispute, and tend to a discovery of the point in question, they will not be considered as scandalous: for a man may be stated on the record to be guilty of a very notorious fraud, or a very scandalous action, as in

[1] 1 Y. & J. 159.
[2] *Ward* v. *Cooke*, 5 Mad. 122; *Wynne* v. *Callander*, 1 Russ. 293, 296; *Powell* v. *Cockerell*, 4 Hare, 557, 562.
[3] 1 M. & K. 559.
[4] Ord. 69.
[5] *Erskine* v. *Garthshore*, 18 Ves. 114; *Ex parte Le Heup*, *ib.* 221, 223.
[6] Wyatt's P. R. 383.
[7] Per Lord Eldon, in *Ex parte Simpson*, 15 Ves. 476; and see *Coffin* v. *Cooper*, 6 Ves. 514.

the case of a brokerage bond, given before marriage, to draw in a poor woman to marry; or where a man falsely represents himself to have a great estate, when in fact he is a bankrupt; or where one man is personated for another; or in the case of a common cheat, gamester, or sharper about the town: in these, and many other instances, the allegations may appear to be very scandalous, and not fit to remain on the records of the Court; and yet, perhaps, without having an answer to them, the party may lose his right; the Court, therefore, always judges whether, though matter be *prima facie* scandalous, it is or is not of absolute necessity to state it: and if it materially tends to the point in question,[1] and is become a necessary part of the cause, and material to the defence of either party, the Court never looks upon this to be scandalous.[2] Were it otherwise, it would be laying down a rule that all charges of fraud are scandalous: which would be dangerous.[3] Upon this principle, therefore, it has been determined, that if a bill be filed by a *cestui que trust* for the purpose of removing a trustee, it is not scandalous or impertinent to challenge every act of the trustee as misconduct, or to impute to him corrupt or improper motives, in the execution of the trust, or 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.[4] It is to be observed, however, that in such case it would be impertinent, and might be scandalous, to state any circumstance as evidence of general malice or personal hostility, without connecting such circumstance with the acts of the trustee which are complained of: because the fact of the trustee entertaining general malice or hostility against the plaintiff, affords no necessary or legal inference that his conduct in any particular instance results from such motive.

It has been decided, that under a general charge of immorality, evidence of particular instances of misconduct may be introduced. Where, therefore, such evidence can be made use of under the general charge, the specific instances should not, if it can be avoided, be introduced into the bill; thus, it is improper, in a suit which is founded upon the want of chastity in a particular individual, as in cases of bills to set aside securities given *turpi consideratione*, to charge particular instances of levity which might affect the character of strangers, and to fill the record with private scandal: because evidence of these partilar instances may be given under the general charge.[5]

[1] *Everett* v. *Prythergch*, 12 Sim. 365, 367; *B.* v. *W.*, 31 Beav. 342; S. C., *nom.* *A.* v. *B.*, 8 Jur. N. S. 1141.

[2] Gilb. For. Rom. 207.

[3] *Fenhoulet* v. *Passavant*, 2 Ves. S. 24.

[4] *Earl of Portsmouth* v. *Fellows*, 5 Mad. 450; and see *Anon.* 1 M. & C. 78; *Lord St. John* v. *Lady St. John*, 11 Ves. 526, 539; *Reeves* v. *Baker*, 13 Beav. 436.

[5] *Whaley* v. *Norton*, 1 Vern. 483; *Clarke* v. *Periam*, 2 Atk. 333, 337.

From what has been said before, it may be collected that, although nothing relevant can be scandalous, matter in a bill may be impertinent without being scandalous.[1] Impertinences are described by Lord Chief Baron Gilbert to be, "where the records of the Court are stuffed with long recitals, or with long digressions of matter of fact, which are altogether unnecessary and totally immaterial to the matter in question: as where a deed is unnecessarily set forth *in hæc verba*."[2]

It is to be observed, that neither scandal nor impertinence, however gross it may be, is a ground of demurrer: it being a maxim of pleading that *utile per inutile non vitiatur*.[3] Where, however, there is scandal in a bill, the defendant is entitled to have the record purified by expunging the scandalous matter; and it was formerly the same with reference to impertinent matter. In order that this might be done, the course formerly was for the defendant to move the Court for an order to have the bill referred to a Master to report whether it was scandalous or impertinent. This reference was obtained of course, and being general, without specifying the particular passages objected to,[4] obviously precluded the party, whose pleading was alleged to be scandalous and impertinent, from exercising any judgment upon the subject, much less from submitting to have the objectionable passages expunged. To remedy this it was provided by a General Order of the Court, that no order should be made for referring any pleading, or other matter for scandal or impertinence, unless exceptions were taken in writing, to the particular passages complained of.[5]

The practice of excepting to bills, answers, and other proceedings for impertinence has been abolished: the Court may, however, direct the costs occasioned by any impertinent matter introduced into any proceeding, to be paid by the party introducing the same, upon application being made to the Court for that purpose:[6] such application to be made at the time when the Court disposes of the costs of the cause or matter, and not at any other time.[7] The Court may also, without any application being made, declare that any pleading, petition or affidavit, is improper or of unnecessary length; or may direct the taxing master to distinguish what part thereof is improper, or of unnecessary length.[8]

[1] *Fenhoulet* v. *Passavant*, 2 Ves. S. 24.

[2] Gilb. For. Rom. 209: and see *Norway* v. *Rowe*, 1 Mer. 135; *Lowe* v. *Williams*, 2 S. & S. 574; *Bally* v. *Williams*, 1 M'L. & Y. 334; *Slack* v. *Evans*, 7 Pri. 278, n.; *Gomperlz* v. *Best*, 1 Y. & C. Ex. 114, 117; *Byde* v. *Masterman*, C. & P. 265, 271: 5 Jur. 643: *Attorney-General* v. *Rickards*, 6 Beav. 444, 449: 1 Phil. 383, 386: 7 Jur. 362; S. C.. *nom. Rickards* v. *Attorney-General*, 12 Cl. & F. 30: 9 Jur. 383; *Allfrey* v. *Allfrey*, 14 Beav. 235: 15 Jur. 831.

[3] See Broom's Maxims, 602.

[4] Harr. by Newl. 43: 1 T. & V. 519.

[5] 38th Ord. May, 1845: Sand. Ord. 998: afterwards the 23rd Ord. Nov., 1850, was substituted: 12 Beav. xxvii.

[6] 15 & 16 Vic. c. 86, s. 17. See *Dufour* v. *Sigell*, 4 De G. M. & G. 520, 526. Our Order 71.

[7] Ord. XL. 11. Our Order 71 is similar.

[8] Ord XL. 9. As to this Ord. see *Moore* v. *Smith*, 14 Beav. 396; *Mayor of Berwick* v. *Murray*, 7 De G. M. & G. 497: 3 Jur. N. S. 1, 5; and for form of Order thereunder, see Seton 89, No. 17. Our Order 71 is similar.

By No. 6 of our Con. G. Orders, exceptions to bills, answers, or other proceedings for scandal or impertinence, are abolished. By Order 69, it is provided that, "If upon the hearing of a cause or matter, the Court is of opinion, that any pleading, petition, or affidavit, or any part of such pleading, petition, or affidavit, is scandalous, the Court may order such pleading, petition, or affidavit, to be taken off the file, or may direct the scandalous matter to be expunged, and is to give such direction as to costs as it may think right." Order 70, declares that "A motion to have any pleading, petition, or affidavit taken off the file for scandal, or to have the scandalous matter expunged, may be made at any time before the hearing of the cause or matter." And Order 71, provides that, "If upon the hearing of a cause or matter the Court is of opinion that any pleading, petition, or affidavit, is of unnecessary length, the Court may either direct payment of a sum in gross or in lieu of taxed costs therefor, or it may direct the taxing officer to look into such pleading, petition or affidavit, and to distinguish what part or parts thereof is or are of unnecessary length, and to ascertain the costs, occasioned to any party by any unnecessary matter: and the Court is to make such order as it thinks just, for the payment, set-off, or other allowance of such costs, by the party or his solicitor.

It appears to have been formerly the opinion that, in cases of scandal, "the Court itself was concerned to keep its records clean, and without dirt or scandal appearing thereon;"[1] and in *Ex parte Simpson*,[2] Lord Eldon said that, with reference to the subject of scandal in proceedings either in causes or in bankruptcy, he did not think that any application by any person was necessary: and that the Court ought to take care that, either in a suit or in a proceeding in bankruptcy, allegations bearing cruelly upon the moral character of individuals, and not relevant to the subject, should not be put upon the record.

As this is the first occasion upon which it has been necessary to refer to the time allowed in procedure, it will be convenient to state here some general rules concerning the manner in which such periods are to be computed.

Order 406, of our Con. G. Orders, provides that, "Where any time, limited from or after any date or event, is appointed or allowed for doing an act, or taking a proceeding, the computation of such time is not to include the day of such date, or of the happening of such event, but is to commence at the beginning of the next following day; and the

[1] 2 P. Wms. 312, *Arg.*

[2] 15 Ves. 476, 477. As to scandal in a proceeding under the summary jurisdiction, see *Re Gornall* 1 Beav. 226.

act or proceeding is to be done or taken at the latest on the last day of such limited time, according to such computation." Order 407, that "Where the time for doing an act, or taking a proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding is, so far as regards the time of doing or taking the same, to be held to be duly done or taken, if done or taken on the day on which the offices shall next open." Our order 412, directs that "The power of the Court, and of a Judge in Chambers, to enlarge or abridge the time for doing an act, or taking a proceeding in any cause or matter, upon such (if any) terms as the facts of the case may require, or to give any special directions as to the course of proceeding in any cause or matter, is unaffected by these orders." By order 7, it is declared, that the word "month" means calendar month; but by a declaratory order of 17th October, 1868, the word "month" used in Order 88, and 120, is to be read as "lunar" month.

As a general rule, the costs occasioned by scandalous matter, and of the application to have it expunged, follow the decision; but they should be asked for when the application is heard.[1]

Section V.—*The Form of the Bill.*

Having thus endeavoured to point out the matter of which a bill in Equity ought to consist, it remains to direct the reader's attention to the form.

The form of an original bill commonly used, previously to the late Act, according to the analysis of Lord Redesdale,[2] consisted of nine parts: some of which, however, were not essential, and might be used or not, at the discretion of the person who prepared it.[3] These nine parts were as follows:—

I. The address to the person or persons holding the Great Seal.

II. The names and addresses of the parties complainant.

III. The statement of the plaintiff's case, commonly called the *stating part.*

IV. The charge that the defendant unlawfully confederated with others to deprive the plaintiff of his right.

[1] *Muscott* v. *Halhed*, 4 Bro. C. C. 222; *Joddrell* v. *Joddrell*, 12 Beav. 216.
[2] Ld. Red. 42.
[3] Ld. Red. 47.

V. The allegation that the defendants intend to set up a particular sort of defence, the reply to which the plaintiff anticipates by alleging certain facts which will defeat such defence. This was usually termed the *charging part*, from the circumstance that the plaintiff's allegations were usually introduced by way of charge, instead of statement.

VI. The statement that the plaintiff has no remedy without the assistance of a Court of Equity: which was termed the *averment of jurisdiction*.

VII. The *interrogating part*, in which the stating and charging part were converted into interrogatories, for the purpose of eliciting from the defendant a circumstantial discovery, upon oath, of the truth or falsehood of the matters stated and charged.

VIII. The *prayer for relief*, adapted to the circumstances of the case.

IX. The *prayer that process* might issue, requiring the defendant to appear and answer the bill: to which sometimes was added a prayer for a provisional writ, such as an injunction or a *ne exeat regno*, for the purpose of restraining some proceedings on the part of the defendant, or of preventing his going out of the jurisdiction till he had answered the bill. And as against some of the defendants, this part sometimes contained a prayer that such parties might, upon being served with a copy of the bill, be bound by all the proceedings in the cause.

The form of a bill has, however, been materially altered by the Chancery Amendment Act of 1862, by which, as we have seen,[1] it is enacted that every bill "shall contain, as concisely as may be, a narrative of the material facts, matters, and circumstances, on which the plaintiff relies: such narrative being divided into paragraphs, numbered consecutively: and each paragraph containing, as nearly as may be, a separate and distinct statement or allegation; and shall pray specifically for the relief which the plaintiff may conceive himself entitled to, and also for general relief."[2]

A bill, as ordinarily framed, may now be said to consist of the first, second, third, and eighth parts above enumerated only; the charging part is indeed, still occasionally inserted, but it is rather as part of the narrative than as a separate part, and the allegations are, by most draftsmen, introduced as statements, and not by way of charge; so that, practically, this part may now be considered as included in the stating part.[3] The averment of jurisdiction is also still sometimes inserted, but it may also, when inserted, be considered as a portion of the stating

[1] *Ante.*

[2] 15 & 16 Vic. c. 86, s. 10. The present form of bill appears to be a return to the more ancient form. See *Partridge* v. *Haycraft*, 11 Ves. 574.

[3] See *Mansell* v. *Feeney*, 2 J. & H. 313, 318.

part. The fourth part, or charge of confederacy, gradually became disused, and is now universally omitted; the seventh, or interrogating part, is now omitted by express enactment;[1] and the ninth part, or prayer for process, is also omitted: the writ of *subpœna* to appear and answer the bill having been abolished.[2] The prayer for an injunction, or a *ne exeat regno*, or that certain formal parties may be bound upon being served with a copy of the bill, is inserted when it forms part of the relief adapted to the circumstances of the case; but then it properly forms a portion of the eighth part.

Our Order 74 provides that "A bill of complaint is to be in the form of a petition addressed 'To the Honourable the Judges of the Court of Chancery.' It must contain

"I. The name and description of each party complainant.

"II. The name of each party defendant.

"III. The name of the place at which witnesses are intended to be examined.

"IV. A statement of the plaintiff's case in clear and concise language.

"V. A prayer for the specific relief to which the plaintiff supposes himself entitled; but the prayer for general relief may be added."

Order 75 declares that "In the cases enumerated in Schedule B., hereunder written, the bill of complaint may be in the form, or to the effect set forth in that schedule as applicable to the particular case: and, in cases not enumerated in that schedule, forms of pleading similar in principle may be adopted whenever a more detailed statement is not necessary for the full developement of the case." And by Order 76, "A bill of complaint is not to contain any interrogatories: all merely formal facts, except the address and conclusion, are to be omitted; and the signature of Counsel is unnecessary." The absence of a venue in the margin of a bill is not a cause of demurrer: nor is a description of the premises which omits the Township or County. *It seems*, that no venue being stated in the margin of the bill is an irregularity, and may be taken advantage of by motion to compel the insertion of a venue.[3]

The attention of the reader will, therefore, be confined to the four parts above enumerated, as the distinct parts of which a bill now consists.

[1] 15 & 16 Vic. c. 86, s. 10, and by our Order 76.
[2] Ibid s. 2. Our Order 6.
[3] *Duncan* v. *Gearu*. 10 Grant 34.

1. *Address of the Bill.*

Every bill must, by the English practice, be addressed to the person or persons who have the actual custody of the Great Seal at the time of its being filed: unless the seals are in the Queen's own hand, in which case the bill must be addressed "*To the Queen's Most Excellent Majesty in her High Court of Chancery.*"[1]

If the Lord Chancellor or Lord Keeper himself be a party, the bill must, in like manner, be addressed to the Queen;[2] but in all other cases, including a case where the Master of the Rolls is a party,[3] the bill must be directed to the Lord Chancellor, or other person having the custody of the Great Seal.

Upon every change in the custody of the Great Seal, or alteration in the style of the person holding it, notice of the form in which bills are to be addressed is put up in the Record and Writ Clerk's office. In this Province the Bill is addressed "To the Honourable the Judges of the Court of Chancery."

2. *Names and Addresses of the Plaintiffs.*

It is not only necessary that the names of the several complainants in a bill should be correctly stated, but the description and place of abode of each plaintiff must be set out, in order that the Court and the defendants may know where to resort to compel obedience to any order or process of the Court, and particularly for the payment of any costs which may be awarded against the plaintiffs, or to punish any improper conduct in the course of the suit.[4]

It seems that a demurrer will lie to a bill which does not state the place of abode of the plaintiff; and that if the bill describes the plaintiff as residing at a wrong place, the fact may be taken advantage of by plea; though a defendant cannot put in such a plea, after a demurrer, upon the same ground, has been overruled, without leave of the Court.[5]

[1] 2 West Symb. 194, b.

[2] 4 Vin. Ab. 385; Leg. Jud. in Ch. 44, 258; Jud. Auth. M. R. 179, 182; Ld. Red. 7; Coop. Eq. Pl. 23. Braithwaite's Pr. 20. In 1 Prax. Alm. 463, is a precedent of a bill by Lord Chancellor Jefferies, addressed to the King's Most Excellent Majesty, and praying his Majesty to grant the usual process of *Subpœna*; and in Vol. II. of the same book, 310, is to be found an answer to the same bill. The final decree in such cases is, "*By the Queen's Most Excellent Majesty, in her High Court of Chancery*," and is signed by her: Leg. Jud. in Ch. 254, 256. In *Lord Keeper* v. *Wyld*. 1 Vern. 139, where Lord Keeper Guildford and others were plaintiffs, the Master of the Rolls and one of the Chief Justices sat to decide the cause: Coop. Eq. Pl. 23.

[3] See Leg. Jud. in Ch. 44, where it is stated that in the bundle of Chancery parchments in the Tower, there is a bill by Moreton, Keeper of the Rolls, directed to the Right Rev. Father in God, Robert, Bishop of Bath and Wells: Coop. Eq. Pl. 23, n. (*p*).

[4] Ld. Red. 42. And see, as to what is a sufficient description, *Griffith* v. *Ricketts*, 5 Hare, 195; *Sibbering* v. *Earl of Balcarras*, 1 De G. & S. 683: 12 Jur. 108.

[5] *Rowley* v. *Eccles*, 1 S. & S. 511; *Smith* v. *Smith*, Kay, App. 22. In *Bainbrigge* v. *Orton*, 20 Beav. 28, however, Sir John Romilly, M. R., appears to have doubted whether such a plea can be maintained; and if such a plea is bad, so, it is apprehended, would a demurrer be, where no address is stated. It is to be observed that, in *Rowley* v. *Eccles*, the demurrer was overruled, and in *Smith* v. *Smith* the plea disallowed. See, however, *Sibbering* v. *Earl of Balcarras*, *ubi sup.* The reader will bear in mind that "pleas" being abolished in our Court, and "answers" substituted, the English cases referring to a "plea" will apply here by reading "answer" where the word "plea" is used.

The modern practice, however, in such cases, is not to demur, or plead to the bill, but to apply by special motion,[1] on notice to the plaintiff, that he may give security for costs, and that in the meantime proceedings in the suit may be stayed.[2] Thus, in *Simpson* v. *Burton*,[3] Lord Langdale, M. R., said: "There can be no doubt, that it is the duty of a plaintiff to state his place of residence, truly and accurately at the time he files his bill; and if, for the purpose of avoiding all access to him, he wilfully misrepresents his residence, he will be ordered to give security for costs. I do not think the rule extends to a case where he has done so innocently, and from mere error."[4] It is to be observed, that, in this case, all the plaintiffs were incorrectly described in the bill; but there does not appear to be any decision upon the point, where there have been several plaintiffs, one or more of whom are correctly described, and the rest not so. It is presumed, however, from analogy to the practice where there are several plaintiffs, one only of whom is resident abroad,[5] that the Court would not, in such case, require those plaintiffs who are not properly described to give security.

Where a bill is filed on behalf of an infant, or person of unsound mind not so found, it is not necessary or usual to describe the plaintiff by his place of abode;[6] because an infant or person of unsound mind is not responsible either for costs or for the conduct of the suit; the description and place of abode of the next friend must, however, be set out. In the case of a married woman suing by her next friend, it is usual, but not essential, to set out the address of the married woman, but the address of the next friend must be stated;[7] and where a married woman sues as a *feme sole*, that fact must be stated in this part of the bill.

The address of a peer of the realm or of a corporate body, suing as plaintiff, need not be stated in the bill.[8]

A plaintiff in a cross bill is not required to give security for costs on the ground of insufficient description of residence.[9]

The defendant should apply that the plaintiff may give security for

[1] *Tynte* v. *Hodge*, 2 J. & H. 692.

[2] *Sandys* v. *Long*, 2 M. & K. 487; see also *Bailey* v. *Gundry*, 1 Keen, 53; *Campbell* v. *Andrews*, 12 Sim. 578; *Bainbrigge* v. *Orton*, 20 Beav. 28.

[3] 1 Beav. 556.

[4] See also *Waits* v. *Kelly*, 6 W. R. 206, V. C. W.; *Smith* v. *Cornfoot*, 1 De G. & S. 684; 12 Jur. 260; *Griffith* v. *Ricketts*, 5 Hare, 195; *Player* v. *Anderson*, 15 Sim. 104; *Manby* v. *Bewicke*, 8 De G. M. & G. 468: 2 Jur. N. S. 671; *Kerr* v. *Gillespie*, 7 Beav. 269; *Knight* v. *Cory*, 9 Jur. N. S. 491: 11 W. R. 254, V. C. W.

[5] See *ante*.

[6] Braithwaite's Pr. 25.

[7] Braithwaite's Pr. 21, 25. If the next friend of a plaintiff be undescribed in the bill, he may, on special application by motion, be ordered to give security for costs; see *Kerr* v. *Gillespie*, and *Waits* v. *Kelly*, *ubi sup.*

[8] Braithwaite's Pr. 25.

[9] *Wild* v. *Murray*, 18 Jur. 892, V. C. W.; see also *Vincent* v. *Hunter*, 5 Hare, 320; *Watteau* v. *Billam*, 3 De G. & S. 516: 14 Jur. 165; *Sloggett* v. *Viant*, 13 Sim. 187.

costs as soon as he becomes aware of the fact that the plaintiff's address is incorrectly stated in the bill; and if the defendant takes any active steps in the cause after he becomes so aware, and before applying, it will be a waiver of his right to security.[1]

Where a plaintiff sues as executor or administrator, it is not necessary so to describe himself in this part of the bill: though, as we have seen before, it is necessary that it should appear in the stating part that he has duly proved the will or obtained administration, as the case may be.[2]

Where a plaintiff sues on behalf of himself and of others of a similar class, it should be so stated in this part of the bill; and the omission of such a statement will, in many cases, render a bill liable to objection for want of parties,[3] and in other cases will deprive the plaintiff of his right to the whole of the relief which he seeks to obtain. Thus, in the case of a single-bond creditor suing for satisfaction of his debt out of the personal and real estate of his debtor, and not stating that he sues "on behalf of himself and the other specialty creditors," he can only have a decree for satisfaction out of the personal estate in a due course of administration, and not for satisfaction out of the real estate.[4]

3. *Stating Part.*

With respect to the manner in which the plaintiff's case should be presented to the Court, it is to be observed, that whatever is essential to the rights of the plaintiff, and is necessarily within his knowledge, ought to be alleged positively:[5] and it has been determined, upon demurrer, that it is not a sufficient averment of a fact, in a bill, to state that a plaintiff "is so informed;"[6] or to say that one defendant alleges, and the plaintiff believes, a statement to be true:[7] nor is an allegation, that the defendant sets up certain pretences, followed by a charge that the contrary of such pretences is the truth, a sufficient allegation or averment of the facts which make up the counter statement.[8]

The claims of a defendant may be stated in general terms, and if a

[1] *Swanzy* v. *Swanzy*, 4 K. & J. 237; 4 Jur. N. S. 1013.

[2] *Ante.*

[3] *Ante.*

[4] *Bedford* v. *Leigh*, 2 Dick. 237: *May* v. *Selby*, 1 Y. & C. C. C. 235; *Connolly* v. *M'Dermott*, 3 Jo. & Lat. 260; *Ponsford* v. *Hartley*, 2 J. & H. 736; *Johnson* v. *Compton*, 4 Sim. 47. If, however, a defect of this description appear at the hearing, the Court will allow the case to stand over, with liberty to the plaintiff to amend, *ibid.*; *Biscoe* v. *Waring*, Rolls, 7 Aug. 1835, MS.

[5] Ld. Red. 41; *Darthez* v. *Clemens*, 6 Beav. 165, 169; *Munday* v. *Knight*, 3 Hare, 497, 502; *Padwick* v. *Hurst*, 18 Beav. 575: 18 Jur. 763; *Bainbrigge* v. *Moss*, 3 Jur. N. S. 58, V. C. W.

[6] *Lord Uxbridge* v. *Staveland*, 1 Ves. S. 56.

[7] *Egremont* v. *Cowell*, 5 Beav. 620, 622; *Hodgson* v. *Espinasse*. 10 Beav. 473.

[8] *Flint* v. *Field*, 2 Anst. 543; *Houghton* v. *Reynolds*, 2 Hare, 267: 7 Jur. 414.

matter essential to the determination of the plaintiff's claim is charged to rest within the knowledge of a defendant, or must of necessity be within his knowledge, and is consequently the subject of a part of the discovery sought, a precise allegation is not required.[1]

In general, however, a plaintiff must state upon his bill a case upon which, if admitted by the answer, or proved at the hearing, the Court could make a decree; and, therefore, where a bill was filed to restrain a defendant from setting up outstanding terms, in bar of the plaintiff's right at law; not stating that there were any outstanding terms or estates, but merely alleging that the defendant threatened to set up some outstanding term, or other legal estate, Sir Lancelot Shadwell, V. C., allowed a demurrer, on the ground that the bill ought to have stated what the outstanding term or estate was.[2]

Although the rules of pleading in Courts of Equity, especially in the case of bills, are not so strict as those adopted in Courts of Law, yet, in framing pleadings in Equity, the draftsman will do well to adhere as closely as he can to the general rules laid down in the books which treat of Common Law pleadings, whenever such rules are applicable to the case which he is called upon to present to the Court; for there can be no doubt, that the stated forms of description and allegation which are adopted in pleadings at Law have all been duly debated under every possible consideration, and settled upon solemn deliberation, and that, having been established by long usage, experience has shown them to be preferable to all others for conveying distinct and clear notions of the subject to be submitted to the Court; and if this be so at Law, there appears to be no reason why they should not be considered as equally applicable to pleadings in Courts of Equity, in cases where the object of the pleader is to convey the same meaning as that affixed to the same terms in the ordinary Courts. Thus, as at Law, if a man intends to allege a title in himself to the inheritance or freehold of lands or tenements in possession, he ought regularly to say that he is *seised;* or, if he allege possession of a term of years, or other chattel real, that he is *possessed;*[3] if he allege seisin of things *manurable,* as of lands, tenements, rents, &c., he should say that he was *seised in his demesne as of fee;* and if of things not manurable, as of an advowson, he should allege that he is *seised as of fee and right,* omitting the words *in his demesne,*[4] so that there seems to be no reason why the same forms of expression should not be equally proper in stating the same estates in Equity. It is,

[1] Ld. Red. 42.

[2] *Stansbury* v. *Arkwright,* 6 Sim. 481, 485; see also *Jones* v. *Jones,* 3 Mer. 161, 175; *Barber* v. *Hunter,* cited *ib.* 170, 173; *Frietas* v. *Dos Sandos,* 1 Y. & J. 574.

[3] Stephen on Pl. 233, 242; Whitworth Eq. Prec. 162, n., *et seq.*

[4] *Ibid.*

indeed, the general practice in all well-drawn pleadings, to insert them, although they are frequently accompanied with other words, which are sometimes added by way of enlarging their meaning, and of extending them to other than mere legal estates. Thus, in stating a seisin in fee, the words "*or otherwise well entitled to*," are frequently added: although it would seem that, in some cases, the addition of these words would be incorrect, and might render the allegation too uncertain.[1]

In recommending the use, in pleadings in Equity, of such technical expressions as have been adopted in pleadings at Common Law, it is not intended to suggest that, in Equity, the use of any particular form of words is absolutely necessary, or that the same thing may not be expressed in any terms which the draftsman may select as proper to convey his meaning, provided they are adequate for that purpose. All that is contended for is, that notwithstanding the looseness with which pleadings in Courts of Equity may, consistently with the principles of those Courts, be worded, yet, where it is intended to express things for which adequate legal or technical expressions have been adopted in pleadings at Law, the use of such expressions will be desirable, as best conducing to brevity and clearness. Assuming, therefore, that even in pleadings in Equity the same form of words as are used in pleadings at Law may generally be introduced with advantage, the reader's attention will here be directed to some of the rules adopted in legal pleadings, which may with good effect be adopted in Equity.

Thus, it is a rule in pleading, at Common Law, that the nature of a conveyance or alienation should be stated according to its legal effect, rather than its form of words.[2]

It may be observed, however, that although it is desirable, in stating instruments, that this rule should be adhered to, and that the substance only of such instruments, as are necessary to be set out should be stated, without repeating them *in hæc verba*, yet cases may arise in which it is convenient to state written documents in their very words. This occurs, whenever any question in the cause is likely to turn upon the precise words of the instrument, as in the case of bills filed for the establishment of a particular construction of a will which is informally or inartificially worded; in such bills, the words which are the subject of the discussion ought to be accurately set out, in order more specifically to point the attention of the Court to them. Indeed, wherever informal instruments are insisted on, upon the construction of which any difficulty is likely to arise, as is frequently the case in agreements reduced into writing by persons who have not been professionally

[1] *Baring* v. *Nash*, 1 V. & B. 551.
[2] Stephen on Pl., 237.

educated, or which are insisted on as resulting from a written correspondence: in all such cases, the written instruments relied on, or at least the material parts of them, should be set out *in hæc verba*. So also, in bills filed for the purpose of carrying into effect written articles, upon the construction of which, although they are formally drawn, questions are likely to arise, such articles or so much of them as are likely to give rise to questions, should be accurately stated. In many cases also, the expressions of an instrument or writing are such that any attempt to state their substance, without introducing the very words in which they are expressed, would be ineffectual: in such cases, also, it is best that they should be set forth; and where a deed or agreement, or other instrument relied upon by the plaintiff has been lost or mislaid, and is not forthcoming, it may be useful, if it can be done, to set out the contents of the instrument at length, in order to obtain an admission of the contents from the defendant in his answer.

With reference to the subject of stating written instruments, it may be observed, that it is a rule in pleading at Law, that where the nature of a conveyance is such that it would, at Common Law, be valid without deed or writing, there no deed or writing need be averred, though such document may in fact exist; but where the nature of the conveyance requires, at Common Law, a deed or other written instrument, such instrument must be alleged.[1] The same rule has, it would seem, been adopted with respect to pleadings in Equity; thus, in stating a conveyance by bargain and sale, it is not essential to state that it was enrolled: for though such a process is rendered necessary by statute, it was not so at Common Law.[2]

In a bill for specific performance of an agreement relating to land, it is, however, necessary to allege that the agreement is in writing;[3] otherwise, the bill will be demurrable; but it is not necessary to allege that it has been signed;[4] because, from the statement that it is in writing, it is necessarily to be inferred that it has been signed.[5]

It may be noticed, in this place, that where an agreement relied upon in a bill is to be collected from the letters between the parties, the letters may be stated in the bill, either as constituting the alleged agreement, or as evidence of an alleged parol agreement. In the first case, the

[1] Stephen on Pl. 238, 237, 288.

[2] See *Harrison* v. *Hogg*, 2 Ves. J. 327.

[3] *Whitchurch* v. *Bevis*, 2 Bro. C. C. 559, 568; *Redding* v. *Wilks*, 3 Bro. C. C. 400; *Barkworth* v. *Young*, 4 Drew 1; 3 Jur. N. S. 34; *Wood* v. *Midgeley*, 5 De G. M. & G. 41. A trust need not be alleged to be in writing, but it is sufficient if the trust is proved by writing at the hearing, see *Davies* v. *Otty*, 10 Jur. N. S. 506: 12 W. R. 682, M. R.; *ib.* 896, L. JJ.: and see *Forster* v. *Hale*, 3 Ves. 696; *Randall* v. *Morgan*, 12 Ves. 74, and comp. the 4th and 7th sects. of Stat. of Frauds.

[4] *Rist* v. *Hobson*, 1 S. & S. 543; *Barkworth* v. *Young*, 4 Drew 1; 3 Jur. N. S. 34.

[5] *Barkworth* v. *Young*, *ubi sup.*

defendant may insist that they do not make out a concluded agreement and that no intrinsic evidence can be received; in the latter, he may plead the Statute of Frauds.[1]

It is upon the principle above referred to, that although stamping is, by sundry Acts of Parliament, rendered necessary to the validity of a variety of instruments, it is not necessary, nor is it even usual, in pleadings, to aver that such instruments have been duly stamped.

It is to be observed also, that the rule of pleading above referred to applies only to cases in which the necessity for a conveyance or agreement being in writing, is superadded by statute to things which at Common Law might have been by parol; but where a thing is originally created by Act of Parliament, and required to be in writing, it must then be stated, with all the circumstances required by the Act. Thus, it was necessary to allege that a devise of lands (which at Common Law is not valid, and was first authorized by the statutes 32 Hen. VIII. c. 1, and 34 Hen. VIII. c. 5,) had been made in writing, which is the only form in which those statutes authorize it to be made.[2]

It seems, however, that it is sufficient, under the present Wills Act,[3] to allege, that a will has been duly made, or duly made in writing: and that it is not necessary to allege the signature and attestation, as required by the Act.[4]

It has been before stated, that it is a rule in pleading, that whenever at Common Law a written instrument was not necessary to complete a conveyance, it is not necessary in pleading to aver it, although such an instrument has been rendered necessary by statute, and has been executed. The converse of this is also a rule, so that, whenever a deed in writing is necessary by Common Law, it must be shown in pleading; therefore, if a conveyance by way of grant be pleaded, a deed must be alleged; because matters that "lie in grant," according to the legal phrase, can pass by deed only.[5] Thus, in *Henning* v. *Willis*,[6] where the plaintiff filed a bill for tithes, and set up by way of title a parol demise by the impropriator for one year, the defendant demurred for want of title in the plaintiff, and the plaintiff submitted to the demurrer. Upon the same ground, in *Jackson* v. *Benson*,[7] where the bill prayed an account of tithes, and merely stated that the impropriate rector demised the tithes to him, a demurrer, put in by the defendant, was considered to

[1] *Birce* v. *Bletchley*, 6 Mad. 17: *Skinner* v. *M'Douall*, 2 De G. & S. 265; 12 Jur. 741; Sugd. V. & P. 149; Dart, V. & P. 649.
[2] Stephen on Pl. 239.
[3] 7 Will. IV. and 1 Vic. c. 26.
[4] *Hyde* v. *Edwards*, 12 Beav. 160; 13 Jur. 757.
[5] Stephen on Pl. 239.
[6] 3 Wood, 29: 2 E. & Y. 188.
[7] M'Cel. 62; 13 Pri. 131.

be well founded: and in *Williams* v. *Jones*,[1] the same objection was taken at the hearing, and would have prevailed, had it not appeared that the impropriators had originally been made parties to the suit, but had been dismissed in consequence of their having disclaimed all interest in the tithes in question.[2]

It may be noticed here that, in stating deeds or other written instruments in a bill, it is usual to refer to the instrument itself, in some such words as the following, *viz.*; "*as by the said indenture, when produced, will appear.*" The effect of such a reference is to make the whole document referred to part of the record. It is to be observed, that it does not make it evidence; in order to make a document evidence, it must, if not admitted, be proved in the usual way; but the effect of referring to it is to enable the plaintiff, to rely upon every part of the instrument, and to prevent his being precluded from availing himself, at the hearing,[3] of any portion, either of its recital or operative part, which may not be inserted in the bill, or which may be inaccurately set out. Thus, it seems that the plaintiff may, by his bill, state simply the date and general purport of any particular deed or instrument under which he claims, and that such statement, provided it is accompanied by a reference to the deed itself, will be sufficient. As in *Pouncefort* v. *Lord Lincoln*,[4] where the plaintiff's claims were founded on a variety of deeds, wills, and other instruments; but to avoid expense, or for some other purpose, the dates and general purport only of such instruments were stated in the bill, with reference to them. This manner of stating the case does not appear to have been considered as a ground of objection to the bill; but when the cause was brought to a hearing, Sir Thomas Clarke, M. R., referred it to the Master to state the rights claimed by the plaintiff under the several instruments mentioned in the bill, and reserved costs and further directions until after the report, and the cause was afterwards heard, and a decree made, on the report, which stated the instruments. It is obvious that the method of stating the plaintiff's title adopted in the above-mentioned case, was one of great inconvenience; and although it has been referred to here, it is by no means from a wish to recommend its adoption as a precedent. It is always necessary, in drawing bills, to state the case of the plaintiff clearly, though succinctly, upon the record; and in doing this, care should be taken to set out precisely those deeds which are relied upon, and those parts of the deeds which are most important to the case.

Although the same precision of statement is not required in bills in

[1] Younge, 252.

[2] Younge, 255; and see *ante*.

[3] But on the argument of a demurrer, he cannot avail himself of the portion not set out: *Harmer* v. *Gooding*, 3 De G. & S. 407, 410; *Cuddon* v. *Tite*, 1 Giff. 395: 4 Jur. N. S. 579.

[4] 1 Dick. 362.

Equity as in pleadings at Law, yet it is absolutely necessary that such a convenient degree of certainty should be adopted, as may serve to give the defendant full information of the case which he is called upon to answer. In *Cressett* v. *Mitton*,[1] Lord Thurlow observed, "special pleading depends upon the good sense of the thing, and so does pleading here; and though pleadings in this Court run into a great deal of unnecessary verbiage, yet there must be something substantial;" and in Lord Redesdale's Treatise it is said, that the rights of the several parties, the injury complained of, and every other necessary circumstance, as time, place, manner, or other incidents, ought to be plainly, yet succinctly alleged.[2] And, in several cases, demurrers have been allowed to bills on the ground of the vagueness and uncertainty of their statements.[3] Upon the same principle, a mere allegation that the defendant is a trustee for the plaintiff, not supported by the facts stated, will not prevent a demurrer;[4] and so, a statement that a defendant claimed an interest as purchaser, under an alleged agreement, but that such agreement, if any, had been long since abandoned and waived, was held insufficient to prevent a demurrer by that defendant.[5] However, where in a bill for specific performance of an agreement to take an assignment of a lease, the plaintiff stated a covenant in the lease not to assign without license of the lessor, and did not aver that the plaintiff had or could obtain such a license; there being no statement of a proviso for re-entry on default, the Court overruled a demurrer, and, at the hearing, directed a reference to inquire whether the plaintiff could make a good title.[6]

With respect to the allegation of time, it is to be observed that, where it is material, it ought to be alleged with such a degree of accuracy, as may prevent any possibility of doubt as to the period intended to be defined. Thus, in prescribing for a modus in a bill, it is necessary that a time for the payment of it should be mentioned;[7] and, formerly, it appears to have been considered, that not only the day of payment should be mentioned, but that laying the day of payment on or about a particular day was too uncertain.[8] It has, however, been decided that, in ordinary cases, the laying of an event on or about a

[1] 1 Ves. J. 450; 3 Bro. C. C. 482.

[2] Ld. Red. 41.

[3] *Wormald* v. *De Lisle*, 3 Beav. 18; *Boyd* v. *Moyle*, 2 Coll. 316, 323: *Kelly* v. *Rogers*, 1 Jur. N. S. 514, V. C. W.: see also *Vernon* v. *Vernon*, 2 M. & C. 145, 171; *Reed* v. *O'Brian*, 7 Beav. 32, 37, 39; *Darthez* v. *Clemens*, 6 Beav. 165, 169; *Parker* v. *Nickson*, 4 Giff. 306; 9 Jur. N. S. 196; Affd. *Ib.* 451; 1 De G. J. & S. 177.

[4] *Jackson* v. *The North Wales Railway Company*, 6 Rail. Ca. 112; 13 Jur. 69; *Steedman* v. *Marsh*, 2 Jur. N. S. 391, V. C. W.

[5] *Hodgson* v. *Espinasse*, 10 Beav. 473, 477.

[6] *Smith* v. *Capron*, 7 Hare, 185: 14 Jur. 686,

[7] *Goddart* v. *Keeble*, Bumb. 105; *Phillips* v. *Symes*, *ib.* 171.
Blacket v. *Finney*, *ib.* 198.

certain day of a certain month or year, is a sufficient specification of time. In the case of *Leigh* v. *Leigh*,[1] the bill prayed that the defendant might be restrained from setting up a term of 500 years, in bar of an action of ejectment which the plaintiff had brought against the present possessor, and alleged that the plaintiff's title accured on the death of an individual named, which happened on or about the 2nd July, 1806. The defendant demurred, on the ground that the period alleged in the bill, as the time of the death of the individual named, was more than twenty years (the period required by the stat. 3 & 4 Will. IV. c. 27, ss, 2 and 24, to bar suits,) before the filing of the bill, which took place in 1834. When the demurrer was first argued, Sir Lancelot Shadwell, V. C., was of opinion, that the words, on or about the 2nd July, 1806, did not fix any precise date, and that it might mean many years before, or many years after that time; and overruled the demurrer. Upon appeal, however, the Lords Commissioners, Pepys and Bosanquet, reversed the decision: being of opinion, that from the known and accepted use of the expression, "on or about," in all the ordinary transactions of life, it was sufficiently definite for all the purposes of demurrer, and did satisfactorily set out the fact, that the person named died in the year 1806.[2]

With respect to the certainty required, in setting out the other incidents in the plaintiff's case, the following cases will serve to show what degree of it is required under the circumstances to which they refer. In the case of *Cresset* v. *Mitton*,[3] before alluded to, a bill had been filed to perpetuate testimony to a right of common and of way, and it stated "that the tenants, owners and occupiers of the said lands, messuages, tenements and hereditaments, in right thereof, or otherwise have, from time whereof the memory of man is not to the contrary, had, and of right ought to have," &c. To this bill a demurrer was put in: one of the grounds for which was, that it was not stated as to what messuages in particular the rights of common and of way were claimed; and, in allowing the demurrer, Lord Thurlow said, "you have not stated whether the right of way and common is appurtenant and appendant to the land, that you hold; and you state it loosely that you have such right as belonging to your estate, or otherwise, so that your bill is to have a commission to try any right of common and way whatever." The same doctrine appears to have been held by Lord Keeper North, in *Gell* v. *Hayward*,[4] who, upon a bill to perpetuate the testimony

[1] Before the Lords Commissioners, Aug. 6 and 8, 1835.

[2] See also *Richards* v. *Evans*, 1 Ves. S. 39; *Roberts* v. *Williams*, 12 East, 33. See, as to words "shortly after," *Baker* v. *Wetton*, 14 Sim. 426: 9 Jur. 98; and as to words "soon after," *Edsell* v. *Buchanan*, 4 Bro. C. C. 254.

[3] 2 Bro. C. C. 481: 1 Ves. J. 449.

of witnesses touching a right of way, held, that in such a bill the way ought to be laid exactly *per et trans*, as in a declaration at Law. And so, in *Ryves* v. *Ryves*,[1] where a bill was filed for a discovery of title-deeds, relating to lands in the possession of the defendant, and for the delivery of the possession of such lands to the plaintiff, upon a loose allegation that, under some deeds in the custody of the defendants, the plaintiff was entitled to some interest in some estates in their possession, but without stating what the deeds were, or what the property was to which they applied, a demurrer was allowed.

Upon the same principle, in bills to establish a modus, or other customary payment, in lieu of tithes, a considerable degree of accuracy is required in setting out the modus; thus, if it is a modus applicable only to a particular portion of lands in the parish, as in the case of an ancient farm, the quantity and boundaries of the lands covered by the modus ought to be stated, in order that the rector may know what the particular lands are in respect of which the exemption is claimed.[2] In this respect there is a great difference between the mode of stating a modus in a bill and in an answer; much more precision being required in the former than in the latter, where it is merely set up as a defence: and the Court of Exchequer has carried this distinction so far as to say, that though it was impossible to establish a modus as laid in a cross-bill, in consequence of the want of sufficient accuracy in describing the farms alleged to be covered by it, yet it was a very different consideration whether the modus, as laid in the answer to the original bill, from which the statement in the cross-bill was copied, might not afford such a defence as would prevent the plaintiff from having a decree for an account.[3] The reason of this distinction appears to be, because a landholder, who endeavours to establish a modus, is bound to know what his claim is before he brings it into Court, and is therefore tied down to an accurate statement of it; but, in an answer, a tenant is bound, within a limited time, to shew whether he has any defence to make or not, and if he give such a statement as will inform the plaintiff of the general nature of the case to be brought against him, it will be sufficient.[4]

The principle which requires a sufficient degree of certainty in the statement of a bill, has been further illustrated in the case of *Stansbury* v. *Arkwright*,[5] before referred to, where a bill to restrain a defendant

[1] 3 Ves. 343; see also *Loker* v. *Rolle*, *ib.* 4, 7; *East India Company* v. *Henchman*, 1 Ves. J. 287, 290; and see *Houghton* v. *Reynolds*, 2 Hare 264; 7 Jur. 414; *Munday* v. *Knight*, 3 Hare, 497, and reporter's note, *ib.* 501; S. C. 8 Jur. 904.

[2] *Scott* v. *Allgood*, 3 Gwil. 1369; 1 Anst. 16.

[3] *Ibid.* *Atkyns* v. *Lord Willoughby de Brooke*. 3 Gwil. 1412.

[4] *Baker* v. *Athill*, 3 Gwil. 1423; 2 Anst. 491, 493.

[5] 6 Sim. 481, 485.

from setting up outstanding terms in bar to the plaintiff's claim at Law, was held to be demurrable, on the ground that it did not allege what sort of term or estate was outstanding.

The rule which prescribes that a plaintiff cannot sustain a bill, unless he has employed such a degree of certainty in setting out his case as may enable the defendant to ascertain the precise grounds upon which it is filed, applies to all cases in which a person comes to a Court of Equity for relief upon a general allegation of error, without specifying particulars;[1] and if a person, seeking to open a settled account, files his bill without such a specification of errors, he will not be permitted to prove them at the hearing, even though the settlement of the account is expressed to be, errors excepted: which is the usual form observed in settling accounts.[2] And it should be noticed, that where a plaintiff files a bill for a general account, and the defendant sets forth a stated one, the plaintiff must amend his bill: because a stated account is *prima facie* a bar till the particular errors in it are assigned.[3] Upon the same ground it has been held, that an award is a bar to a bill brought for any of the matters intended to be bound by it; and that if a bill is filed to set aside the award as not being final, the specific objections to it must be stated upon the bill.[4]

It is to be remarked, that in most of the cases above cited, the question has come before the Court upon demurrer, which seems to be the proper way in which a defendant ought to take the objection that a bill is deficient in certainty: if he neglects to do so, it seems that he cannot avail himself of the objection at the hearing.[5]

As a general rule, conclusions of law need not be averred; but where certain facts are stated from which it is intended to draw a conclusion of law, the bill ought to be so framed as to give notice to the defendant of the plaintiff's intention to insist on such conclusion: otherwise, he will not be allowed to do so. Thus, in a bill for specific performance of an agreement to sell a leasehold, the plaintiff was not allowed to insist that the defendant had waived his right to inquire into the landlord's title: because, although he had stated in his bill facts from which the waiver might be inferred, he had not alleged the waiver.[6]

4. *The Prayer for Relief.*

The prayer for relief is generally divided into two parts: *viz.*, the prayer for specific relief, and the prayer for general relief.

[1] *Taylor* v. *Haylin*, 2 Bro. C. C. 310: 1 Cox, 435; *Johnson* v. *Curtis*, 3 Bro. C. C. 266.

[2] *Johnson* v. *Curtis*, *ubi sup.*

[3] *Dawson* v. *Dawson*, 1 Atk. 1; as to what are settled accounts, see *Croft* v. *Graham*, 9 Jur. N. S. 1032, V. C. S.; 9 L. T. N. S. 589, L. JJ.

[4] *Routh* v. *Peach*, 2 Anst. 519.

[5] *Carew* v. *Johnston*, 2 Sch. & Lef. 280.

[6] *Clive* v. *Beaumont*, 1 DeG. & S. 397: 13 Jur. 826; *Gaston* v. *Frankum*, 2 De G. & S. 561: 16 Jur. 507.

Although there is no doubt but that a mere prayer for general relief was formerly, in most cases, sufficient to enable the plaintiff to obtain such a decree as his case entitled him to,[1] yet it was the usual practice to precede the request for relief generally, by a statement of the specific nature of the decree which the plaintiff considered himself entitled to, under the circumstances of his case; and now, the plaintiff must specifically pray for the relief to which he may conceive himself entitled, as well as for general relief;[2] and where he is entitled to no other relief against any defendant, he must pray for costs.[3]

This part of the bill, therefore, should contain an accurate specification of the matters to be decreed; and, in complicated cases, the framing of it requires great care and attention: for, although where the prayer does not extend to embrace all the relief to which the plaintiff may at the hearing show a right, the deficient relief may be supplied under the general prayer, yet such relief must be consistent with that specifically prayed, as well as with the case made by the bill: for the Court will not suffer a defendant to be taken by surprise, and permit a plaintiff to neglect and pass over the prayer he has made, and take another decree, even though it be according to the case made by his bill. Therefore, in *Soden* v. *Soden*,[4] where a bill was filed against a woman to compel her to elect between the provision made for her by a will, and that to which she was entitled under a settlement, and the case made by the bill was solely calculated to call upon her to elect, Lord Eldon held, that a declaration that she had elected, so as to conclude her, could not be maintained under the prayer for general relief: being inconsistent both with the case made by the bill, and with the specific prayer that she should make her election. And so, where a bill[5] was filed by a person in the character of mortgagee, praying a sale under a trust, to which it appeared he was not entitled, the Court would not permit him, under the general prayer, to take a decree that the defendant might redeem or be foreclosed; although it was the relief which properly belonged to his case. And, in like manner, where a bill was brought for an annuity or rent-charge under a will, and the counsel for the plaintiff prayed at the bar that they might drop the demand for the annuity, and insist upon the land itself, Lord Hardwicke denied it: because it came within the rule before laid down.[6] Upon the same principle, where a vendor filed a bill for a specific performance against

[1] *Cook* v. *Martyn*, 2 Atk. 23; *Grimes* v. *French*, *ib.* 141; *Partridge* v. *Haycroft*, 11 Ves. 570, 574; *Wilkinson* v. *Beal*, 4 Mad. 408.

[2] 15 & 16 Vic. c. 86, s. 10; see our Order 74.

[3] *Beadles* v. *Burch*, 10 Sim. 332, 337: 4 Jur. 189; *Bowles* v. *Stewart*, 1 Sch. & Lef. 227.

[4] Cited by Lord Eldon, in *Hiern* v. *Mill*, 13 Ves. 119.

[5] *Palk* v. *Lord Clinton*, 12 Ves. 48, 57; see also *Jones* v. *Jones*, 3 Atk. 110, 111; *Chapman* v. *Chapman*, 13 Beav. 308: 15 Jur. 265; *Johnson* v. *Fesenmeyer*, 25 Beav. 88, 96: 3 De G. & J. 13.

[6] *Grimes* v. *French*, 2 Atk. 141.

a purchaser, who had been in possession, under the contract, for several years, but failed to establish his right in consequence of a defect in his title, the Court refused, under the prayer for general relief, to direct an account of the rents and profits against the purchaser: although he had stated by his answer that he was willing to pay a fair rent.[1] And so, where a bill was filed for the specific performance of a written agreement, and parol evidence was read to prove a variation from it, the bill was dismissed with costs: the plaintiff not being allowed to resort to the substantial agreement proved on the part of the defendant.[2] But though, in general, a plaintiff can only obtain the decree he seeks by his bill, the case of a plaintiff in a suit for tithes is different: for there, though a plaintiff may fail in establishing his right to tithes in kind; he may yet have a decree for a modus admitted by the defendant's answer.[3]

The rule, with regard to the nature of the relief which a plaintiff may have under the prayer for general relief, was laid down by Lord Eldon, in *Hiern* v. *Mill*.[4] His Lordship there said, that, as to this point, "the rule is, that if the bill contains charges, putting facts in issue that are material, the plaintiff is entitled to the relief which those facts will sustain, under the general prayer; but he cannot desert specific relief prayed, and under the general prayer ask specific relief of another description, unless the facts and circumstances charged by the bill will, consistently with the rules of the Court, maintain that relief." In that case, a bill had been filed by an equitable mortgagee against the mortgagor, and a person who had purchased from him with notice of the incumbrance, and it prayed an account, and in default of payment a conveyance of the estate; and although it charged the purchaser with notice, it did not pray any specific relief against him individually. Lord Eldon, however, thought that the relief asked against him at the hearing was consistent with the case made by the bill, and accordingly decreed an account to be taken of what was due to the plaintiff by the mortgagor: to be paid by the purchaser, who was to have his election to pay the money and keep the estate.[5] And so, in *Taylor* v. *Tabrum*,[6]

[1] *Williams* v. *Shaw*, 3 Russ. 178, n.

[2] *Legal* v. *Miller*, 2 Ves. S. 299; see also *Mortimer* v. *Orchard*, 2 Ves. J. 243; *Legh* v. *Haverfield*, 5 Ves. 452, 457; *Hanbury* v. *Litchfield*, 2 M. & K. 629, 633. But although, in such a case, the plaintiff cannot have a decree for a different agreement from that set up by his bill, the defendant may have a decree on the agreement, such as he has proved it to be; *Fife* v. *Clayton*, 13 Ves. 546; 1 C. P. Coop. t. Cott. 351. The old course required a cross-bill, but the practice now is to decree a specific performance at the instance of the defendant, upon the offer by the plaintiff in his bill to perform the agreement specifically on his part: *Ibid.* See also *Gwynn* v. *Lethbridge*, 14 Ves. 585.

[3] *Carr* v. *Ball*, 1 Ves. S. 3.

[4] 13 Ves. 119; see also *Brown* v. *Sewell*, 11 Hare, 49, more fully reported on this point 17 Jur. 708; and *Brookes* v. *Boucher*, 3 N. R. 279, M. R., where relief was granted under the general prayer; and *Hill* v. *Great Northern Railway Company*, 5 De G. M. & G. 66: 18 Jur. 685, where it was refused.

[5] 13 Ves. 114, 123.

[6] 6 Sim. 281.

where a bill was filed against two trustees, alleging that only one of them had acted in the trusts, and praying relief against that trustee only, to which the two trustees put in an answer, admitting that they had both acted in the trusts, Sir Lancelot Shadwell, V. C., made a decree against the two, charging them both with the loss occasioned by the breach of trust. It is to be observed that, in order to entitle a plaintiff to a decree, under the general prayer, different from that specifically prayed, the allegations relied upon must not only be such as to afford a ground for the relief sought, but they must have been introduced into the bill for the purpose of showing a claim to relief, and not for the mere purpose of corroborating the plaintiff's right to the specific relief prayed: otherwise, the Court would take the defendant by surprise, which is contrary to its principles. Therefore, where a vendor filed a bill for a specific performance, but, owing to his not being able to make out a title to some part of the property, was unable to obtain a decree for that purpose, it was held, that he could not, under the prayer for general relief, obtain an enquiry into the management of the property during the time it was in the vendee's possession, although the bill did contain charges of mismanagement: which, however, had been introduced, not with the view to obtain compensation, but to establish the fact of acceptance of the title by the defendant.[1]

The principle upon which the Court acts, under these circumstances, receives considerable illustration from what fell from Lord Redesdale, in *Roche* v. *Morgell*.[2] The bill in that case stated various dealings between the plaintiff and defendant, imputing fraud and unfair dealing, and various usurious charges, overcharges and mistakes in accounts delivered, and prayed a discovery of the several transactions, and a general account, and also general relief. To this bill the defendant pleaded a release made by the plaintiff; and a question arose, whether, if the release appeared to be founded on a vicious consideration, and was in itself void, the Court could set it aside, there being no specific prayer for that purpose; and Lord Redesdale, in delivering his opinion in the House of Lords upon the point, expressed himself as follows:— "It has been objected that the bill does not state the release, and pray that it may be set aside. It seems doubtful whether the release has been put in issue by the bill; but whether it is so or not, if the release appears to be founded on a vicious consideration, it is in itself void, and the Court need not set it aside, but may act as if it did not exist. The bill prays the general account, and all the relief necessary for the purpose of obtaining that account. This prayer is sufficient. It never

[1] *Stevens* v. *Guppy*, 3 Russ. 171, 185; see also *Ferraby* v. *Hobson*, 2 Phil. 255, 257; *Chapman* v. *Chapman*, 13 Beav. 308: 15 Jur. 265.

[2] 2 Sch. & Lef. 721, 729.

was thought of that a bill for an account of fraudulent dealings must specially pray that every bond, every instrument taken by the defendant without sufficient consideration, should be set aside. The prayer for general relief is sufficient for the purpose; and upon that prayer, the Court may give every relief consistent with the case made by the bill, and continually does give relief in the manner specifically prayed by the bill, and sought for only by the prayer for general relief."

The rule, that the Court will only grant such relief as the plaintiff is entitled to, upon the case made by the bill, is most strictly enforced in those cases where the plaintiff relies upon fraud. Accordingly, it has been laid down, that where the plaintiff has rested his case in the bill upon imputations of direct personal misrepresentation and fraud, he cannot be permitted to support it upon any other ground;[1] but if other matters be alleged in the bill, which will give the Court jurisdiction as the foundation of a decree, the proper course is to dismiss only so much of the bill as relates to the case of fraud, and to give so much relief as under the circumstances the plaintiff may be entitled to.[2]

It may be well to notice here an order of our own Court, No. 84, modifying the English practice, and which provides that "Where the case for relief made by a bill is a case of actual fraud, and the evidence, though failing to establish the fraud charged, yet shows some other ground on which the plaintiff is entitled to relief, the Court is, at the hearing, to have the same discretion as in other cases to allow an amendment, and to grant relief according to the truth of the case." In a redemption suit, upon its appearing that *K.*, a purchaser for value with constructive notice, but without actual notice, held a registered title of the land in question, as well as *S.*, to whom he had sold, the bill was dismissed, as against *K.*, with costs, and the plaintiff praying specifically for a re-conveyance of the mortgaged premises, it was *held* that he was not entitled to personal relief under the prayer for general relief.[3]

It is to be observed that the Court will not, in general, decree interest upon a balance, unless where it is specifically asked for by the bill.[4] Where, however, from peculiar circumstances, interest was not properly due at the time the bill was filed, and a right to interest has subsequently accrued, the Court has directed interest to be computed, although

[1] *Wilde* v. *Gibson*, 1 H. L. Ca. 605; *Glascott* v. *Lang*, 2 Phil. 310, 322; *Parr* v. *Jewell*, 1 K. & J. 671; *Luff* v. *Lord*, 11 Jur. N. S. 50, L. C. The use of the word "fraud" does not bring the case within this rule, unless the case alleged is one of fraud properly so called: *Marshall* v. *Stadden*, 7 Hare, 428, 443: 14 Jur. 106, 109; *M'Calmont* v. *Rankin*, 8 Hare, 116: 14 Jur. 475.

[2] *Archbold* v. *Commissioners of Charitable Bequests for Ireland*, 2 H. L. Ca. 440, 459; *Harrison* v. *Guest*, 6 De G. M. & G. 424, 438: 2 Jur. N. S. 911.

[3] *Graham* v. *Chalmers*, 9 Grant, 239.

[4] *Weymouth* v. *Boyer*, 1 Ves. J. 416, 426.

there was no prayer to that effect in the bill. Thus, in *Turner* v. *Turner*,[1] interest was, by order on further directions, directed to be computed upon the balance in executors' hands, although not prayed by the bill: because, at the time the bill was filed, there did not appear to have been any money in their hands, and the bill could not advert to those circumstances which arose subsequently.

Upon the principle that the Court will not grant a different relief from that prayed by the bill, it was held by Sir John Leach, V. C., that where a bill merely prayed a commission to examine witnesses abroad, in aid of an action at Law, the Court could not grant a motion that the plaintiff might be at liberty to examine one of the witnesses, who had come to this country and was about to go away again, *de bene esse*, but said that the bill might be amended for that purpose.[2]

But although the Court will not, under the general prayer, grant a different relief from that prayed by the bill, yet, when it appears that the plaintiff is entitled to relief, although it be different from that which he has specifically prayed, it will sometimes allow the cause to stand over, with liberty to the plaintiff to amend his bill. This point was decided by Lord Rosslyn, in *Beaumont* v. *Boultbee*,[3] in which case it appears that, after publication had passed, the relief prayed for specifically was thought not to be that to which the plaintiff was entitled; he therefore applied for liberty to amend, by adding an additional prayer for relief, which was resisted upon the ground that the answer put in was applicable to the specific relief already prayed; but, after much discussion, Lord Rosslyn determined that it was competent to the plaintiff to amend, by adding the additional prayer. In *Palk* v. *Lord Clinton*,[4] above referred to, it appeared at the hearing that the plaintiff 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 a mortgage, it would be necessary to bring an additional party before the Court: an order was accordingly made giving the plaintiff leave to amend his bill by adding parties, and praying such relief as he might be advised.

The instances, however, in which this will be done are confined to those where it appears, from the case made by the bill, that the plaintiff is entitled to relief, although different from that sought by the specific prayer: where the object of the proposed amendment is to make a new

[1] 1 J. & W. 39, 43; and see *Hollingsworth* v. *Shakeshaft*, 14 Beav. 492; *Davenport* v. *Stafford*, *ib* 319, 334; 2 De G. M. & G. 901; *Johnson* v. *Prendergast*, 28 Beav. 480; see also, *Lloyd* v. *Jones*, 12 Sim. 491.

[2] *Atkins* v. *Palmer*, 5 Mad. 19.

[3] 5 Ves. 485, 495: 7 Ves. 599, on a rehearing by Lord Eldon; stated on this point, *arg.* in *Palk* v. *Lord Clinton*, 12 Ves. 63; see also *Cook* v. *Martyn*, 2 Atk. 2.

[4] 12 Ves. 48, 64, 66.

case, it will not be permitted. Thus, where a bill was filed for the specific performance of an agreement for a lease to the plaintiff alone, and it was stated, by the defendant's answer, that the agreement had been to let to the plaintiff and another person jointly, but the plaintiff nevertheless replied to the answer, and proceeded to establish a case of letting to himself alone, in which he failed: Lord Redesdale, upon application being made to him to let the cause stand over, with liberty to the plaintiff to amend, by adding the other lessee as a party, said that such a proceeding would be extremely improper; it was not like letting a case stand over to add a party against whom a decree in a plain case could be made, but for the purpose of making a new case; for a new case it would be if founded on a new agreement.[1] In that case, his Lordship stated that the ordinary practice, where a party has mistaken his case, and brings the cause to a hearing under such mistake, is to dismiss the bill, without prejudice to a new bill; and this practice was adopted by him in *Lindsay* v. *Lynch*,[2] and is in accordance with the decree of Sir William Grant, M. R., in *Woollam* v. *Hearn*,[3] and has been subsequently followed by Lord Lyndhurst, in *Stevens* v. *Guppy*.[4]

But although the Court is thus strict in requiring that, where the plaintiff prays specific relief, it must be such as he is entitled to from the nature of the case made by the bill, yet where infants are concerned this strictness is relaxed; and it has been determined, that an infant plaintiff may have a decree upon any matter arising upon the state of his case, though he has not particularly mentioned or insisted upon it, or prayed it by his bill.[5]

In cases of charities, likewise, the Court will give the proper directions, without any regard to the propriety or impropriety in the prayer of the information.[6]

It sometimes happens that the plaintiff, or those who advise him, are not certain of his title to the specific relief he wishes to pray for; it is, therefore, not unusual so to frame the prayer that, if one species of relief sought is denied, another may be granted. Bills with a prayer of this description, framed in the alternative, are called bills with a double aspect.[7] But, it seems that the alternative prayers must not be founded on inconsistent titles; thus, a plaintiff cannot assert a will to be inva-

[1] *Denistón* v. *Little*, 2 Sch. & Lef. 11, n.; *Watts* v. *Hyde*, 2 Phil. 406: 11 Jur. 979; see also *Griggs* v. *Staplee*, 2 De G. & S. 572: 13 Jur. 29; *Phelps* v. *Prothero*, 2 De G. & S. 274: 12 Jur. 733.

[2] 2 Sch. & Lef. 1.

[3] 7 Ves. 211, 222.

[4] 3 Russ. 171, 186.

[5] *Stapilton* v. *Stapilton*, 1 Atk. 6.

[6] *Attorney-General* v. *Jeanes*, 1 Atk. 355.

[7] *Bennet* v. *Vade*, 2 Atk. 325; Ld. Red. 39.

lid, and at the same time claim to take a benefit on the assumption of its validity.[1]

It is a principle of Equity, that a person seeking relief in Equity must himself do what is equitable; it is therefore required in many cases that a plaintiff should, by his bill, offer to do whatever the Court may consider necessary to be done on his part towards making the decree which he seeks just and equitable, with regard to the other parties to the suit. Upon this principle, where a bill is filed to compel the specific performance of a contract by a defendant, the plaintiff ought, by his bill, to submit to perform the contract on his part; and it is to be observed, that the effect of such submission will be to entitle a defendant to a decree, even though the plaintiff should not be able to make out his own title to relief, in the form prayed by his bill.[2]

Upon the same principle, it was formerly required, that a bill for an account should contain an offer on the part of the plaintiff to pay the balance, if found against him; but it seems that such an offer is not now considered necessary.[3] And so, where a surety brought an action upon an indemnity bond against his principal, to recover monies which he had been compelled to pay on his account, and the principal filed a bill in Equity for an injunction, and to have the bond delivered up to be cancelled, suggesting fraud, but without offering to indemnify the defendant, the Court of Exchequer thought, that the want of an offer in the bill to make satisfaction, was fatal to the bill, and allowed a demurrer, which had been put in by the defendant.[4]

In like manner it has been held, that a mortgagor cannot make a mortgagee a party to a bill in respect of his mortgage estate, without offering to redeem him.[5]

But the practice in this Province is different. On the question arising on demurrer as to whether a bill to redeem should contain an offer to redeem, Mowat, V. C., decided, without deeming it necessary to refer to authorities, that it need not; on the ground that the form given in the Orders, of bills to redeem, contained no offer, but simply the prayer for leave to redeem.[6]

It is upon the same ground that Courts of Equity, in cases where a contract is rendered void by a statute, require that a bill to set aside

[1] *Wright* v. *Wilkin*, 4 De G. & J. 141; see also *Rawlings* v. *Lamberl*, 1 J. & H. 458; *Marsh* v. *Keith* 1 Dr. & S. 342: 6 Jur. N. S. 1182; *Thomas* v. *Hobler*, 8 Jur. N. S. 125, L. C.; *Letl* v. *Parry*, 1 H. & M. 517.

[2] *Fife* v. *Clayton*, 13 Ves. 546: 1 C. P. Coop. t. Cott. 351.

[3] *Columbian Government* v. *Rothschild*, 1 Sim. 94, 103; *Clarke* v. *Tipping*, 4 Beav. 588, 593: 6 Jur. 25; *Barker* v. *Walters*, 8 Beav. 92, 96: 9 Jur. 73; *Toulmin* v. *Reid*, 14 Beav. 499, 505; *Inman* v. *Wearing*, 3 De G. & S. 729, 733.

[4] *Godbolt* v. *Watts*, 2 Anst. 543.

[5] *Dalton* v. *Hayter*, 7 Beav. 313, 319; *Inman* v. *Wearing*, 3 De G. & S. 729: *Attorney-General* v. *Hardy*, 1 Sim. N. S. 338, 355. 15 Jur. 441; *Knebell* v. *White*, 2 Y. & C. Ex. 15, 20.

[6] *P earson* v. *Campbell*, 2 Cham. R. 12.

such contract should contain an offer on the part of the plaintiff to pay to the defendant what is justly due to him. Thus, where a bill was filed, praying that an instrument or security given for an usurious consideration (and void under the usury laws then in force,) might be delivered up to be cancelled, the only terms upon which a Court of Equity would interfere were those of the plaintiff paying to the defendant what was *bona fide* due to him; and where the plaintiff did not offer to do so by his bill, a demurrer was allowed.[1] It seems that there is no difference, in this respect, between a cross-bill and an original bill.[2] The course of proceeding in bankruptcy, however, differs from that in Courts of Equity; for the rule in bankruptcy is, that a debt made void by statute is void altogether, and cannot be proved: because the creditor has no legal remedy by which he can recover; and unless the assignees and creditors voluntarily consent to the payment of what is really due, neither the Court of Bankruptcy nor the Lord Chancellor, or Lords Justices, have power to order it; and applications of this nature have frequently been refused.[3]

It is a rule in Equity, that no person can be compelled to make a discovery which may expose him to a penalty, or to anything in the nature of a forfeiture. As, however, the plaintiff is, in many cases, himself the only person who would benefit by the penalty or forfeiture, he may, if he pleases to waive that benefit, have the discovery he seeks.[4] The effect of the waiver, in such cases, is to entitle the defendant (in case the plaintiff should proceed upon the discovery which he has elicited by his bill, to enforce the penalty or forfeiture,) to come to a Court of Equity for an injunction: which he could not do without such an express waiver.[5]

It is usual to insert this waiver in the prayer of the bill, and if it is omitted the bill will be liable to demurrer. Upon this ground, where an information was filed by the Attorney-General, to discover copyhold lands, and what timber had been cut down and waste committed, and the defendant demurred, because, although the discovery would have exposed the defendant to a forfeiture of the place wasted and treble damages, the Attorney-General had not waived the forfeitures, the demurrer was allowed.[6] And so it has been held, that a demurrer will lie to a bill by a reversioner, for a discovery of an assignment of a lease

[1] *Mason* v. *Gardiner*, 4 Bro. C. C. 436; *Scott* v. *Nesbit*, 2 Bro, C. C. 641, 649: 2 Cox, 183; *Whitmore* v. *Francis*, 8 Pri. 616.

[2] *Mason* v. *Gardiner*, 4 Bro. C. C. ed. Belt, 438, n.

[3] *Ex parte Thompson*, 1 Atk. 125; *Ex parte Skip*, 2 Ves. S. 489; *Ex parte Mather*, 3 Ves. 373; *Ex parte Scrivener*, 3 V. & B. 14; Archbold's Bankruptcy, 110.

[4] In *Mason* v. *Lake*, 2 Bro. P. C. ed. Toml. 495, 497, leave appears to have been given to amend a bill, by waiving penalties and forfeitures, after a demurrer upon that ground allowed.

[5] *Lord Uxbridge* v. *Staveland*, 1 Ves. S. 56.

[6] *Attorney-General* v. *Vincent*. Bunb. 192.

without license, if it does not expressly waive the forfeiture.[1] Upon the same principle, if a rector or impropriator, or a vicar, file a bill for tithes, he must waive the penalty of the treble value, to which he is entitled by the statute of 2 & 3 Edward VI.: otherwise, his bill will be liable to demurrer.[2] It seems, however, that if the bill pray an account of the single value of the tithes only, such a prayer will amount to an implied waiver of the treble value, and that an injunction may be granted against suing for the penalty of the treble value, as well upon this implied waiver as upon the most express.[3] It is to be observed, also, that if the executor or administrator of a parson bring a bill for tithes, he need not offer to accept the single value, as the statute of Edward VI. does not give to such persons a right to the treble value.[4]

And it seems, that if a plaintiff has made a gratuitous offer by his bill, he cannot afterwards withdraw it;[5] but it is in the discretion of the Court whether or not to enforce it.[6]

For the purpose of preserving the property in dispute pending a suit, or to prevent evasion of justice, the Court either makes a special order on the subject, or issues a provisional writ: such as, the writ of injunction to restrain the defendant from proceeding at Common Law against the plaintiff, or from committing waste, or doing any injurious act; the writ of *ne exeat regno*, to restrain the defendant from avoiding the plaintiff's demands by quitting the kingdom; or other writ of a similar nature. When a bill seeks to obtain the special order of the Court, or a provisional writ for any of these purposes, a prayer for the order or particular writ which the case requires should be inserted, and the bill is then commonly named from the writ so prayed: as, an injunction bill, or a bill for a writ of *ne exeat regno*.[7]

As a general rule, the Court will not grant an injunction, unless expressly prayed by the bill.[8] A prayer for general relief will not be sufficient to authorize it:[9] for, as against the general words, the defendant might make a different case than he would against a prayer for an injunction.[10] It seems, however, that there are exceptions to this rule; and that, in some cases, the Court will grant an injunction, though not prayed for.[11]

[1] *Lord Uxbridge* v. *Staveland*, 1 Ves. S. 56.
[2] Ld. Red. 195; *Anon.* 1 Vern. 60.
[3] *Wools* v. *Walley*, 1 Anst. 100.
[4] *Anon.* 1 Vern. 60; see also *Attorney-General* v. *Vincent*, *ubi sup.*
[5] *Pelly* v. *Wathen*, 7 Hare, 371: 14 Jur. 9, 13; *Potter* v. *Waller*, 2 De G. & S. 410, 420; *Kendall* v. *Marsters*, 2 De G. F. & J. 200.
[6] *Knight* v. *Bowyer*, 2 De G. & J. 421, 447: 4 Jur. N. S. 569.
[7] Ld. Red. 46.
[8] *Savory* v. *Dyer*, Amb. 70.
[9] *Wright* v. *Atkyns*, 1 V. & B. 313, 314.
[10] *Savory* v. *Dyer*, *ubi sup.*
[11] *Blomfield* v. *Eyre*, 8 Beav. 250, 259: 9 Jur. 717.

It is to be observed, that the rule not to grant an injunction, unless specially prayed, applies only to cases where it is required, provisionally, until the hearing: but that after decree, the Court will interpose by injunction, although it is not asked for by the bill.[1]

Where an injunction is sought, not as a provisional remedy merely, but as a continued protection to the rights of the plaintiff, the prayer of the bill must be framed accordingly.[2]

The prayer for a *ne exeat regno* resembles, *mutatis mutandis*, that for an injunction. But, though it is usual, it is not necessary that the bill should pray the 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 kingdom, 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.[3] In the case, however, of *Sharp* v. *Taylor*,[4] where the plaintiff knew, at the time of the filing of the bill, that the defendant was going abroad, Sir Lancelot Shadwell, V. C., refused to grant a writ of *ne exeat regno*, in consequence of its not having been prayed for by the bill.[5]

In addition to the particulars already mentioned as necessary parts of a bill, the bill should also, in the heading, be expressed to be between the intended plaintiffs and defendants; the names of the defendants should be repeated at the end, as defendants to the bill.[6]

SECTION VI.—*In what Cases the Bill must be accompanied by an Affidavit.*

THERE are certain cases in which it is necessary that the bill should be accompanied by an affidavit, to be filed with it, and in which the omission of such accompaniment will render the bill liable to demurrer. Thus, when a bill is filed to obtain the benefit of an instrument upon which an action at Law would lie, upon the ground that it is lost, and that the plaintiff in equity cannot therefore have any relief at Law, the Court requires that the bill should be accompanied by an affidavit of

[1] *Wright* v. *Atkyns*, *ubi sup.*; *Paxton* v. *Douglas*, 8 Ves. 520; *Jackson* v. *Leaf*, 1 J. & W. 229, 232 *Clarke* v. *Earl of Ormond*, Jac. 122; *Reynell* v. *Sprye*, 1 De G. M. & G. 660, 690.

[2] Ld. Red. 47.

[3] *Collinson* v. ———, 18 Ves. 353; *Moore* v. *Hudson*, 6 Mad. 218; *Barned* v. *Laing*, 13 Sim. 255: 6 Jur. 1050: 7 Jur. 383; *Howkins* v. *Howkins*, 1 Dr. & S. 75: 6 Jur. N. S. 490.

[4] 11 Sim. 50; and see remarks on that case in *Barned* v. *Laing*, *ubi sup.*

[5] See *Darley* v. *Nicholson*, 1 Dr. & War. 66; 2 Dr. & War. 86: 1 Con. & L. 207, for the principles upon which the Court acts in granting writs of *ne exeat regno*.

[6] The words, "out of the jurisdiction," should be added after the name of a defendant who is

the loss of the instrument.[1] If, however, the objection is not taken by demurrer, but the cause proceeds to a hearing, and the answer of the defendant admits the loss or destruction of the instrument, then the Court has jurisdiction, and the objection for want of the affidavit will be overruled.[2] So, in suits for the discovery of deeds and writings, and for relief founded upon such instruments, if the relief prayed be such as might be obtained at Law, on the production of deeds or writings, the plaintiff must annex to his bill an affidavit that they are not in his custody or power, and that he knows not where they are, unless they are in the hands of the defendant.

But a bill for a discovery merely, or which only prays the delivery of deeds or writings, or equitable relief grounded upon them, does not require such an affidavit.[3] The reader will bear in mind that by our Order 85, "No bill is to be filed for discovery merely, except in aid of the prosecution or defence of an action at Law." It was decided, in *King* v. *King*,[4] that an affidavit is also unnecessary in the case of a bill for discovery of an instrument which has been fraudulently cancelled by the defendant, and to have another deed executed: for, in such a case, if the plaintiff had the cancelled instrument in his hands he could make no use of it at Law, and, indeed, the relief prayed is such as a Court of Equity only can give; but, in *Rootham* v. *Dawson*,[5] the authority of *King* v. *King* appears to have been questioned, and a different decision come to. In that case, the bill was filed for the discovery of the contents of a bond which had been given to the plaintiffs, as parish officers, as an indemnification for the expense of a bastard child, and which was alleged in the bill to have been defaced and cancelled by tearing off the signature of the obligor, so that the bond was no longer in force; the bill also prayed an account and payment of what was due on the bond, as well as the execution of a new one for the future indemnification of the trustees. To this bill the defendant demurred: "for that the plaintiffs ought, according to the rules of the Court, to have made an affidavit of the bond being defaced and avoided, as stated in the bill;" and the demurrer was allowed. It is to be observed, that the L. C. B. Macdonald, in his judgment, appears to have proceeded upon the ground that the plaintiffs had not confined themselves to seeking a discovery and re-execution of the bond, but had gone on to pray for payment of the sum already due: though, certainly, that distinction

[1] Ld. Red. 124; *Walmsley* v. *Child*, 1 Ves. S. 341; *Wright* v. *Lord Maidstone*, 1 K. & J. 701: 1 Jur. N. S. 1013; *Whitchurch* v. *Golding*, 2 P. Wms. 541.

[2] *Crosse* v. *Bedingfield*, 12 Sim. 35: 5 Jur. 836.

[3] Ld. Red. 54; see 1 Ves. S. 341, 344; *Whitchurch* v. *Golding*, 2 P. Wms. 541; *Anon.* 3 Atk. 17; *Dormer* v. *Fortescue*, *ib.* 132.

[4] Mos. 192; and see Ld. Red. 124.

[5] 3 Anst. 859.

does not appear to have been recognized by the learned Baron Thompson, who delivered his opinion upon the occasion. It is, however, submitted that the reason given for the decision in *King* v. *King* is quite satisfactory: for, as the ground for the interference of a Court of Equity in such a case is not the loss, but the cancellation of the instrument, so as to render it impossible to use it at Law, no relief will be granted by the Court until it is satisfied that the cancellation has taken place, by the production of the cancelled instrument; whereas, in the case of the loss of a document, the Court has, in general, no means of satisfying itself that the document has been lost but the assertion of the party himself: which it consequently requires should be made upon oath.

Even in cases in which the legislature has expressly directed that the affidavit should be "annexed to the bill," it is not necessary that the affidavit should be sworn at the same time as the bill is filed; but it is the usual practice, in all cases in which an affidavit is necessary, to have it sworn a day or two before the bill is filed.[1]

The other cases, in which bills are required to be accompanied by an affidavit, may be mentioned here, although they do not come within the description of bills which are now the subject of discussion. These are: bills for the purpose of perpetuating the testimony of witnesses, where, from circumstances, such as the age or infirmity of witnesses, or their intention of leaving the country, it is probable the plaintiff would lose the benefit of their testimony: in which case, an affidavit of the circumstances, by means of which the testimony may probably be lost, must be annexed to the bill;[2] and bills of interpleader, which also, to avoid a demurrer, must be accompanied by an affidavit by the plaintiff that there is no collusion between him and any of the parties.[3]

It is to be observed that, in cases of this nature, advantage can only be taken of the omission of an affidavit, by demurrer; and that where a plaintiff, instead of demurring on this ground in the first instance, put in a plea to the whole bill, which was overruled, he was not allowed to demur, *ore tenus*, on the ground that the necessary affidavit was not annexed.[4]

If there are several plaintiffs, all must join in the affidavit, unless

[1] *Walker* v. *Fletcher*, 1 Phil. 115; 12 Sim. 420, 422: 6 Jur. 4; but see *Francome* v. *Francome*, 13 W. R. 355, L. C. The affidavit is usually, but need not be attached to the bill: *Jones* v. *Shepherd*, 29 Beav. 293: 7 Jur. N. S. 250; Affirmed by L. C. 7 Jur. N. S. 228: *sub nom. Shepherd* v. *Jones*, 3 De G. F. & J. 56. It may be made an exhibit to the bill.

[2] Ld. Red. 150; *Phillips* v. *Carew*, 1 P. Wms. 116.

[3] Ld. Red. 49; *Bignold* v. *Audland*, 11 Sim. 23; *Hamilton* v. *Marks*, 5 De G. & S. 638. For forms of demurrer for want of affidavit, see 2 Van Hey. 77. In *Larabrie* v. *Brown*, 1 De G. & J. 204: 23 Beav. 607, leave was given to file an interpleader bill *quantum valeat*, on affidavit of the plaintiffs' solicitor, the plaintiffs being abroad, and time pressing; but the affidavit of the plaintiffs was afterwards, by leave of the Court, filed and annexed to the bill, *nunc pro tunc*: Braithwaite's Pr. 27. Where there were several plaintiffs residing in distant places, leave was given, on a like affidavit, and an injunction granted for a limited time, on an undertaking to file the usual affidavit: *Nelson* v. *Barter*, 10 Jur. N. S. 611: 12 W. R. 857, V. C. W.

[4] *Hook* v. *Dorman*, 1 S. & S. 227, 231; *Crosse* v. *Bedingfield*, 12 Sim. 35: 5 Jur. 836.

a satisfactory explanation be given for their non-joinder.[1] If a corporation is plaintiff, the affidavit may be made by the secretary or other responsible officer. The affidavit may be written or printed; and a copy of it, but not necessarily an office copy, should be sealed at the Record and Writ Clerks' office, and annexed to each copy of the bill sealed there for service,[2] and served therewith.

Section VII.—*Printing and Filing the Bill.*

After the bill has been drawn, it is, in some cases, to be printed. The following Orders point out the practice: Order 66, provides that, "Pleadings, and all other proceedings in a cause may be written or printed, or partly written and partly printed; and where wholly printed, dates and sums occurring therein are to be expressed by figures instead of words." Order 67 declares that "All pleadings and other proceedings are to be written or printed neatly and legibly on good paper, of the size and form heretofore in use; and, if printed, the same are to be printed with pica type leaded, and the solicitor is not to be entitled to the costs of any pleading or other proceeding which is not in conformity with this order, and the Clerk of Records and Writs, or Deputy Registrar, is to refuse to file the same." And Order 68 provides that, "Every bill, answer and petition filed, and every affidavit to be used in any cause or matter, is to be divided into paragraphs, and every paragraph is to be numbered consecutively, and, as nearly as may be, is to be confined to a distinct portion of the subject. No costs are to be allowed for any bill, answer, petition, or affidavit, or part of any bill, answer, petition, or affidavit, substantially violating this order: nor shall any affidavit violating this order be used in support of, or opposition to, any motion, without the express permission of the Court."

It has been decided, on these Orders, that where the office copy of the bill served upon a defendant is not printed in accordance with these Orders, the service will be set aside with costs: and that although the Registrar may have filed a bill not printed in accordance with the orders of Court, a motion to take the bill off the files for such non-compliance may be made.[3] The practice as to the endorsement of bills and other proceedings, and their service, has already been pointed out.[4]

[1] Braithwaite's Pr. 27, and *Gibbs* v. *Gibbs*, there cited.
[2] Braithwaite's Pr. 27. No fee is payable on filing an affidavit with, or annexed to, a bill: *ib.*
[3] *Cossey* v. *Ducklow*, 2 Cham. R. 227.
[4] See *ante*, Orders 40, 41, 42, 43, 44, 45.

By two English Orders of 1660 and 1666, it is provided that no plea, answer, or affidavit is to be filed in which there is any knife erasure, or which is blotted so as to obliterate any word, or which is improperly written, or so altered as to cause any material disfigurement, or in which there is any interlineation of any word or words, unless the person before whom the same is sworn duly authenticates such interlineation with his initials, in such manner as to show that the interlineation was made before the plea, answer, or affidavit was sworn, and so as to mark the extent of such interlineation. These orders are in force in this Province. An affidavit, containing unauthenticated interlineations of Christian names was allowed to be filed.[1] Erasures in recital of contents of an exhibit were held immaterial.[2]

The copy of the bill being prepared, it is delivered to the Clerk of Records and Writs, or Deputy Registrar, who thereupon writes thereon the date on which it is brought into his office, and receives it into his custody. The bill is then said to be filed, and of record; but before this process is completed it is not of any effect in Court.

Our Order 73 provides that "Every paper to be filed in the office of the Clerk of Records and Writs is to be distinctly marked at or near the top or upper part thereof on the outside, with the name of the city or town in which the bill is filed. And the Clerk of Records and Writs is not to file any paper which is not so marked." Order 72 declares that "All the pleadings in any cause must be filed at the same office." And Order 77 provides that "A bill of complaint may be filed either with the Clerk of Records and Writs, or with a Deputy Registrar, at the option of the plaintiff: and the filing of a bill of complaint shall have the same effect as the filing of a bill and the issuing of a subpœna to appear and answer formerly had." The endorsement of an office copy bill must specify distinctly which relief the plaintiff seeks, whether sale or foreclosure.[3]

The copy of an information intended to be filed must bear the signature of the Attorney-General.[4] To obtain this, a copy of the draft is left with him, together with a certificate of the counsel who settled it, that it is proper for his sanction, and also a certificate of the solicitor for the relator that he is a proper person to be relator, and is able to pay costs; and if the Attorney-General approves of the draft, he will then, on the copy to be filed being left with him, together with a certificate that it is a true copy of the draft as settled by counsel,[5] affix his signa-

[1] *Vorweig* v. *Barweiss*, 3 W. R. 259.
[2] *Savage* v. *Hutchinson*, 24 L. J. Ch. 232.
[3] *Drewry* v. *O'Neill*, 2 Cham. R. 204.
[4] Braithwaite's Pr. 25.
[5] *Ibid.*

ture thereto. The information so signed is then filed, in the same manner as a bill.

The bill being filed, it is provided by our Order 405 that "Every defendant, appearing by a different solicitor, is entitled to demand from the plaintiff two copies of any printed bill, paying for each copy two cents per folio." If the plaintiff desire, he may, as soon as he has filed the bill, obtain from the Registrar or Deputy Registrar, and register in the County Registry Office, a certificate of *Lis Pendens*, under Con. Sta. U. C. c. 12, s. 64, and 31 Vic. c. 20 (Ontario): but no certificate is required to be registered of a suit or proceeding for the foreclosure of a registered mortgage. And where a certificate of *lis pendens* has been registered, and the bill is afterwards dismissed, it is not necessary to obtain an order discharging the certificate from the registry: the registration of the decree dismissing the bill being sufficient for all purposes.[1] There is no precedent for dispensing with the signature of the Attorney-General to an information. Where, in the absence from the Province of the Attorney-General, an information was filed without signature, but having endorsed thereon a fiat by the Solicitor-General, it was ordered to be taken off the files.[2]

Section VIII.—*Amending the Bill.*

When a plaintiff has preferred his bill, and is advised that the same does not contain such material facts, or make all such persons parties, as are necessary to enable the Court to do complete justice, he may alter it, by inserting new matter,[3] or by adding such persons as shall be deemed necessary parties; or in case the original bill shall be found to contain matter not relevant, or no longer necessary to the plaintiff's case, or to name as parties persons who may be dispensed with, the same may be struck out; the original bill, thus added to or altered, is termed an amended bill.[4]

But, although it is the practice to call a bill thus altered an amended bill, the amendment is in fact esteemed but as a continuation of the original bill, and as forming part of it; for both the original and

[1] *Deater* v. *Cosford*, 1 Cham. R. 22.

[2] *Attorney-General* v. *Toronto Street Railway*, 2 Cham. R. 165.

[3] If at the time of filing the bill the plaintiff had no title to the relief prayed, he cannot make out a title by introducing by amendment facts which have subsequently occurred: *Attorney-General* v. *Portreeve of Avon*, 11 W. R. 1051, L.JJ.; *contra*, *Talbot* v. *Lord Radnor*, 3 M. & K. 252.

[4] Hinde, 21. A written bill may be thus amended, as well as a printed bill.

amended bill constitute but one record:[1] so much so, that where an original bill is fully answered, and amendments are afterwards made, to which the defendant does not answer, the whole record may be taken, *pro confesso*, generally,[2] and an order to take the bill *pro confesso* as to the amendments only will be irregular.[3] An amended bill must, therefore, in all cases, be addressed in the same way as a bill.[4] But, so far as the pendency of a suit can affect either the parties to it, or strangers, matter brought into a bill by amendment will not have relation to the time of filing the original bill, but the suit will be so far considered as pendent only from the time of the amendment.[5]

Where there is a bill and cross bill, and the plaintiff in the original suit amends his bill before answer, he will lose his priority of suit, and his right to have an answer before he is called upon to answer the cross bill.[6]

Amendments to a bill are of two sorts; those which relate to parties, and those which affect the substance of the case. Our Order 78 provides that "Orders of course to amend a bill of complaint may be obtained at any time before answer, upon *præcipe*." Order 79 declares that "Service upon a defendant of an order of course to amend before answer, may be dispensed with upon an application *ex parte*, where the Court is satisfied that such an order may be made without prejudice to the defendant's rights; and where service upon a defendant of an order to amend is dispensed with, the cause as to such defendant is to proceed as if the bill had been originally filed in the amended form." Order 80, that "An order to amend the bill, for the purpose of rectifying a clerical error in names, dates, or sums only, may be obtained at any time upon *præcipe*." Order 82 declares that "A plaintiff may move *ex parte* for leave to amend the bill, without prejudice to an order to take the bill *pro confesso*, or to the entry of a note that the defendant is in default for want of an answer; and where the Court is satisfied that the rights of the defendant will not be prejudiced by such order, it may direct the same accordingly." And Order 83 provides that "A plaintiff, having obtained an order to amend his bill, is to amend within fourteen days from the date of the order; otherwise the

[1] *Vere* v. *Glynn*, 2 Dick. 441.

[2] *Jopling* v. *Stuart*, 4 Ves. 619.

[3] *Bacon* v. *Griffith*, *ib.* n.; and see *Landon* v. *Ready*, 1 S. & S. 44.

[4] If the description of the plaintiff, or his next friend, is not the same as when the bill was filed, the new description should appear in the amended bill: *Kerr* v. *Gillespie*, 7 Beav. 269, 271: 8 Jur. 50; but the name of his solicitor cannot be altered, unless an order to change the solicitor has been obtained: Braithwaite's Pr. 299.

[5] Ld. Red. 330; *Long* v. *Burton*, 2 Atk. 218.

[6] *Steward* v. *Roe*, 2 P. Wms. 434; *Johnson* v. *Freer*, 2 Cox, 371; *Noel* v. *King*, 2 Mad. 392. But if the plaintiff amends his bill before he knows of the filing of the cross bill, he does not lose his priority: *Gray* v. *Haig*, 13 Beav. 65.

order to amend becomes void, and the case as to dismissal stands in the same situation as if the order had not been made."

Where new plaintiffs are added by amendments, they have at the hearing the same rights, and the Court has the same discretion in the case of a misjoinder, as if they had been the plaintiffs originally, and the Court may, under the General Orders, treat such new plaintiffs as the sole plaintiff.[1]

In some cases, special orders are obtained for the purpose of altering the co-plaintiffs; but, as a diminution of the number of plaintiffs has the effect of lessening the defendant's security for costs, an order will not be made to strike out the names of plaintiffs without the Court also providing, at the same time, that security for the costs of the suit shall be given,[2] unless such security be waived by the defendants. In the case of *Brown* v. *Sawer*,[3] one of two co-plaintiffs, who had authorized the institution of the suit, refused to proceed in it; a motion was thereupon made, on behalf of the other co-plaintiff, that she might be at liberty to amend the bill by striking out the name of the co-plaintiff who had refused to proceed, and by making him a defendant, and that he might be ordered to pay the costs occasioned by such amendment, and also the costs of giving any security for costs which the defendants or any of them might be declared entitled to in consequence of such amendment, and incidental thereto, and also the costs of and incident to that application, to be taxed as between solicitor and client. Lord Langdale, M. R., in giving judgment upon the motion, said: "The suit cannot be prosecuted unless the alteration is made, and, therefore, justice will not be done unless the alteration is made; I think, therefore, that this order must be made, but on such terms as will be just towards the defendants, and by securing the costs of suit already incurred; and the co-plaintiff having, by revoking the authority, made this application necessary, ought therefore to pay the costs."

It must not be considered as a matter of course to obtain an order to strike out the name of a person who has once been made a plaintiff in a cause, even upon the terms of giving security for costs. In the case of the *Attorney-General* v. *Cooper*,[4] an application was made, by a number of relators named in an information, to strike out the names of several of themselves. Lord Cottenham, in refusing the motion, observed: "It cannot be justly said, that all that the relators have to establish in sup-

[1] *Mason* v. *Seney*, 11 Grant, 447.

[2] For form of order, see Seton, 1253, No. 7.

[3] 3 Beav. 598: 5 Jur. 500; see *Hart* v. *Tulk*, 6 Hare, 611, 613; *Bather* v. *Kearsley*, 7 Beav. 545; *M'Leod* v. *Lyttleton*, 1 Drew. 36; *Drake* v. *Symes*, 7 Jur. N. S. 399, L.JJ. As to the course where, after decree, the solicitor of the plaintiffs ceases to practice, and one of them refuses to concur with the rest in appointing a successor, see *Butlin* v. *Arnold*, 1 H. & M. 715.

[4] 3 M. & C. 258, 261: 1 Jur. 790.

port of such an application is, that the defendants will not be prejudiced by such an alteration; they must show that justice will not be done, or that the suit cannot be so conveniently prosecuted, unless the alteration is made. I cannot give them such an advantage as they ask, and permit them to alter the record, merely because they may have a different wish at one time, from that which they may have at another time: which may be the result of mere caprice."

In the case of *Hall* v. *Lack*,[1] where it appeared that the association of a *cestui que trust* and trustee, as co-plaintiffs on the record, might materially injure the interests of the former, Sir J. L. Knight Bruce, V. C., gave leave to amend the record, by striking out the name of the trustee as plaintiff, and making him a defendant.

Leave may also be obtained to amend a bill, by the addition of persons as co-plaintiffs. After answer, however, the addition of a co-plaintiff is not a matter of course, but is discretionary in the Court; and it would appear, that where a plaintiff applies, after answer, for leave to amend his bill, by adding a co-plaintiff, he must, in support of his application, show that the person proposed to be added is willing to become a co-plaintiff.[2] An order for leave to amend by adding a plaintiff after replication has been refused, where the plaintiff had been guilty of *laches*.[3]

A bill of discovery cannot be amended by adding parties as plaintiffs. This was held to be the law of the Court by Lord Eldon, in *Lord Cholmondeley* v. *Lord Clinton*,[4] where a bill had been filed by *cestui que trusts*, in aid of an ejectment at Law, and the defendant pleaded facts to show that the legal estate was in the trustees. The difficulty in the case was, however, got over by the plaintiffs consenting to the allowance of the plea, and moving to amend by inserting a statement to show that the legal estate was in trustees, and that a count had been introduced in the declaration in ejectment on the demise of the trustees.

An order made at the hearing for leave to amend, by adding parties, will not authorize the introduction of co-plaintiffs;[5] 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, for the purpose of being amended by the introduction of the words: on behalf of himself, and all others of the class. Thus, in *Lloyd* v. *Loaring*,[6]

[1] 2 Y. & C. C. C. 631; see also *Plunket* v. *Joice*, 2 Sch. & Lef. 159, *ante*, ; *Jones* v. *Rose*, 4 Hare, 52, where leave given to strike out "on behalf of themselves and all other shareholders;" *Hart* v. *Tulk*, 6 Hare, 612; *Drake* v. *Symes*, 7 Jur. N. S. 399, L.JJ.

[2] *The Governors of Lucton Free School* v. *Smith*, M'Lel. 17, 19.

[3] *Milward* v. *Oldfield*, 4 Pri. 325.

[4] 2 Mer. 71, 74.

[5] *Milligan* v. *Mitchell*, 1 M. & C. 433, 442.

[6] 6 Ves. 773, 778; see also *Attorney-General* v. *Newcombe*, 14 Ves. 1, 6; *Good* v. *Blewitt*, 13 Ves. 397, 401.

where a demurrer was allowed, because the parties affected to sue in a corporate capacity, leave was given to amend, by making them sue in their individual rights as members of a co-partnership, on behalf of themselves and others.

It has been said, that the Court will, at any time before the hearing, suffer parties to be added by amendment, upon a proper case being shown;[1] and that even after a decree, and before it has been enrolled, persons interested may, by petition, be made parties and let into it, if their right be interwoven with the other plaintiffs, and settled (in general) by the decree: they paying the plaintiffs a proportionable part of the charges of the suit.[2]

But where an application was made to amend the bill after decree by substituting the words "second concession" for the words "twelfth concession," it was refused.[3] And in a subsequent case, an application was made *ex parte* for leave to amend, after decree, by correcting the description of the mortgaged premises, when it was held that the application could not be granted *ex parte*, and *quære*, whether a bill can be amended at all after decree. In *Barrett* v. *Gardner*, the Chancellor refused leave to amend, whilst in *Joy* v. *Spafford*, V. C. Spragge granted it.[4] After a decree had been pronounced in a suit of foreclosure, the plaintiff discovered that portions of the mortgaged premises had been sold by the mortgagor before the bill was filed. *Held*, in accordance with decisions of Esten, V. C., per Blake, C., that the purchasers of such portions might be brought before the Court by amendment, and that the proper mode of proceeding was by petition, although, but for those decisions, he would have thought a motion to amend, under Order 9, June, 1853, s. 14, the proper course.[5]

If parties are added after the expiration of the time for giving notice of the cross-examination of the witnesses, the evidence of such witnesses cannot be read against the parties so added.[6]

It is not within the province of this work to point out the cases in which amendments may become requisite, for the purpose of altering the case upon the record as against the defendants already before the Court, or to what extent they may be made. It is to be observed, however that the rule which formerly existed, that a plaintiff ought not to introduce facts, by amendment, which have occurred since the filing of the

[1] *Goodwin* v. *Goodwin*, 3 Atk. 370; see *Forbes* v. *Stevens*, 10 Jur. N. S. 861, V. C. W.: 4 N. R., 386, L.JJ.

[2] Wyatt's Pr. 301.

[3] *Barrett* v. *Gardner*, 1 Cham. R. 344.

[4] *B. of Montreal* v. *Power*, 2 Cham. R. 47.

[5] *Rumble* v. *Moore*, 1 Cham. R. 59.

[6] *Pratt* v. *Barker*, 1 Sim. 1, 5; *James* v. *James*, 4 Beav. 578: 5 Jur. 1148; *Quantock* v. *Bullen*, 5 Mad. 81.

original bill, has been abolished; and that facts and circumstances occurring after the institution of a suit may be introduced into the bill by amendment, if the cause is otherwise in a state in which an amendment may be made,[1] and if not, they may be added by supplemental statement.

Where an answer of a defendant states facts which are material to the plaintiff's case, but which have not been stated in the bill, it is not necessary that the plaintiff, in order to avail himself of them at the hearing, should introduce such facts into his bill by amendment, although perhaps the most convenient course would be to do so.[2] Where, however, it is important to the plaintiff that a fact disclosed in the answer should be further inquired into, or avoided by some further statement, the practice is often resorted to of introducing such fact from the answer of the defendant into the bill; and where a plaintiff, not being satisfied with the answer, amended his bill, stating, by way of pretence, a quotation from the answer, and negativing it, and insisted that the facts would appear differently if the defendant would look into his accounts, Sir Thomas Plumer, V. C., held, that the matter so introduced was not impertinent.[3]

Great latitude is allowed to a plaintiff in making amendments, and the Court has even gone to the extent of permitting a bill to be converted into an information:[4] it has also been held, where a plaintiff 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 plaintiff, that the plaintiff might amend his bill, abandoning his first agreement, and praying for a decree according to that admitted by the defendant.[5] In that case, however, the amendment was permitted, because the bill in its original form might have been prepared under a mistake or misconception of counsel, and the plaintiff, having afterwards discovered the error, was allowed by the Court to abandon his original case, and insist upon the one alleged by the defendant; but the Court will not carry its liberality further, and permit a plaintiff 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. Upon this principle, where the original bill prayed the specific performance of an agreement, and the defendant denied the agreement as stated in the bill, but admitted a different one, whereupon the plaintiff amended his bill, continuing to insist on the

[1] Our Orders 348, 349, 350, 351. See *Tudway* v. *Jones*, 1 K. & J. 691; *Forbes* v. *Stevens*, *uoi sup.* and see *Attorney-General* v. *Portreeve of Avon*, 11 W. R. 1050 1051, L.JJ

[2] *Attwood* v. ——, 1 Rus. 353, 361.

[3] *Seeley* v. *Boehm*, 2 Mad. 176, 180.

[4] *President of St. Mary Magdalen* v. *Sibthorp*, 1 Russ. 154.

[5] Per Lord Redesdale, *Lindslay* v. *Lynch*, 2 Sch. & Lef. 9.

original agreement, and praying in the alternative, if not entitled to that, to have the execution of the admitted agreement; Lord Redesdale dismissed the bill with costs, but without prejudice to any bill the plantiff might be advised to file, to obtain a performance of the admitted agreement.[1]

The Court will not grant leave to amend a bill, where the proposed amendment would render the bill of a different nature.[2]

It seems that, as a general rule, the Court will not permit a bill, filed for the mere purpose of discovery, to be converted into one for relief, by the addition of a prayer for relief,[3] though it has been allowed in some cases:[4] and it seems, that a bill for relief cannot be converted into a bill for discovery by striking out the prayer; thus, in *Lord Cholmondeley* v. *Lord Clinton*,[5] where the defendants, having answered the bill, obtained an order for the plaintiff to elect whether he would proceed at Law or in Equity, whereupon the plaintiff elected to proceed at Law, and moved to dismiss his bill as far as it sought relief, and to amend the record by striking out the prayer for relief, the motion was refused: Lord Eldon being of opinion, that the better course for the plaintiff would be to dismiss his bill, and file another for discovery only; which was accordingly done.[6]

Any amendment of a bill, however trivial and unimportant, authorizes a defendant, though not required to answer, to put in an answer, making an entirely new defence, and contradicting his former answer. Thus, in *Bolton* v. *Bolton*,[7] Sir Lancelot Shadwell, V. C., on this ground refused with costs, a motion to take an answer to an amended bill off the file: although it was filed nearly three years after the bill had been amended, and eight years after the original answer, and contradicted the original answer, introducing no less than four new issues or defences. An amendment of the bill does not, however, enable a defendant who has answered the original bill to demur to an amended bill upon any cause of demurrer to which the original bill was open,[8] unless the nature of the case made by the bill has been changed by the amendments.[9]

[1] *Lindsay* v. *Lynch*, 2 Sch. & Lef. 1; see also *Woollam* v. *Hearn*, 7 Ves. 211, 222; and *Deniston* v. *Little*, 2 Sch. & Lef. 11, n. (*a*).

[2] *Crawford* v. *Bradburn*, 1 Cham. R. 280.
Butterworth v. *Bailey*, 15 Ves. 358, 361; *Jackson* v. *Strong*, M'Lel. 245; *Parker* v. *Ford*, 1 Coll. 506.

[4] *Hildyard* v. *Cressy*, 3 Atk. 303; *Crow* v. *Tyrell*, 2 Mad. 397, 409; *Lousada* v. *Templer*, 2 Russ. 561, 565; *Severn* v. *Fletcher*, 5 Sim. 457.

[5] 2 V. & B. 113.
2 Mer. 71. In the above case, *Gurish* v. *Donovan*, 2 Atk. 166, was cited in argument in support of the motion, but, upon reference to the Registrar's book, it appeared that the order for striking out the prayer was made by consent, and that an answer was put in by the defendant after the order was made; 2 V. & B. 114, n. (*a*).

[7] 29th June 1831, MSS., *ex relatione Beames.*

[8] *Attorney-General* v. *Cooper*, 8 Hare, 166; see also *Wyllie* v. *Ellice*, 6 Hare, 505; *Ellice* v. *Goodson*, 3 M. & C. 653, 661; 2 Jur. 249.

[9] *Cresy* v. *Bevan*, 13 Sim. 354.

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 an Order. Orders for leave to amend bills, may, subject to the rules and regulations hereafter pointed out, be obtained at any period of the cause, previously to the hearing.

An order for leave to amend a bill may be obtained at any time before answer, upon motion without notice.[1]

An order for leave to amend a bill, only for the purpose of rectifying some clerical error in names, dates, or sums may be obtained at any time, upon motion without notice.[2] The order should specify the errors which are to be corrected.[3]

It is provided by Order 121 of our Con. G. O. that, "Where a demurrer is not set down for argument by the plaintiff, or the plaintiff does not obtain an order to amend, within eight days after notice of filing the demurrer is served, the defendant may set the same down, and serve notice thereof."

Where a demurrer has been overruled, it is irregular to obtain an order of course to amend pending an appeal; and in such a case, the order was discharged with costs, and the amendments expunged.[4]

In like manner, it is irregular to obtain an order of course to amend, pending an inquiry which of two suits is most for an infant's benefit.[5]

If, at the time the order for amendment is made, none of the defendants have appeared, the plaintiff may amend without payment of any costs. If any of the defendants have appeared, but have not answered, or, having answered, the plaintiff requires no further answer from them, the plaintiff may amend without payment of any costs to them; but the plaintiff must pay 20*s.* to each defendant, or set of defendants, who have answered, and from whom the plaintiff requires a further answer.

Where no further answer is required, the order should contain a recital to that effect: otherwise it is irregular.[6]

It is now proposed to consider the circumstances under which a bill may be amended after answer.

Our Order 81, provides that "One order of course to amend the bill, as the plaintiff may be advised, may be obtained by the plaintiff upon

[1] Ord. 76. As many orders as may be required may be thus obtained.

[2] Ord. 80. But such an amendment will render inoperative an order to take a bill *pro confesso*; *Weightman* v. *Powell*, 2 De G. & S. 570: 12 Jur. 958; see, however, *Cheeseborough* v. *Wright*, 28 Beav. 173. As to the necessity of re-serving the bill after such an amendment, see *Barnes* v. *Ridgway*, 1 Sm. & G. App. 18.

[3] Braithwaite's Pr. 304; and see form of Order, Seton, 1251, No. 1.

[4] *Ainslie* v. *Sims*, 17 Beav. 174.

[5] *Fletcher* v. *Moore*, 11 Beav. 617; 13 Jur. 1063.

[6] *Boddington* v. *Woodley*, 9 Sim. 380; 2 Jur. 917; *Breeze* v. *English*, 2 Hare, 638.

præcipe, at any time before filing the replication, and within four weeks ter afthe answer, or the last of several answers, has been filed; but no further order of course for leave to amend the bill is to be granted after an answer has been filed, except in the cases provided for by Order 80." This is similar to Order 9, of June, 1853, s. 12, under which the following case was decided; a bill was filed against three defendants, *A.*, *B.*, and *C.*, one of whom, *C.*, was out of the Province at the time. An order was obtained for leave to serve *C.* by substitutional service on *A.* and *B. for the purpose of a motion for injunction.* *A.* and *B.* answered the bill, but *C.* did not: the bill was then amended, and notice of motion for injunction served on *A.* and *B.* for themselves, and together with the bill on them for *C.*, under the order for service. After the motion was disposed of, the plaintiff took out an order, dismissing the bill against *A.* and *B.*, and on the same day an order to amend, under which a re-engrossment of the bill was filed, and served personally on *C.* This order to amend was styled in the original suit, and worded to amend the "office copies" of the "defendants." *Held*, that it was a second order to amend after answer, within the meaning of Order 9, June 1853, sec. 12; and it was on the application of *C.*, discharged as irregular, with costs.[1] After replication had been filed, the plaintiff served a notice to amend his bill by adding parties, but raised no new issues. It was held that the plaintiff might amend his bill by adding a defendant, and making the amendment, set out in his notice of motion. For this purpose it was considered not necessary to withdraw the replication. To do so is necessary only that the plaintiff may reply *de novo* to the answers of the new defendant, and in this case, no new issue was raised. It has always been the practice to permit a plaintiff to amend for the limited purpose of adding parties without withdrawing his replication.[2] The plaintiffs filed their bill to impeach a conveyance of lands in it to the wife of one of the defendants: in describing the lands by metes and bounds, by mistake, only a portion of the lands in it were included, which portion was afterwards lost to the parties by being sold under a power contained in a mortgage. Under these circumstances a motion for leave to amend the bill by inserting the property in it not included in the former description was granted.[3] Where the state of facts made by an original bill does not exist when the defendant answers, the plaintiff cannot amend so as to bring in other facts to keep the bill alive, but must file a new bill.[4] On a motion to take a bill off the files for irregularity, the description of the plaintiff being omitted, leave was

[1] *Kemp* v. *Jones*, 1 Cham. R. 374.

[2] *Johnson* v. *Cowan*, 2 Cham. R. 13; citing *Brattle* v. *Watterman*, 4 Sim. 125; *Brian* v. *Wastel*, 18 Jur. 446.

[3] *Wallace* v. *Ford*, 1 Cham. R. 287.

[4] *City Bank* v. *Amsden*, 7 U. C. L. J. 293.

given to amend on payment of costs.[1] In a suit instituted by an administrator with the will annexed upon a mortgage, the defendant, produced a release for the mortgage money given by this testator in his lifetime; therefore the plaintiff sought to be allowed to proceed against the defendant as a creditor of the estate, but as this would involve such an amendment as would create an entirely different record, the Court refused such permission and dismissed the bill with costs.[2] Where the plaintiff's solicitor absconded before the time to amend the bill, as of course, had expired, and his departure was not known to the plaintiff till afterwards, and due diligence appeared to have been used by the plaintiff to proceed with the cause after becoming acquainted with such departure, the Court granted leave to amend on payment of costs.[3] The Court refused to give special leave to amend by introducing new matter where the matter of the proposed amendment could be proved under the pleading without such amendment.[4]

A voluntary answer is deemed sufficient as soon as it is put in; and therefore in that case, the period of four weeks commences to run as soon as it is filed.[5]

In computing the period for amending or obtaining orders for leave to amend bills, the times of vacation are not to be reckoned.[6]

It will be convenient here to state the different times of vacation. Order 421, of the Con. G. Orders provides that "The long vacation is to commence on the 1st day of July, and to terminate on the 21st day of August in every year." Order 422, that "The Christmas vacation is to commence on the 24th day of December in every year, and terminate on the 6th day of the following month of January." Order 423, that "The days of the commencement and termination of each vacation, shall be included in and reckoned part of the vacation." Order 424, that "The offices of the Court shall be open on every day in the year, except during vacation, and on Sundays, New Year's Day, Good Friday, Easter Monday, Christmas Day, the days appointed for the celebration of the birthday of Her Majesty, and Her Royal Successors, and any day appointed by proclamation for a General Fast, or Thanksgiving." Order 425, declares that "During vacation, the Court will not sit, and the offices thereof are respectively to be closed; but the offices of the Registrar, and Clerk of Records and Writs, are to be open for all purposes of making applications for injunctions; and from ten o'clock in the forenoon till

[1] *Hill* v. *M'Guire*, Cooper's Dig. 41.
[2] *Bennett* v. *Crosthwaite*, 9 Grant. 422.
[3] *Carney* v. *Boulton*, 1 Grant. 423.
[4] *Willmott* v. *Boulton*, 1 Grant. 479.
[5] *Rodgers* v. *Fryer*, 2 W. R. 67; 2 Eq. Rep. 253, V. C. K.
[6] One Order 408

twelve o'clock noon, each day, for such proceedings, as do not require the attendance of the opposite party." And by Order 408, it is provided that "The time of vacation is not to be reckoned in the computation of the times appointed or allowed for the following purposes:

I. Answering either an original or amended bill.

II. Amending or obtaining orders for leave to amend bills:

III. Setting down demurrers:

IV. Filing replications, or setting down causes under the directions of Order 152, Order 153, Order 154, or Order 155:—

V. Master's reports becoming absolute:

VI. Moving to discharge an order of revivor:

VII. Moving to add to, vary, or set aside a decree, by any party served therewith."

The days of the commencement and termination of each vacation are included in and reckoned part of such vacation.[1]

When the bill has been once amended after answer, under an order of course, the plaintiff is not, except for the purpose of rectifying clerical errors in names, dates, or sums,[2] or of adding parties,[3] entitled to another order of course, giving him leave to amend his bill;[4] and this applies, notwithstanding that some of the defendants may answer subsequently to the date of the amendment,[5] and that those defendants who have already answered consent to the application for the order.[6]

For the purpose of determining whether an order of course to amend can be obtained, an answer held to be insufficient, or the insufficiency of which is admitted by the defendant, must be considered as no answer; and consequently, an order to amend after such insufficient answer, or after a demurrer or plea overruled,[7] is of course, and does not preclude the plaintiff from obtaining a further order of course for the amendment of his bill, after a sufficient answer has been put in.[8] It must, however, be recollected that an answer is deemed sufficient until it has been held insufficient; and further, that an amendment of the bill, made previously to the answer being held insufficient, operates as an admission of the sufficiency of the answer; consequently, however insufficient an answer

[1] Ord. 423.

[2] Ord. 80.

[3] *Ante.*

[4] Ord. 81.

[5] *Attorney-General* v. *Nethercoat*, 2 M. & C. 604; 1 Jur. 635; *Duncombe* v. *Lewis*, 10 Beav. 273; *Winthrop* v. *Murray*, 7 Hare, 150; 14 Jur. 302.

[6] *Bainbrigge* v. *Baddeley*, 12 Beav. 152: 13 Jur. 997.

[7] But pending an appeal, an order of course, after a demurrer overruled, is irregular: *Ainslie* v. *Sims*, 17 Beav. 174.

[8] *Mendizabel* v. *Hullett*, 1 R. & M. 324: *Bird* v. *Hustler*, *ib.* 325.

may be in fact, an amendment of the bill before it is held insufficient, will have the effect of preventing any further order to amend from being obtained, as of course.

After exceptions for insufficiency have been submitted to, or allowed, the plaintiff may obtain an order, as of course, on motion, that he may be at liberty to amend his bill, and that the defendant may answer the amendments and exceptions together.[1] If the bill has been already amended under such an order, and exceptions are taken to the answer to the amended bill, and are submitted to or allowed, the plaintiff may have a further order, as of course, to amend, and that the defendant may answer the amendments and exceptions together.[2] If, however, the defendant can put in his further answer, before he is served with the order to answer the amendments and exceptions together, the plaintiff will lose the benefit of such order, and the defendant may move on notice, to discharge it for irregularity.[3] Where the plaintiff did not amend his bill within the period allowed for that purpose, it was held, that a second order of course for leave to amend was irregular.[4]

All the applications to amend hitherto considered are of course, and require no notice. They are usually obtained on *præcipe* of course: but they may also be made on motion of course, in Chambers.

In all cases, other than those above pointed out in which an order may be obtained as of course, the plaintiff must, if he desires to amend his bill after answer, make a special application to the Judge for leave to do so. This application is made by motion in Chambers. The notice of motion must be served on the solicitors for all the defendants who have appeared to the bill. The Judge, at the time of making the order usually disposes of the costs of the application.

If the plaintiff amends his bill after answer by adding parties, the period of four weeks will still be reckoned from the time when the answer, or the last of the answers required to be put in to the original bill, is to be deemed, or is held to be sufficient.[5]

The rules laid down in the General Orders, as to obtaining orders of course to amend, do not appear to have been framed with a view to meet those cases where no answer is required, and none is put in; consequently it has been held, that it was not irregular to obtain an order of course to amend after the plaintiff had served a notice of motion for a decree, and the defendant had filed his affidavits in oppo-

[1] *Mayne* v. *Hochin*, 1 Dick. 255; *Adney* v. *Flood*, 1 Mad. 449; *Dipper* v. *Durant*, 3 Mer, 465.

[2] *Mendizabel* v. *Hullett*, 1 R. & M. 324: *Bird* v. *Hustler*, *ib.* 325.

[3] *Mayne* v. *Hochin*, 1 Dick. 255; *Bethune* v. *Bateman*, *ib.* 296; *Knox* v. *Symmonds*, 1 Ves. J. 87, 88; *Paty* v. *Simpson*, 2 Cox. 392; *Partridge* v. *Haycraft*, 11 Ves. 570, 578; *Pariente* v. *Bensusan*, 13 Sim. 522; 7 Jur. 618; *Hemming* v. *Dingwall*, 8 Beav. 102.

[4] *Dolly* v. *Challin*, 11 Beav. 61; and see *Watson* v. *Life*, 1 M'N. & G. 104; 13 Jur. 479.

[5] *Bertolacci* v. *Johnstone*, 2 Hare, 632: 8 Jur. 751.

sition to such motion.[1] It would seem, that if the motion had been set down for hearing, an order of course would have been irregular.[2]

After the evidence is closed, the bill cannot be amended in any other respect than by adding parties; and no new allegation can be introduced, or material fact put in issue, which was not so before.[3] And where a plaintiff, 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 the application of the defendant at the opening of the cause, when it came on for hearing.[4]

It is said[5] that, after publication has passed, (that is after the evidence is closed,) there is no instance of a plaintiff obtaining an order to amend, without withdrawing his replication. The observation, however, appears to be a mere *dictum*, and it certainly cannot apply to cases where the amendment is merely by adding parties. In *Habergham* v. *Vincent*,[6] 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 the purpose would be regular, provided it was only for the purpose of making him a witness to what was done in the Master's office; but that, if there was anything in the decree affecting him in the way of an order to pay, such an order would be out of the power of the Court.

Where it is intended to amend a bill after replication filed, by the addition of new facts or charges, the proper course is to apply for leave to withdraw the replication and amend; and it seems that an order of this description may be obtained, upon an application in Chambers supported by proper affidavits, at any time before the closing of the evidence.[7] The order may be made without prejudice to the evidence already gone into being used.[8]

Sometimes the Court, at the hearing, will order a cause to stand over, with liberty to the plaintiff to perfect his case by amendment, upon his paying the costs of the day.[9] Thus, as we have seen, if, at the hearing, the record appears to be defective for want of proper parties, the Court will allow the cause to stand over, for the plaintiff to amend his bill by

[1] *Gill* v. *Rayner*, 1 K. & J. 395; and see *ante*.

[2] *Ibid.*; *Goodwin* v. *Goodwin*, 3 Atk. 370. A motion for a decree would for this purpose, it is apprehended, be considered a hearing of the cause.

[3] *Goodwin* v. *Goodwin*, 3 Atk. 370; *Milligan* v. *Mitchell*, 1 M. & C. 433, 442; *Thompson* v. *Judge*, 2 Drew. 414; *Horton* v. *Brocklehurst*, 29 Beav. 503; *Forbes* v. *Stevens*, 10 Jur. N. S. 861, V.C.W.; but see S. C. 4 N. R. 386, L.JJ.

[4] *Harding* v. *Cox*, 3 Atk. 583.

[5] 1 Atk. 51.

[6] 1 Ves. J. 68; see, however, 1 C. P. Coop. t. Cott. 40, n.

[7] *Horton* v. *Brocklehurst*, 29 Beav. 503; *Champneys* v. *Buchan*, 3 Drew. 5.

[8] *Ricardo* v. *Cooper*, cited Seton, 1253.

[9] This may be done when the cause is heard on motion for decree: *Thomas* v. *Bernard*, 7 W. R. 271, V. C. K.

adding parties;[1] or, where the parties are too numerous to be brought before the Court, to alter the form of the bill, by making it a bill by the plaintiffs, on behalf of themselves and all others of the same class.[2] This practice is not confined to amendment, by adding parties: it will be extended to permit the plaintiff to show why he cannot bring the necessary parties before the Court.[3] And if the record is defective by reason of a misjoinder of plaintiffs, the Court may direct such amendments as may be necessary, in order to grant such relief as any of the plaintiffs may be entitled to, and at the hearing, before such amendments are made, treat any of the plaintiffs as if he were a defendant.[4] And so, as we have seen,[5] the Court will sometimes, at the hearing, permit the prayer of the bill to be amended, so as to make it more consistent with the case made by the plaintiff than the one he has already introduced. And where a plaintiff 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 put off the cause, in order that the plaintiff might have an opportunity to re-amend his bill by inserting it.[6]

Usually, amendments are allowed at the hearing only for the purpose of making the record complete as to parties, or adapting the prayer to the case made by the bill.[7] Upon the question of allowing amendments for other purposes at the hearing, Sir George Turner, L. J., in the case of *Lord Darnley* v. *The London, Chatham and Dover Railway Company*,[8] observed: "It is impossible to lay down any general rule; all depends upon the circumstances; but, speaking generally, I should say that leave should be given when the matters proposed to be introduced are connected with the matters in issue, but should be refused when it is not so."[9] Thus, where a matter has not been put in issue, with sufficient precision, the Court has, upon hearing the cause, given the plaintiff liberty to amend the bill for the purpose of making the necessary alteration.[10]

[1] *Ante.* And see *Leyland* v. *Leyland*, 10 W. R. 149, V. C. K.

[2] *Ante;* and see *Gwatkin* v. *Campbell*, 1 Jur. N. S. 131, V. C. W.

[3] *Milligan* v. *Mitchell*, 1 M. & C. 511, 515; *Gibson* v. *Ingo*, 5 Hare, 156.

[4] 15 & 16 Vic. c. 86, s. 49; *ante*, and see *Lee* v. *Blackstone*, Seton, 1113, No. 2. See our Orders 53, 54, 55, taken from this Statute.

[5] *Ante.*

[6] *Harding* v. *Cox*, 3 Atk. 583.

[7] *Watts* v. *Hyde*, 2 Phil. 406, 411: 11 Jur. 979; and see *Bellamy* v. *Sabine*, 2 Phil. 425, 447.

[8] 9 Jur. N. S. 452, 453: 11 W. R. 338, 391; and see *Gossop* v. *Wright*, 9 Jur. N. S. 592: 11 W. R. 632, V. C. K.

[9] In *Walker* v. *Armstrong*, 8 De G. M. & G. 531: 2 Jur. N. S. 959, however, the L.JJ. allowed a bill to be amended at the hearing, by raising an entirely new case: viz., the rectification of a deed.

[10] Ld. Red. 326; *Filkin* v. *Hill*, 4 Bro. P. C. Ed. Toml. 640; and see observations of L. J. Turner on this case, in *Lord Darnley* v. *London, Chatham and Dover Railway Company*, 9 Jur. N. S. 452: 11 W. R. 391; see also *Watts* v. *Lord Eglinton*, 1 C. P. Coop. t. Cott. 423; *Knox* v. *Gye*, 9 Jur. N. S. 1277, V. C. W.: 12 W. R. 1125, L.JJ.; *Forbes* v. *Stevens*, 10 Jur. N. S. 861, V. C. W.: 4 N. R. 386, L.JJ.; *Firth* v. *Kidley*, *ib.* 415, L.JJ. For form of orders to amend at the hearing, see Seton, 1113, Nos. 1, 2: and see *ib.* 1114—1116.

Amendments may be made at the hearing of causes, under the new practice as at *nisi prius*.[1] An application to amend at a late stage of the cause (after the hearing) cannot be granted if it appears that such amendment will be attended with any risk of doing injustice, notwithstanding the practice established by Order 9, sec. 14 of 1853.[2] The defendant, by his answer, set up a compromise and settlement of the plaintiff's claim, and proved the same at the hearing, whereupon the plaintiff asked liberty to amend for the purpose of impeaching this settlement, the Court granted the leave upon payment of costs, but without the right to use again the evidence which had been taken in the cause.[3]

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.[4] Upon the same principle where an infant heir-at-law had been made a co-plaintiff, Lord Redesdale ordered the cause to stand over, with liberty to the plaintiff to amend his bill, by making the heir-at-law a defendant;[5] and where a matter has not been put, by the bill, properly in issue, to the prejudice of an infant, the Court has generally ordered the bill to be amended.[6]

The Court has even gone to the extent of allowing the plaintiffs, at the hearing of an appeal, to amend their bill, by converting it from a bill into an information and bill, or information only.[7]

But, although the Court will sometimes, at the hearing, allow the cause to stand over, with liberty for the plaintiff to amend his bill, the plaintiff ought to be careful, before the cause comes on, to have the record in a proper state, so as to enable the court to make a complete decree: for the plaintiff himself cannot, when the cause comes on for hearing (unless under particular circumstances, or with the consent of the defendant,) obtain leave to amend his bill, even upon the usual terms of paying the costs of the day; and if a decree were to be obtained upon pleadings which are defective in a material point, it would afterwards be liable to be set aside for error.[8]

It frequently happens that, upon the argument of a demurrer, the Court, where the ground for demurring can be removed by amendment, has, in order to avoid putting the plaintiff to the expense of filing a new

[1] *Fraser* v. *Rodney*, 11 Grant, 426; and see *Street* v. *Hogeboom*, 3 Grant, 128.
[2] *Aitchison* v. *Coombs*, 6 Grant. 643.
[3] *M'Intyre* v. *Cameron*, 13 Grant, 475.
[4] *Serle* v. *St. Eloy*, 2 P. Wms. 386. *ante*.
[5] *Plunkett* v. *Joice*, 2 Sch. & Lef. 159.
[6] Ld. Red. 327.
[7] *President of St. Mary Magdalen College* v. *Sibthorpe*, 1 Russ, 154: *ante*.
[8] Wyatt's P. R. 299. As to obtaining leave to amend at the hearing of an interlocutory application see *Barnett*, v. *Noble*, 1 J. & W. 227; *Pare* v. *Clegg*, 7 Jur. N. S. 1136: 9 W. R. 216, M. R.

bill, instead of deciding upon the demurrer, given the plaintiff liberty to amend his bill, on payment of the costs incurred by the defendant: because, after a demurrer allowed to the whole bill, the bill is so completely out of Court that no amendment can take place:[1] and where the demurrer is for want of parties, the Court, in general, annexes to the order allowing the demurrer a direction that the plaintiff shall be at liberty to amend his bill by adding parties thereto. Where, previously to the filing of a general demurrer, a notice of motion for an injunction had been served, leave was given, on allowing the demurrer, to amend within ten days, without prejudice to the notice of motion.[2]

Where, by an order allowing a demurrer, leave was given to amend the bill, and the plaintiff afterwards neglects to amend, the proper course for the defendant to take in such a case, is to move that the plaintiff do amend within a given time, otherwise that the order to amend may be discharged, and the demurrer allowed.[3] Where a plaintiff, after demurrer, desired to amend by adding a judgment creditor, who had assigned his claim to the plaintiff as a party defendant, leave was given for that purpose, dispensing with service on the defendants already before the Court.[4]

The Court, in allowing a plea, frequently gives leave to amend:[5] it must not, however, be understood that this is by any means a matter of course, even where the plea covers only part of the bill.[6] Leave to amend has also been given where a plea was overruled, with leave to plead *de novo*.[7]

It may be observed in this place, that where a plea for want of parties was put in to a bill of discovery, which had been filed in aid of an ejectment at law, on the ground that the trustees in whom the legal estate was vested where not co-plaintiffs with the *cestui que trusts*, and upon argument a case was directed for the opinion of a Court of Law, but the parties not being able to agree upon the case, the plaintiffs moved for leave to amend the bill by adding the trustees as co-plaintiffs, Lord Eldon refused the motion, as being irregular while the judgment on the plea was pending.[8] Afterwards, however, upon the plaintiffs moving that the Vice-Chancellor's order, directing the case to be stated, might be discharged, and that the plaintiffs might be at liberty to amend their

[1] *Lord Coningsby* v. *Jekyll*, 2 P. Wms. 300; 2 Eq. Ca. Ab. 59, pl. 3; *Smith* v. *Barnes*, 1 Dick, 67; see also *Mason* v. *Lake*, 2 Bro. P. C. Ed. Toml. 495, 497; *Bressenden* v. *Decreets*, 2 Cha. Ca. 197; *Lloyd* v. *Loaring*, 6 Ves. 773, 779.

[2] *Rawlings* v. *Lambert*, 1 J. & H. 458; *Harding* v. *Tingey*, 10 Jur. N. S. 872; 12 W. R. 703 V. C. K.

[3] *Nelson* v. *Robertson*, 1 Grant. 530.

[4] *Boomer* v. *Gibson*, 4 Grant. 430.

[5] Ld. Red. 281; *Doyle* v. *Muntz*, 5 Hare, 509, 518: 10 Jur. 914; *Tudway* v. *Jones*, 1 K. & J. 691 and see *Barnett* v. *Grafton*, 8 Sim. 72.

[6] *Taylor* v. *Shaw*, 2 S. & S. 12; *Neck* v. *Gains*, 1 De G. & S. 223; 11 Jur. 763.

[7] *Chadwick* v. *Broadwood*, 3 Beav. 316; 5 Jur. 359.

bill, by the introduction of facts to show that the legal estate was in the trustees, and that there was a count in the declaration in ejectment on the demise of such trustees, the Lord Chancellor made such an order, but upon condition of the plaintiffs consenting to the plea being allowed.[1]

It seems that, where a plea has been replied to, the plaintiff may, in some cases, have leave to withdraw his replication and amend, but that such leave is not a matter of course, and can only be obtained on a special application;[2] and, therefore, where an order to withdraw replication to a plea, and to amend, was obtained on a motion of course, it was discharged for irregularity, and the amended bill was ordered to be taken off the file.[3]

An application for leave to withdraw replication, and amend the bill by adding parties where the cause had been set down for examination, and when the amendment would postpone examination till the following term, was refused with costs: the plaintiffs having been guilty of laches in making the application. An amendment of a bill after replication, and long after bill filed for the purpose of stating a case of gross fraud, will not be allowed unless it appears on the clearest evidence that the plaintiff or his solicitor did not know, and could not with reasonable diligence have discovered before filing the bill, the fact upon which the charge of fraud is grounded.[4]

After the plaintiff has obtained an order to amend, he has, in all cases in which no other time is limited by such order, fourteen days after the date of the order, within which he may amend his bill.[5] If he does not amend within the time limited, or within the fourteen days, the order becomes void, and the cause, as to dismissal, stands in the same situation as if such order had not been made.[6] The fact of the plaintiff not making his amendment within this period will not, however, preclude him from obtaining another similar order of course to amend, upon the same terms, if the original order was obtained before any answer was put in.[7]

If the plaintiff is unable to amend the bill within the time limited by

[1] *Ibid.* 74.

[2] *Carleton* v. *L'Estrange*, T. & R. 23; *Barnett* v. *Grafton*, 8 Sim. 72.

[3] *Carleton* v. *L'Estrange*, *ubi sup.*

[4] *Woodstock* v. *Niagara*, 1 Cham. R. 166.

[5] Ord. 83. This order applies to all orders to amend, whether of course or special: see *Cridland* v. *Lord de Mauley*, 2 De G. & S. 560: 12 Jur. 1015; *Armitstead* v. *Durham*, 11 Beav. 428: 13 Jur. 330; *Bainbrigge* v. *Baddeley*, 12 Beav. 152; 13 Jur. 997. These cases were decided on the former orders; in the existing orders. the words have been somewhat altered, apparently to meet this question. For a case on the present orders see *Tampier* v. *Ingle*, 1 N. R. 159, V.C.K.

[6] Ord. 83.

[7] *Nicholson* v. *Peile*, 2 Beav. 497: see, however, where the plaintiff had excepted, *Dolly* v. *Challin*, 11 Beav. 61. The service of an order to amend does not prevent the defendant from filing his answer; *Mackerell* v. *Fisher*, 14 Sim. 604; 9 Jur. 574.

the order to amend, or, if no time is thereby limited, within the fourteen days, he should apply by notice of motion, before the time has expired, for an enlargement of the time.[1] The notice must be served on all the defendants who have appeared to the bill; and the order is drawn up at chambers.

In a proper case, an order may also be obtained, on a notice of motion served in like manner, to enlarge the time allowed by the General Orders of the Court, to obtain an order to amend.[2] The order is drawn up in chambers. The usual course is, however to obtain the common order within due time, and then to apply, before the fourteen days have expired, for an extension of time to amend under it.

Where the time had elapsed for obtaining the usual order of course to amend, the Court will not grant an order to amend as the plaintiff may be advised as an indulgence on the ground, that the plaintiff had intended to take out the usual order within the proper time, but had not done so through a mistake of a clerk of his solicitor.[3] This Order to amend may in some cases be obtained from the Deputy Registrar, in whose office the bill is filed. Order 35 provides that "Where a bill is filed with a Deputy Registrar, the Local Master and Deputy Registrar respectively in the county where such bill has been filed, are to have all such powers and authorities in relation to such suit, as belong to the Master and Clerk of Records and Writs respectively." And Order 36, that "In addition to the powers and authorities conferred upon Local Masters by Order 35, the Local Master in the County where the bill has been filed may hear and dispose of all applications in the progress of such suit, for the following purposes, viz:—

I. To appoint guardians *ad litem* for infants.

II. For time to answer, or demur.

III. For leave to amend before replication.

IV. To postpone the examination of witnesses, or to allow further time for the production of evidence.

V. For security for costs."

Order 37 provides that "All orders which are drawn up by the Clerk of Records and Writs without the special direction of the Court, may be drawn up by the Deputy Registrar with whom the bill is filed." Where a bill is filed in an outer office, the order for production and other orders of course are properly obtainable at such office, and not from the Registrar.[4]

[1] *Dolly* v. *Challin*, *ubi sup.*: *Bainbrigge* v. *Baddeley*, 12 Beav. 152, 154: 13 Jur. 997.

[2] See *Potts* v. *Whitmore*, 10 Beav. 177, 179.

[3] *Bowen* v. *Turner*, 1 Cham. R. 268.

[4] *Dougall* v. *Wilburn*, 1 Cham. R. 155. "Registrar," in this case must not be read "Clerk of Records and Writs."

It may here be mentioned, that Order 305 provides that "It shall be competent for a Local Master, upon disposing of applications made to him under Order 36 to direct payment of a sum in gross in lieu of taxed costs, and to direct by and to whom such sum in gross is to be paid."

In computing the time for amending the bill, the times of vacation are not to be reckoned:[1] if, therefore, the time would expire in vacation and it is intended to deprive the plaintiff of this advantage, the order should be so framed as to direct the amendment to be made on or before some specified day.

When an order to amend has been irregularly made, the defendant may move on notice to discharge it;[2] it will, however be considered as valid until it has been discharged;[3] and the irregularity will be waived if the defendant accept costs under it.[4]

An order to amend, whether of course or special, should be served without delay, on such of the defendants as have appeared to the bill, either in person or by their solicitors: as the order only operates from the time of service.[5]

If the amendments extend, in any one place to 180 words, or two folios,[6] or if the bill has been so often amended that the amendment to be inserted cannot be interlined on the record, or is so considerable as to blot or deface it, a reprint of the bill will be necessary.[7]

The draft of an amended information, or the reprint, if there be one, must be signed by the Attorney-General;[8] otherwise, the defendant may move that it be taken off the file.[9] Before signing the amended information, the Attorney-General requires a certificate from the counsel who settled it that the amendments are proper for his sanction.

The same rules, as regards reprinting, apply to informations as to bills.

If a reprint of a bill is not required, the Record and Writ Clerk will insert the amendments in the record, on the draft amended bill, being left with him, together with the order directing the amendments, and a *præcipe*; and the draft and order will be afterwards returned on appli-

[1] Ord. 408.

[2] *Potts* v. *Whitmore*, 10 Beav. 177: *Horsley* v. *Fawcett*, *ib.* 191; *Peile* v. *Stoddart*, 11 *ib.* 591; *Bainbrigge* v. *Baddeley*, 12 *ib.* 152: *Bennett* v. *Honeywood*, 1 W. R. 490, V.C.K.

[3] *Blake* v. *Blake*, 7 Beav. 514; *Chuck* v. *Cremer*, 2 Phil. 113; C. P. Coop. t. Cott. 338.

[4] *Tarleton* v. *Dyer*, 1 R. & M. 1, 6; *King of Spain* v. *Hullet*, *ibid.* 7, n.; see also *Kendell* v. *Beckett*, 1 Russ. 152; *Bramston* v. *Carter*, 2 Sim. 458.

[5] *Price* v. *Webb*, 2 Hare, 515.

[6] A folio for this purpose is ninety words; Braithwaite's Pr. 305, n.

[7] *Stone* v. *Davies*, 3 De G M. & G. 240; 17 Jur. 585.

[8] Braithwaite's Pr. 25, 309.

[9] *Attorney-General* v. *Fellows*, 1 J. & W. 254.

cation. Where a reprint is necessary, the amended bill must be printed and filed in the manner before explained in treating of original bills; and a like fee is payable on filing the amended bill. The order to amend must be produced at the time the reprint is filed.

The record of the bill, when amended, is marked with the date of the order, and the day on which the amendment is made[1]; and an entry of the amendment, and of the date of making it, and of the order, is made in the Record and Writ Clerk's Book; and the amended bill is deemed to be filed at and from the date of making the amendment.

The like course is pursued, where the bill requires to be re-amended.

Where the order to amend is made upon payment of costs, or where, by the course of the Court, fixed costs are payable on amendment,[2] such costs should be paid or tendered before any further proceedings are had: otherwise, the defendant may apply to the Court to stay such proceedings until the plaintiff has fulfilled the condition, by making the required payment.[3]

If the plaintiff amends his bill after he has obtained an injunction, it is usual, although not indispensable, for the order giving him liberty to amend, to be expressed to be "without prejudice to the injunction;" and the order of course to amend may be obtained in this form.[4] Where however, an injunction had been obtained until answer or further order, in a suit by a sole plaintiff, it was held that the injunction was dissolved by adding a co-plaintiff, under an order to amend in which those words were not inserted.[5]

Where the plaintiff has obtained an injunction, and afterwards amended his bill, but without materially changing the allegations therein, it was *held* not to be a waiver of the injunction.[6] Amendments of a material character will not be allowed, without prejudice to a pending motion for injunction.[7] After service of an injunction, the plaintiff amended his bill and added a new defendant, who was a mere trustee for the plaintiff, without, however, altering the frame of the bill or prayer. Subsequently to the amendment, the de-

[1] Thus: Amended — day of ——, 186—, by order dated —— day of——, 186—.

[2] *Ante.*

[3] *Breeze* v. *English* 2 Hare, 638. The costs of a demurrer prepared, but not filed at the time of amending the bill, will be costs in the cause: *Bainbrigge* v. *Moss*, 3 K. & J. 62: 3 Jur. N. S. 107. The costs are usually paid at the time the order to amend is served.

[4] *Mason* v. *Murray*, 2 Dick. 536; *Warburton* v. *London and Blackwall Railway Company*, 2 Beav. 253; *Woodruffe* v. *Daniel*, 9 Sim. 410. see *Kennedy* v. *Lewis*. 14 Jur. 166; Seton, 873, V. C. K. B.; see also *Ferrand* v. *Hamer*, 4 M. & C 143, 145; 3 Jur. 236; *Pratt* v. *Archer*, 1 S. & S. 433; *Pickering* v. *Hanson*, 2 Sim. 488.

[5] *Attorney-General* v. *Marsh*, 16 Sim. 572; 13 Jur. 317; and see *Sharp* v. *Ashton*, 3 V. & B. 144; *King* v. *Turner*, 6 Mad. 255.

[6] *McDonnel* v *McKay*, 2 Cham. R. 14.

[7] *Davy* v. *Davy*, 2 Cham. R. 81.

fendant committed a breach of the injunction, and the plaintiff moved to commit the defendant; *held*, that the amendment was not a waiver of the injunction.[1] Where the time for amending the bill as of course, has not elapsed, an order to amend, without prejudice to an injunction, is as of course, and obtainable on *præcipe*: it is unnecessary to apply in Chambers for it.[2] Where a motion for injunction stood over, and before it was brought on, the plaintiff amended his bill by adding parties necessary to the suit, for the purpose of obtaining the relief sought thereby, and in the absence of whom such relief would not have been granted, and again brought on the motion without giving a fresh notice, the Court refused to hear the motion on this objection being taken.[3]

A writ of *ne exeat regno* is not lost by a subsequent amendment of the bill; it is, therefore, unnecessary that the order should be expressed to be without prejudice to the writ.[4]

Where a motion for an injunction had been, by arrangement, turned into a motion for decree, times being fixed for the filing of affidavits on both sides, and the defendant undertaking not to do certain specified acts until the hearing, it was held, that the plaintiff, by amending his bill after the time fixed for filing his affidavits, broke the terms of the arrangement, and the defendant was accordingly discharged from his undertaking.[5]

If the plaintiff amends his bill after he has given a notice of motion for an injunction,[6] or for a receiver,[7] he thereby waives the notice; and must pay the defendant's costs of the motion.[8] Where after notice of motion for an injunction had been served, a general demurrer to the bill was allowed, leave was given to amend, without prejudice to the notice of motion.[9]

Where after serving a notice of motion for injunction, and before the motion is made, the plaintiff amends his bill: such amendment is an answer to the motion.[10]

The amendment of the bill, even for the purpose of rectifying a clerical error, renders a previous order to take the bill *pro confesso* inopera-

[1] *McDonnell* v. *McKay*, 12 Grant 414.
[2] *Evans* v. *Root*, 1 Cham. R. 357.
[3] *Westacott* v. *Cockerline*, 13 Grant 159.
[4] *Grant* v. *Grant*, 5 Russ. 189.
[5] *Clark* v. *Clark*, 13 W. R. 133, V. C. W.
[6] *Martin* v. *Fust*, 8 Sim. 199; *Gouthwaite* v. *Rippon*, 1 Beav. 54; *Monypenny* v. ——, 1 W. R. 99, V. C. K.
[7] *Smith* v. *Dixon*, 12 W. R. 934, V, C. K.
[8] *Monypenny* v. ——, *ubi sup.*; *London and Blackwall Railway Company* v. *The Limehouse Board of Works*, 3 K. & J. 123; *Smith* v. *Dixon*, *ubi sup.*
[9] *Rawlings* v. *Lambert*, 1 J. H. 458; and see *Harding* v. *Tingey*, 10 Jur. N. S. 872: 12 W. R. 703, V. C. K.
[10] *McDonnell* v. *Street*, 13 Grant 168.

tive[1] : unless the amendment was made in pursuance of an order obtained under No. 82 of our Con. G. Orders.

Where the plaintiff had obtained an order *pro confesso* against one of the defendants, and afterwards applied to amend, by adding parties without prejudice, the motion was refused.[2] Where an order to amend has been taken, but through inadvertence, not without prejudice to an order *pro confesso* previously obtained, the Court, if the case is a proper one to have granted an order to amend without prejudice in the first instance, will grant such an order *nunc pro tunc*, so as thereby to revive the order *pro confesso*.[3]

If the plaintiff takes advantage of an order to amend, so as entirely to change his case, and to make the bill a perfectly new one, or if the amendments introduced into the bill are not, in other respects, warranted by the order to amend, the defendant may move, on notice to the plaintiff, that the amended bill may be taken off the file, or that the amendments may be struck out, and the record restored to its original state; and that the plaintiff may be ordered to pay the defendant's costs occasioned by the amendment, and of and consequent on the application, or to place the defendant in the same position with regards to costs that he would have been in if the plaintiff, instead of amending, had dismissed his original bill with costs, and filed a new one.[4] Thus, where a plaintiff originally filed his bill against the defendant as his bailiff or agent, in respect of certain farms, praying an account against him upon that footing, and afterwards, upon an issue being directed to try whether the plaintiff was or was not a mortgagee of such farms, and the jury finding that he was, the plaintiff amended his bill by stating the mortgage, and converting his former prayer for relief into a prayer for a foreclosure : upon the defendant's moving that the amended bill might be taken off the file, Lord Eldon held, that the defendant was entitled to all the costs sustained by him, beyond what he would have been put to if the bill had been originally a bill for a foreclosure, and made an order accordingly: although, as the amended bill had been set down for hearing, he did not go the length of ordering it to be taken off the file.[5]

[1] *Weightman* v. *Powell*, 2 De G. & S. 570 : 12 Jur. 958.

[2] *Herchmer* v. *Benson*, 1 Grant 92.

[3] *Ruttan* v. *Smith*, 1 Cham. R. 296

[4] *Bullock* v. *Perkins*, 1 Dick. 110, 112; *Dent* v. *Wardel*, *ib.* 339 : *Smith* v. *Smith*, G. Coop. 141; *Mavor* v. *Dry*, 2 S. & S. 113, 116; *Attorney-General* v. *Cooper*, 3 M. & C. 258, 262 : 1 Jur. 790; *Allen* v. *Spring*, 22 Beav. 615; *Thomas* v. *Bernard*, 7 W. R. 271, V. C. K.; *Eagle* v. *Le Breton*, cited Seton, 1254; and see *Ainslie* v. *Sims*. 17 Beav. 174; *Parker* v. *Nickson*, 4 Giff. 311 : 9 Jur. N. S. 864. For form of order, see Seton, 1253, No. 10.

[5] *Smith* v. *Smith*, *ubi sup.*; and see *Mavor* v. *Dry*, and *Parker* v. *Nickson*, *ubi sup*; see, however, *Allen* v. *Spring*, *ubi sup.*, where such a motion was refused; and it seems it will only be granted where the case made is entirely new; *Thomas* v. *Bernard*, *ubi sup.* The defendant should not enter into evidence, as to any charges struck out by amendment; *Stewart* v. *Stewart*, 23 Beav. 393.

Where after the time for amendment as of course, an order is obtained to amend, by adding a party "with apt words, to charge him or otherwise, as plaintiff shall be advised," the plaintiff is not at liberty to make any amendment whatever except such as is required for the purpose of introducing the additional party.[1] A redemption suit having stood over at the hearing, with leave to amend, by adding parties as plaintiffs or defendants, the plaintiff added the new parties as co-plaintiffs, and amended that part of the prayer of the bill, which asked that the plaintiffs might be directed to surrender and deliver up possession of the mortgaged premises to one of the then plaintiffs, so that in the amended bill it ran thus:—that the defendants might be directed to surrender and to *convey or assign, for the residue of the term therein created as aforesaid,* and deliver up possession of the mortgaged premises to all the plaintiffs to the amended bill. *Held,* that this amendment was not so unconnected with the order as to render a motion to expunge the same proper. When a cause stands over with leave to amend, by adding parties, the plaintiff has no right to introduce any amendment, though immaterial, that is unconnected with such leave.[2] Where a cause stands over at the hearing, for the purpose of adding parties, the plaintiff has not the right to amend, by changing the venue; but a defendant having delayed unreasonably in making his application, a motion to take the amended bill off the file for irregularity in having been thus amended, was refused without costs.[3]

Upon the same principle, where a plaintiff 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, with notice, order such costs to be taxed and paid to the defendant. Thus, where a plaintiff filed a bill which was of great length, and prayed relief in a variety of matters, to which the defendants put in answers, which were also of great length, after which the plaintiff, by virtue of a common order to amend, amended his bill and filed a new engrossment, which was very short, and confined to one only of the objects of relief prayed by the original bill; upon the defendants moving that the order to amend might be discharged, and the bill dismissed with costs, or that the plaintiff might pay to them the costs of putting in their answer to so much of the original bill as did not relate to the relief prayed by the amended bill,

[1] *Gillespie* v. *Grover*, 2 Grant 120.
[2] *Chisholm* v. *Sheldon*, 1 Grant 294.
[3] *Fenton* v. *Cross*, 1 Cham. R. 25.

Lord Northington directed that the order for amending the bill should stand, but that the plaintiff should pay to the defendants the further sum of five pounds, beyond the sum of twenty shillings mentioned in the order.[1] And where a cause, at the hearing, was ordered to stand over, with liberty to the plaintiff to amend by adding parties, and the plaintiff took advantage of that order to strike out several charges which had necessarily led the defendant into the examination of witnesses, and to add others, the Court, upon motion, ordered that part of the amendment to be discharged, and the plaintiff's bill to be restored to what it was before: in order that, at the hearing, the costs of those parts of the bill which had been abandoned by the plaintiff might be awarded to the defendant.[2] Where, however, a bill was filed for a foreclosure of a mortgage and for a transfer of a sum of stock, and, on the answer being filed, disclosures were made which rendered it advisable to amend the blll by striking out all that related to the mortgage, whereby nearly one-half of the bill and answer was rendered useless, Sir Lancelot Shadwell, V. C., refused to order, on motion, the plaintiff to pay the defendant's costs occasioned by the amendment, as it appeared that the amendment was made under the advice of counsel, and not for the purpose of vexation or oppression.[3]

The fact of an irregular amendment having been made, under a common order to amend, will not be a sufficient reason for ordering the bill to be taken off the file, if the record can be restored to the state in which it was before such irregular amendment was made.[4]

CHAPTER VII.

SECTION I.—*Proceedings by Service of Notice of the Decree.*

THE practice of serving, with notice of the decree, persons who are not named as parties on the record, was introduced into England by

[1] *Dent* v. *Wardel*, 1 Dick. 339.

[2] *Ballock* v. *Perkins*, 1 Dick. 110; and see *Strickland* v. *Strickland*, 3 Beav. 242; *Leather Cloth Company* v. *Bressey*, 3 Giff. 474, 494: 8 Jur. N. S. 425, 429.

[3] *Monck* v. *Earl of Tankerville*, 10 Sim. 284: 3 Jur. 1167.

[4] *Attorney-General* v. *Cooper*, 3 M. & C. 258, 262: 1 Jur. 790; and see *Ainslie* v. *Sims*, 17 Beav. 174.

the 42nd section of the Chancery Amendment Act, of 1852.[1] Under the provisions of that section: (1.) Any residuary legatee or next of kin may, without serving the remaining residuary legatees or next of kin, have a decree for the administration of the personal estate of a deceased person.[2] (2.) Any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate, directed to be sold, may, without serving any other legatee or person interested in the proceeds of the estate, have a decree for the administration of the estate of a deceased person.[3] (3.) Any residuary devisee or heir may, without serving any co-residuary devisee or co-heir, have the like decree.[4] (4.) Any one of several *cestuis que trust* under any deed or instrument may, without serving any other of such *cestuis que trust*, have a decree for the execution of the trusts of the deed or instrument.[5] (5.) In all cases of suits for the protection of property pending litigation, and in all cases in the nature of waste, one person may sue on behalf of himself and of all persons having the same interest.[6] (6. Any executor, administrator, or trustee may obtain a decree against any one legatee, next of kin, or *cestui que trust* for the administration of the estate, or the execution of the trusts.[7] In all the above cases, the persons who, according to the former practice of the Court, were necessary parties, may be served with notice of the decree; and after such notice shall be bound by the proceedings, in the same manner as if they had been originally made parties to the suit.[8]

The notice of the decree must be served personally, unless otherwise directed; and where a husband and wife have to be served, the notice must be served on each, personally, notwithstanding that the suit does not relate to the wife's separate estate, and that they are residing together; but the Court or Judge will, on a proper case being made, dispense with personal service.[9]

The process by service of notice of the decree applies to infants, per-

[1] 15 & 16 Vic. c. 86.

[2] 15 & 16 Vic. c. 86, s. 42, r. 1;

[3] Rule 2.

[4] Rule 3.

[5] Rule 4.

[6] Rule 5.

[7] Rule 6. In all the above cases, the Court, if it shall see fit, may require any other person to be made a party to the suit, and may give the conduct of the suit to such person as it may deem proper, and may make such order in any particular case as it may deem just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question: Rule 7. By rule 9, trustees represent beneficiaries in certain cases.

[8] Rule 8. It is improper to serve, under these provisions, notice of the decree on any other persons than those specified in 15 & 16 Vic c. 86. S. 42: *Colyer* v. *Colyer*, 9 Jur. N. S. 294, V. C. K. The first six rules of our Order 58 are similar to the six referred to as forming part of the 42nd section of the Imperial Statute. Rule 8 of the statute is similar to our Order 60.

[9] Braithwaite's Pr. 520, 521.

sons of unsound mind not so found by inquisition, and persons out of the jurisdiction.[1]

In England an application must be made on summons for the direction of the Judge as to the manner of serving notice of the decree on infants, and persons of unsound mind not so found by inquisition, and persons out of the jurisdiction; but in this Province, when infants and persons of unsound mind are served under Order 60, they are served in such manner as the Master, before whom the reference is being prosecuted, may direct.

Order 517 provides that "In the case of an infant defendant, under "the age of ten years, a copy of the bill of complaint is not to be served "on the infant personally, but is to be delivered to or left at the dwell- "ing house of the person with whom, or under whose care the infant is "residing at the time of the service; and if more defendants than one "under the said age live with, or under the care of the same person, "one copy only is to be served for all such infant defendants." And Order 523 declares that "Where a person required to be served with an "office copy of a decree, pursuant to Order 60, is an infant, or a person "of unsound mind not so found by inquisition, the service is to be "effected upon such person or persons, and in such manner as the Master "before whom the reference under the Order is being prosecuted directs." Where the proceedings are being taken under Order 60, the application should be made to the Master *ex parte* on affidavits shewing as far as the applicant is able: (1.) With respect to infants: The ages of the infants; whether they have any parents or testamentary guardians, or guardians appointed by the Court of Chancery; where, and under whose care, the infants are residing; at whose expense they are maintained, and, in case they have no father or guardian, who are their nearest relations; and that the parents, guardians, relations, or persons on whom it is proposed to serve the notice, have no interest in the matters in question, or, if they have, the nature of such interest, and that it is not adverse to the interests of the infants. (2.) With respect to persons of unsound mind not found so by inquisition: Where, and under whose care, such persons are residing, and at whose expense they are maintained; who are their nearest relations; and that such relations, or persons, upon whom it is proposed to serve the notice, have no interest in the matters in question, or, if they have, the nature of such interest, and that it is not adverse to the interest of the persons of unsound mind.

The order is drawn up by the Master, and a copy of such order must also be served, at the time of serving the notice of the decree.[2]

[1] *Chalmers* v. *Laurie*, 10 Hare, App. 27; 1 W. R. 265; *Clark* v. *Clark*, 9 Hare, App. 13, marginal note: 1 W. R. 48; *Strong* v. *Moore*, 22 L. J. Ch. 917, M. R.

[2] Braithwaile's Pr. 523; see Seton, 1212.

In these cases, however, the Master, before proceeding with the enquiries directed by the Order, must see that a guardian *ad litem* is appointed for the infant, or person of unsound mind thus served. Order 522 provides that "When infants, or persons of unsound mind not so "found by inquisition, are made parties to suits after decree, or are "served with notice of motion under Order 467, guardians *ad litem* are "to be appointed for them in like manner, as they are now appointed "at any time after bill filed." And it may be observed in this place, that, should occasion require, the Master has power to require a guardian *ad litem* to be appointed at any stage of the proceedings before him, under order 524, which provides that "At any time during the pro- "ceedings before a Master under an Order, the Master may, if he thinks "fit, require a guardian *ad litem* to be appointed for any infant, or per- "son of unsound mind not so found by inquisition, who has been served "with an office copy of the decree." The mode of appointing a guardian *ad litem* in these cases is precisely similar to that adopted in appointing him to answer and defend; for Order 525 declares that "Guardians "*ad litem* for infants, or persons of unsound mind not so found by in- "quisition, who shall be served with an office copy of a decree, are to "be appointed in like manner as guardians *ad litem* to answer and de- "fend, are appointed in suits on bill filed." This practice has already been described.

Where, however, the party is to be served with an office copy of the decree under Order 60, the Master has no authority to direct the manner of service as he has in the case of infants, and persons of unsound mind, for the Order 523 does not extend to absent parties. He is to make the order as in the case of infants and persons of unsound mind, and the practitioner must see that the service is properly effected. The practice on this point seems confused; but it is believed that the following course will be found correct:—Sec. 71 of our Chancery Act (C. 127, Con. Stat., U. C.) provides that "An absent defendant may be served at "any place out of the jurisdiction of the Court with a copy of any bill "or proceeding, without an application being previously made to the "Court for the allowance of such service, and the service shall be "allowed on proof to the satisfaction of the Court that the same was "duly made." In practice this Section was never acted upon until recently, as the Court would not, upon default of answer, grant an order *pro confesso* until an order limiting the time within which the defendant was to answer had been obtained, and had been served personally upon him; and this even although the endorsement upon the office copy of the bill required by Order 86 had been altered so as to give the defendant the same time for answering, as the Court would give by the order

authorizing service of the bill out of the jurisdiction. The necessity, however, for obtaining an order giving leave to serve out of the jurisdiction is now done away with, and the time within which a defendant is to answer, according to the distance of the place where served, is regulated by a general Order, No. 90. This Order provides that "The time "within which a defendant served out of the jurisdiction of the Court "with an office copy of a bill of complaint shall be required to answer "the same, or demur thereto, is as follows:

"I. If the defendant is served in the United States of America, in any "City, Town, or Village within ten miles from Lake Huron, the River "St. Clair, Lake St. Clair, the River Detroit, Lake Erie, the River Nia- "gara, Lake Ontario, or the River St. Lawrence, or in any part of "Lower Canada, not below Quebec, he is to answer or demur within "six weeks after such service.

"II. If served within any State of the United States of America, not "within the limits above described, other than Florida, Texas, or Cali- "fornia, he is to answer or demur within eight weeks after such service.

"III. If served within any part of Lower Canada below Quebec, or "in Nova Scotia, New Brunswick, or Prince Edward Island, he is to "answer or demur within eight weeks after such service.

"IV. If served within any part of the United Kingdom, or of the "Island of New Foundland, he is to answer or demur within ten weeks "after such service.

"V. If served elsewhere than within the limits above described, he is "to answer or demur within six calendar months after such service."

This order is very similar to order 7, of 10th January, 1863, but it omits the 6th division of that Order which declares that "The time "within which any party served with any *petition, notice or other proceed-* "*ing*, other than a bill of complaint, is to answer or appear to the same, "is to be the same time as prescribed for answering or demurring to a "bill of complaint, according to the locality of service." This order would apply to the serving of an office copy of decree under Order 60, and it is presumed that it is still in force; for although Order 1 of the Con. G. Orders of June, 1868, provides that "From and after the first "day of July, 1868, all the General Orders of this Court which have "been at any time heretofore made shall be abrogated, and in lieu "thereof, the orders hereinafter expressed shall constitute the General "Orders of the Court," yet Order 2 declares that "The abrogation here- "inbefore made shall not affect any practice of the Court, or any prac- "tice or usage of, in, or connected with any of the offices of the Court, "or the officers thereof, which originated in or was sanctioned by, any

"of the orders hereby abrogated, except so far as the same may be in-"consistent with any thing hereinafter contained." None of the consolidated orders refer, in terms, to service or persons out of the jurisdiction of any proceeding other than an office copy of a bill of complaint, and the omitted 6th division of the order of January, 1863, is therefor not inconsistent with any of the new orders, and is, it is presumed, still in force. If this be the correct view, the practioner, in serving parties out of the jurisdiction, will be guided in every case by Order 90.

It was formerly necessary to obtain an order in Chambers permitting service out of the jurisdiction before the service was made, but this is not now necessary; and when the order requiring service of an office copy of decree, or other proceeding is made by the Master, or by a Local Master, the proof of the service will be laid before him, and he will decide upon its sufficiency.

If, however, the Solicitor should think it undesirable to attempt the service in the mode just pointed out, his remedy is in Chambers, for the Master or Local Master has no authority either to dispense with service, or make an order for substitutional service. A Judge in Chambers will entertain an application to dispense with the service upon any person as to whom it appears that, from absence, or other sufficient cause, it ought to be dispensed with, or cannot be made; or to substitute service, or give notice by advertisement or otherwise, in lieu of such service. Order 95 provides that "The service of a bill without the juris-"diction of the Court is to be of no validity, if not made within a period "consisting of twelve weeks, and an additional time equal to that "limited by order 90 for the answer of a defendant, computed from the "filing of the bill as to a party made defendant by the original bill, and "from the amendment of the bill as to a party added by amendment."

The Court will, in a proper case, grant leave to serve short notice of motion out of the jurisdiction. An application was made on behalf of a purchaser for leave to serve a notice of motion for a vesting order on a party residing in Buffalo; the time given by the orders is six weeks, and V. C. Spragge shortened it to fourteen days.[1]

The party having the prosecution of the decree should, therefore, in the first place, consider what persons not named on the record ought, under the provisions of the Order,[2] to be served with notice of the decree. On this subject, he is referred to the former part of this treatise.[3]

[1] Re Babcock; *Moore* v. *Gould*, 1 Cham. R. 233.
[2] Con. G. O. 58.
[3] See *ante*.

He should then consider whether the circumstances of the case, and the nature of their interest in the suit, are such as will justify an application to the Judge to dispense with service on any of them; or to sanction some special mode of service: as, on one or more for all the members of a class, or by public advertisement, or through the post, or on a substitute. An application of this description to the Judge is usually made *ex parte*, supported by evidence of the facts on which it is founded; and where a special mode of service is directed, an order is drawn up by the Registrar, which will contain a direction that a copy of it shall be served with the notice. Where service is dispensed with, an order to that effect is drawn up; and a copy is filed with the Master or Local Master.

If service through the post is sanctioned, and no special directions are given as to the mode of authenticating such service, it seems advisable to enclose the notice in a letter addressed to the person to be served, and to request him to acknowledge, through the post, the receipt of the notice; and it would be well to enclose a form of acknowledgement for signature. The service, in this case, will be deemed to have been effected at the date of the letter of acknowledgement.[2]

The Master to whom the case is referred, will, usually, proceed to give his directions as to the manner in which the decree is to be prosecuted, notwithstanding evidence is not adduced to satisfy him that all proper parties have been served with notice of it. Indeed, it not unfrequently happens, that the persons to be served cannot be known till some of the inquiries under the decree have been prosecuted: as where the members constituting a class of residuary legatees, or next of kin, have to be ascertained; and by directions being obtained for insertion of advertisements for creditors and other claimants to come in, and for the accounts to be brought in, and the inquiries answered, before these class inquiries are entered upon, much time in prosecuting the decree may be saved, without prejudicing persons who may be subsequently served with notice of the decree, and obtain orders to attend the proceedings. As a rule, it is better not to proceed upon any of the enquiries until all the parties have been properly brought into the Master's Office: but where time can be saved, without detriment to these absent parties, the Master should proceed.

The notice of the decree must be entitled in the cause; and a memorandum must be indorsed thereon, giving the person served notice that from the time of service he will be bound by the proceedings in the case, in the same manner as if he had been originally made a party; and

[2] Braithwaite's Pr. 522.

that he may, upon giving notice to the plaintiff, have liberty to attend the proceedings, and may, within fourteen days after service, apply to the Court to add to the decree.[1]

Service of a copy of the decree is regarded as service of notice of the decree; but the copy must be indorsed in like manner as a notice.[2]

The party served may apply, within fourteen days after service, for leave to add to the decree.[3] Such application is usually made by notice of motion, which must be served on the solicitors of all parties to the cause, and of all persons who have obtained orders to attend.

Infants, and persons of unsound mind not so found, attend the proceedings by their guardians *ad litem*, who are appointed in the same manner as guardians *ad litem* to answer and defend suits.

Where a person served with notice of the decree, gives notice to the plaintiff, under Schedule A to Order 60, of his intention to attend the proceedings, no other evidence of service of the notice on him will be required; the Master must, however, be satisfied of his identity with the person on whom the notice ought to have been served.

If the party served attends, without notifying the plaintiff, he will not be allowed his costs of such attendance, without a special order for that purpose; and it is to be observed, that the order giving a party served with notice of the decree liberty to attend, does not specify at whose costs he is to attend, but his costs are dealt with at the hearing of the cause on further consideration; and it is conceived that, where the Court is of opinion that the interest of the party in question is sufficiently protected by the parties named on the record, or who have already obtained leave to attend the proceedings, it will refuse to allow him any costs.[4]

A person who has been served with notice of the decree, and who has given notice of his intention to attend the proceedings, may, if aggrieved by any order in the suit, present a petition of rehearing in the usual manner,[5] but if he is unable to raise the question on the pleadings, the proper course for him to pursue is to move, on notice, for leave to file a bill.[6]

[1] Ord. 60.

[2] Braithwaite's Pr. 519.

[3] Ord. 60. Where the party to be served is out of the jurisdiction, an enlarged time may be given: see *Strong* v. *Moore*, 22 L. J. Ch. 917, M. R....

[4] See Ord, 218; Seton 187; *Stevenson* v. *Abington*, 11 W. R. 936, M. R., as to classes of parties appearing by different solicitors; and see *Bennett* v. *Wood*, 7 Sim. 522; *Hutchison* v. *Freeman*, 4 M. & C. 490: 3 Jur. 694; *Shuttleworth* v. *Howarth*, 4 M. & C. 492: 5 Jur. 2, where persons intervening, who were not made parties because they belonged to a very numerous class, were allowed the same costs as if they had been made parties to the suit.

[5] *Ellison* v. *Thomas*, 1 De G. J. & S. 13.

[6] *Kidd* v. *Cheyne*, 18 Jur. 348, V. C. W.

CHAPTER VIII.

SECTION I.—*Service of the Copy of the Bill.*

FORMERLY, when the bill was filed, the ordinary course of proceeding against the defendants was to sue out and serve a writ of *subpœna*. This has, however, been abolished.

Our Order 86 provides that "In lieu of serving a defendant with a "subpœna to appear and answer, an office copy of the bill of complaint "is to be served upon him, with an endorsement thereon, in the form, "or to the effect, set forth in schedule C, hereinunder written."[1] And Order 87, that "Service upon a defendant of an office copy of the bill of "complaint, is to be effected in the same manner, and shall have the "same effect as the service of a writ of subpœna, to appear and answer, "under the former practice: but it shall not be necessary to produce "the original bill." In preparing copies of the bill and making them office copies for service, the practitioner will observe the following orders:—Order 402 provides that "Office copies of answers, affidavits, "and other proceedings are dispensed with; and where service is re- "quired, true copies, instead of office copies, are to be served; but this "order is not to apply to bills, decrees, or orders, of which office copies "are by the practice of the Court required to be served." Order 403 declares that "No more than four copies of any pleading or other pro- "ceeding are to be allowed to any party, in a cause or matter, exclu- "sive of of the draft, but inclusive of copies, to file, copies to serve, "briefs, and any other copies that may be required or made in the progress "of the cause." And Order 404. that "If more than three copies, ex- "clusive of the draft, are required of any pleading or other proceeding, "and the party chooses to have the pleading or proceeding printed, for "the purposes of the suit or matter, he is, in lieu of all charges for "copies, to be allowed thirty cents per folio of the pleading or proceed- "ing, and his reasonable disbursements of procuring the same to be "printed."

To make the service of an office copy of a bill on a person, other than the defendant, good service on the defendant, when no order for substitutional service has been obtained, it is not sufficient to shew that the person

[1] See Schedule C.

served is a relation of the defendant: he must be actually residing with the defendant, and the service should be made at the defendant's place of abode.[1] Where a married woman, who had received an office copy bill and order to answer, separately, by mail, accepted service in writing, and returned the acceptance endorsed on the original order, it was held under the circumstances, to be sufficient service.[2] Where a husband and wife are defendants, service of a notice of motion for an order *pro confesso* against the husband, upon the wife, will not be good service on the husband, unless made at the dwelling-house of the husband.[3]

It may here be noticed that Order 547 provides that "Office copies of "decrees to be served on persons made parties in the Master's office "may be certified by the Deputy-Registrar, at the place where the "reference is being prosecuted."

Where the Attorney-General is served with a bill, there should be no indorsement upon it.[4]

When the copies of the bill have been prepared, they are to be made "office copies." This is done in Toronto by the Clerk of Records and Writs; in the outer counties by the Deputy-Registrar. The copy is stamped with the seal of the officer with whom the bill is filed, and he signs his name at the end of the copy: this should be done only after comparing the copy with the filed bill, and the sealing and signing make the copy an "office copy": the same practice is adopted in making office copies of decrees and orders.

When the copies of the bill have been thus stamped and signed, the next step is to serve each of the defendants with one of such copies. This, unless the Court directs some other mode of service, is effected, by serving such copy on each defendant personally, or by leaving the same with his servant, or some member of his family,[5] at his dwelling-house or usual place of abode; and has the same effect as the service of a *subpœna* formerly had.[6]

Order 47 provides that "Where an acceptance of service of any bill, "order, or other proceeding, and an undertaking to answer or appear "thereto, are given by a solicitor, such acceptance and undertaking are "to be equivalent to personal service upon the party for whom the "same are given, within the meaning of the orders requiring personal

[1] *Elliot* v. *Beard*, 2 U. C. L. J., N. S. 332: S. C. 2 Cham. R. 80.
[2] *Keachie* v. *Buchanan*, 1 Cooper's C. & P. R. 44.
[3] *Heward* v. *Magahay*, 1 Cham. R. 366.
[4] Braithwaite's Pr. 31.
[5] The member of the family should be an inmate of the house: *Edgeon* v. *Edgeon*, 3 De G. & S. 629.
Our Order 87.

"service, and an affidavit of personal service is in such case dispensed "with." And Order 48 declares that "Admissions and acceptance of "the service of a bill, order, notice of motion or other paper, upon the "opposite solicitor, need not be verified by affidavit." Where a solicitor accepts service of an office copy bill of complaint, and gives a written undertaking to answer the same, or in case of default, that an order *pro confesso* may be drawn up, the usual two day's notice of motion for that purpose must be given, and may be served on the solicitor.[1] This case to some extent overrules a previous case,[2] where it was held that where service of the office copy of a bill was made upon a solicitor acting on behalf of several defendants, and such solicitor gave a written undertaking to answer, but afterwads made default in so doing, the bill might be taken *pro confesso* on an *ex parte* application. An office copy of the bill had been served on the solicitor of one of the defendants, who gave an undertaking to put in an answer, or in default, that the plaintiffs might proceed to take the bill *pro confesso*, without further notice being given of the proceedings: the order was made accordingly.[3]

When an affidavit has been filed with the bill, a copy of such affidavit, but not necessarily an office copy, should be sealed at the Record and Writ Clerks' office, and annexed to, and served with, each copy of the bill sealed there for service.[4]

Service on a Sunday is not good service.[5] Service of a copy of the bill is either ordinary, or extraordinary. Ordinary service requires no leave from the Court; extraordinary service requires a special order of the Court to render it valid, and is not used except under special circumstances, when the ordinary service cannot be effected.

When the copy is left at the dwelling-house, it is necessary that it should be the place where the defendant actually resides[6]; and the mere leaving the copy at a defendant's ordinary place of business, if he does not reside there, will not be good service; and therefore, where, under the old practice, a *subpœna*, returnable immediately,[7] was moved for upon affidavit stating that the defendant lived at Epsom, but that he had chambers in the Temple and resided there, Lord Thurlow said, that as it did not appear that his place of abode was in the Temple, he could not make the order.[8] Where, however, a member of the House

[1] *Ross* v. *Hayes*, 6 Grant 277.
[2] *Shaw* v. *Liddell*, 4 Grant 352.
[3] *Peterborough* v. *Conger*, 1 Cham. R. 18.
[4] *Ante.*
[5] *Mackreth* v. *Nicholson*, 19 Ves. 367.
[6] Service on the Deputy Governor of a prison was held to be due service on a defendant, a prisoner there: *Newenham* v. *Pemberton*, 2 Coll. 54: 9 Jur 637.
[7] See Hinde, 78
[8] —— v. *Shaw*, Hinde, 92.

of Commons, having a house at Southampton and no town residence, was served with a *subpœna*, returnable immediately, at a friend's house in London, with whom he was upon a visit, and for default of appearance a sequestration had been awarded, Lord Thurlow refused to set aside the sequestration for irregularity: saying, that he could not suppose that the defendant, a Member of Parliament, during the session of Parliament had no town residence, or that the residence above stated should not be taken as a residence *quoad* the defendant, whose duty it was to attend, and who actually did attend, the House.[1] And so, where a letter missive, and subsequently a *subpœna*, had been served at the town residence of a peer during the sitting of Parliament, Lord Thurlow appears to have been of opinion that it was good[2]: and where a letter missive, and afterwards a *subpœna*, had been served at the town residence of a peer, who at the time was abroad, and afterwards an order *nisi* for a sequestration was issued, a motion to discharge the order *nisi* was refused.[3]

Ordinary service upon an infant defendant, or upon a defendant of weak or unsound mind, not so found by inquisition, is effected in the same manner as upon an adult.[4]

Where a husband and wife are defendants, ordinary service upon the husband alone is sufficient.[5] But if they are living apart, each should be served. If the husband is abroad, or cannot be served, and the subject matter of the suit arises in right of the wife, the plaintiff must obtain, on an *ex parte* motion, supported by affidavits, an order that service upon her may be deemed good service.[6] Service on her alone, in the usual manner, will then be sufficient.[7]

If a corporation aggregate be a defendant, Order 91 provides that "Service of a bill of complaint within the jurisdiction of the Court "upon a corporation aggregate, is to be effected by personal service of "an office copy thereof on the Warden, Reeve, Mayor, or Clerk, in case "of a Municipal Corporation, or on the President, Manager, or other "Head Officer, or the Cashier, Treasurer, or Secretary, at the Head

[1] *East India Company* v. *Rumbold*, Hil. Term 1781; cited Hinde, 92.

[2] *Attorney-General* v. *Earl of Stamford*, 2 Dick. 744.

[3] *Thomas* v. *Earl of Jersey*, 2 M; & K. 398; and see *Davidson* v. *Marchioness of Hastings*, 2 Keen, 509, 513.

[4] See Ord. 517. In *Morgan* v. *Jones*, 4 W. R. 381, V. C. W., substituted service on the medical officer or keeper of any asylum in which a lunatic was confined, was refused: personal service if practicable being held necessary; and see *Anon.* 2 Jur. N. S. 324, V. C. W.

[5] *Gee* v. *Cottle*, 3 M. & C. 180. The affidavit of service should state that the service was made on on the husband and wife, by serving the husband: *Steel* v. *Parsons*, 8 Jur. 641, V. C. K. B. For an order, giving leave to serve husband and wife separately out of the jurisdiction, the fact of the marriage being in dispute, see *Longworth* v. *Bellamy*, cited Seton, 1245.

[6] For form of order, see Seton, 1246, No. 9.

[7] *Bell* v. *Hyde*, Prec. Ch. 328; *Dubois* v. *Hole*, 2 Vern. 613; *Bunyan* v. *Mortimer*, 6 Mad. 278; and see *Pemberton* v. *M'Gill*, 1 Jur. N. S. 1045, V. C. W.

"Office, or at any branch or agency in Ontario, or on any other person "discharging the like duties, in the case of any other corporation." And Order 92, that "Where a foreign corporation aggregate, defendant "to a bill of complaint has no branch or agency in Ontario, service of "the bill upon such corporation may be effected out of the jurisdiction "by personal service of an office copy thereof on the Warden, Reeve, "Mayor, Clerk, President, Manager, or other Head Officer, or on the "Cashier, Treasurer, Manager, or Secretary of such corporation, or "other person discharging the like duties, as in the case of service in "Ontario." Where the business of a Company had practically ceased, but the Company had never been dissolved, service was ordered on the late Chairman and Secretary.[1] This order refers to a corporation having its head office in this Province, and it has been decided under a similar order (of 17 March, 1857,) that it did not authorize service upon the agents in this Province of a corporation, such as the Bank of Upper Canada, when the Head Office was within the jurisdiction.[2] If the Head Office of the corporation is situated in this Province, service must be effected there; if out of the jurisdiction, at any agency.[3] Where a Company is virtually defunct before bill filed, the proper course to effect service is to apply to the Court for an order therefor, otherwise an order *pro confesso* cannot be obtained.[4]

If the plaintiff amends his bill, he must serve an office copy of the amended bill on all the defendants, or, if they have answered, on their solicitors.[5] It is, of course, to be understood, that as to defendants added by amendment, the bill is to be treated as an original bill.

It may here be noticed that Order 93 provides that "The service of "a bill within the jurisdiction of the Court is to be of no validity if not "made within twelve weeks after the filing of the bill," and Order 94 that "The service of an amended bill within the jurisdiction of the "Court, upon a party added by amendment, is to be of no validity if "not made within twelve weeks after the amendment." But the times fixed by Orders 93, 94, and 95, within which a bill or amended bill must be served, may be extended under Order 96, which provides that "Ser- "vice may be allowed when made after the periods above limited, upon "its being made to appear, to the satisfaction of the Court, that due "diligence has been used in effecting service." The practioner, how-

[1] *Gaskell* v. *Chambers*, 26 Beav. 252: 5 Jur. N. S. 52.

[2] *Campbell* v. *Taylor*, 1 Cham. R. 2.

[3] *Howland* v. *Grierson*, 5. U. C. L. J. 19.

[4] *Furnsss* v. *Metropolitan Water Co'y*, 1 Cham. R. 369.

[5] It is sufficient to serve one copy on each solicitor, notwithstanding he may be concerned for several defendants. Where, however, a solicitor is properly concerned as solicitor for one defendant, and as agent for another, two copies should be served: Braithwaite's Pr. 308; and *ib.* n.

ever, should lose no time in applying for allowance of service under this order, as Order 97 provides that "In case the application for the "allowance of the service is made within four weeks after the service, "the order need not be served, but the defendant is to have four weeks "to answer beyond the time allowed by the foregoing orders." And Order 98, that "In case the application is not made within four weeks "after service of the bill, the order for the allowance of the service may "be made on such terms as the Court sees fit."

The Orders 93, 94, and 95, are similar to the orders of 6 February, 1865, and it has been decided under them that the Court will not grant an order extending the time for the service of a bill. The solicitor must use due diligence to effect the service, and, after it is effected, must come to the Court to get it allowed if more than the time given by the orders of the 6th of February, 1865, has elapsed.[1] Where a bill has been filed, and a *lis pendens* registered, but no office copy served within the twelve weeks allowed for service by Order 5 of 6th February, 1865, the bill was ordered to be dismissed with costs.[2] The Court will permit service of pleadings to be effected by parties to the suit, and will allow the same fees upon taxation as if served by third persons.[3]

Where the plaintiff is unable to effect ordinary service upon a defendant, in the manner above mentioned, the Court will, in many cases, permit service to be effected upon the defendant himself out of the jurisdiction, or to be substituted upon his agent within the jurisdiction.

Order 99 provides that "Orders for substitutional service of an office "copy of a bill of complaint may be obtained in the same manner, and "in the same cases, as orders for substitutional service of a subpœna to "appear, and answer might have been obtained under the former prac-"tice." Where a plaintiff desires to effect service of the subpœna by serving the agent of an absent defendant, he must show that the party to be served is the agent of the defendant in relation to the subject-matter of the suit, to such an extent as to satisfy the Court that the acceptance of a subpœna by such agent will fall within the authority conferred upon him by his principal; where, therefore, a motion for such order was made, grounded on an affidavit which stated that the agent at present conducted the defendant's business of land agent, and had "acted for the defendant in reference to the mortgage, which was the subject-matter of the suit"—the application was refused.[4] The rule

[1] *Munn* v. *Glass*, 1 Cham. R. 337.
[2] *Somerville* v. *Kerr*, 2 Cham. R. 154.
[3] *M'Clure* v. *Jones*, 6 Grant, 383.
[4] *Passmore* v. *Nicolls*, 1 Grant, 130; and see *Prentise* v. *Brennan*, Re Bunker, 2 Grant, 322; *Cannifft* v. *Taylor*, 2 Grant, 617.

allowing substitutional service of a bill upon an attorney-at-law, applies only to cases where the object of the suit is to restrain proceedings at law, not where any other relief is sought.[1] The same time must be allowed for answering a bill served by substitutional service as if the service had been personal.[2] The Act 28 Vic. c. 17 gives the Court larger powers as to proceedings against absent defendants, whose residence is unknown, and the Court will grant orders for substitutional service in cases where it would not under the practice before the Act dispensing with advertising where it would be useless.[3] Where some, or all of the parties to be served, are out of the jurisdiction, substitutional service of a bill may be effected on partners or agents, where there is clear proof of agency with reference to the subject-matter of the suit.[4] It is not necessary to take out a new order for substitutional service on an agent whenever the original bill is amended.[5] On an application for an order for substitutional service of a bill of complaint, on its being shown that the defendant could not, without delay and difficulty, be served personally out of the jurisdiction, he not remaining long at one place, and that he had a branch business in Toronto, in charge of an agent, and the subject-matter of the suit having reference to such agency, service of the bill on such agent was directed, and that a copy be mailed to the defendant at New York, nine weeks being given to answer.[6] When a defendant, who was made a party in the suit, in respect of a mortgage held by him upon the lands, which form the subject-matter of the suit, was out of the jurisdiction, but, it appearing that his solicitor had always had the mortgage in his possession, substitutional service upon such solicitor was allowed.[7] Substitutional service will not be allowed under 28 Vic. c. 18 (1865) unless it is shown that it would be very expensive or very difficult to effect a service.[8]

The principle upon which the Court acts in directing substituted service, is clearly enunciated by Lord Cranworth, C., in the case of *Hope* v. *Hope*:[9] in which case he says, that where there is an agent in this country managing all the affairs of a defendant who is abroad, and regularly communicating with him upon his affairs, or where he has an agent here specially managing the particular matter involved in the

[1] *Crawford* v. *Cooke*, 1 Cham. R. 57.
[2] *Cruikshank* v. *Sager*, 1 Cham. R. 202.
[3] *Cooper* v. *Lane*, 1 Cham. R. 363.
[4] *Allan.* v. *Pyper*, 5. U. C. L. J. 118.
[5] *Rainey* v. *Dickson*, 5. U. C. L. J. 163.
[6] *Cupples* v. *Yorston*, 2 Cham. R. 31.
[7] *Young* v. *Wilson*, 2 Cham. R. 56.
[8] *Pearson* v. *Campbell*, 2 Cham. R. 25; and see *Peel* v. *Kingsmill*, 2 Grant, 272; *Rolph* v. *Calcoun*, 2 Grant, 623; *Legge* v. *Winstanley*, 3 Grant, 106.
[9] 4 De G. M. & G. 328.

suit, the Court has felt that it might safely allow service upon the agent to be deemed good service upon the person abroad: because the inference was irresistible, that service so made was service on a person either impliedly authorized to accept that particular service, or who certainly would communicate the process so served to the party who was not in this country to receive it himself. The object of all service was of course only to give notice to the party on whom it was made, so that he might be made aware of, and able to resist, that which was sought against him; and when that had been substantially done, so that the Court might feel perfectly confident that service had reached him, everything had been done that was required.[1]

Where a bill is filed to restrain an action at law, and the defendant (the plaintiff in the action) is out of the jurisdiction, or cannot be found,[2] the Court will allow substituted service on the Attorney employed by him to conduct the proceedings at law, on an affidavit proving those facts.[3]

Substituted service of the copy of a cross bill, upon the solicitor who filed the original bill, will not be ordered; but the Court will, in such a case, stay the proceedings in the original cause until the defendants have entered an appearance.[4]

In the case of *Hobhouse* v. *Courtney*,[5] the cases and authorities upon the subject of substituted service upon an agent were reviewed. There, the defendant, who was out of the jurisdiction, had given special authority to a person within the jurisdiction to act as his agent, with respect to the property which was the subject of the suit; and the Court ordered service on that person to be good service upon the defendant. An application of a similar kind was made to Sir James Wigram, V. C., in the case of *Webb* v. *Salmon*,[6] and refused by him upon the ground, that the persons upon whom the substituted service was sought to be effected were not agents in the matter of the suit when the correspondence with the plaintiff's solicitor commenced, and that they refused to accept the agency; there was not, therefore, that appointment of them, as the solicitors or agents of the defendant, which, in the case of *Hobhouse* v.

[1] *Ibid.* 342.

[2] *Sergison* v. *Beavan*, 9 Hare, App. 29, marg.: 16 Jur. 1111, V. C. S.; *Hamond* v. *Walker*, 3 Jur. N. S. 686, V. C. W.: and see Seton, 877; *Anderson* v. *Lewis*, 3 Bro. C. C. 429: 5 Sim. 505.

[3] The merits need not now be shown by affidavit: *Sergison* v. *Beavan*, *ubi sup.*

[4] *Anderson* v. *Lewis*, *ubi sup.*; and *Gardiner* v. *Mason*, 4 Bro. C. C. 478: 5 Sim. 506; and see *Waterton* v. *Croft*, 5 Sim. 502, 507.

[5] 12 Sim. 140, 157: 6 Jur. 28; approved and acted on in *Murray* v. *Vipart*, 1 Phil. 521: 9 Jur. 173; and see *Bankier* v. *Poole*, 3 De G. & S. 375: 13 Jur. 800; *Hurst* v. *Hurst*, 1 De G. & S. 694: 12 Jur. 152; *Hornby* v. *Holmes*, 4 Hare, 306: 9 Jur. 225, 796; *Dicker* v. *Clarke*, 9 Jur. N. S. 636: 11 W. R. 635, V. C. K.; *Barker* v. *Piele*, 11 W. R. 658, V. C. K.; *Jackson* v. *Shanks*, 13 W. R. 287, V. C. W.

[6] 3 Hare, 251, 255.

Courtney, was assumed to be necessary. He also observed, that he was not prepared to go beyond that case. In *Cooper* v. *Wood*,[1] Lord Langdale, M. R., ordered substituted service on a person who had acted as the solicitor of the absent defendant, in the subject of the mortgage to which the suit related, and who, there was reason to believe, was in communication with the defendant. And in *Weymouth* v. *Lambert*,[2] the same judge ordered substituted service in a creditor's suit, on one who, acting as the attorney of the executor and general devisee and legatee, resident in India, had obtained administration here, and had entered into receipt of the rents of the real estate; and where an infant had been taken out of the jurisdiction for the express purpose of preventing his being served personally, his Lordship ordered, that service upon the solicitor and Six Clerk of the parent should be good as against the infant.[3] It is to be observed, however, that the principle, as laid down in *Hope* v. *Hope*,[4] seems to go beyond the case of *Hobhouse* v. *Courtney*.

The court in the exercise of its discretion, has by special order permitted various other modes of substituted service to be adopted. Thus, service at the last place of abode of the defendant's wife, has been ordered to be good service.[5] So, service by sending the document under cover to the person to whom the defendant had directed his letters to be sent, has been permitted.[6] Again, in the case of infants, substituted service upon the mother, in one case,[7] and upon the father-in-law in another,[8] was ordered to be good service.

Whenever an order is made for substitutional service, such order must be served at the same time that the bill is served, and it must be stated in the order that it is to be served;[9] care should also be taken that the service is effected in strict accordance with the terms of the order, and it will then have the same effect as ordinary service.[10] The application for the order is made by an *ex parte* motion;[11] and must be

[1] 5 Beav. 391; and see *Heald* v. *Hay*, 9 W. R. 369, V. C. S.

[2] 3 Beav. 333; and see *Howkins* v. *Bennett*, 1 Giff. 215: 6 Jur. N. S. 948; and the cases cited in the note to *Skegg* v. *Simpson*, 2 De G. & S. 454, 456; and as to service of bill, or order of revivor, see *Norton* v. *Hepworth*, 1 McN. & G. 54: 13 Jur. 244; *Hart* v. *Tulk*, 6 Hare, 618; *Forster* v. *Menzies*, 16 Beav. 568: 17 Jur. 657.

[3] *Lane* v. *Hardwicke*, Beav. 222.

[4] 4 De G. M. & G. 328.

[5] *Pulteney* v. *Shelton* 5 *Ves.* 147; and see *Manchester and Stafford Railway Company* v. *How*, 17 Jur. 617, V. C. W.

[6] *Hunt* v. *Lever*, 5 Ves. 147; but see *Gathercole* v. *Wilkinson*, 1 De G. & S. 681: 11 Jur. 1096.

[7] *Baker* v. *Holmes*, 1 Dick. 18; and see *Garnum* v. *Marshal*, *ib.* 77; S. C. *nom. Smith* v. *Marshall*, 2 Atk. 70; *Clark* v. *Waters*, V. C. S., cited, 1 Smith's Pr. 378.

[8] *Thompson* v. *Jones*, 8 Ves. 141.

[9] *Jones* v. *Brandon*, 2 Jur. N. S. 437, V. C. W. For form, see Seton, 1244, No. 4.

[10] *Wilcoxon* v. *Wilkins*, 9 Jur. N. S. 742: 11 W. R. 868, M. R.; but see *Dicker* v. *Clarke*, 11 W. R. 765, V. C. K.

[11] *Reed* v. *Barton*, 4 W. R. 793, V. C. W.

supported by an affidavit showing what efforts have been made to serve the defendant, and that all practicable means of doing so have been exhausted,[1] and how the substituted service is proposed to be effected.

It would seem that the Court had no authority, under its original jurisdiction, to serve process upon any defendant, whether a natural born subject or not, who was residing out of the territorial limits of its jurisdiction; unless, indeed, the defendant was shown to have absconded to avoid such service.[2]

Such power has, however, been conferred on it by Statute both in England and in this Province. The 71st Sec. of our Chancery Act already referred to, gave a limited power for this purpose; this was extended by Sec. 12 of 28 Vic. c. 17, which declares that "Where a "defendant or respondent in any suit or matter is absent from the Pro- "vince, or cannot be found therein to be served, the Court may authorize "proceedings to be taken against him according to the practice of the "Court in the case of a defendant, whose residence is unknown, or in "any other manner that may be provided or ordered, if the Court shall, "under the circumstances of the case, deem such mode of proceeding "conducive to the ends of justice."

Besides the provisions of these Acts, there are two Orders, 101 and 102, relating to this subject. Order 101 provides that "Where the defendant is "out of the jurisdiction of the Court, then, upon application supported by "such evidence as may satisfy the Court in what place or country such "defendant is or may probably be found, the Court, instead of direct- "ing publication as provided for by Order 100, may order that an office copy of the bill be served on the defendant in such place or country, "or within such limits, as the Court thinks fit to direct; and the order "is in such case, to limit a time (depending on the place of service) "within which the defendant is to answer or demur, or obtain from the "Court further time to make his defence." And Order 102 declares that "The Court may provide for or order service in any other manner "that the Court, under the circumstances of the case, deems conducive "to the ends of justice." Order 109 provides that "Where a plaintiff "has proceeded under Orders 100, 101, and 102, and the defendant has

[1] *Firth* v. *Bush*, 9 Jur. N. S. 431: 11 W. R. 611. V. C. K.; and see *Barker* v. *Pisle*, 11 W. R. 658, V. C. K.

[2] Per Lord Westbury, L. C., *Cookney*, v. *Anderson*, 1 De G. J. & S. 365, 382: 9 Jur. N. S. 736; and see *Foley* v. *Maillardet*, 1 De G. J. & S. 389: 10 Jur. N. S. 161; *Samuel* v. *Rogers*, 1 De G. J. & S. 396; *Norris* v. *Gotterill*, 5 N. R. 215, V. C. W. Where leave was given to serve process out of the jurisdiction, the service was useless unless the defendant entered an appearance, for no subsequent proceeding could be based upon it: *Cookney* v. *Anderson*, 31 Beav, 452, 468; 8 Jur. N. S. 1220, 1223; and see note to *Shaw* v. *Lindsay*, 18 Ves. 2nd ed. 496; *Fernandez* v. *Corbin*, 2 Sim. 544; *Davidson* v. *Marchioness of Hastings*, 2 Keen, 509, 516; *Whitmore* v. *Ryan*, 4 Hare, 612, 615; 10 Jur. 368.

"neglected to answer or demur within the time limited, the plaintiff "may apply to the Court *ex parte* for an order to take the bill *pro con-* "*fesso* against the defendant; and the Court, on being satisfied of the "due publication of the Order and notice in that behalf prescribed, or "that service has been effected in the prescribed manner, may direct "the bill to be taken *pro confesso* against the defendant, if it thinks fit, "either immediately or at such time, and upon such terms, and subject "to such conditions, as the Court, under the circumstances of the case, "thinks proper."

The application under Order 101 is made in Chambers *ex parte*, and must be supported by affidavits showing where the defendant resides. The affidavit should be made by some person who knows that the person proposed to be served is the defendant, that he is residing at the place alleged, from having recently seen him there, or received letters from him dated at, and bearing the postmark of the place, and which show that he is resident there. If the defendant's residence be proved by letters, it must be shown when the last communication was received from him.[1] An application for an order to serve a defendant out of the jurisdiction was refused; the affidavit upon which the motion was founded merely stating that letters had been received from the defendant dated at that place, but did not show that he was resident there.[2] It is usual to name in the order a particular place where service is to be effected, but this is not necessary, as the Court may order service not merely in a particular place, but within certain limits; as within the Grand Duchy of Baden.[3] In fixing the time the Court has regard to the facilities for communicating with the place where service is to be effected, a copy of the order must be served with the document, service of which is thereby authorized; and the person served must be identified with the defendant either by the affidavit of service, or by a separate affidavit. The Court is very strict in the proof of identity required. A statement that the defendant served "the above named defendant," or that the person served admitted himself to be the defendant, is insufficient; there must be clear and distinct proof of identity, and the defendant's means of knowledge must appear by the affidavit. In moving for a decree *pro confesso* against a defendant who has been served out of the jurisdiction, it must be shown that such defendant formerly resided in Canada and had left the Province.[4] It is not sufficient proof of the

[1] *Farry* v. *Davis*, 1 Cham. R. 7.
[2] *Kingston* v. *Monger*, 1 Cham. R. 18.
[3] *Preston* v. *Dickenson*, 9 Jur. 919; and see *Blenkinsopp* v. *Blenkinsopp*, 8 Beav. 612; *Whilmore* v. *Ryan*, 4 Hare, 612.
[4] *Anon.* 1 Cham. R. 204.

identity of a party served out of the jurisdiction that the deponent to the affidavit of service swears that he served "the above named defendant." The affidavit should show the means of knowledge.[1] The admission of a person served with an office copy of the bill that he is the proper party named in the bill is not sufficient proof of the identity of the person served with the defendant.[2] The plaintiff's solicitors had written to the defendant, Hancock, (residing out of the jurisdiction), and had received letters in reply; they also mailed him an office copy of the bill properly endorsed, and had since received a letter showing that he had received the bill. A motion was made *ex parte* on an affidavit showing these facts, for an order allowing the service, which was granted, but the Chancellor directed a copy of it to be mailed to the defendant.[3]

The application for leave to effect service out of the jurisdiction, is made by an *ex parte* motion, or by notice of motion, at Chambers.[4] The affidavits in support must show the place of residence at the time the application is made, or as near thereto as is practicable;[5] and an affidavit showing that the defendant was resident at Calais, seven weeks previously to the application, was held insufficient;[6] but the affidavit need not, it seems, show more than the country in which the defendant resides.[7]

It is not necessary to show, by affidavit, that the circumstances are such as to warrant the order. The Court may look at the pleadings for that purpose;[8] and, if necessary, may go into the merits of the case: it being always in the discretion of the Court whether to grant or refuse the application;[9] but it acts on a *primâ facie* case being made out.[10]

Leave may be granted to serve infants,[11] and persons of unsound mind,[12] out of the jurisdiction; and upon such service, guardians *ad*

[1] *Armour* v. *Robinson*, 1 Cham. . 282.

[2] *Stilton* v. *Kennedy*, 1 Cham. R. 236.

[3] *Woodside* v. *Toronto Street Railway*, 2 Cham. R. 24.

[4] For form of order, see Seton, 1244. No. 6.

[5] *Preston* v, *Dickinson*, 9 Jur. 919 : 7 Beav. 582 n.

[6] *Fieske* v. *Buller*, 7 Beav. 581.

[7] *Blenkinsopp* v. *Blenkinsopp*, 8 Beav. 612 ; 2 Phil. 1 : 1 C. P. Coop. t. Cott. 20 *Preston* v. *Dickinson*, *ubi sup.* : *Biddulph* v. *Lord Camoys*, 7 Beav. 580: 10 Jur. 485.

[8] *Blenkinsopp* v. *Blenkinsopp*, *ubi sup.* ; *Maclean* v. *Dawson*, 4 De G. & J. 150: 5 Jur. N. S. 663; *Official Manager of National Association* v. *Carstairs*, 9 Jur. N. S. 955; 11 W. R. 866, M. R.; *Steele* v. *Stuart*, 1 H. & M. 793: 10 Jur. N. S. 15; *Foley* v. *Maillardet*, *ubi sup.* ; *Hawarden* v. *Dunlop*, 2 Dr. & S. 155; *Norris* v. *Cotterill*, *ubi sup.*

[9] *Lewis* v. *Baldwin*, 11 Beav. 153, 158; *Whitmore* v. *Ryan*, 4 Hare, 612, 617: 10 Jur. 368; *Innes* v. *Mitchell*, 4 drew. 141: 3 Jur. N. S. 991; 1 De G. & J. 423; *Cook* v. *Wood*, 7 W. R. 424, V. C. K.; *Maclean* v. *Dawson*, 27 Beav. 25 ; 4 De G. & J. 150 : 5 Jur. N. S. 663.

[10] *Maclean* v. *Dawson*, *ubi sup.* ; *Meiklan* v. *Campbell*, 24 Beav. 100.

[11] *Anderson* v. *Stather*, 10 Jur. 383, L. C.; *Turner* v. *Sowden*, 12 W. R. 522 : 13 W. R. 66 : 10 Jur N. S. 1122, V. C. K.

[12] *Biddulph* v. *Lord Camoys*, 7 Beav. 580 : 10 Jur. 485.

litem will be appointed; and a husband out of the jurisdiction may be served for himself and his wife.[1] Where the fact of the marriage is in dispute, leave will be granted to serve them separately.[2] Where a father and his infant children were living together out of the jurisdiction, it was held, that a separate copy must be served on each.[3]

The order giving leave to make the service out of the jurisdiction must be served with the copy of the bill. If no directions to the contrary are given by the order, the service should be effected by serving the copy of the bill and a copy of the order on the defendant personally, or by leaving the same with his servant, or some member of his family, at his dwelling-house or usual place of abode,[4] within the limits defined by the order. The order fixes the time after service of the bill within which the defendant is to appear, and also, if an answer is required, the time within which the defendant is to answer, or demur, or obtain from the Court further time to make his defence to the bill.[5]

The times so fixed should be inserted in the indorsement on the bill, instead of the time inserted there when the bill is to be served within the jurisdiction.[6]

A defendant, on being served with the bill, may file his answer at the Record and Writ Clerks' or Deputy Registrar's Office, whereupon the suit will be prosecuted against him in the ordinary way; or he may move, on notice to the plaintiff, to set aside such service for irregularity.[7]

All orders, writs, and other proceedings upon which process of contempt may afterwards be issued, require, in general, what is called personal service.[8] The same strictness is not, however, necessary for the service of notice of ordinary proceedings in the cause; and it will be convenient here to state the manner in which service of such proceedings is effected.

Our Order 40 provides that "Upon every writ served out, and upon "every bill, demurrer, answer, or other pleading, or proceeding, there "shall be endorsed the name or firm, and place of business of the solic

[1] *Jones* v. *Geddes*, 9 Jur. 1002, V. C. E.; *Steele* v. *Plomer*, 2 Phil. 782, n. 1 M'N. & G. 83.

[2] *Longworth* v. *Bellamy*, M. R., cited Seton, 1245.

[3] *Jones* v. *Geddes*, *ubi sup.*

[4] Braithwaite's Pr. 33.

[5] *Ibid.*: Ord. 100.

[6] *Baynes* v. *Ridge*, 9 Hare, App. 27: 1 W. R. 99; *Chatfield* v. *Berchtoldt*, *ubi sup.*; *Sharpe* v. *Blondeau*, 1 W. R. 100, V. C. K.

[7] *Maclean* v. *Dawson* 27 Beav. 25: 4 De G. & J. 150: 5 Jur. N. S. 663; *Official Manager of National Association* v. *Carstairs*, 9 Jur. N. S. 655: 11 W. R. 866, M. R.; *Foley* v. *Maillardet*, 10 Jur. N. S. 34; *ib.* 161: 1 De G. J. & S. 389; see Braithwaite's Pr. 321.

In such cases, personal service is, however, sometimes dispensed with: *Rider* v. *Kidder*, 12 Ves. 202; *De Manneville* v. *De Manneville*, *ib.* 203.

"tor or solicitors by whom such writ has been sued out, or such plead-
"ing or other proceeding has been filed; and when such solicitors are
"agents only, then there shall be furthur endorsed thereon the name
"or firm and place of business of the principal solicitor."

Service of subpœna to appear and answer (under the old practice) without endorsement may be set aside on speedy application.[1] An omission of the address for service does not necessarily make the writ void, but the Court will stay process till the rule is complied with.[2] An attachment was discharged with costs, the endorsement of the subpœna on which it was issued being defective.[3] An irregularity in the endorsement, on a pleading of the name and place of business of the solicitor filing it, is waived by demanding and receiving a copy of the pleading.[4]

And Order 41, that "Where the name and place of business of a soli-
"citor have been endorsed upon any pleading or proceeding filed, it
"shall not be necessary to endorse such place of business on any plead-
"ing or proceeding in the same cause or matter subsequently filed or
"subsequently served on any person who was served with the for-
"mer proceeding."

Order 42 provides that "Where the pleadings in any cause have been
"filed in the office of the Clerk of Records and Writs, or in the office of
"any Deputy Registrar, all notices, appointments, warrants, and other
"documents and written communications in relation to matters trans-
"acted in Court or Chambers, or in the office of the Master, Registrar,
"or Clerk of Records and Writs, which do not require personal service
"upon the party to be affected thereby, are to be served upon the soli-
"citor when residing in the City of Toronto; and when the solicitor to
"be served resides elsewhere than in the City of Toronto, then such
"notices, appointments, warrants, and other documents and written
"communications aforesaid, may be served either upon such solicitor or
"upon his Toronto agent named in the "solicitors' and agents' book,"
"unless the Court, or a Judge thereof, or a Master, before whom any
"such proceeding is had, shall give any direction as to the solicitor
"upon whom any such notice, appointment, warrant, or other docu-
"ment or written communication is to be served. If any solicitor ne-
"glect to cause such entry to be made in the "solicitor and agents'
"book," as is required by Order 24, the posting up a copy of any such
"notice, appointment, warrant, or other document or written commu-

[1] *Johnson* v. *Barnes*, 1 De G. & S. 129.
[2] *Price* v. *Webb*, 2 Hare, 511.
[3] *Barnes* v. *Tweddell*, Coop. 440.
[4] *Bennett* v. *O'Meara*, 2 Cham. R. 167.

"nication for the solicitor so neglecting as aforesaid, in the office of the "Clerk of Records and Writs, is to be deemed sufficient service unless "the Court direct otherwise."

The Court, under peculiar circumstances, allowed service to be effected upon the solicitor by placing the paper under the door of his Chambers.[1] And where a solicitor had absconded, he was held properly served with a notice of motion left at his unoccupied place of business.[2] Where the solicitor of a defendant against whom costs had been decreed, and who had gone out of the jurisdiction, died pending taxation, leave was given on the application of the plaintiff to serve at the last place of residence in England of the defendant a notice to appoint a new solicitor, and it was ordered that such service should be good service on the defendant.[3]

Order 43 provides that "All writs, pleadings, notices, orders, warrants, "and other documents and written communications which do not re- "quire personal service upon the party to be affected thereby, may be "served upon his solicitor residing in the County where such proceed- "ings are conducted, or, where such solicitor does not reside in the "County where such proceedings are conducted, then upon the agent "named in the "Solicitor and Agent's Book," provided for by Order 33. "And if any such solicitor neglect to cause such entry to be made in "the "Solicitor and Agent's Book" the posting of a copy of any such "writ, pleading, notice, order, warrant, or other document or written "communication for the solicitor so neglecting as aforesaid in the "office of such Deputy Registrar, is to be deemed sufficient service."

To understand clearly the effect of these two Orders (42 and 43), reference must be had to Orders 24 and 33 Order 24 requires a "Solicitor and Agent Book" to be kept in Toronto, where each solicitor residing *out of Toronto* is to specify the name of one having an office in it, upon whom papers may be served. Order 42 directs that *wherever* the pleadings have been filed, all papers in relation to matters transacted in *Court*, or *Chambers*, or in the office of the *Master*, *Registrar*, or *Clerk of Records and Writs*, not requiring personal service (all being in Toronto) are to be served upon the solicitor if he resides in Toronto; or if he resides out of it, then either upon him, wherever he may be, or upon his Toronto agent. In case no such agent is specified, then service may be made by posting in the office of the Clerk of Records and Writs. But where the proceeding does not bring the parties before the Court (*in Toronto*), or in Chambers (*in Toronto*), or the Master (*in Toronto*), or

[1] Re Templeman, 20 Beav. 574.
[2] *Newton* v. *Thompson*, 22 L. J. Ch. 10: 16 Jur. 1008. S. C.
[3] *Gibson* v. *Ingo*, 12 Jur. 105.

the Registrar (*in Toronto*), or the Clerk of Records and Writs (*in Toronto*), then, by Order 43, papers may be served upon the solicitor residing in the County where the proceedings are conducted (the County where the bill is filed,) or, where he does not reside in the County where they are conducted, then upon the agent specified in the "Solicitor and Agent Book" kept in each County by the Deputy Registrar under Order 33. In case no such agent is specified, then the same may be made by posting in the office of the Deputy Registrar.

Order 44 provides that "Every party suing or defending in person is "to cause to be endorsed or written upon every writ which he sues out, "and upon every bill, demurrer, answer, or other pleading or proceed- "ing, his name and place of residence, and also (where his place of "residence is more than three miles from the office where such plead- "ing or other proceeding is filed) another proper place, to be called his "address for service, not more than three miles from the said office, "where writs, notices, orders, warrants, and other documents, proceed- "ings, and written communications may be left for him." And Order 45, that "Where a party sues or defends in person, and no address for "service of such party is written or printed pursuant to the directions "of Order 44, or where a party has ceased to have a solicitor, all writs, "notices, orders, summonses, warrants, and other documents, proceed- "ings and written communications, not requiring personal service upon "the party to be affected thereby, shall, unless the Court shall other- "wise direct, be deemed to be sufficiently served upon such party, by posting up a copy thereof in the office of the Clerk of Records and Writs, or a Deputy Registrar where the bill is filed. But if an ad- "dress for service is written or printed as aforesaid, then all such writs, "notices, orders, summonses, warrants, and other documents, proceed- "ings, and written communications, shall be deemed sufficiently served "upon such party, if left for him at such address for service."

D., a Country solicitor, employed McN. and H. as his booked Chancery agents in Toronto, H. being the one who conducted the Chancery business of the firm. McN. and H. dissolved partnership. It was held that a notice served upon a Clerk in the office of McN. and H. after the dissolution was not a good service upon D.[1]

With regard to the time when service is to be made, our Order 410 provides that "Service upon solicitors of pleadings, notices, orders, and "other proceedings, is to be made between the hours of ten o'clock in "in the forenoon and four o'clock in the afternoon, except on Saturdays,

[1] *Hind v. Little*, 1 Cham. R. 355.

"when it shall be made between the hours of ten o'clock in the forenoon "and two o'clock in the afternoon." And Order 411, that "If service "is made after four o'clock in the afternoon on any day except Saturday, the service is to be deemed as made on the following day; and "if made after two o'clock on Saturday, the service is to be deemed as "made on the following Monday." Service of a paper effected after the hour of four o'clock on Saturday by putting it under the door of a solicitor's office, is not a good service for that day, unless it be shown that the paper came to the hands of the solicitor or his clerk on that day, during such hours as the one or the other might be served personally. When Sunday is an intermediate day, it is reckoned in the computation of the time for service of papers.[1] The latter part of this case was, however, overruled in a later case,[2] where it was held that there must be two clear days between the service of a notice and the day for hearing the motion; and in the computation thereof, Sunday is not to be reckoned.

Every party suing or defending in person, must cause to be written upon every writ which he sues out, and upon every bill,[3] demurrer, plea, answer or other pleading or proceeding, his name and place of residence, and also (if his place of residence shall be more than three miles from the office where the pleadings are filed,) another proper place (to be called his address for service), which shall not be more than three miles from that office, where writs, notices, orders, warrants, and other documents, proceedings and written communications may be left for him.[4]

SECTION II.—*Proceedings where no Service of a Copy of the Bill can be effected.*

In the event of the plaintiff not being able to effect service of a copy of the bill, either personally, at the dwelling of the defendant, or out of the jurisdiction, the Court has provided a mode of service by publication; on the adoption of which the plaintiff is entitled to have the bill taken *pro confesso*, without either service on the defendant, or answer by him. Order 100 provides that "In case it appears to the Court by

[1] *Sprague* v. *Henderson*, 1 Cham. R. 213.

[2] Re Crooks, 1 Cham. R. 304.

[3] This includes an information, Prel. Ord. 10 (4).

[4] Ord. 44. See *Price* v. *Webb*, 2 Hare, 511, 513; *Johnson* v. *Barnes*, 1 De G. & S. 129: 11 Jur. 261 Where the solicitor for any party, or any party suing or defending in person, changes his residence or address for service, notice thereof should be given to the Clerk of Records and Writs and also to each solicitor concerned in the cause: Braithwaite's Pr. 10.

"sufficient evidence that a defendant is absent or cannot be found after "due diligence to be served with an office copy of the bill of complaint, "the Court may order the defendant to answer or demur within a time "to be named in the order, and may direct a copy of the order, together "with a notice to the effect set forth in schedule C hereunder written, "to be published in such manner as the Court thinks fit; and in case "the defendant does not answer or demur within the time limited by "such order, the Court may order the bill to be taken *pro confesso* in the "manner hereafter provided." This Order is somewhat similar to the provisions of the Imperial Statutes 11 Geo. IV., 1 Will. IV. c. 36, and 15 and 16 Vic. c. 86, s. 4. On moving for an order to serve an absconding defendant by publication, it must be shown where the defendant last resided, and whether he has any relations within the jurisdiction, and if so, that enquiries have been made of them as to his whereabouts.[1] In a suit which is not for foreclosure or specific performance, the Court cannot order service of the bill by publication on defendants who have been out of the jurisdiction for more than two years before the filing of the bill.[2] We have now neither statute nor order preventing service by publication where the defendant has been out of the jurisdiction for more than two years; and this decision was made under a Sec. of Order 9, of June, 1853, not now in force. The Court will permit service of a bill by publication (under Sec. 8 of Order 9—similar in some respects to Order 100 of the Con. G. Orders) upon a defendant in a foreclosure suit, who has left the jurisdiction, though the defendant sought to be advertised is merely an incumbrancer by virtue of a subsequent mortgage.[3] In moving for an order for substitutional service of an absconding defendant, or for an order to advertise him, the affidavit on which the motion was made stated that the defendant had "made enquiries and exertions to serve the defendant, but had been unable so to do." The motion was refused, as the affidavit ought to show *what* exertions had been made, so that the Court or Judge may be enabled to determine whether or not the defendant is absconding, or that it would be proper to dispense with personal service;[4] but it is not necessary to show that he has absconded to avoid service in the particular suit.[5] Where the sole defendant in a foreclosure suit had been absent from the jurisdiction for fourteen years, and had not been heard of during that time, a motion for the service of the bill upon him by publication was refused, notwithstanding 28 Vic. c. 17, s. 12.[6] A similar applica-

[1] *Irving* v. *Straith*, 1 Cham. R. 185.
[2] *Berkis* v. *Nichols*, 1 Cham. R. 232.
[3] *Robson* v. *Reesor*, 1 Cham. R. 280.
[4] *Murney* v. *Knapp*, 1 Cham. R. 26.
[5] *Barton* v. *Whitcombe*, 16 Beav. 205: 17 Jur. 81; *Allen* v. *Loder*, 15 Jur. 420, V. C. Ld. C.
[6] *Shaw* v. *Ackers*, 1 Cham. R. 395.

tion was refused on 29th May, 1865, by V. C. Spragge; where one of the defendants had been absent from the Province and not heard of for upwards of seven years, on the ground that in such case the presumption of law was that the party was dead, and that the proper course would be to revive in the name of the representatives of such defendant.[1] Where an absent defendant is an infant, the Court has like powers as to granting an order for service by publication, as in case of an adult; but *Semble*, the notice published should not state that in default of answer the bill will be taken *pro confesso*. The Court will also, in exercise of the discretion given to it by 28 Vic. c. 17, s. 12, call upon such defendant to show cause why a solicitor of the Court should not be appointed his guardian *ad litem*.[2] When a defendant who cannot be found has any relatives in the country, they should be examined before a Special Examiner, or Local Master, as to their knowledge of his residence.[3]

The Court in some cases orders an office copy of the bill to be served upon one of the defendant's relatives in addition to the publication of an advertisement. The Order usually directs the advertisement to be published once in each week for the four weeks preceeding the day appointed for defendant to answer. In such an order the word "week" means any period of seven consecutive days, and not the particular seven commencing with Sunday. Where the last insertion of an advertisement was on a Tuesday, and the day appointed for answering was the Thursday week following, this was held not to be a sufficient compliance with the order.[4]

In moving to take a bill *pro confesso* against a defendant who has been advertised, it is necessary to show by affidavit that he cannot be found to be served with notice of the motion.[5] Where an order had been made pursuant to the general orders of 1853, to advertise the defendant as absconding, and no further action had been taken thereon for nearly four months, on an application to the Judge in Chambers for an order to take bill *pro confesso* against such defendant, Esten, V. C., required an affidavit showing that defendant had not returned within the jurisdiction, and that the plaintiff was still ignorant of his whereabouts, so that he was unable to serve him with notice of this application.[6] The Chancellor, on a motion for an order to take the bill *pro confesso* against the defendant under the Orders of 1853, authorizing notice to be given

[1] *Kelly* v. *Macklem*, 1 Cham. R. 396.
[2] *Duffy* v. *O'Connor*, 1 Cham. R. 393.
[3] *Perkins*, v. *Plebs*, 1 Cham. R. 307; *McMurrich* v. *Hogan*, *Ibid.*
[4] *Bazalgette* v. *Lowe*, 24, 368.
[5] *Gilmour* v. *Matthews*, 4 Grant, 376.
[6] *McCarty* v. *Wessels*, 1 Cham. R. 5.

in some public paper where the defendant has absconded, stated that in future, on all such orders being applied for, the several newspapers in which the advertisement has been inserted, must be produced and shown to the Judge to whom the application is made before the order *pro confesso* will be granted.[1] A party having absconded from the Province, as alleged, to avoid service of proceedings in this Court, and it being shown upon affidavits that within a few months he had been resident at several different places, and that it was impossible to say with any degree of certainty in which of them he could be served with process, the Court directed an advertisement to be inserted in a newspaper published at the place of the residence of the party in the Province, and that a copy of the several papers containing the advertisement should be sent to his address at each of the places named.[2] This case was decided under S. 7 and 8 of Order 9, June, 1853; and Order 100 of the Con. G. Orders, so far as the point decided is concerned, seems to have the same effect. Where an application was made to advertise a defendant as absconding, and in the affidavit it was shown that the defendant had absconded to Michigan, where his wife had lately gone to join her husband, but did not state that any endeavor had been made to ascertain his residence; Esten, V. C., before granting the application, required an affidavit to be produced showing that the defendant could not be found in Michigan, where it was supposed he had gone to reside, for the purpose of being served with the bill out of the jurisdiction.[3] Where there is an inconsistency in an endorsement of the bill, and the order under which foreign service is effected, the Court will not grant an order *pro confesso*.[4] Where proceedings are taken against an absent defendant by advertisement, a decree cannot be obtained on *præcipe*.[5]

If the defendant (not being an infant, or person of unsound mind,) neglects to answer or demur within the time mentioned in the endorsement thereon, to a bill which has been duly served upon him within the jurisdiction of the Court, the plaintiff may have the bill noted against him. It may here be observed that these remarks do not apply to suits for foreclosure or sale under mortgage, the practice as to such suits being treated of in another part of this work. Order 88, as amended by Order 550, directs that "A defendant who has been served with an "office copy of a bill of complaint within the jurisdiction of the Court, "is to answer or demur to an original bill, or bill amended before an- "swer, within one lunar month after the service of the office copy of

1 *Goodfellow* v. *Hanbly*, 1 Cham. R. 62.
2 *Stimson* v. *Stimson*, 6 Grant, 379.
3 *Lipsey* v. *Cruise*, 1 Cham. R. 2.
4 *James* v. *Wertheimer*, 5. U. C. L. J. 163.
5 *McMichael* v. *Thomas*, 14 Grant, 249.

"the original or anmended bill, as the case may be;" and Order 89, that "Where a plaintiff amends his bill after answer, a defendant desir-"ing to answer the same is to put in his answer thereto within seven "days after service of the bill as amended." Order 103 provides that "Affidavits of the service of an office copy of a bill of complaint are to "be in the form or to the effect set forth in schedule D hereunder writ-"ten; they are to state where, when, and how such service was effected; "but no copy of the bill is to be annexed."

It will be convenient to notice here the Orders relating to the service by the Sheriff of the various proceedings:—

Order 298 provides that "On the taxation of costs, no fees are to be "allowed for the mileage or service of office copies of bills, orders, "subpœnas, warrants, notices of motion, or other proceedings, unless "served, and sworn in the affidavit of service to have been served, by "the Sheriff, his Deputy or Bailiff being a literate person."

Order 299, that "Upon the delivery of an office copy of a bill, order, "subpœna, warrant, notice of motion or other proceeding, at the office "of any sheriff, to be served by him, he, his Deputy or Clerk is to note "the time it was so delivered."

Order 300, that "In case the office copy of the bill, order, subpœna, "warrant, notice of motion, or other proceeding, is not fully and com-"pletely served within fifteen days after such delivery, the plaintiff or "defendant, his solicitor or agent, is to be entitled to receive the same "back, and the Sheriff, Deputy Sheriff, or Clerk shall therewith return "a note of the time when the same was received, and the time of re-"delivery, and on the taxation of costs, the costs of the mileage and "service of the office copy of the bill, order, subpœna, warrant, notice "of motion, or other proceeding, by any literate person, are to be al-"lowed, as if the same had been served by the Sheriff or his officer."

Order 301, that "If the Sheriff neglects or refuses to return any such "office copy of a bill, order, subpœna, warrant, notice of motion, or "other proceeding, after the expiration of the said fifteen days, the "plaintiff or defendant may issue or prepare another office copy of the "bill, order, subpœna, warrant, notice of motion, or other proceeding, "and the costs thereof and occasioned by the default of the said Sheriff, "may be charged against, and recovered from the Sheriff by the plain-"tiff or defendant, or his solicitor; and the Sheriff in whose office any "such proceeding is received for service, is to receive it subject to this "liability."

Order 302, that "No mileage shall be taxed or allowed for the service "of any office copy of a bill, order, subpœna, warrant, notice of motion,

"or other proceeding, without an affidavit being produced to the Tax-"ing Officer, stating the sum actually disbursed and paid for such "mileage, and the name of the party to whom such payment has been "made."

Order 303, that "The preceding orders are not to apply to services "effected out of the jurisdiction, nor to services effected by a solicitor "upon the opposite solicitor."

CHAPTER IX.

TAKING BILLS PRO CONFESSO.

SECTION I.—*Preliminary Order.*

In England the practice obtains of filing an appearance to the bill by the defendant; and in default, of the plaintiff filing one for him. There is a mode, too, under the English practice of compelling appearance by attaching and imprisoning the defendant, or of sequestrating his property, and in the case of refractory corporations of proceeding against them by *distringas*. The plaintiff may also file a "Traversing Note," by which he declares his intention to proceed with the suit as if the defendant had filed an answer, traversing the case made by the bill; but we have no such practice. Our Order 6 abolishes "appearance either by the defendant, or by the plaintiff on his behalf;" and no provision is made for attachment, sequestration, distringas, or traversing note, in default of answer. It is obvious, that in a Court of Equity, where the nature of the relief is 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, cannot always answer the object of doing that justice to the plaintiff which it is the business of Equity to secure. The English Court, and our own Court following its example, have therefore adopted a method of rendering process effectual by treating the defendant's contumacy as an admission of the plaintiff's case, and by making an order that the facts of the bill shall be considered as true, and decreeing against the defendant according to the Equity arising upon the case stated by the plaintiff. This proceeding is termed, taking a bill *pro confesso*.

It seems that this practice is not of very ancient standing, and that the custom formerly was to put the plaintiff to make proof of the substance of his bill; but the course of taking the bill *pro confesso* has now, for some time, been the established practice of the Court.[1] And this practice has been very materially extended and facilitated by Acts of Parliament and General Orders of the Court. Considerable difference formerly existed in the practice of taking bills *pro confesso*, in cases where the defendant was in custody, and in those where he was not: but the General Orders have so far assimilated the practice in the two cases, that it will be most convenient to state the general rules applicable to all cases in which a bill is taken *pro confesso:* remarking any peculiarities resulting from the particular circumstances in which a defendant may be placed.

Order 104 provides that "Where a defendant, not appearing to be an "infant, or a person of weak or unsound mind, unable of himself to de- "fend the suit, has been personally served within the jurisdiction of the "Court, with an office copy of a bill of complaint, and has neglected to "answer or demur within one month from the time of such service, no "order is to issue for taking the bill *pro confesso*; but in lieu thereof the "plaintiff is, after the expiration of one month and within six months, "to file the usual affidavit of service of the bill, and a *præcipe* requiring "the Clerk of Records and Writs, or the Deputy Registrar, to note that "the defendant is in default for want of answer, and that the bill is to "be taken *pro confesso* against him." It will be recollected that the order does not apply to bills filed for foreclosure or sale under a mortgage when they are specially endorsed under Order 436. In such cases, where no answer, demurrer, or note disputing the amount claimed by the plaintiff as endorsed on the office copy of the bill served, is filed, no noting is required, but the decree is obtained on *præcipe*, on the certificate of the Deputy Registrar showing these facts. Order 105 provides that "If the defendant is in default for want of answer, the Clerk of Records "and Writs, or Deputy Registrar, is to enter a note in the Registry of "Pleadings, as required by the *præcipe*, in the same manner as plead- "ings are entered therein, and the entry is to have the same effect as "an order for taking the bill *pro confesso*." It will be recollected that by Order 47 an acceptance of service and an undertaking to appear by a solicitor are equivalent to personal service. Where a plaintiff allows six months to elapse after service of the bill, before moving for an order *pro confesso* for want of answer, notice of the application must be given

[1] *Hawkins* v. *Crook*, 2 P. Wms. 556; *Gibson* v. *Scevington*, 1 Vern. 247; *Johnson* v. *Desmineere*, *Ibid.* 223.

to the defendant.[1] This decision was made under Order 13, of June, 1853, S. 1, by which the limit is two months; but the Court then intimated what they have since embodied in Order 104, that after six months from the service of the bill, any application to take it *pro confesso* must be made upon notice. Where, on a motion for an order *pro confesso* after six months from the service of the bill, it appears that the defendant has absconded, the order *pro confesso* will be granted *ex parte*.[2] This order was granted under the orders of June, 1853, No. 34, S. 5, of which Order 199 of the Con. G. Orders is nearly a copy. An order *pro confesso* was granted *ex parte* although more than six months had elapsed from the service of the bill, the long vacation having intervened.[3] This case was determined before the order giving six months from the service of the bill, within which time the plaintiff may have had his bill noted; and it is presumed that it would not now be followed, as Order 408 as to vacation does not apply to such a case. In making the motion, the usual two-days notice of motion is sufficient.[4] Where the Attorney-General is a party defendant to a suit, and does not put in an answer, the proper course is to obtain an order that he do answer within a week, or, in default, that the bill be taken *pro confesso* against him.[5] In applying for an order *pro confesso* after six months from the service of the bill, the Registrar's certificate as to no answer being filed should be as recent as possible;[6] and the affidavit of service of the notice of motion should show that the notice was served within the jurisdiction.[7] The six months after service of the bill, within which an order *pro confesso* may be obtained *ex parte*, are six calendar months. Where separate affidavits of service of bill are made by one person, the costs of one only should be allowed.[8] A note *pro confesso* was set aside where the affidavit of service of the office copy of the bill was shown to be imperfect and insufficient.[9]

It may here be noticed that Order 518 provides that "An order to "take a bill *pro confesso* against a defendant, who, at the time of the "making such order, is an infant, or person of weak or unsound mind, "unable of himself to defend the suit, is of no validity."

[1] *Brown* v. *Baker*, 1 Cham. R. 7.
[2] *Hare* v. *Smart*, 1 Cham. R. 350.
[3] *Grange* v. *Conroy*, 1 Cham. R. 70.
[4] *Howard* v. *Watson*, 1 Cham. R. 203.
[5] *Shea* v. *Fellowes*, 1 Cham. R. 30; and see *Groom* v. *Attorney-General*, 9 Sim. 325; *Peto* v. *Attorney-General*, 1 Y. & J. 509
[6] *McCann* v. *Eastwood*, 1 Cham. R. 233.
[7] *McClary* v. *Durand*, 1 Cham. R. 233.
[8] *Boulton* v. *McNaughton*, 1 Cham. R. 216.
[9] *Gordon* v. *Johnson*, 2 Cham. R. 210.

It will be observed that the Orders just considered, 104 and 105, refer to services of bills within the jurisdiction; the next Order, 106, relates to personal services out of the jurisdiction. It provides that "Where a "defendant, not appearing to be an infant or a person of weak or unsound "mind, unable of himself to defend the suit, has been personally served "with an office copy of a bill out of the jurisdiction, and has neglected "to answer or demur within the time limited for that purpose, the "plaintiff may apply to the Court *ex parte* for an order to take the bill "*pro confesso* against such defendant; and the Court, on being satisfied "by affidavit that an office copy of the bill was served personally, and "that no answer has been filed for such defendant, may, if it thinks fit, "order the same accordingly." On a motion for leave to enter a note *pro confesso* against a defendant, and for an order to answer separately against his wife—these defendants living out of the jurisdiction,—the leave was granted to enter the note, and the note was made. The Registrar's Clerk, however, refused to enter the note, saying that the General Orders of the Court did not authorize him to do so. The Secretary was of opinion that as the suit was one in which a *præcipe* decree must be issued, the Clerk was right. However, on consultation with his Lordship the Chancellor, the Secretary directed the Clerk to enter the note against the defendant.[1]

Order 107 relates to service not personal. It provides that "Where "an office copy of a bill has been duly served, but the service has not "been personal, and the defendant has neglected to answer or demur "within the time limited in that behalf, the plaintiff may cause the de- "fendant to be served personally, or by his solicitor if he has one, with "notice of a motion to be made on some day, not less than seven days, "after the date of such service, that the bill may be taken *pro confesso* "against the defendant; and thereupon, unless the defendant has "in the meantime put in his answer, the Court, if it thinks fit, "may order the bill to be taken *pro confesso*, either immediately, "or at such time, and upon such terms, and subject to such con- "ditions, as the Court, under the circumstances of the case, thinks "proper." An application was made for an order allowing substitutional service of a notice of motion under Sec. 3 of Order 13, 1853, (of which Order 107 is a copy,) to take the bill *pro confesso*. The service of the office copy had been effected by delivering it to a son of the defendant at his place of business. No order for substitutional service had been obtained, this was held to be insufficient service.[2]

Order 108 relates to service not personal, and out of the jurisdiction,

[1] *Marshall* v. *Balfour*, 2 Cham. R. 69.
[2] *Elliott* v. *Beard*, 2 Cham. R. 80.

and provides that "Where an office copy of a bill of complaint has been "duly served, but the service has not been personal, and the defendant "has neglected to answer or demur within the time limited in that be- "half, then, in case the office copy of the bill has been served upon the "defendant out of the jurisdiction, or the plaintiff has been unable with "due diligence to serve him personally with such notice of motion as "is provided by Order 107, the Court, upon the *ex parte* application of "the plaintiff, may direct a notice of motion in the form or to the effect "set forth in schedule E hereunder written, to be published in such "manner as the Court thinks fit; and upon the hearing of the motion "the Court, being satisfied of the due publication of the notice, and "that no answer has been filed, may order the bill to be taken *pro con-* "*fesso*, either immediately, or at such time, and upon such conditions, "as the Court, under the circumstances of the case, thinks proper." In a case where the defendants had been served out of the jurisdiction with an office copy of the bill upon an order obtained for the purpose, and after more than six months had elapsed, the plaintiff moved *ex parte* for an order *pro confesso*; under the circumstances the order was made.[1]

Order 110 provides that "Where a corporation aggregate, served "with an office copy of a bill of complaint, has neglected to answer "or demur within the time limited in that behalf, the plaintiff may "apply to the Court *ex parte* for an order to take the bill *pro confesso* "against the corporation; and the Court, on being satisfied of the due "service of the bill, and that no answer has been filed for the corpora- "tion, may, if it thinks fit, order the same accordingly."

It may be here mentioned that an order *pro confesso* is not served. Our Order 111 provides that "An order to take a bill *pro confesso* "against a defendant does not require to be served; and all further "proceedings in the case may be *ex parte* as to such defendant unless "the Court orders otherwise." Where an order to take a bill *pro con-* *fesso* had been obtained six years ago, and no proceedings had been taken since to bring the cause on to a hearing, leave was given to the plaintiff to set down the cause, giving to the defendant notice forthwith of the proceedings.[2] Where after a bill has been ordered to be taken *pro confesso*, but before any decree is drawn up, the defendant intervenes and is a party to proceedings taken between the plaintiff and the defendant, that is not such a case as is contemplated by Sec. 7 of 13 of the Orders of 1853, where all further proceedings in the cause may be taken *ex parte*.[3] It may here be noticed that by Orders 144 and 145, a de-

[1] *Kerr* v. *Clemon*, 1 Cham. R. 14.
[2] *Cryne* v. *Doyle*, 1 Cham. R. 1.
[3] *Strachan* v. *Murney*, 6 Grant, 284.

fendant to a suit refusing to attend and be examined before the Court or an Examiner, or refusing to obey an order for the production of documents, may, in addition to being punished as for a contempt, be punished by having the bill taken *pro confesso* against him.

Where a cause had been set down to be heard *pro confesso*, and had been struck out, in consequence of the absence of counsel, it was permitted to be restored to the paper, on the application of the plaintiff alone.[1]

It is to be observed, generally, that, in proceeding to take a bill *pro confesso*, the greatest care must be taken to bring the case strictly within the General Orders;[2] and all formalities must be scrupulously complied with. Thus, an advertisement in a newspaper, which omitted the defendant's name as a party to the cause, although the notice was addressed to him, and stated that application would be made to have the bill taken *pro confesso* against him, was held insufficient.[3]

And so, after an order to take the bill *pro confesso* has been obtained, the bill cannot be amended, even to the extent of correcting a clerical error, without vitiating the proceedings, and rendering the order useless.[4]

The preliminary order for taking the bill *pro confesso*, having been obtained by one or other of these means, it remains only to be observed, that the mere putting in an answer by the defendant, will not be a sufficient ground for moving to set it aside; and where, upon that ground, a motion was made to discharge an order for taking a bill *pro confesso*, it was refused with costs.[5]

Notwithstanding that, at one time, there seeems to have been some doubt upon the subject,[6] it is now clearly settled that, for the purpose of having the bill taken *pro confesso*, an insufficient answer is to be treated as no answer, and that the whole bill is taken *pro confesso*, in the same manner as it is where no answer at all has been put in.[7] And so also, where a husband and wife are defendants, and the husband puts in an answer without his wife joining in it, and without an order to warrant such a proceeding, the Court treats the answer as a nullity, and will make an order for taking the bill *pro confesso*.[8] It has likewise

[1] *Harvey* v. *Renon*, 12 Jur. 445, V. C. K. B.
[2] *Butler* v. *Matthews*, 19 Beav. 549.
[3] *Jones* v. *Brandon*, 3 Jur. N. S. 1146, V. C. W.
[4] *Weightman* v. *Powel*, 2 De G. & S. 570: 12 Jur. 958.
[5] *Williams* v. *Thompson*, 2 Bro. C. C. 280: 1 Cox, 413.
[6] *Hawkins* v. *Crooke*, 2 P. Wms. 556; 2 Eq. Ca. Ab. 178, pl. 4.
[7] *Davis* v. *Davis*, 2 Atk. 24; *Turner* v. *Turner*, cited 4 Ves. 619.
[8] *Bilton* v. *Bennett*, 4 Sim. 17.

been held, that where, after a full answer, a bill has been amended, and the amended bill is not answered, the plaintiff is entitled to an order to have the bill taken *pro confesso* generally;[1] and where an order was made for the Clerk in Court to attend with the record of the bill, in order to have it taken *pro confesso*, as to the amendments only, Lord Apsley discharged the order: being of opinion, that the original and amended bills were one record, and that the amendments not being answered, the record was not answered.[2]

But although the mere gratuitously putting in an answer will not be sufficient to discharge the order for taking a bill *pro confesso*, yet, wherever an order of this nature has been made, and the defendant comes in upon any reasonable ground of indulgence, and pays the costs, the Court will attend to his application, unless the delay has been extravagantly long.[3] It is not, however, a matter of course to discharge the order for taking the bill *pro confesso*; and the Court, before doing so, will require to see the answer proposed to be put in, in order that it may form a judgment as to the propriety of it, and will not put the plaintiff to the peril of having just such an answer as the defendant shall think proper to give.[4]

To obtain an order to vacate an order *pro confesso*, and decree, and get leave to answer, a very clear case must be made.[5] It is irregular to take an order *pro confesso*, where a *pro confesso* note stands in the Registrar's book unvacated. Strict service of an office copy of the bill duly stamped will be required before an order *pro confesso* can regularly issue.[6] In a suit of foreclosure after the cause had been at issue for more than three years, but no hearing or examination of witnesses had taken place, the Judge in Chambers allowed the personal representative of a deceased party to the cause, who had purchased from the mortgagor, and against whom the bill had been taken *pro confesso*, to put in an answer, setting up what, in the opinion of the learned Judge, was a meritorious defence. Query.—Was not this a matter of discretion with the Judge, and not the subject of appeal?[7]

[1] *Jopling* v. *Stuart*, 4 Ves. 619.
[2] *Bacon* v. *Griffith*, 4 Ves. 619, n.
[3] *Williams* v. *Thompson*, 2 Bro. C. C. 280: 1 Cox, 413.
[4] *Hearne* v. *Ogilvie*, 11 Ves. 77.
[5] *B. of Montreal* v *Wallace*, 2 Cham. R. 17.
[6] *Cameron* v. *U. C. Mining* Cy. 2 Cham. R. 215.
[7] *Anonymous* 12 Grant, 51.

Section II.—*Hearing, Decree, and Subsequent Proceedings.*

The preliminary order having been obtained, the next subject for investigation is the manner in which the cause is heard, and the decree perfected.[1]

A defendant, against whom an order to take a bill *pro confesso* is made, is at liberty to appear at the hearing of the cause; and if he waives all objection to the order, but not otherwise, he may be heard to argue the case upon the merits, as stated in the bill.[2]

Our Order 112 is taken from this English Order, and provides that "A defendant, against whom an order to take a bill *pro confesso* has been "made, is at liberty to appear at the hearing of the cause; and if he "waives all objection to the order, but not otherwise, he may be heard to "argue the case upon the merits as stated in the bill." Our Order 113 also provides that "Upon the hearing of a cause in which a bill has "been ordered to be taken *pro confesso*, such a decree is to be made as "the Court thinks just; and the decree so made is to be absolute in the "following cases, viz.:—

"I.—Where an office copy of the bill has been served personally, or "where service has been accepted by a solicitor under Order 47.

"II.—Where notice of a motion to take the bill *pro confesso* has been "served under Order 107.

"III.—Where the defendant has appeared at the hearing and waived "all objections to the order to take the bill *pro confesso*."

This order is also taken from an English Order, XXII—8. A defendant appearing at the hearing, and waiving all objection to an order *pro confesso*, may show that the bill is open to demurrer for want of Equity.[3] And even though the defendant does not appear, the bill will be dismissed, if the plaintiff appears to have no Equity.[4] The Court will not hear any affidavits against the bill as confessed, the order *pro confesso* must first be set aside.[5]

It may be here mentioned that Order 417 provides that "A cause may "be set down to be heard *pro confesso* at any time after the expiration "of fourteen days from the date of the order or note *pro confesso*."

[1] For forms of decree when bill is taken *pro confesso*, see *Brown* v. *Home*, 8 Beav. 610; Seton, 1128, No. 1.

[2] Eng. Ord. XXII. 7; *Greaves* v. *Greaves*, 12 Beav. 422; and for form of decree in that case, see Seton, 1128, No, 2.

[3] *Greig* v. *Green*, 6 Grant, 240.

[4] *Speidall* v. *Jervis*, 2 Dick, 632.

[5] *Manley* v. *Williams*, 5 U. C. L. J. 163.

At the hearing of the cause, the Court, upon reading the bill, and taking it to be true, will make such decree as seems just;[1] and in the case of any defendant who has appeared at the hearing, and waived all objection to the order to take the bill *pro confesso*, or against whom the order has been made after appearance by himself or his own solicitor, or upon notice served on him, the decree is to be absolute.[2]

Formerly, it was necessary that the Record itself should actually be produced and read in Court, and the Clerk of Records and Writs attended in Court with the record for that purpose; now, however, the bill may be read at the hearing from an office copy without the attendance of the Clerk of Records and Writs.

Our Order 114 provides that "After a decree, founded on a bill taken "*pro confesso*, has been passed and entered, if the decree is not absolute "under Order 113, an office copy thereof may be served on the defend- "ant against whom the order to take the bill *pro confesso* was made, or "his solicitor, together with a notice to the effect that if the defendant "desires permission to answer the plaintiff's bill and set aside the de- "cree, application for that purpose must be made to the Court within "the time specified in the notice, or the defendant will be absolutely "exluded from making such application."

Our Order 115 provides that "If the notice is to be served within the "jurisdiction of the Court, the time therein specified for such applica- "tion to be made by the defendant is to be three weeks after service of "the notice; and if the notice is to be served out of the jurisdiction, "the time is to be specially appointed by the Court upon the *ex parte* "application of the plaintiff."

Our Order 118 provides that "In pronouncing the decree, the Court, "either upon the case stated in the bill, or upon that case, and a peti- "tion presented by the plaintiff for the purpose, as the case requires, "may order a receiver of the real and personal estate of the defendant, "against whom the bill has been ordered to be taken *pro confesso*, to be "appointed with the usual directions; or may direct a sequestration "of such real and personal estate to be issued; and may, if it appears "to be just, direct payment to be made out of such real and personal "estate of such sum or sums of money, as at the hearing, or any sub- "sequent stage in the cause, the plaintiff seems to be entitled to: pro-

[1] Ord. XXII. 8. The Court will only make such a decree as it would have made, if the defendant had appeared: *Brierly* v. *Ward*, 15 Jur. 77, V. C. K. B., which was a foreclosure suit; see *Haynes* v. *Ball*, 4 Beav. 103; *Stanley* v. *Bond*, 6 Beav. 421; *Simmonds* v. *Palles*, 2 Jo. & Lat. 489.

[2] Ord. XXII. 8; *Grover and Baker Sewing Machine Company* v. *Millard*, 8 Jur. N. S. 713, V. C. W.

"vided that, unless the decree is absolute, such payment is not to be "directed without security being given by the plaintiff for restitution, "in case the Court afterward should think fit to order restitution to be "made." [1]

Our Order 328 provides that "A defendant, waiving all objection to "the order to take the bill *pro confesso*, and submitting to pay such "costs as the Court directs, may have the cause reheard upon the "merits stated in the bill."

Order 116 provides that "Where a decree is not absolute under Or- "der 113, the Court may order the same to be made absolute, on the "motion of the plaintiff:

"1. After the expiration of three weeks from the service of a copy of "the decree on a defendant, where the decree has been served within "the jurisdiction.

"2. After the expiration of the time limited by the notice provided "for by Order 115.

"3. After the expiration of three years from the date of the decree, "where a defendant has not been served with a copy thereof: and the "order may be made, either on the first hearing of the motion, or on the "expiration of any further time which the Court may allow to the "defendant for presenting a petition for leave to answer the bill." [2]

Where a defendant was out of the jurisdiction, service of an office copy of the order, limiting the time within which he might apply for leave to answer the bill, and set aside the decree, was held to be a sufficient notice under the rule above referred to. [3]

The application to the Court, to dispense with service of the decree, should be made after the expiration of the three years mentioned in Order 116. [4]

Where proceedings are to be taken against an accounting defendant in the Master's Office, he should be served with the usual warrants as well as with an office copy of the decree; and no proceedings ought to be taken in the Master's Office until the expiration of the time limited for setting aside the decree. [5]

[1] See *Lett* v. *Randall*, 7 Jur, 1075; *Torr* v. *Torr*, Johns 660.

[2] For form of order, see Seton, 1130, No. 2.

[3] *Trilly* v. *Keefe*, 16 Beav. 83: 16 Jur. 442.

[4] *Vaughan* v. *Rodgers*, 11 Beav. 165; *James* v. *Rice*, 5 De G. M. & G. 461: 18 Jur. 818. It was dispensed with before the expiration of the three years, however, in *Kerrp* v. *Latter*, 16 Jur. 770, M. R.; *Benbow* v. *Davies*, 12 Beav. 421; and see *Brierly* v. *Ward*, 15 Jur. 177, V. C. K. B. These cases are, it is conceived, overruled by *James* v. *Rice*; and see *Thurgood* v. *Caue*, 11 W. R. 297, M. R.

[5] 1 Daniell (4 Ex.) 487; *Golden* v. *Newton*, Johns. 720; and see *King* v. *Bryant*, 3 M. & C. 191, 196: 2 Jur. 106.

Our Order 117 provides that "Where the decree is not absolute "under Order 113, and has not been made absolute under Order 116, "and the defendant has a case upon the merits not appearing in the "bill, he may apply to the Court by petition, stating such case, and "submitting to such terms with respect to costs and otherwise, as the "Court may think reasonable, for leave to answer the bill; and the "Court, on being satisfied that the case is proper to be submitted to the "judgment of the Court, may, if it thinks fit, and upon such terms as may "seem just, vacate the enrolment (if any) of the decree, and permit the "defendant to answer the bill; and if permission is given to the "defendant to answer the bill, leave may be given to file a separate repli- "cation to such answer, and issue may be joined, and witnesses exam- "ined, and such proceedings had, as if the decree had not been made, and "no proceedings against such defendant had been had in the cause."[1]

Our Order 119 provides that "The rights and liabilities of a plaintiff "or defendant, under a decree made upon a bill taken *pro confesso*, ex- "tend to the representatives of a deceased plaintiff or defendant at the "time when the decree was pronounced; and, with reference to the "altered state of parties and any new interests acquired, the Court "may, upon motion, served in such manner and supported by such "evidence as under the circumstances of the case, the Court deems suf- "ficient, permit any party, or the representative of any party, to adopt "such proceedings as the nature and circumstances of the case may "require, for the purpose of having the decree (if absolute) duly exe- "cuted, or for the purpose of having the matter of the decree and the "rights of the parties duly ascertained and determined."

CHAPTER X.

THE DEFENCE TO A SUIT.

In the preceding Chapters, the attention of the reader has been principally directed to the case on the part of the plaintiff, the method of submitting it to the Court, and the means provided by the practice of the Court for compelling the defendant to submit himself to its jurisdic-

[1] In *Inglis* v. *Campbell*, 2 W. R. 396, V. C. K., which was a foreclosure suit, permission was given under this rule, on payment of the costs of the application and of the suit.

tion; or, in case of his refusal, of depriving him of the benefit of his contumacy, by giving to the plaintiff the relief to which the justice of his case appears to entitle him. The line of conduct to be pursued by a defendant, who is willing to submit himself to the authority of the Court, and to abide its decision upon the matter in litigation, will now be considered.

The first step to be taken by or on behalf of a defendant who intends to defend the suit, is to file his answer within the proper time, at the office of the Clerk of Records and Writs or Deputy Registrar.[1] Unless the suit is defended by the defendant in person, this is done by his solicitor. A special authority is not necessary to enable a solicitor to undertake the business; a general authority to act as solicitor for his client is sufficient:[2] although a solicitor ought not to take upon himself to enter an appearance for a defendant without some authority; and where a solicitor, 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.[3] The retainer need not be in writing;[4] but if it is not, and his authority is afterwards challenged, the solicitor runs a risk of having to pay the costs, if he have only assertion to offer against assertion.[5]

The propriety of putting in an answer depends upon the circumstances of each case; and, in general, where the defendant relies upon a case which does not appear upon the bill, he should put in an answer.

It may, however, happen from some cause, either apparent upon the face of the bill itself, or capable of being concisely submitted to the Court, that the plaintiff is not entitled to the relief or part of the relief which he has prayed: in such cases, the defendant may, according as his objection goes to the whole or to part of the relief, submit the grounds upon which he considers the plaintiff not entitled to what he seeks, in a concise form to the Court, and pray the judgment of the Court whether the plaintiff is entitled to the relief prayed by his bill, to which the defendant objects. This species of defence, if the objection appears upon the face of the bill itself, is made by *demurrer;* but if it depends upon any matter not in the bill, it must be submitted to the Court in the form of an answer. If the defence submitted to the Court, in either of the above forms, is admitted, or held upon argument to be

[1] C. G. Ord. 23, 34.
[2] *Wright* v. *Castle*, 3 Mer. 12.
[3] *Richards* v. *Dadley*, Rolls, sittings after Trinity term, 1837; and see *Leese* v. *Knight*, 8 Jur. N. S. 1006: 10 W. R. 711, V. C. K.
[4] *Lord* v. *Kellett*, 2 M. & K. 1.
[5] *Wiggins* v. *Peppin*, 2 Beav. 403, 405.

good, the effect of it, if it be a demurrer, is to put the bill, or that part of it which has been demurred to, out of Court; or, if it be an answer, to limit the matter in dispute to the question whether the point raised by it be true or not: in which case, if the defendant succeeds in establishing the point raised by the answer, by evidence at the hearing, the bill, so far as it is covered by the answer, will be dismissed. If the demurrer or answer be held upon argument to be bad, the effect of the judgment of the Court, in general, is in favor of the plaintiff.

If the defendant thinks proper to relinquish any claim he may have to the property in question in the suit, he can do so by putting in a species of answer called a *disclaimer;* by which he disclaims all interest in the matters in question in the suit.

CHAPTER XI.

DEMURRERS.

SECTION I.—*The General Nature of Demurrers.*

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 appropriate mode of defence is by demurrer.[1]

Demurrers are now of much less frequent occurrence than formerly: the readiness with which the Court gives the plaintiff leave to amend his bill rendering it inexpedient to demur, in any case, where the defect in the bill can be cured by amendment;[2] but where the question raised by the bill can be properly determined on demurrer, a defendant, by neglecting to demur, injures his position with respect to the costs of the suit. Thus, bills dismissed at the hearing, have often been dismissed without costs, on the ground that they might have been demurred to;[3] or the defendant has only been allowed the same costs as he would have received if he had demurred.[4] The defendant is not

[1] Ld. Red. 107.

[2] As to the expediency of demurring, see Wigram on Disc., 158.

[3] *Jones* v. *Davids*, 4 Russ. 277; *Hill* v. *Reardon*, 2 S. & S. 431, 439; *Hollingsworth* v. *Shakeshaft*, 14 Beav. 492; *Webb* v. *England*, 29 Beav. 44: 7 Jur. N. S. 153; *Ernest* v. *Weiss*, 9 Jur. N. S. 145: 11 W. R. 206, V. C. K.; *Nesbitt* v. *Berridge*, 9 Jur. N. S. 1044: 11 W. R. 446, M. R.; but see *Morocco Company* v *Fry*, 11 Jur. N. S. 76, 78; 13 W. R. 310, 312, V. C. S.

[4] *Godfrey* v. *Tucker*, 9 Jur. N. S. 1188: 12 W. R. 33, M. R.

justified in neglecting to demur to the bill, because it contains charges of fraud which he is desirous of answering.[1]

The Court sometimes declines to decide a doubtful question of title on demurrer: in which case, the demurrer will be overruled, without prejudice to any question.[2] A demurrer may also be overruled, with liberty to the defendant to insist upon the same defence by answer, if the allegations of the bill are such that the case ought not to be decided without an answer being put in.[3]

A demurrer has been so termed, because the party demurring *demoratur*, or will go no further: the other party not having shown sufficient matter against him; and it is in substance an allegation by a defendant, which, admitting the matters of fact stated by the bill to be true, shows that, as they are therein set forth they are insufficient for the plaintiff 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 therein, or for want of some circumstance which ought to be attendant thereon, the plaintiff ought not to be allowed to proceed. It, therefore, demands judgment of the Court, whether the defendant shall be compelled to make any further or other answer to the plaintiff's bill, or that particular part of it to which the demurrer applies.[4]

A demurrer will lie wherever it is clear that, taking the charges in the bill to be true, the bill would be dismissed at the hearing;[5] but it must be founded on this: that it is an absolute, certain, and clear proposition that it would be so;[6] for if it is a case of circumstances, in which a minute variation between them as stated by the bill, and those established by the evidence, may either incline the Court to modify the relief or to grant no relief at all, the Court, although it sees that the granting the modified relief at the hearing will be attended with considerable difficulty, will not support a demurrer. Therefore, where a bill was filed for the specific performance of an agreement, and the case turned upon the point, whether the facts stated amounted to a perfect agreement, Lord Rosslyn thought that, although the circumstances, as stated in the bill, amounted more to a treaty than

[1] *Nesbitt* v. *Berridge*, *ubi sup.*

[2] *Brownsword* v. *Edwards*, 2 Ves. S. 243, 247; *Mortimer* v. *Hartley*, 3 De G. & S. 316; *Evans* v. *Evans*, 18 Jur. 666, L.JJ.; *Cochrane* v. *Willis*, 10 Jur. N. S. 162, L.JJ.; Ld. Red. 154, n. (*p*).

[3] *Collingwood* v. *Russell*, 13 W. R. 63, L.JJ.; *Lautour* v. *Attorney-General*, 11 Jur. N. S. 48: 13 W. R. 305, L.JJ.

[4] Ld. Red. 107.

[5] *Utterson* v. *Mair*, 2 Ves. J. 95: 4 Bro. C. C. 270; *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 607, 638.

[6] *Brooke* v. *Hewitt*, 3 Ves. 253, 255; *Morrison* v. *Morrison*, 4 Drew. 315.

a complete agreement, the question whether it was an agreement or not depended very much upon the effect of the evidence, and therefore overruled the demurrer.[1]

As a demurrer proceeds upon the ground that, admitting the facts stated in the bill to be true, the plaintiff is not entitled to the relief he seeks, it is held that, at least for the purpose of argument, all the matters of fact which are stated in the bill are admitted by the demurrer,[2] and cannot be disputed in arguing the question whether the defence thereby made be good or not; and such admission extends to the whole manner and form in which it is there stated. Upon this ground, where a bill misstated a deed, by alleging it to contain a proviso which it did not, Lord Cottenham, upon the argument of a demurrer to the bill, refused to allow the defendant's counsel to refer to the deed itself, for the purpose of showing the incorrectness of the manner in which it was set out: although the bill contained a reference "for greater certainty as to its contents, &c.," to the deed, as being in the custody of the defendants. His Lordship said, that to hold otherwise would be to give the defendants an advantage, depending upon the accident of their having the custody of the document which the bill purported to set out, and would in effect be to decide the question raised by the demurrer, upon matter which was *dehors* the record.[3] In this case, the object of referring to the deed was to contradict a statement in the bill; and where the object is to support, and not contradict, the plaintiff's case, it appears that the Court will still refuse to look into the document.[4]

It is also to be remarked, that where a bill professes to set out a deed inaccurately, and alleges, as a reason for so setting it out, that it is in the possession of the defendants, a demurrer to the bill cannot be sustained, although, according to the terms of the deed, as stated by the plaintiff, he can take no title under it: because the Court will not, under such circumstances, bind the plaintiff by the statement he has made, which he alleges to be inaccurate, and which the defendant, therefore, by his demurrer admits to be so. In a case of this description, if the defendant means that the Court should at once be called upon to determine the true construction of the deed, he must answer.[5]

[1] *Brooke* v. *Hewitt*, *ubi sup.*; but see *Reeves* v. *Greenwich Tanning Company*, 2 H. & M. 54.

[2] *E. I. Company* v. *Henchman*, 1 Ves. J. 289; and see *Nesbitt* v. *Berridge*, 9 Jur. N. S. 1044: 11 W. R. 446, M. R.

[3] *Campbell* v. *Mackay*, 1 M. & C. 603, 613; *Cuddon* v. *Tite*, 1 Giff. 395.

[4] *Harmer* v. *Gooding*, 3 De G. & S. 407, 410, 411: 13 Jur. 400, 402; see, however, *Weld* v. *Bonham*, 2 S. & S. 91; and as to Acts of Parliament, see *Wilson* v. *Stanhope*, 2 Coll. 629: 10 Jur. 421; *Apperly* v. *Page*, 1 Phil. 779, 785: 11 Jur. 271; *Bailey* v. *Birkenhead Junction Railway*, 12 Beav. 433, 443: 14 Jur. 119, 122.

[5] *Wright* v. *Plumptree*, 3 Mad. 481, 490.

On a demurrer, ambiguous statements are construed adversely to the pleader; but a defendant is not entitled to press the principle so far, as to draw any inference of facts he pleases which may happen to be inconsistent with the averments of the bill.[1]

But although a demurrer confesses the matters stated in the bill to be true, such confession is confined to those matters which are well pleaded, *i. e.*, matters of fact.[2] It does not, therefore, admit any matters of law which are suggested in the bill, or inferred from the facts stated: for, strictly speaking, arguments, or inferences, or matters of law, ought not to be stated in pleading, although there is sometimes occasion to make mention of them for the convenience or intelligibility of the matter of fact. Thus, in the case of *Campbell* v. *Mackay*, above referred to, if the bill had gone on, after stating the alleged words of the proviso, to aver a legal inference from them which such words did not authorize, the demurrer, although it was held to confess the existence in the deed of a proviso, in the words stated, as a matter of fact, would not have been considered as admitting the inference of law alleged to have arisen from it. An inference of this nature is called a *Repugnancy;* and it is a rule in pleading that a demurrer will not admit matters, either of law or of fact, which are repugnant to each other. Thus, where a bill was filed for a discovery, and for an account and delivery up of the possession of land, on the ground that the plaintiff could not describe the land so as to proceed at Law, by reason of the defendant having got possession of the title-deeds and mixed the boundaries, Lord Rosslyn allowed a demurrer, because the bill was a mere ejectment bill; but he intimated that, even if the bill had been for a discovery only, it could not have been sustained: because the averment, that the plaintiff could not ascertain the lands, was contrary to the facts disclosed in the bill, in which the lands were sufficiently described.[3] And so, where a record is pleaded, it has been held, that a demurrer is never a confession of a thing stated in the bill, repugnant to the record.[4]

1 *Simpson* v. *Fogo*, 1 J. & H. 18: 6 Jur. N. S. 949.

2 *Ford* v. *Peering*, 1 Ves. J. 72, 78.

3 *Loker* v. *Rolle*, 3 Ves. 4, 7.

4 *Arundel* v. *Arundel*, Cro. Jac. 12; Com. Dig. Pleader Q. 6; *Mortimer* v. *Fraser*, 30 Jan. 1837, reported upon another point, 2 M. & C. 173.

It may be noticed here, that there are some facts of which the Court is said to take *judicial notice:* thus, it recognizes foreign states; and when facts are averred in a bill which are contrary to any fact of which the Court takes judicial notice, the Court will not pay any attention to the averment. Thus, where, in order to prevent a demurrer, it was falsely alleged in the bill that a revolted colony of Spain had been recognized by Great Britain as an independent state, Sir Launcelot Shadwell, V. C., upon the argument of a demurrer to the bill, held, that the fact averred was one which the Court was bound to take notice of as being false, and that he must, therefore, take it just as if there had been no such averment on the record.[1] It is to be observed, that besides the recognition of foreign states, the Court will also take judicial or official notice of a war in which this country is engaged; but not of a war between foreign countries.[2] The Court is also bound to notice the time of the Queen's accession, her proclamations, and privileges; time and place of holding Parliaments, the time of sessions and prorogation, and the usual course of proceedings; the Ecclesiastical, Civil and Maritime Laws; the course of the Almanack;[3] the division of England into counties, provinces, and dioceses;[4] the meaning of English words and terms of art, even when only local in their use; legal weights and measures, and the ordinary measurement of time; the existence and course of proceeding of the Superior Courts, and the other Courts of General Jurisdiction; and the privileges of its own officers.[5] It follows, therefore, from the principle before laid down, that where a bill avers any fact in opposition to what the Court is so officially bound to notice, such averment will, in arguing a demurrer to the bill, be considered as a nullity.

SECTION II.—*The different grounds of Demurrer.*

A DEMURRER may be either to the relief prayed, or, if discovery is sought, to the discovery only, or to both. If the demurrer is

1 *Taylor* v. *Barclay*, 2 Sim. 213, 220.

2 *Dolder* v. *Lord Huntingfield*, 11 Ves. 292.

3 *Mayor of Guildford*, v. *Clark*, 2 Vent. 247.

4 But not the local situation, and distance of different places in a county from each other: *Deybel's case*, 4 B. & Ald. 243.

5 Taylor on Evid. Chap. II.; Stephen on Pl. 269; and see 1 Chitty on Pl. 236, *et seq.*, where further information on the subject is to be found.

good to the relief, it will be so to the discovery;[1] if, therefore, a plaintiff is entitled to the discovery alone, and goes on to pray relief, a general demurrer to the whole bill will be good;[2] and, for the purposes of a demurrer, a prayer for general relief renders the bill a bill for relief.[3] A prayer will not, however, convert a bill into one for relief, if it merely prays for the equitable assistance of the Court, consequential upon the prayer for discovery: such as, a writ of injunction, or a commission to examine witnesses abroad,[4] or that the testimony of witnesses may be perpetuated,[5] or that defendant may set forth a list of deeds.[6]

Notwithstanding the general rule, that if the relief prayed is unnecessary or improper, the defendant may cover himself by a general demurrer, yet this will not preclude the defendant, in cases where, if the bill had been for a discovery only, there would have been a right to such discovery, from demurring to the relief only, and answering as to the discovery, or, in other words, giving the discovery required.[7]

The converse of this proposition, however, will not equally hold: for it has been determined, that where a bill prays relief as well as discovery, the defendant cannot demur to the discovery and answer to the relief: for then he does not demur to the thing required, but to the means by which it is to be obtained.[8]

There are, however, some exceptions to the last-mentioned rule: as where the discovery sought would subject the defendant to punishment, or to a penalty, or forfeiture; or is immaterial to the relief prayed; or is of matters which have been communicated under the seal of professional confidence; or which relate entirely to the de-

1 Ld. Red. 183; *Loker* v. *Rolle*, 3 Ves. 4, 7; *Ryves* v. *Ryves*, *ib.* 343, 347; *Muckleston* v. *Brown*, 6 Ves. 63; *Barker* v. *Dacie*, *ib.* 686; *Hodgkin* v. *Longden*, 8 Ves. 3; *Williams* v. *Steward*, 3 Mer. 502; *Gordon* v. *Simpkinson*, 11 Ves. 509; *Speer* v. *Crawter*, 17 Ves. 216; *Evan* v. *Corporation of Avon*, 29 Beav. 144.

2 *Price* v. *James*, 2 Bro. C. C. 319; *Collis* v. *Swayne*, 4 Bro. C. C. 480; *Albretcht* v. *Sussman*, 2 V. & B. 328.

3 *Angell* v. *Westcombe*, 6 Sim. 30; *Ambury* v. *Jones* Younge, 119; *James* v. *Herriott*, 6 Sim. 428; *Rose* v. *Gannel*, 3 Atk. 439; *Baker* v. *Bramah*, 7 Sim. 17; *South Eastern Railway Company* v. *Submarine Telegraph Company*, 18 Beav. 429: 17 Jur. 1044.

4 *Brandon* v. *Sands*, 2 Ves. J. 514; *Noble* v. *Garland*, 19 Ves. 376; *Lousada* v. *Templer*, 2 Russ. 561; *King* v. *Allen*, 4 Mad. 247; see also *Duke of Dorset* v. *Girdler*, Prec. in Ch. 532.

5 *Hall* v. *Hoddesdon*, 2 P. Wms. 162, *Vaughan* v. *Fitzgerald*, 1 Sch. & Lef. 316; *Rose* v. *Gannell*, 3 Atk. 439.

6 *Crow* v. *Tyrell*, 2 Mad. 397, 408.

7 *Hodgkin* v. *Longden*, 8 Ves. 2; *Todd* v. *Gee*, 17 Ves. 273.

8 *Morgan* v. *Harris*, 2 Bro. C. C. 121, 124.

fendant's title, and not to that of the plaintiff. In cases of this nature, the Court will allow a defendant to protect himself by demurrer from the particular discovery sought: though it will not protect him from the relief prayed, if the plaintiff's title to it can be established by other means than the discovery of the defendant himself. Thus in a bill to inquire into the reality of deeds, on a suggestion of forgery, the Court has entertained jurisdiction of the cause, though it does not oblige the party to a discovery, and has directed an issue to try whether the deeds were forged or not.[1]

It is proposed now to consider: first, the grounds of demurrer to the relief; and then those of demurrer to the discovery only.

Demurrers to the relief may be either: To the jurisdiction; the person; or the matter of the bill, either in its substance or form.

Demurrers to the jurisdiction are either on the ground: I. That the case made by the bill does not come within the description of cases in which a Court of Equity assumes the power of decision; or, II. That the subject-matter is within the jurisdiction of some other Court.[2]

I. It would be a task far exceeding the limits of this work, and not strictly within its object, to attempt to point out the cases in which a demurrer will hold to a bill, on the ground that the case made by it does not come within the ordinary cases for relief in a Court of Equity. It is sufficient to direct the reader's attention to the admirable statement of the general objects of the jurisdiction of a Court of Equity, which is to be found in Lord Redesdale's Treatise upon Pleading;[3] and to observe, that if the case made by the bill appears to be one on which the jurisdiction of the Court does not arise, a demurrer will hold. And it is to be observed, that a demurrer will hold equally, where the defect arises from the omission of matter which ought to be contained in the bill, or

1 *Per* Lord Hardwicke in *Brownsword* v. *Edwards*, 2 Ves. S. 246; *Attorney-General* v. *Sudell*, Prec. in Ch. 214.

2 A demurrer for want of equity, includes a demurrer for want of jurisdiction: *Thompson* v. *University of London*, 33 L. J. Ch. 625: 10 Jur. N. S. 669, V. C. K.; see also *Barber* v. *Barber*, 4 Drew 666: 5 Jur. N. S. 1197; *Cookney* v. *Anderson*, 31 Beav. 452: 8 Jur. N. S. 1220; 1 De G. J. & S. 365: 9 Jur. N. S. 736. As to the form of demurrer for want of jurisdiction, see *Barber* v. *Barber*, *ubi sup.*

3 And see Fonb. on Eq.; Coop. Eq. Pl.; Story Eq. Jur.; Story Eq. Pl.

of some circumstance which ought to be attendant thereon for the purpose of bringing the case properly within the jurisdiction; as where it appears that the case is such as, under no circumstance, can be brought within the ordinary scope of a Court of Equity. Thus, where it appears on the face of the bill that the defendants were, at the time of the institution of the suit, resident in a foreign country, and that the suit does not relate to any of the subjects in respect of which the Court is warranted in exercising jurisdiction against persons so resident, a demurrer for want of equity will be allowed.[2]

II. A demurrer, because the subject-matter of the suit is within the cognizance of some other Court, may be on the ground that it is within the jurisdiction either: 1. of a Court of Common Law; 2. of the Court of Probate; 3. of the Insolvent Court; or, 4. of some statutory jurisdiction.

1. If it appears by the bill, that the plaintiff can have as effectual and complete a remedy in a Court of Law as in a Court of Equity, and that such remedy is clear and certain, the defendant may demur. Thus, where a bill was brought by the executrix of an attorney, for money due from the defendant for business done as an attorney, the Court allowed a demurrer to the relief: because the remedy was at Law, and an Act of Parliament had pointed out a summary method of obtaining it.[3] And where the plaintiff had contrived to purchase goods for export to America, and, after the ship had sailed with them, it was discovered that there had been fraud used in the quantity and quality of the goods, but the plaintiff, being threatened with an action, paid the original price under a protest that he would seek relief in Equity, a demurrer was allowed to a bill, when it was afterwards brought for a discovery and account: though it is quite clear that, if the plaintiff had not paid the money, the Court would have granted him relief, by injunction, against the threatened action for the price.[4] Upon the same principle, if a bill is filed for an account, where the subject is matter of set-off, and capable of proof

1 Ld. Red. 108; *see* *Columbine* v. *Chichester*, 2 Phil. 27; 1 C. P. Coop. t. Cott. 295: 10 Jur. 626. For forms of demurrer for want of equity, see 2 Van. Hey. 74, 75, 80, 92.

2 *Cookney* v. *Anderson*, *ubi sup.*; and see *Foley* v. *Maillardei*, 1 De G. J. & S. 389: 10 Jur. N. S. 161; *Samuel* v. *Rogers*, 1 De G. J. & S. 396; and *ante*

3 *Parry* v. *Owen*, 3 Atk. 740: Amb. 109. For form of the demurrer, see *ib.*; Beames on Costs 376; also *Maw* v. *Pearson*, 28 Beav. 196.

4 *Kemp* v. *Pryor*, 7 Ves. 237, 251.

at Law, it may be demurred to.[1] And so, if a bill is filed for the possession of land, or an *Ejectment* Bill, as it is called, it may be demurred to, even though the bill charges the defendants to have got the title-deeds, and to have mixed the boundaries, and prays a discovery, possession, and account: for the plaintiff, though he is entitled to a discovery, has, by praying such relief, rendered his whole bill liable to demurrer.[2]

It is to be recollected that, in many cases, Courts of Equity have assumed a concurrent jurisdiction with Courts of Law, as in cases of account, partition, and assignment of dower;[3] and that, where an instrument on which a title is founded is lost, or fraudulently suppressed or withheld from the party claiming under it, a Court of Equity will interfere to supply the defect occasioned by the accident or suppression, and will give the same remedy which a Court of Common Law would have given, if the instrument had been forthcoming.[4] In all such cases, therefore, a demurrer, because the subject-matter of the suit is within the jurisdiction of a Court of Law, will not hold.

Amongst other cases in which Courts of Equity and Courts of Law entertain a concurrent jurisdiction, are those arising upon frauds; therefore, where fraud is made the ground for the interference of this Court, a demurrer will not hold.

Although the extension of the jurisdiction of the Courts of Common Law has prevented the necessity of resorting to the Courts of Chancery, in many cases in which it was formerly necessary to do so, yet, the jurisdiction of the Court of Chancery is not thereby destroyed.[5]

1 *Dinwiddie* v. *Bailey*, 6 Ves. 136, 141. It is a difficult question to determine, when there is an account between two persons, consisting of items cognizable at Law, under what circumstances a concurrent jurisdiction in Equity exists; for cases on the subject, see *Foley* v. *Hill*, 1 Phil. 399, 403; *North Eastern Railway Company* v. *Martin*, 2 Phil. 758, 763; S. C. *nom.*; *South Eastern Railway Company* v. *Martin*, 13 Jur. 1; *South Eastern Railway Company* v. *Brogden*, 3 M'N. & G. 8, 16, 28: 14 Jur. 795, 797; *Phillips* v. *Phillips*, 9 Hare, 471; *Navulshaw* v. *Brownrigg*, 2 De G. M. & G. 441: 16 Jur. 979; *Padwick* v *Hurst*, 18 Beav. 575: 18 Jur. 763; *Fluker* v. *Taylor*, 3 Drew 183; *Croskey* v. *European and American Shipping Company*, 1 J. & H. 108: 6 Jur. N. S. 1190; *Barry* v. *Stephens*, 31 Beav. 258: 9 Jur. N. S. 143; *Shepard* v. *Brown*, 4 Giff. 208: 9 Jur. N. S. 195; *Smith* v. *Leveaux*, 9 Jur. N. S. 1140, L. JJ.: 12 W. R. 31; *Hemings* v. *Pugh*, 4 Giff. 456: 9 Jur. N. S. 1124; *Makepeace* v. *Rogers*, 13 W. R. 450, V.C.S.

2 *Loker* v. *Rolle*, 3 Ves. 4, 7; *Ryves* v. *Ryves ib.* 343; *Vice* v. *Thomas*, 4 Y. & C. Eq. 538.

3 Ld. Red. 120, 123.

4 Ld. Red. 113.

5 *Kemp* v. *Pryor*, 7 Ves. 237, 249; *British Empire Shipping Company* v. *Somes*, 3 K. & J. 433; *Athenæum Life Assurance Society* v. *Pooley*, 3 De G. & J. 294, 299,; *Oriental Bank* v. *Nicholson*, 3 Jur. N. S. 857, V.C. S.; *Croskey* v. *European and American Steam Shipping Company*, 1 J. & H. 108: 6 Jur. N. S. 1190; *Shepard* v. *Brown*, 4 Giff. 208: 9 Jur. N. S. 195.

The general way of objecting to the jurisdiction of the Court is by answer; and in *Roberdeau* v. *Rous*,[1] in which a bill was filed for delivery of possession of lands in St. Christopher's, Lord Hardwicke held, that the objection that the Court had no jurisdiction over land in that island, although right in principle, was irregularly and informally taken by demurrer, and should have been pleaded. Lord Redesdale, however, appears to have been of opinion, that the rule, that an objection to the jurisdiction should be pleaded, and not be taken by demurrer, can only be considered as referring to cases where circumstances may give the Chancery jurisdiction, and not to cases where no circumstance can have that effect; and that where all the circumstances which would be requisite in an answer, to show that the Court has no jurisdiction, are shown in the bill, a demurrer will lie.[2] What those circumstances are, will be stated when we come to treat of pleas to the jurisdiction. In the mean time, it may be observed, that if the objection on the ground of jurisdiction is not taken in proper time, namely, either by demurrer or plea, before the defendant enters into his defence at large, the Court having the general jurisdiction, will exercise it: unless in cases where no circumstances whatever can give the Court jurisdiction, as in the case before put, of a bill of appeal and review from a decree in a county palatine; in which case, the Court cannot entertain the suit, even though the defendant does not object to its deciding on the subject.[3]

The objections arising from the personal disability of the plaintiff, have been already discussed.[4] All, therefore, that need now be said upon the subject is, that if any of these incapacities appear upon the face of the bill, the defendant may demur. So, also, he may, if the incapacity is such only as prevents the party from suing alone, as in the case of an infant or a married woman, an idiot or a lunatic: in which cases, if no next friend or committee be named in the bill, a demurrer will lie.[5] Where a bill against an Insurance

1 1 Atk. 543.

2 Ld. Red. 152, 153. In the case of *Henderson* v. *Henderson*, 3 Hare, 100, 110, 118, a demurrer was allowed on the ground that the whole of the matters were in question between the parties, and might have been the subject of adjudication in a suit before the Supreme Court of Newfoundland.

3 Ld. Red. 153.

4 *Ante*.

5 *Ante*. A married woman may, however, under certain circumstances, sue without a next friend, and an idiot or lunatic by his next friend, without a committee: see *ante*.

Company in a policy alleged that the policy was made by the Company, but did not state that it was under seal, it was on demurrer held sufficient.[1]

This objection extends to the whole bill;[2] and advantage may be taken of it, as well in the case of a bill for discovery merely, as in the case of a bill for relief: for the defendant, in a bill for discovery, being always entitled to costs, after a full answer, as a matter of course, would be materially injured by being compelled to answer a bill by persons whose property is not at their own disposal, and who are, therefore, incapable of paying the costs.[3]

We come now to the consideration of demurrers arising upon objections applying more specifically to the matter of the bill; these may be either: I. to the substance; or, II. to the form in which it is stated.

I. Demurrers to the substance are: 1. that the plaintiff has no interest in the subject; 2. that although the plaintiff has an interest, yet the defendant is not answerable to him, but to some other person; 3. that the defendant has no interest; 4. that the plaintiff is not entitled to the relief which he has prayed; 5. that the value of the subject-matter is beneath the dignity of the Court; 6. that the bill does not embrace the whole matter; 7. that there is a want of proper parties; 8. that the bill is multifarious, and improperly confounds together distinct demands; 9. that the plaintiff's remedy is barred by length of time; 10. the statute of frauds; 11. that it appears by the bill, that there is another suit depending for the same matter.

1. In a former section, in which the matter of a bill has been discussed, the reader's attention has been directed to the necessity of showing that the plaintiff has a claim to the thing demanded, or such an interest in the subject as gives him a right to institute a suit concerning it.[4]

2, 3. The same section also exhibits the nature of the privity

1 *Workman* v. *The Royal Insurance Company*, 16 Grant, 185.
2 *Gilbert* v. *Lewis* 1 De G. J. & S. 38: 9 Jur. N. S. 187.
3 See *post*.
4 *Ante*.

which it is necessary the bill should aver to be existing between the plaintiff and defendant, and the application of the rule which requires that the bill should show that the defendant has an interest in the subject-matter of the suit. It also points out the exceptions to the rule, in certain cases in which persons, who have no interest in the subject-matter, may be made parties for the purpose of eliciting discovery from them, and in which they are prevented from availing themselves of a demurrer, to avoid answering the bill.[1]

4. It has been before stated[2] as one of the requisities to a bill that it should pray proper relief: to which may be added, that if for any reason founded upon the substance of the case, as stated in the bill, the plaintiff is not entitled to the relief he prays, the defendant may demur. Many of the grounds of demurrer, already mentioned, may perhaps be referred to this head; and in every instance, if the case stated is such that, admitting the whole bill to be true, the Court ought not to give the plaintiff the relief or assistance he requires, either in the whole or in part, the defect thus appearing on the face of the bill is a sufficient ground of demurrer.

It is to be observed, in this place, that the question upon a demurrer of this nature is, frequently, not whether, upon the case made by the bill, the plaintiff is entitled to all the relief prayed, but whether he may, under the prayer for general relief, be entitled to some relief.[3] The question, how far the defects in the relief prayed in the prayer for special relief may be supplied under the prayer for general relief, which forms part of every bill, has been before discussed[4]; it is only necessary now to remind the reader, that such relief must be consistent with the special prayer, as well as with the case made by the bill.

5. It has been before observed, that every bill must be for a matter of sufficient value: otherwise, it will not be consistent with the dignity of the Court to entertain it.[5] The usual method of taking advantage of an objection of this nature is, as we have seen,[6] by motion to take the bill off the file. There is no doubt,

1 *Ib.* 2 *Ib.* 3 *Ib.* 4 *Ante.* 5 *Ib.* 6 *Ib.*

however, that if the objection appears upon the face of the bill, a demurrer, upon the ground of inadequacy of value, will be held good.

6. A bill must not only be for matter of a sufficient value, but it must be for the whole matter. It is not, however, necessary to discuss here the principle and application of this rule, the reader's attention having been already fully called to it.[1] All that need be said is, that if it appears by the bill that the object of the suit does not embrace all the relief which the plaintiff is entitled to have against the defendant, under the same representation of facts, it will be liable to demurrer, unless it comes within any of the exceptions before pointed out.[2]

7. The question: who are the proper parties to be brought before the Court, for the purpose of enabling a Court of Equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the Court perfectly safe to those who are compelled to obey it, and to prevent future litigation, has been before so fully discussed,[3] that nothing remains to be said upon it here, further than to remind the reader, that wherever a want of parties appears on the face of a bill, it is a cause of demurrer: unless a sufficient reason for not bringing them before the Court is suggested, or unless the bill seeks a discovery of the persons interested in the matter in question, for the purpose of making them parties[4]; but it is no answer to a demurrer that the addition of the party would render the bill multifarious.[5] In consequence of the alterations in the rules of the Court as to parties, before pointed out, demurrers for want of parties are now of comparatively rare occurrence.[6]

8. The subject of multifariousness has been already discussed[7]; and it need only be added, that a bill is demurrable on this ground;

1 *Ibid.* 2 *Ibid.*
3 *Ante.*
4 Ld. Red. *180; ante.*
5 *Lumsden* v. *Fraser*, 1 M. & C. 589, 602; and as to amending in such cases, see S. C.; *Attorney-General* v. *The Merchant Tailors' Company*, 1 M. & K. 189, 191, and ante.
6 For forms of demurrers for want of parties, see 2 Van. Hey. 81; as to demurrer for misjoinder, see *Smith* v. *Bogart*, 10 Grant. 560; *Gartshore* v. *Gore Bk.* 13, Grant. 187; *Westbrook* v. *Attorney-General*, 11 Grant. 264.
7 *Ante, et seq.*

and that a demurrer for multifariousness goes to the whole bill, and it is not necessary to specify the particular parts of the bill which are multifarious[1]

9. In determining whether the length of time which has elapsed since the plaintiff's claim arose is a bar to the relief which he asks, Courts of Equity have considered themselves bound by the Statute of Limitations, 21 Jac. I. c. 16, as to all legal titles and demands: although suits in Equity are not within the words of that statute[2]; and as to all equitable titles and demands, they act in analogy to the statute.[3] The modern Statutes of Limitations apply, for most purposes, to suits in Equity, as well as actions at Law. The objection of lapse of time was formerly considered a proper ground for a plea, and not for a demurrer; and in *Gregor* v. *Molesworth*,[4] Lord Hardwicke refused to allow a demurrer of this nature, alleging as his reason, that several exceptions might take it out of the length of time, as infancy, or coverture, which the party should have the advantage of showing, but which cannot be done if demurred to. This, however, can hardly be a sufficient reason for the distinction in this case between a plea and a demurrer, as the plaintiff, if he has any reason to allege to take his case out of the bar, arising from the length of time, should show it by his bill; and it is now clearly the rule of the Court, that the Statute of Limitations, or objections in analogy to it, upon the ground of laches, may be taken advantage of by way of demurrer, as well as by plea.[5]

Where there is no positive limitation of time the question whether the Court will interfere or not depends upon whether from the facts of the case, the Court will infer acquiescence, or confirmation, or a release. Such inference is an inference of fact, and not an inference of law, and cannot be raised on demurrer[6];

1 *East India Company* v. *Coles*, 3 Swanst. 142 n. For forms of demurrers for multifariousness, see 2 Van. Hey. 79, 80; *Cole* v. *Glover*, 16 Grant. 392; *Mutchmore* v. *Davis*, 14 Grant. 346.

2 *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 630, 631; *Hony* v. *Hony*, 1 S. & S. 568, 580.

3 In *Bond* v. *Hopkins*, 1 Sch. & Lef. 428; *Hovenden* v. *Lord Annesley*, *ubi sup.*; *Stackhouse* v. *Barnston*, 10 Ves. 466; *Ex parte Dewdney*, 15 Ves. 496; *Beckford* v. *Wade*, 17 Ves. 96; *Lord Cholmondeley* v. *Lord Clinton*, 2 J. & W. 1, 161, 192.

4 2 Ves. S. 109. See also *Aggas* v. *Pickerell*, 3 Atk. 225; *Deloraine* v. *Browne*, 3 Bro. C. C. 633, 646.

5 Ld. Red. 212, n.; *Saunders* v. *Hord*, 1 Ch. Rep. 184; *Jenner* v. *Tracey*, 3 P. Wms. 287 n.; *Hovenden* v. *Lord Annsley*, 2 Sch. & Lef. 607, 637; *Foster* v. *Hodgson*, 19 Ves. 180; *Hoare* v. *Peck*, 6 Sim. 51; *Bampton* v. *Birchall*, 5 Beav. 67, 76; *Prance* v. *Sympson*, Kay 678, 680; *Smith* v. *Fox*, 6 Hare, 386, 391; *Rolfe* v. *Gregory*, 8 Jur. N. S. 606: 10 W. R. 711, V. C. K.

6 *Cuthbert* v. *Creasy*, 6 Mad. 189.

because a defendant has no right to avail himself, by demurrer, of an inference of fact upon matters on which a jury, in a Court of Law, would collect matter of fact to decide their verdict, if submitted to them, or a Court would proceed in the same manner in Equity.[1]

10. The non-compliance with the requirements of the Statute of Frauds, may also be a ground of demurrer; for there can be no doubt but that a bill may contain such statements as to entitle a defendant, by general demurrer, to take advantage of the want of signature to an agreement: because it might appear clear that the plaintiff was not entitled to the relief he asked.[2] It is, however, more usual to plead this statute, as it is seldom that the bill discloses everything necessary for the defence.

11. If it appears, by the bill, that another suit is pending relating to the same matter, a defendant may demur. Such a demurrer, however, will not hold, unless it appears, by the bill, that the suit already depending will afford to the plaintiff the same relief as he would have been entitled to, under the bill which is the subject of the demurrer.[3]

II. The grounds upon which a bill may be demurred to, by reason of a deficiency in matters of form, are, as we have seen, as follows:— 1. Because the plaintiff's place of abode is not stated.[4] 2. Because the facts essential to the plaintiff's right, and within his own knowledge, are not alleged positively.[5] 3. Because the bill is deficient in certainty.[6] 4. Because the plaintiff does not, by his bill, offer to do equity where the rules of the Court require that he should do so[7]; or to waive penalties or forfeitures, where the plaintiff is in a situation to make such waiver.[8] To these may be added: 5. the

1 Ld. Red. 213

2 Per Lord Langdale in *Field* v. *Hutchinson*, 1 Beav. 600: 3 Jur. 792; see also *Howard* v. *Okeover*, 3 Swanst. 421, n.; *Barkwork* v. *Young*, 4 Drew, 1: 3 Jur. N. S. 34; *Wood* v. *Midgley*, 5 De G. M. & G. 41: *Middlebrook* v. *Bromley*, 9 Jur. N. S. 614: 11 W. R. 712, V. C. K.; *Davies* v. *Otty*, 10 Jur. N. S. 606, M. R.

3 *Law* v *Rigby*, 4 Bro. C. C. 60, 63; see also *Peareth* v. *Peareth*, Johns. 58: 5 Jur. N. S. 60; *Singleton* v. *Selwyn*, 9 Jur. N. S. 1149: 12 W. R. 98, V. C. W. As to demurrers on the ground of *res judicata*, see *Waine* v. *Crocker*, 10 W. R. 204, L.JJ.

4 *Ante*.

5 *Ib.*; on this head, see *Smith* v. *Kay*, 7 H. L. Ca. 750, which decided that the point must be raised on demurrer.

6 *Ante*,

7 *Ib.* 8 *Ib.*

absence of the proper affidavit, in those cases in which the rules of the Court require that the plaintiff's bill should be accompanied by one. A bill against an Insurance Company alleged that the policy had been destroyed,—it was held on demurrer that an affidavit of the fact must be annexed to the bill.[1]

The grounds of demurrer before pointed out apply to the relief prayed by the bill, and not to the discovery, further than as it is incidental to the relief. It has, however, been stated that there are cases in which a defendant may demur to the discovery sought by the bill: although such demurrer will not extend to preclude the plaintiff from having the relief prayed, provided he can establish his right to it by other means than a discovery from the defendant himself.

In consequence of the changes which have taken place in the practice of the Court of Chancery, demurrers to discovery are now of rare occurrence (the objection being almost always taken by answer); but in determining the question whether a party is bound to give the discovery sought by the other side, the Court is guided by the same rules as it formerly acted on in allowing or overruling demurrers to discovery. These rules (which we shall now proceed to consider), therefore, still remain of importance.

Demurrers to discovery may be arranged under the following heads:—I. That the discovery may subject the defendant to pains and penalties, or to some forfeiture, or something in the nature of forfeiture. II. That, in conscience, the defendant's right is equal to the plaintiff's. III. That the discovery sought is immaterial to the relief prayed. IV. That the discovery would be a breach of professional confidence. V. That the discovery relates only to the defendant's case. VI. That a third party has an interest in the discovery, and ought not to be prejudiced. VII. That the discovery might be injurious to public interests.

I. We have before seen, that in cases where the plaintiff is the person who is entitled to the advantage of the penalty, or of the forfeiture, to which the defendant would render himself liable by

1 *Workman* v. *Royal Insurance Company*, 16 Grant. 185.

making the discovery sought, he may obviate a demurrer by expressly waiving his right to the penalty or forfeiture in his bill :[1] the effect of which waiver is, to enable the defendant, in case the plaintiff should sue him for the penalty, or endeavour to take advantage of the forfeiture, to apply to the Court for an injunction to restrain him from proceeding[2]. But where the forfeiture or penalty is not of such a nature that the plaintiff can, by waiver, relieve the defendant from the consequence of his discovery, a demurrer will hold; for it is a general rule, that no one is bound to answer so as to subject himself to punishment, in whatever manner that punishment may arise, or whatever may be the nature of that punishment: whether it arises by the Ecclesiastical Law, or by the law of the land[3]. This rule is not confined to cases in which the discovery must necessarily subject the defendant to pains and penalties, but it extends to cases where it may do so.[4] If, therefore, a bill alleges any thing which, if confessed by the answer, may subject the defendant to a criminal prosecution[5], or to any particular penalties, as maintenance[6], champerty,[7] simony,[8] or subornation of perjury[9], the defendant may object to the discovery. In the application of this principle it has been held, that a married woman will not be compelled to answer a bill which would subject her husband to a charge of felony.[10]

It is not necessary to the validity of an objection of this nature, that the facts inquired after should have an immediate tendency to criminate the defendant; he may equally object to answering the circumstances, though they have not such an immediate tendency[11]. This was very clearly laid down by Lord Eldon, in *Paxton* v. *Douglas*[12], in which his Lordship said, "In no stage of the proceedings in this Court can a party be compelled to answer any question, accusing

1 *Ante.* For form of demurrer, where the penalty of forfeiture is not waived, see 2 Van. Hey. 82.
2 *Ante.*
3 *Brownsword* v. *Edwards*, 2 Ves. S. 243, 245: *Harrison* v. *Southcote*, 1 Atk. 528, 538: see also *Parkhurst* v. *Lowten*, 2 Swanst. 214; Hare on Discovery, 131-132, where the cases are classed.
4 *Harrison* v. *Southcote*, 1 Atk. 539.
5 *East India Company* v. *Campbel*, 1 Ves. S 246; *Chetwynd* v. *Lindon*, 2 Ves S. 450; *Cartwright* v. *Green*, 8 Ves. 405: *Claridge* v. *Hoare*, 14 Ves. 59, 65; *Maccallum* v. *Turton*, 2 Y. & J. 183. For form of demurrer in such case, see 2 Van. Hey. 83.
6 *Penrice* v. *Parker*, Rep. t. Finch, 75; *Sharp* v. *Carter*, 3 P. Wms. 375; *Wallis* v. *Duke of Portland*, 3 Ves. 494; affirmed by H. L. *ib.* 761; *Mayor of London* v. *Ainsley*, 1 Anst. 158; *Scott* v. *Miller*, Johns. 220, 328: 5 Jur. N. S. 858.
7 *Hartley* v. *Russell*, 2 S. & S. 244, 252.
8 *Attorney-General* v. *Sudel*, Prec. Ch. 214; *Parkhurst* v. *Lowten*, 1 Mer. 391, 401.
9 *Selby* v. *Crew*, 2 Anst. 504; *Baker* v. *Pritchard*, 2 Atk. 389; as to discovering returns made to Income Tax Commissioners, see *Mitchell* v. *Koecker*, 11 Beav. 380: 13 Jur. 797.
10 *Cartwright* v. *Green*, 8 Ves. 405, 410; *ante.*
11 *East India Company* v. *Campbel*, *ubi sup.*; see also *Lee* v. *Reed*, 5 Beav. 381, 386.
12 19 Ves. 225, 227; and see *Maccallum* v. *Turton*, and *Claridge* v. *Hoare*, *ubi sup.*; *Thorpe* v. *Macauley*, 5 Mad. 218, 229.

himself, or any one in a series of questions that has a tendency to that effect: the rule in these cases being, that he is at liberty to protect himself against answering, not only the direct question, whether he did what was illegal, but also every question fairly appearing to be put with the view of drawing from him an answer containing nothing to affect him, except as it is one link in a chain of proof that is to affect him."

It results from the principle above laid down, that a defendant is not bound to make any discovery which may tend to show himself to have been guilty of any moral turpitude, which may expose him to ecclesiastical censure; thus, it has been held, that a defendant is not bound to discover whether a child was born out of lawful wedlock[1]; nor is an unmarried woman bound to discover whether she and the plaintiff cohabited together[2]. It has been held, however, that a woman is bound to discover where her child was born, though it might tend to show the child to be an alien[3]. It has also been held, that though parties may demur to any thing which may expose them to ecclesiastical censure, a defendant cannot protect himself from discovery whether he has or has not a legitimate son[4]; and it is to be observed, that the objection to answering, upon the ground that the answer might show a defendant to be guilty of moral turpitude, appears to be confined to those cases where the moral turpitude is of such a nature as would lay the party open to proceedings in the Ecclesiastical or other Courts. In other cases, a defendant is bound to answer fully, notwithstanding his answer may cast a very great degree of reflection on his moral character[5]; or may render him liable for fraudulent dealings[6]; therefore, where a defendant demurred to such part of the bill as sought a discovery from her, as to a conspiracy or attempt to set up a bastard child, which she pretended to have by a person who kept her, and was desirous to have a child by her, the demurrer was overruled[7]: because the conspiracy, or attempt

1 *Attorney-General* v. *Duplessis*, Parker, 163. As to proof of non-access and how far parents can bastardize their issue, see *Anon* v. *Anon*, 22 Beav. 481; 23 Beav. 273; *Legge* v. *Edmonds*, 25 L. J. Ch. 125, V. C. W.; *Plowes* v. *Bossey*, 2 Dr. & Sm. 145, 8 Jur. N. S. 352; and other cases collected in Taylor on Evid. s. 868.
2 *Franco* v. *Bolton*, 3 Ves. 368, 371, 372; see on this subject *Benyon* v. *Nettlefold*, 3 M'N. & G. 94, and the cases collected in the note *ib.* 100.
3 *Attorney-General* v. *Duplesis*, *ubi sup.*
4 *Finch* v. *Finch*, 2 Ves. S. 491, 493.
5 Per Lord Eldon, in *Parkhurst* v. *Lowten*, 1 Mer. 400.
6 *Gartside* v. *Outram*, 3 Jur. N. S. 39, V. C. W.
7 *Chetwynd* v. *Lindon*, 2 Ves. S. 450.

to set up the bastard, not being alleged to have been for the purpose of defeating the heir, was not of itself an offence.

Where the discovery might subject a defendant to penalties to which the plaintiff is not entitled, and which he consequently cannot waive, yet, if the defendant has expressly covenanted not to plead or demur to the discovery sought, he will be compelled to answer.[1] And where a person, by his own agreement, subjects himself to a payment, in the nature of a penalty, if he does a particular act, a demurrer to a discovery of that act will not hold[2]; thus, were a lessee covenanted not to dig loam, with a proviso that, if he did, he should pay to the lessor 20*s.* a cart load, and he afterwards dug great quantities: upon a bill being filed by the lessor for a discovery of the quantities, waiving any possible forfeiture, a demurrer by the lessee, because the discovery might subject him to a payment by way of penalty, was overruled[3]. Upon the same principle, where servants to a company bound themselves to pay a specified sum, in case of a breach of the regulations of their service, they cannot protect themselves from answering, as to breaches, because they would be subject to a penalty.[4]

Upon the principle that the Court will not allow a man to contradict what he has, either by his actions or express words, asserted, it has been held, that a person who represents himself to be a broker of the city of London, and is employed in that character, cannot afterwards protect himself from discovery on the ground that he was not licensed to act as broker, and that, by answering, he may expose himself to penalties.

It would appear that where a defendant is entitled to the protection of the Court against a discovery tending to establish a criminal charge, he cannot deprive himself of the benefit of it by any agreement whatever.[6]

1 *South Sea Company* v. *Bumsted*, 1 Eq. Ca. Ab. 77, pl. 16; *East India Company* v. *Atkins*, cited *ib.*: 1 Stra. 168; *Paxton* v. *Douglas*, 16 Ves. 239.

2 Ld. Red. 195; *Morse* v. *Buckworth*, 2 Vern. 443; *East India Company* v. *Neave*, 5 Ves. 173, 185.

3 Ld. Red. 195, 196.

4 *African Company* v. *Parish*, 2 Vern. 244; *East India Company* v. *Neave*, *ubi sup.*

5 *Green* v. *Weaver*, 1 Sim. 404, 432; *Robinson* v. *Kitchen*, 21 Beav. 365; 2 Jur. N. S. 57; *ib.* 294; 8 De G. M. & G. 88.

6 *Lea* v. *Reed*, 5 Beav. 381, 385. This appears to be confined to criminal cases: see observation of Sir J. Romilly, M. R., in *Robinson* v. *Kitchin*, 21 Beav. 365, 370.

The rule that a defendant is not bound to answer, in cases which may subject him to punishment or penalties, appears to be liable to modification, in some cases, where the facts charged in the bill would amount to conspiracy; and also, in certain cases, where the defendants would appear to be guilty of fraud, or of publishing a libel which might be the subject of indictment; as in the cases mentioned by Lord Eldon, in *Macauley* v. *Shakell*,[2] as having frequently occurred in the Court of Exchequer, in which it was the practice with underwriters, where policies of insurance were found to be affected with gross frauds, to bring the parties into Court, and compel them to answer, by stating in their bills frauds which would have been indictable.

It may be mentioned here, that the Legislature has, in some cases, expressly provided, that parties to transactions rendered illegal by statute, shall be compelled to answer bills in Equity for the discovery of such transactions: in such cases, of course, the defendant cannot protect himself from the discovery required, on the ground that it will render him liable to the penalties imposed by the statute itself. Thus, trustees and other persons who are liable to a criminal prosecution for the fraudulent mis-application of monies intrusted to them, are, nevertheless, bound to give discovery, in answer to a bill in Equity.[3] So, also, a person infringing a trade mark, though liable to prosecution, must give discovery in Equity.[4]

If a party be liable to a penalty or forfeiture, provided he is sued within a limited time, and the suit is not commenced till after the limitation has expired, the defendant will be bound to answer fully, even though, by so doing, he may expose his character and conduct to reflection;[5] and it seems, that the plaintiff is entitled to an answer, if the liability ceases after the defence has been put in, and before it is heard, even though there was a liability at the time of putting in his defence. This has been decided upon a plea,[6] and upon exceptions to an answer;[7] and there is no doubt that the same decision would be come to upon demurrer.

1 *Dummer* v. *Corporation of Chippenham*, 14 Ves. 245, 251; see also Lord Eldon's observation in *Mayor of London* v. *Levy*, 8 Ves. 404; and Hare on Disc. 143.
2 1 Bligh, N. S. 96.
3 24 & 25 Vic. c. 96, ss. 75—86.
4 25 & 26 Vic. c. 88, s. 11.
5 *Parkhurst* v. *Lowten*, 1 Mer. 400.
6 *Corporation of Trinity House* v. *Burge*, 2 Sim. 411.
7 *Williams* v. *Farrington*, 3 Bro. C C. 38.

It has been before stated, that if the executor or administrator of a parson bring a bill for tithes, he need not offer to accept the single value: [1] the reason of which rule is, that the treble value is not given, by the statute, to the representatives; and there can be no doubt that the same reason will be valid against allowing a demurrer, in all cases, where the penalty is personal, and does not survive to the representatives of a person entitled to sue for it. [2]

A defendant cannot refuse to give discovery on the ground that it will expose him to penalties in a foreign country[3].

Some of the cases in which a demurrer will lie to a bill, on the ground that the discovery required will expose the defendant to a forfeiture have been before referred to,[4] for the purpose of illustrating the principle, that where it is in the power of a plaintiff to waive such forfeiture, his admission to do so may be taken advantage of by demurrer. The bill, however, will be equally liable to this species of objection, in cases where the plaintiff has no power to waive the effects of the discovery, as in those where he has such power, and omits to exercise it; therefore, where the discovery sought by an information would have subjected the defendants to a *quo warranto*, a demurrer was allowed.[5] In like manner, where a legacy was given to a woman, on her marriage, with a condition, that if she married without the consent of the trustees under the will, the legacy was to be forfeited, and a bill was filed against the legatee for a discovery whether any marriage had taken place, in which it was alleged she had married without consent: Lord Hardwicke allowed the demurrer, as she could not answer to the marriage without showing, at the same time, that it was against consent. [6] In a case of this nature, where the husband and wife put in separate answers, under an order for that purpose, and the husband, by his answer, admitted the marriage without consent, but the wife omitted to do so, Lord Talbot, upon exceptions being taken to her answer, said, that he could not reconcile himself to compelling a wife to con-

1 *Ante.*
2 See Hare on Disc. 148.
3 *King of the Two Sicilies* v. *Wilcox*, 1 Sim. N. S. 301 : 15 Jur. 214.
4 *Ante.*
5 *Attorney-General* v. *Reynolds*, 1 Eq. Ca. Ab. 131, pl. 10.
6 *Chancey* v. *Fenhoulet*, 2 Ves. S. 265; S. C. *nom. Chauncey* v. *Tahourden*, 2 Atk. 392; see also *Hambrook* v. *Smith*, 17 Sim. 209; 16 Jur. 144; *Cooke* v. *Turner*, 14 Sim. 218; 8 Jur. 703.

fess that by which she might forfeit all that she had in the world, and held the answer to be sufficient.[1]

The principle, that a defendant is not bound to give discovery which will expose him to a forfeiture, applies equally, whether the forfeiture is enforceable in Equity or at Law.[2]

The rule applies only to cases where a forfeiture, or something in the nature of a forfeiture, may be incurred: where the discovery sought merely extends to the performance of a condition, upon failure in which a limitation over is to take effect, the defendant cannot protect himself from the discovery. Thus, where a husband, by will, gave an estate his wife, whilst she continued his widow, with a limitation over in case of her second marriage, and the remainderman brought a bill against her, in which he sought a discovery of her second marriage: upon the defendant demurring to the discovery, as subjecting her to a forfeiture, Lord Talbot overruled the demurrer.[3] A demurrer, also, will not prevail where the discovery is of a matter which shows the defendant disqualified from having any interest or title: as whether a person claiming a real estate, under a devise, be an alien, and consequently incapable of taking by purchase.[4] A distinction, however, appears to exist, in this respect, between incapacities which are the result of general principles of Law, and those which are imposed by the Legislature, by way of penalty or forfeiture; thus, before the repeal of the statutes imposing disabilities upon persons professing the Popish religion,[5] it was held, that a defendant was not obliged to discover whether he was a Papist or not.[6] Upon the same principle, it has been held, that where a bill sought a discovery, whether a clergyman had been presented to a second living which avoided the first, under the statute 21 Hen. VIII., a demurrer to the discovery of that fact would lie: because the incapacity of holding the first living, incurred by the acceptance of the second, was in the nature of a penalty imposed by the statute.[7]

1 *Wrottesley* v. *Bendish*, 3 P. Wms. 236, 239; *ante*.
2 *Attorney-General* v. *Lucas*, 2 Hare, 566.
3 Cited *Chauncey* v. *Tahourden*, 2 Atk. 393; *Chancey* v. *Fenhoulet*, 2 Ves. S. 265; *Lucas* v. *Evans*, 3 Atk. 260; *Hambrook* v. *Smith*, *ubi sup.*; see *contra Monnins* v. *Monnins*, 2 Ch. Rep. 68.
4 *Attorney-General* v. *Duplessis*, Parker 144.
5 11 & 12 Will. III. c. 4, s. 4.
6 *Smith* v. *Read*, 1 Atk. 526; *Harrison* v. *Southcote*, *ib.* 528; 2 Ves. S. 389, 395.
7 *Boteler* v. *Allington*, 3 Atk. 453, 458.

A defendant, in order to protect himself from answering, on the ground that the discovery of the matters inquired after, would expose, or tend to expose, him to penalties, must state, upon oath, his belief that such would be the case: a submission of the question to the Court is not sufficient.[1]

II. If a defendant has, in conscience, a right equal to that claimed by a person filing a bill against him, though not clothed with a perfect legal title, a Court of Equity will not compel him to make any discovery which may hazard his title; and if the matter appear clearly on the face of the bill, a demurrer will hold.[2] The most obvious case is that of a purchaser for a valuable consideration, without notice of the plaintiff's claim.[3] Upon the same ground, a jointress may, in many cases, demur to a bill filed against her for a discovery of her jointure deed, if the plaintiff is not capable of confirming, or the bill does not offer to confirm, her jointure, and the facts appear sufficiently upon the face of the bill: though, ordinarily, advantage is taken of this defence by plea.[4]

III. A defendant is not compellable to discover anything immaterial to the relief prayed by the bill.[5] Upon this ground, upon a bill filed by a mortgagor against a mortgagee to redeem, and seeking a discovery whether the mortgagee was a trustee, a demurrer to the discovery was allowed: for, as there was no trust declared upon the mortgage deed, it was immaterial to the plaintiffs whether there was any trust reposed in the defendant or not.[6] So, where a bill was filed by the lord of a borough, praying a discovery whether a person applying to be admitted a tenant was a trustee or not, a demurrer was allowed:[7] and where a bill was brought for real estate, and sought discovery of proceedings in the Ecclesiastical Court upon a grant of administration, the defendent demurred, successfully, to that discovery.[8] In like manner, where a bill was filed to establish an

1 *Scott* v. *Miller*, (No. 2,) Johns, 328; 5 Jur. N. S. 858.
2 Ld. Red. 199; see *Glegg* v. *Legh*, 4 Mad. 193, 207.
3 Ld. Red. 199; *Jerrard* v. *Saunders*, 2 Ves. J. 458; see *Sweet* v. *Southcote*, 2 Bro. C. C. 66.
4 Ld Red. 199; *Chamberlain* v. *Knapp*, 1 Atk. 52; *Senhouse* v. *Earl*, 2 Ves. S. 450; see also *Leech* v. *Trollop*, *ib.* 662 from which it appears, that a widow is not bound to discover her jointure deed, by her answer (even where the bill offers to confirm it), till the confirmation has been effecte .
5 Ld. Red. 191.
6 *Harvey* v. *Morris*, Rep. t Finch, 214.
7 *Lord Montague* v. *Dudman*, 2 Ves. S. 396, 398.
8 *Baker* v. *Pritchard*, 2 Atk. 388.

agreement entered into before marriage, by which a separate estate was secured to the defendant's wife, and praying a discovery of several unkindnesses and hardships which the defendant, as it was pretended, had used towards his wife, to make her recede from the agreement, and the defendant demurred to the discovery, the demurrer was allowed. [1] But in general, if it can be supposed that the discovery may in any way be material to the plaintiff, for the purposes of the suit, the defendant will be compelled to make it; [2] thus, where a bill called for a discovery of cases laid before counsel, and their opinion, Lord Eldon held, that the plaintiff had no right to a discovery of the opinions of counsel, but only of the cases. [3] And now, the cases, if prepared subsequently to, or in contemplation of, the litigation, are also protected.[4]

IV. The last case brings us to the consideration of those causes of demurrer to discovery, which are the consequence of the privilege resulting from professional confidence. The privilege conferred by this species of confidence applies, though in a different degree, to both the adviser and the client. The application of the rule, with regard to professional confidence, to discovery required from the client, has been exemplified in the case already referred to of *Richards* v. *Jackson*, in which Lord Eldon, as we have seen, held, that if the demurrer had been confined to the discovery of the opinions, it would have been good; and the rule has since been extended to exempt a defendant from the discovery of the case itself, and to all confidential communications which have passed in the progress of the cause itself, and with reference to it before it was instituted[5]; and also to letters written by a defendant to his solicitor, after a dispute between him and the plaintiff had arisen, with the view to taking the opinion of counsel upon the matter in question, and which afterwards became the subject of the suit.[6] The rule also extends to all observations, notes, and remarks made by counsel upon their briefs, but the briefs themselves, so far as they are copies

1 *Hicks* v *Nelthorpe*, 1 Vern. 204.

2 Ld Red. 193.

3 *Richards* v. *Jackson*, 18 Ves. 472.

4 *Post.*

5 *Garland* v. *Scott*, 3 Sim. 396; *Bolton* v. *Corporation of Liverpool*, *ib.* 467, 487; 1 M. & K. 88, 93; *Hughes* v. *Biddulph*, 4 Russ. 190; *Woods* v. *Woods*, 4 Hare, 83, 86.

6 *Vent* v. *Pacey*, 4 Russ. 193; *Greenough* v. *Gaskell*, 1 M. & K. 98, 101.

of matter otherwise *publici juris*,[1] and counsel's endorsement, or note of any order made by the Court,[2] are not privileged.

The rule has been adopted out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations, which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources: deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsel half his case.[3] Unless, however, the communication has a direct reference to the subject of the dispute, the party himself has no privilege: he is, in other respects, bound to disclose all he knows and believes and thinks respecting his own case; and he must disclose the cases he has laid before counsel for their opinion, unconnected with the suit itself.[4]

Sir James Wigram, V.C., has stated the history of the law upon this subject, in the following terms: "The first point decided upon this subject was, that communications between solicitor and client pending litigation, and with reference to such litigation, were privileged; upon this there is not at this day any question. The next contest was upon communications made before litigation, but in contemplation of, and with reference to, litigation which was expected and afterwards arose; and it was held that the privilege extended to these cases also. A third question then arose, with regard to communications after the dispute between the parties, followed by litigation, but not in contemplation of, or with reference to that litigation; and these communications were also protected. A fourth point which appears to have called for a decision, was the title of a defendant to protect from discovery in the suit of one party, cases or statement of fact made on his behalf by or for his solicitor or legal adviser, on the subject-matter in question, after

1 *Walsham* v. *Stainton*, 2 H. & M. 1.

2 *Nicholl* v. *Jones*, 13 W. R. 451, V. C. W.

3 Per Lord Brougham in *Greenough* v. *Gaskell*, 1 M. & K. 103.

4 *Ibid*, 100, 101.

5 *Bolton* v. *Corporation of Liverpool*. 3 Sim. 467, 487; 1 M. & K. 88, 93; *Hughes* v. *Biddulph*, 4 Russ, 190; *Vent* v. *Pacey*, *ib.* 193; *Clagett* v. *Phillips*, 2 Y & C. C. C. 82, 86; 7 Jur. 31.

litigation commenced or in contemplation of litigation, on the same subject, with other persons, with the view of asserting the same right. This was the case of *Combe* v. *The Corporation of London.*[1] The question in that suit was the right of the corporation to certain metage dues, and the answer stated that other persons had disputed the right of the corporation to metage, and that they had in their possession cases which had been prepared with a view to the assertion of their rights against such other parties, in contemplation of litigation, or after it had actually commenced; Sir J. L. Knight Bruce held, that those cases, relating to the same question, but having reference to disputes with other persons, were within the privilege; and I perfectly concur with that decision."[2]

The case before Sir James Wigram was a bill for a specific performance by a purchaser, and during the treaty for the sale and purchase of the estate, but before any dispute had arisen, the defendant, the vendor, from time to time consulted his solicitor on the subject, and written communications passed between them. A question arose, upon a motion for the production of documents, whether these communications were privileged, regard being had to the circumstance that they took place before any dispute arose, though with refcrence to the very subject in respect of which that dispute had since arisen; and his Honor decided, chiefly upon the authority of *Radcliffe* v. *Fursman*,[3] that such communications were privileged, so far only as they might be proved to contain legal advice or opinions, but not otherwise.[4]

The case of *Radcliffe* v. *Fursman* is commonly referred to as a leading case, upon the extent to which the privilege applies, in protecting cases laid before counsel for their opinion. The defendant, in that cause, demurred to so much of the bill as required him to discover an alleged case, the name of the counsel, and the opinion given upon it. The demurrer was overruled as to the first point, but allowed as to the second and third by Lord King, and the decision was affirmed in the House of Lords. This decision has been

1 1 Y. & C. C. C. 631, 650; see also *Holmes* v. *Baddeley*, 1 Phil. 476, 480: 9 Jur. 289.
2 *Lord Walsingham* v. *Goodricke*, 3 Hare, 124.
3 2 Bro. P. C. Ed. Toml. 514; and see *Mornington* v. *Mornington*, 2 J. & H. 697.
4 See obsesvations of V. C. Wood on *Lord Walsingham* v. *Goodricke* in *Manser* v. *Dix*, 1 K. & J. 451, 453.

frequently mentioned with disapprobation; but having been made by the House of Lords, its authority is recognized, though only to the extent to which it strictly applies. Lord Brougham, in commenting upon it, observed: "Even by the report, and certainly by the printed cases, which I have examined, together with my noble and learned predecessor, it appears plain, that the record did not show any suit to have been instituted, or even threatened, at the time the case was stated for the opinion of counsel; and the decision being upon the demurrer, the Court had no right to know anything which the record did not disclose." "So far this decision rules, that a case laid before counsel is not protected; that it must be disclosed. But the decision does not rule that disclosure must be made of a case laid before counsel in reference to, or in contemplation of, or pending the suit or action, for the purposes of which the production is sought"[1]

The privilege arising from professional confidence, as it respects the legal advisers, is of a more extended nature: "As regards them, it does not appear that the protection is qualified by any reference to proceedings pending or in contemplation. If, touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, from a client, and for his benefit, in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them; and will not be compelled to disclose the information, or produce the papers, in any Court of Law or Equity, either as party or as witness. If this protection were confined to cases where proceedings had commenced, the rule would exclude the most confidential, and, it may be, the most important of all communications: those made with a view of being prepared either for instituting or defending a suit, up to the instant that the process of the Court issued." "The protection would be insufficient if it only included communications more or less connected with judical proceedings: for a person oftentimes requires the aid of professional advice, upon

1 *Bolton* v. *Corporation of Liverpool*, 1 M. & K. 95, 96: C. P. Coop. t. Brough, 24, 25; see *Nias* v. *Northern and Eastern Railway Company*, 3 M. & C. 355: 2 Jur. 295.

the subject of his rights and liabilities, with no reference to any particular litigation, and without any other reference to litigation generally than all human affairs have, in so far as every transaction may, by possibility, become the subject of judicial inquiry. It would be most mischievous, said the learned Judges in the Common Pleas,[1] if it could be doubted whether or not an attorney, consulted upon a man's title to an estate, was at liberty to divulge a flaw."[2] In *Herring* v *Clobery*,[3] in which a solicitor was examined as a witness, Lord Lyndhurst said, "Where an attorney is employed by a client professionally, to transact professional business, all the communications that pass between the client and the attorney in the cause and for the purpose of that business, are privileged communications: and the privilege is the privilege of the client, and not of the attorney."

Communications to a solicitor made, not by his client, but by third parties, and information acquired by such solicitor from collateral sources, are not privileged from disclosure, even though such communications are made to, and information acquired by, him in his character of solicitor, and solely by reason of his filling that character.[4]

Although the general rule is, as laid down in the above case, that a counsel or solicitor cannot be compelled, at the instance of a third party, to disclose matters which have come to his knowledge in the conduct of professional business for a client, even though such business had no reference to legal proceedings, either existing or in contemplation: there is no doubt that the privilege will be excluded, where the communication is not made or received professionally, and in the usual course of business,[5] and during the existence of the professional relation. Thus, a communication made to an attorney or solicitor, in the character of steward, either before the attorney or solicitor was employed as such,[6] or after his employ-

1 *Cromack* v. *Heathcote*, 2 Brod. & Bing. 6.
2 Lord Brougham in *Greenough* v. *Gaskell*, 1 M. & K. 101, 102; C P. Coop. t. Brough. 98.
3 1 Phil. 91; 6 Jur. 202; see also *Carpmael* v. *Powis*, 1 Phil. 687, 692; and that it is the privilege of the client, see *Re Cameron's Coalbrook, &c., Railway Company*, 25 Beav. 1, 4.
4 *Ford* v. *Tennant*, 32 Beav. 162; and see *Gore* v. *Bowser*, 5 De G. & S. 30, 33; S. C. *nom. Gore* v. *Harris*, 15 Jur. 1168.
5 *Greenough* v. *Gaskell*, 1 M. & K 98, 104; *Walker* v *Wildman*, 6 Mad. 47: see also *Desborough* v. *Rawlins*, 3 M. & C. 515; 2 Jur. 125. And the privilege is destroyed if the information is subsequently communicated to the solicitor from another source, *Lewis* v. *Pennington*, 6 Jur. N S. 478: 8 W. R. 465, M. R.
6 *Cutts* v. *Pickering*, 1 Ventris, 197.

ment has ceased, will not be protected from disclosure;[1] and so, where an attorney had been consulted by a friend, because he was an attorney, yet refused to act as such, and was, therefore, applied to only as a friend,[2] or where the matter communicated was not in its nature private, and could in no sense be termed the subject of a confidential disclosure.[3] In all such cases, the matters to be disclosed cannot be said to be matters which the professional adviser has learnt by communication with his client, or on his client's behalf, or as matters which were committed to him in his capacity of attorney, or which in that capacity alone he came to know.[4] And so, where an attorney is, as it were, a party to the original transaction, as if he be the attesting witness to a deed, he may be called upon to disclose facts relating to its execution, or as to an erasure made by himself in a deed or will;[5] if, also, he was present when his client was sworn to an answer in Chancery, he may be called upon to disclose the fact;[6] and if he has been employed as the agent of a party, and does not gain his knowledge of the facts, as to which the discovery is required, merely in his relation of attorney to his client, the rule will not apply: for, in such cases, there was no professional confidence, and he stands in the same situation as any other person.[7]

The privilege will also be excluded, with regard to communications to members of other professions than the Law; it has, therefore, been held not to extend to clergymen;[8] nor to physicians or medical advisers;[9] nor will it extend to mere agents or stewards;[10] it, however, applies to scriveners;[11] and also to counsel.[12] It has, however, been held that it does not extend to communications made to persons acting as conveyancers, who are neither counsel nor solicitors; thus, in the *South Sea Company* v. *Dolliffe*, referred to in

1 *Wilson* v. *Rastall*, 4 T. R. 753.
2 *Ibid*
3 *Rex* v. *Watkinson*, 2 Stra. 1122.
4 *Greenough* v. *Gaskell*, 1 M. & K. 98, 104.
5 *Sandford* v. *Remington*, 2 Ves. J. 189; Taylor on Evid. ss. 857. 858; 1 Phil. on Evi. 128.
6 *Doe* v. *Andrews*, 2 Cowp. 846; Taylor on Evid. s. 857.
7 *Morgan* v. *Shaw*, 4 Mad. 54, 56, 57; see also *Desborough* v. *Rawlins*, 3 M. & C. 515: 2 Jur. 125.
8 Taylor on Evid. s. 838.
9 *Duchess of Kingston's* case, 11 Harg. St. Tr. 243; S.C. 20 How. St. Tr. 572; *Greenough* v. *Gaskell*, *ubi sup.*
10 *Vaillant* v. *Dodemead*, 2 Atk. 524; *Wilson* v. *Rastall*, 4 T. R. 753. As to bankers and clerks, see *Loyd* v. *Freshfield*, 2 Car. & P. 325.
11 *Harvey* v. *Clayton*, 2 Swanst. 221, n.
12 *Rothwell* v. *King*, 2 Swanst. 221, n.; *Spencer* v. *Luttrell*, and *Stanhope* v. *Nott*, *ibid.*

Vaillant v. *Dodemead*,[1] a Mr. Gambier, who had settled certain articles, is reported to have demurred to the discovery sought from him, as to the alterations in those articles, on the ground that he was counsel for the company; and it is stated that the demurrer was overruled: "for that what he knew was as the conveyancer only."[2] It has also been held, that the privilege will not apply to one who has been consulted confidentially as an attorney, when in fact he was not one.[3]

A person who acts as an interpreter,[4] or agent,[5] between an attorney and his client, stands in the same situation as the attorney; and the rule has also been held to apply to the clerk of the counsel or solicitor consulted;[6] and the privilege extends to the representatives of the party as against third persons, but not as between different claimants under him.[7] The privilege extends to communications with an unprofessional agent, employed to collect evidence;[8] and also to communications with a Scotch solicitor and law agent, resident in England.[9]

The privileges does not cease upon the solicitor afterwards becoming interested in the matters in question in the suit;[10] nor upon his being struck off the rolls.[11]

The propriety of the distinction which has been made between the extent of the privilege, as it affects the client and as it affects the solicitor, has been doubted. Upon this point, Sir J. L. Knight Bruce, V. C., said: "I confess myself at a loss to perceive any substantial difference, in point of reason, or principle, or convenience, between the liability of the client, and that of his counsel, or solicitor, to disclose the client's communications made in confidence professionally to either;"[12] and upon the same point, Sir R. T. Kindersley,

1 2 Atk. 525.
2 *Ibid.*: and see *Turquand* v. *Knight*, 2 M. & W. 100, as to certificated conveyancers.
3 *Fountain* v. *Young*, 6 Esp. 113; but see *Calley* v. *Richards*, 19 Beav. 401, 404.
4 *Du Barre* v. *Livette*, Peake, N. P. C. 77, 78, explained 4 T. R. 756
5 *Parkins* v. *Hawkshaw*, 2 Stark. N. P. 239; *Reid* v. *Langlois*, 1 M'N. & G. 627, 638: 14 Jur. 467, 470; *Russell* v. *Jackson*, 9 Hare, 387: 15 Jur. 1117; *Goodall* v. *Little*, 1 Sim. N. S. 155: 15 Jur. 309; *Hooper* v. *Gumm*, 2 J & H. 602.
6 *Taylor* v. *Foster*, 2 Car & P. 195; *Foote* v. *Hayne*, 1 Car. & P. 545: 1 Ry. & M. 165.
7 Wigram on Disc. 82; see also *Parkhurst* v. *Lowten*, 1 Mer 391, 402; *Russell* v. *Jackson*, *ubi sup.*; *Gresley* v. *Mousley*, 2 K. & J. 288; *Tugwell* v. *Hooper*, 10 Beav. 348, 350.
8 *Steele* v. *Stewart*, 1 Phil. 471, 475: 9 Jur. 121; *Lafone* v. *Falkland Island Company*, 4 K. & J. 34; *Walsham* v. *Stainton*, 2 H. & M. 1; see also *Kerr* v. *Gillespie*, 7 Beav. 572.
9 *Lawrence* v. *Campbell*, 4 Drew. 485; see also *Bunbury* v. *Bunbury*, 2 Beav. 173, 176, where the question was as to an opinion by a Dutch counsel.
10 *Chant* v. *Brown*, 7 Hare. 79.
11 *Lord Cholmondeley* v. *Lord Clinton*, 19 Ves. 268.
12 *Pearse* v. *Pearse*, 1 De G. & S. 12, 26: 11 Jur. 52.

V.C., observed; "If I could upon authority determine the abstract point which has been argued, viz., whether the privilege of the client is as extensive as that of the solicitor, I should be glad to remove the anomaly by which it seems, that where the solicitor is interrogated, and objects, because it would be calling on him to divulge matters which passed in the relation of solicitor and client, then there is a privilege without more: whether such matters relate to an actual or contemplated litigation or not; and yet, if the same questions are put to the client, then when his privilege is in question, he is to be told that he has a less privilege than he would have through his solicitor, if the latter were questioned. So great an anomaly, so inconsistent and absurd a rule, I should be glad to take on myself to say is not the rule of this Court, and that there is no such distinction. When *Reid* v. *Langlois*[1] was cited to me, it did appear, at first sight, that it established the broad proposition contended for; and I should certainly have followed that case if it did so; but on further examination, though that case does not establish the contrary, yet I think it was not the intention of Lord Cottenham to lay down the general proposition: that point he did not decide; nor do the cases of *Pearse* v. *Pearse*,[2] and *Follett* v. *Jefferyes*,[3] so lay it down, as to enable me to say I can follow them. If that point is to be decided, it must be by a higher authority than mine."[4]

The more recent cases upon the privilege, as it affects the client, are very numerous; and although it is difficult if not impossible, to extract any clear rules from them as to the extent of the privilege, it may be said that their tendency is to make the rules the same, whether the discovery is sought from the solicitor or client;[5] and in matters of title, this seems to have been decided.[6]

There does not seem to be any difference, in principle, between

1 1 M'N. & G, 627, 638: 14 Jur. 467, 469.
2 1 De G. & S. 12: 11 Jur. 52.
3 1 Sim. N. S. 1: 15 Jur. 118.
4 *Thompson* v. *Falk*, 1 Drew. 21, 25.
5 The following are some of the more recent decisions: *Nias* v. *Northern and Eastern Railway Company*, 3 M. & C. 355, 357: 2 Jur. 295; *Bunbury* v. *Bunbury*, 2 Beav. 173; *Flight* v. *Robinson*, 8 Beav. 22, 33: 8 Jur. 888; *Maden* v. *Vevers*, 7 Beav. 489; *Woods* v. *Woods*, 4 Hare, 83; *Reece* v. *Trye*, 9 Beav. 316; *Pearse* v. *Pearse*, *ubi sup.*; *Tugwell* v. *Hooper*, 10 Beav. 348; *Penruddock* v. *Hammond*, 11 Beav. 59; *Beadon* v. *King*, 17 Sim. 34; *Reid* v. *Langlois*, and *Follett* v. *Jefferyes*, *ubi sup.*; *Warde* v. *Warde*, 3 M'N. & G. 365: 15 Jur. 759; *Balguy* v. *Broadhurst*, 1 Sim. N. S. 111: 14 Jur. 1105; *Hawkins* v. *Gathercole*, 1 Sim. N. S. 150: 15 Jur. 186; *Goodall* v. *Little*, 1 Sim. N. S. 155: 15 Jur. 309; *Thompson* v. *Falk*, *ubi sup.*; *Bluck* v. *Galsworthy*, 2 Giff. 453; *Ford* v. *Tenant*, 32 Beav. 162.
6 *Manser* v. *Dix*, 1 K. & J. 451: 1 Jur. N. S. 466; *Pearse* v. *Pearse*, *ubi sup.*

cases stated for opinion, and other communications of matters of fact between a client and professional advisers.[1]

The privilege is, however, confined to legal advisers: for it has been held, that although a defendant in a suit cannot be compelled to discover or produce letters, between himself and his solicitor, subsequently to the institution of the suit, and in relation thereto, yet, where there are more defendants than one, they are bound to discover letters, and copies of letters, which have passed between them with reference to their defences.[2]

Where a solicitor is party to a fraud, the privilege does not attach to the communications with him upon the subject: because the contriving of a fraud is not part of his duty as solicitor;[3] and it seems, that it is the same where the communications are with a view to affecting any illegal purpose.[4] In order, however, to prevent the privilege attaching, the bill must contain allegations specifically connecting the solicitor with the fraud or illegal act.[5] Questions concerning privileged communications arise more frequently upon applications for the production of documents, than upon demurrers to discovery; and the subject is, therefore, more fully considered under that title.

V. The necessity that the bill should show, that a certain degree of privity exists between the plaintiff and defendant, in order to entitle him to maintain his suit, has been before pointed out;[6] and it has been stated, that the want of such privity will afford a ground for demurrer to the relief prayed. It may sometimes, however, happen, that a plaintiff may, by his bill, show that, supposing the facts he states are true, (and which, as we have seen, are admitted by every demurrer,) he has a right to the relief he prays, and yet may not show such a privity as will entitle him to the discovery which he asks for: for it is a rule of the Court that, where

1 *Lord Walsingham* v. *Goodricke*, 3 Hare, 122, 129.
2 *Whitebread* v. *Gurney*, Younge, 541; *Goodall* v. *Little*, *ubi sup.*; *Glyn* v. *Caulfield*, 3 M'N. & G. 463, 474: 15 Jur. 807; *Betts* v. *Menzies*, 3 Jur. N. S. 885: 5 W. R. 767, V. C. W.; see also *Reynolds* v. *Goodlee*, 4 K. & J. 88.
3 *Follet* v. *Jefferyes*, 1 Sim. N. S. 1: 15 Jur. 118; *Russell* v. *Jackson*, 9 Hare, 387; 15 Jur. 1117; *Gilbert* v. *Lewis*, 1 De G. J. & S. 38, 49, 50: 10 Jur. N. S. 187.
4. *Russell* v. *Jackson*, *ubi sup.*
5. *Mornington* v. *Mornington*, 2 J. & H. 697; *Charlton* v *Coombes*, 4 Giff. 372, 382; 9 Jur. N. S. 534.
6 *Ante.*

the title of the defendant is not in privity, but inconsistent with the title made by the plaintiff, the defendant is not bound to discover the evidence of the title under which he claims.[1] Thus, where a bill was filed by a person claiming to be lord of a manor, against another person also claiming to be lord of the same manor, and praying, amongst other things, a discovery how the defendant derived title to the manor, and the defendant demurred, because the plaintiff had shown no right to the discovery, the demurrer was allowed;[2] and so, where a bill was filed by one claiming to be the heir, *ex parte materna*, against another claiming to be heir, *ex parte paterna*, and the bill sought a discovery in what manner the claim *ex parte paterna* was made out, and the particulars of the pedigree, a demurrer to that discovery was allowed.[3]

The principle upon which these cases proceed is: that the right of a plaintiff in equity to the benefit of a defendant's oath, is limited to a discovery of such material facts as relate to the plaintiff's case, and does not extend to a discovery of the manner in which, or of the evidence by means of which, the defendant's case is to be established.[4] This principle is recognized by Lord Brougham, in *Bolton* v. *The Corporation of Liverpool*;[5] and by Lord Abinger, in *Bellwood* v. *Wetherell*.[6] It is true that in those cases the question did not come before the Court upon demurrer, but the rule is the same in whatever way the question may be raised: on demurrer, on exceptions to the defendant's answer, or on application to produce documents in the defendant's possession.[7]

1 Ld. Red. 190; *Stroud* v. *Deacon*, 1 Ves S. 37; *Buden* v. *Dore*, 2 Ves. S. 445; *Sampson* v. *Swettenham*, 5 Mad. 16; *Tyler* v. *Drayton*, 2 S. & S. 309; see also *Stainton* v. *Chadwick*, 3 M'N. & G. 575, 582: 15 Jur. 1139.

2 Ld. Red. 190; and notes and cases there cited.

3 *Ivy* v. *Kekewick*, 2 Ves. J. 679.

4 Wigram on Disc. 261; *Ingilby* v *Shafto*, 33 Beav. 31: 9 Jur. N. S. 1141.

5 1 M. & K. 88, 91; see also *Attorney-General* v. *Corporation of London*, 2 M'N. & G. 247, 256.

6 1 Y. & C. Ex. 211, 215.

7 For instances in which this rule has been acted upon, where the objection has been taken by demurrer: see *Stroud* v. *Deacon*, 1 Ves. S. 37; *Ivy* v. *Kekewick*, 2 Ves. J. 679: *Glegg* v. *Legh*, 4 Mad. 193: *Compton* v. *Earl Gray*, 1 Y. & J. 154; *Wilson* v. *Forster*, Younge, 280: *Tooth* v. *Dean and Chapter of Canterbury*, 3 Sim. 49, 61. On Application to Produce: *Princess of Wales* v. *Earl of Liverpool*, 1 Swanst. 114, 121: *Micklethwait* v. *Moore*, 3 Mer. 292: *Bligh* v. *Benson*, 7 Pri. 205: *Tyler* v. *Drayton*, 2 S. & S. 309: *Sampson* v. *Swettenham*, 5 Mad. 16: 2 M. & K. 754, n. (b): *Firkins* v. *Low*, 13 Pri. 193: *Wilson* v. *Foster*, M'Lel. & Y. 274; *Tomlinson* v. *Lymer*, 2 Sim. 489: *Shaftesbury* v. *Arrowsmith*, 4 Ves 66, 70: *Aston* v. *Lord Exeter*, 6 Ves. 288: *Worsley* v. *Watson*, cited *ib.* 289: *Bolton* v. *The Corporation of Liverpool*, 1 M. & K. 88: *Wasney* v. *Tempest*, 9 Beav. 407; *Attorney-General* v. *Thompson*, 8 Hare, 106: *Manby* v *Bewicke* (No. 3), 8 De G M. & G. 476: *Rumbold* v. *Forteith*, No. 2, 3 K. & J. 748: *Hunt* v *Elmes*, 27 Beav. 62: 5 Jur. N. S 645. On Exceptions to Answers: *Buden* v. *Dore*, 2 Ves. S. 445: *Stainton* v. *Chadwick*, 3 M'N. & G. 575: 15 Jur. 1139: *Ingilby* v. *Shafto*, *ubi sup.*; *Bethell* v. *Casson*, 1 H. & M. 806

This rule will not extend to defeat the plaintiff of his right to discovery from the defendant, where he makes a case in his bill, which, if admitted, would disprove the truth of, or otherwise invalidate the defence made, to the bill; in such cases, he is entitled to discovery from the defendant, of all which may enable him to impeach the defendant's case: for the plaintiff does not rest on a mere negative of the defendant's case, but insists upon some positive ground entitling him to the assistance of the Court, such as fraud, or other circumstances of equitable cognizance, to a discovery of which, no objection of this kind can be raised.[1]

If a plaintiff is entitled to a discovery of deeds or other documents for the purpose of establishing his own case, his right to such discovery will not be affected by the circumstance that the same documents are evidence of the defendant's case also;[2] and if a defendant, bound to keep distinct accounts for another party, improperly mixes them with his own, so that they cannot be separated, he must discover the whole.[3]

VI. The circumstance that a party not before the Court has an interest in a document which a defendant, so far as his own interest is concerned, is bound to produce, will, in some cases, deprive the plaintiff of his right to call for its production, at least in the absence of the third party, as in the instance of a person being a trustee only for others. Upon this principle, a mortgagee cannot be compelled to show the title of his mortgagor, unless such mortgagor is before the Court:[4] in such cases, however, a demurrer, for want of proper parties, would be the proper form in which to raise the objection, where the bill is for relief as well as for a discovery.[5]

VII. Communications which come within a certain class of official correspondence, are privileged, upon the ground, that they could not be made the subject of discovery in a court of Justice

1 Hare on Disc. 201.

2 *Burrell* v. *Nicholson*, 1 M. & K. 680: Wigram on Disc. 244: *Smith* v. *The Duke of Beaufort*, 1 Hare, 507, 518: 1 Phil. 209, 218: 7 Jur. 1095: *Combe* v. *The Corporation of London*, 1 Y. & C. C. C. 631, 650: *Earp* v. *Lloyd*, 3 K. & J. 549.

3 *Freeman* v. *Fairlie*, 3 Mer. 43: *Earl of Salisbury* v. *Cecil*, 1 Cox, 277: Wigram on Disc. 244: Hare on Disc. 245.

4 *Lambert* v. *Rogers*, 2 Mer. 489: see however *Balls* v. *Margrave*, 3 Beav. 448, 4 Beav. 119: *Few* v. *Guppy*, 13 Beav. 457: *Gough* v. *Offley*, 5 De G. & S. 653: *Hercy* v. *Ferrers*, 4 Beav. 97.

5 See *ante*.

without injury to the public interest. In *Smith* v. *The East India Company*,[1] Lord Lyndhurst had to consider whether correspondence, between the Court of Directors of the East India Company and the Board of Control, came within the limits of this privilege; and he decided that it could not be subject to be communicated, without infringing the policy of the Act of Parliament,[2] and without injury to the public interests.

The above are the principal grounds upon which a defendant may demur to the discovery sought by a bill; although the plaintiff may be entitled to the relief prayed, in case he could establish his right to it by other means than discovery from the defendant, on those points as to which the defendant is entitled to defend himself from making discovery. In all other cases, a plaintiff, if entitled to relief, is entitled to call upon the defendant to make a full discovery of all matters upon which his title to relief is founded. It does not, however, very often happen that these grounds affect the whole of the discovery sought; in such cases, the defendant must, if interrogated, answer all those parts of the bill, the answer to which will not expose him, or have a tendency to expose him, to the inconveniences before enumerated. A demurrer, under such circumstances, should precisely distinguish each part of the bill demurred to, and if it does not do so it will be overruled.[3]

If a defendant objects to a particular part of the discovery, and the grounds upon which he may demur appear clearly on the face of the bill, and the defendant does not demur to the discovery, but, answering to the rest of the bill, declines answering to so much, the Court will not compel him to make the discovery; but in general, unless it clearly appears by the bill that the plaintiff is not entitled to the discovery he requires, or that the defendant ought not to be compelled to make it, a demurrer to the discovery will not hold, and the defendant, unless he can protect himself by plea, must answer.[4]

1 1 Phil. 50, 55: 6 Jur. 1: see also *Wadeer* v. *East India Company*, 8 De G. M. & G. 182: 29 Beav. 300.

1 3 & 4 Will. IV. c. 85.

3 *Chetwynd* v. *Lindon*, 2 Ves. S. 450: *Devonsher* v. *Newenham*, 2 Sch. & Lef. 198: *Robinson* v. *Thompson*, 2 V. & B. 118: *Weatherhead* v. *Blackburn*, *ib.* 121, 124.

4 Ld. Red. 200.

Any irrgularity in the frame of a bill may be taken advantage of by demurrer.[1] Thus, if a bill is brought, contrary to the usual course of the Court, a demurrer will hold;[2] as where, after a decree directing incumbrances to be paid according to priority, a creditor obtained an assignment of an old mortgage, and filed a bill to have the advantage it would give him, by way of priority, over the demands of some of the defendants, a demurrer was allowed:[3] it being, in effect, a bill to vary a decree, and yet neither a bill of review, nor a bill in the nature of a bill of review, which are the only kinds of bills which can be brought to affect or alter a decree, unless the decree has been obtained by fraud.[4] Where, however, a supplemental bill was filed, in a case in which, according to the former practice of the Court, a supplemental bill was the proper course, but by more recent practice the same object had been accomplished by petition: Sir John Leach, V. C., held, that the supplemental bill was not rendered irregular, although the circumstances would be taken into consideration upon the question of costs.[5]

If the plaintiff neglects to take advantage of the irregularity by demurrer, he will be held to have waived the objection,[6] unless he has claimed the benefit of it by answer.[7]

An amended bill is liable to have the same objections taken to it, by demurrer, as an original bill; and even where a demurrer to the original bill has been overruled, a demurrer to an amended bill has been allowed;[8] and the circumstances of the amendment being of the most trifling extent will not, it seems, make any difference; and, even where the bill was amended by the addition of a party only, the demurrer was held to be regular.[9] Where the defence first put in is a plea, and the bill is afterwads amended, the amended bill may still be demurred to.[10] A defendant, however, cannot, in general, after he has answered the original bill, put in a general demurrer to the amended bill: because the answer to the original

1 Ld. Red. 206; *Bainbrigge* v. *Baddeley*, 9 Beav. 538, *Ranger* v. *Great Western Railway Company*, 13 Sim. 368: 7 Jur. 935; *Henderson* v. *Cook*, 4 Drew. 306.
2 Ld. Red. 206.
3 *Wortley* v. *Birkhead*, 3 Atk. 809.
4 Ld. Red. 206: *Lady Granville* v. *Ramsden*, Bunb. 56.
5 *Davies* v. *Williams*, 1 Sim. 5.
6 *Archbishop of York* v. *Stapleton*, 2 Atk. 136: *Ranger* v. *Great Western Railway Company*, *ubi sup.*
7 *Milligan* v. *Mitchell*, 1 M. & C. 433, 442.
8 *Bancroft* v. *Wardour*, 2 Bro. C. C. 66: 2 Dick. 672.
9 *Bosanquet* v. *Marsham*, 4 Sim. 573.
10 *Robertson* v. *Lord Londonderry*, 5 Sim. 226.

bill, being still on the record, will, in fact, overrule the demurrer.[1] The defendant must, in such case, confine his demurrer to the matters introduced by amendment. But where a substantially new case is made by the amended bill, a general demurrer will lie.[2]

A defendant may demur to part only to the relief or discovery: in which case, it is called a partial demurrer. Under the former practice, a defendant demurring to part of the bill, was bound to answer the rest; and when interrogatories have been served, a defendant must still answer such of the interrogatories as are not covered by the demurrer; but where no interrogatories have been served, he may file the partial demurrer without coupling any answer with it.[3]

A demurrer cannot be good in part and bad in part;[4] so that, if a demurrer 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.[5]

Instances are, certainly, mentioned by Lord Redesdale,[6] in which demurrers have been allowed in part; but whatever may have formerly been done, the practice appears to be now more strict: though sometimes the Court has, upon overruling a demurrer, given the defendant leave to put in a less extended demurrer, or to amend and narrow the demurrer already filed.[7] In the latter case, however, the application to amend ought to be made before the judgment upon the demurrer, as it stands, has been pronounced: though, even where that has been omitted, the Court has, after the demurrer has been overruled, upon a proper case being shown, given the defendant leave, upon motion, to put in a less extended demurrer and answer.[8]

1 *Atkinson* v. *Hanway*, 1 Cox. 369: see *Ellice* v. *Goodson*, 3 M. & C. 653, 658: 2 Jur. 249: *Salkeld* v. *Phillips*, 2 Y. & C. Ex. 580: and see *ante*.
2 *Cresy* v. *Bevan*, 13 Sim. 354: see also *Powell* v. *Cockerell*, 4 Hare, 565, 569: *Wyllie* v. *Ellice* 6 Hare, 505, 510: *Attorney-General* v. *Cooper*, 8 Hare, 166: *ante*.
3 *Burton* v. *Robertson*, 1 J. & H. 38: 6 Jur. N. S. 1014.
4 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 Ves. 70.
5 Per Lord Hardwicke in *Metcalf* v. *Hervey*, 1 Ves. S. 248; *Earl of Suffolk* v. *Greene*, 1 Atk. 450, *Todd* v. *Gee*, 17 Ves. 273. 277; *Attorney-General* v. Brown, 1 Swanst. 304.
6 Ld. Red. 214; *Rolt* v. *Lord Somerville*, 2 Eq. Ca. Ab. 759 pl. 8; *Radcliffe* v. *Fursman*, 2 Bro. P. C. ed. Toml. 514.
7 *Baker* v. *Mellish*, 11 Ves. 68; *Gregg* v. *Legh*, 4 Mad. 193, 207; *Thorpe* v. *Macaulay*, 5 Mad. 218.
8 *Baker* v. *Mellish*, 11 Ves. 72, 76.

A defendant may also put in separate demurrers to separate and distinct parts of a bill, for separate and distinct causes:[1] 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 this case, one demurrer may be overruled upon argument, and another allowed.[2]

Although a demurrer cannot be good in part and bad in part, it may be good as to one of the defendants demurring, and bad as to others.[3]

SECTION III.—*The Form of Demurrers.*

A DEMURRER must be entitled in the cause, and is headed "The demurrer of *A. B.* (or, of *A. B.* and *C. D.*), one, &c., of the above named defendants, to the bill of complaint of the above named plaintiff." If it be accompanied by an answer, it should be called in the title "the demurrer and answer." Where it is to an amended bill, it need not be expressed, in the title, to be a demurrer to the original and amended bill; but a demurrer to the amended bill will be sufficient.[4]

As a demurrer confesses the matters of fact to be true, as stated by the opposite party, it is always preceded by a general protestation against the truth of the matters contained in the bill: a practice borrowed from the Common Law, and probably intended to avoid conclusion in another suit,[5] or in the suit in which the demurrer is put in, in case the demurrer should be overruled.

After the protestation, the demurrer, if it is a partial demurrer and not to the whole bill, must proceed distinctly to point out the parts of the bill to which it is intended to apply. The rule, as to this, is laid down by Lord Redesdale, in *Devonsher* v. *Newenham*,[6] "that where a defendant demurs to part, and answers to part of a

1 Ld. Red. 214; *North* v. *Earl of Strafford*, 3 P. Wms. 148; Roberdeau v. Rous, 1 Atk. 544.
2 Ld. Red. 214; *North* v. *Earl of Strafford*, *ubi sup.*
3 *Mayor, &c., of London* v. *Levy*, *ubi sup.*; but not unless it is in form a "joint and several demurrer:" per Sir L. Shadwell, V. C., in *Glascott* v. *Copper Miners' Company*, 11 Sim, 305, 310: 5 Jur. 264.
4 *Smith* v. *Bryon*, 3 Mad. 428: *Osborn* v. *Jullion*, 3 Drew. 552; and see *Granville* v. *Betts*, 17 Sim. 58. For forms of demurrer, see 2 Van Hey 74—92; and see *Ferguson* v. *Kilty*, 10 Grant. 102.
5 Ld. Red. 212.
6 2 Sch. & Lef. 199, 205.

bill, 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 it is the party refuses to answer; and I cannot agree that it is a proper way of demurring to say, that the defendant answers to such a particular fact, and demurs to all the rest of a bill: the defendant ought to demur to a particular part of the bill, specifying it precisely.[1]

A demurrer to part of a bill, unaccompanied by an answer to the rest, is informal, and will be overruled.[2]

Although a demurrer, in the form above stated, namely, "to all the rest of the bill which is not answered," would, for the reasons stated by Lord Redesdale, be a bad form of demurrer: a demurrer to all the bill, except as to a particular specified part, would not be open to the same objection; and where the exception applies to a very small part only of the bill, it has been held to be the proper way of demurring.[3] In framing such a demurrer, however, care must be taken that it should appear distinctly, by the demurrer itself, what part of the bill is to be included in the exception: otherwise the demurrer will be bad.[4]

The above rule also applies to cases where there are two or more distinct demurrers to different portions of the bill; in such cases, the different portions of the bill to be covered by each demurrer must be distinctly pointed out. And where a demurrer is put in to such parts of an amended bill as have been introduced by the amendments, it will not be sufficient to say it is a demurrer to the amendments, but the parts must be specifically pointed out, and a demurrer to so much of the amended bill as has not been answered by the answer to the original bill, will be bad.[5]

A demurrer will not be good if it merely says, generally, that the defendant demurs to the bill;[6] it must express some cause of de-

1 *Chetwynd v. Lynden*, 2 Ves. S. 450; *Salkeld* v. *Science*, *ib.* 107; *Barnes* v. *Taylor*, 4 W. R. 577, V. C. K.
2 *Martin* v. *Kennedy*, 2 Grant 80.
3 *Hicks* v. *Raincock*, 1 Cox, 40; *Howe* v. *Duppa*, 1 V. & B. 511.
4 *Robinson* v. *Thompson*, 2 V. & B. 118; *Weatherhead* v. *Blackburn*, *ib.* 121; *Burch* v. *Coney*, 14 Jur. 1009, V. C. K. B.; *Osborn* v. *Jullion*, 3 Drew. 552; *Barnes* v. *Taylor*, 4 W. R. 577, V. C. K.; and see *Burton* v. *Robertson*, 1 J. & H. 38: 6 Jur. N. S. 1014, for case where no answer had been required.
5 *Mynd* v. *Francis*, 1 Anst. 5; and see *Walker* v. *City of Toronto*, 1 Grant 447.
6 *Duffield* v *Graves*, Cary 87; *Offeley* v. *Morgan*, *ib.* 107; *Peachie* v. *Twycrosse*, *ib.* 113.

murrer, either general or specific. A defendant is said to demur generally, when he demurs to the jurisdiction, or to the substance of the bill; or specially, when he demurs on the ground of a defect in form. He may, however, in cases where he demurs either to the jurisdiction or to the substanee, state specially the particular grounds upon which he founds his objection; and, indeed, some of the grounds of demurrer, which go to the substance of the bill, require rather a particular statement; thus, a demurrer for want of parties, must, as has been before stated, show who are the necessary parties, in such a manner as to point out to the plaintiff the objection to his bill, so as to enable him to amend by adding proper parties;[1] and in the case of a demurrer for multifariousness, a mere allegation, "that the bill is multifarious," will be informal; it should state, as the ground of demurrer, that the bill unites distinct matters upon one record, and show the inconvenience of so doing.[2]

Some objections, which appear to be merely upon matters of form, may be taken advantage of under general demurrers, for want of equity; thus, it has been before stated[3] that some bills may be demurred to on the ground that they are not accompanied by an affidavit; that objection, however, is in fact an objection to the equity, because the cases in whch an affidavit is required are those in which the Court has no jurisdiction, unless upon the supposition that the fact stated in the affidavit is true; and the Court requires the annexation of the affidavit to the bill, for the purpose of verifying that fact. In these cases, the objection may be made either in the form of a special demurrer, or of general demurrer for want of equity: because the plaintiff, by his bill, does not bring his case within the description of cases over which the Court exercises jurisdiction. Upon the same principle, a defendant may take advantage, by general demurrer, of the omission to offer to do equity, in cases where such an offer ought to be made.[4] The objection for want of sufficient positiveness in the plaintiff's statement of facts, within his own knowledge, may also be taken by general demurrer;[5] but where a defendant to a bill praying relief, demurs to

1 *Ante.*
2 *Rayner* v. *Julian*, 2 Dick. 677: 5 Mad. 144, n. (*b*); *Barber* v. *Barber*, 4 Drew. 666: 5 Jur. N. S. 1197.
3 *Ante.* A demurrer for want of equity need not refer to the allegations of the bill: *Middlebrook* v. *Bromley*, 9 Jur. N. S. 614, 615: 11 W. R. 712, V. C. K.
4 *Ante.* *Inman* v. *Wearing*, 3 De G. & S. 729.
5 *Ante.*

the discovery only, he cannot do so under a general demurrer for want of equity: he must make it the subject of special demurrer;[1] and so, a general demurrer does not include a demurrer on the ground that the bill (being a bill of review) does not state on the face of it that it is by leave of the Court; but that ground may be taken *ore tenus*.[2]

Care must be taken, in framing a demurrer, that it is 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.[3] Thus, where a bill was filed to redeem a mortgage, alleging that the plaintiff's ancestor had died in 1770, and that, soon after, the defendant took possession, &c.; and the defendant demurred, and for cause of demurrer showed, that it appeared upon the face of the bill, that from the year 1770, which is upwards of twenty years before the filing of the bill, the defendant has been in possession, &c., Lord Rosslyn overruled the demurrer, because the language of the bill did not show that the defendant took possession in the year 1770, but, that he did so, could only be collected from the averment in the demurrer.[4] But a demurrer, for that it appeared on the bill that the agreement, therein alleged to have been entered into, is not in writing, signed by the defendant, is not a speaking demurrer.[5] It is material to notice that, in order to constitute a speaking demurrer, the fact or averment introduced must be one which is necessary to support the demurrer, and is not found in the bill: the introduction of immaterial facts, or averments, or of arguments, is improper; but it is mere surplusage, and will not vitiate the demurrer.[6]

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, but they must be stated as distinct and separate causes of demurrer;[7] and if any one of the causes of demurrer assigned hold good, the demurrer will be allowed.[8] Where, however, two or more causes of demurrer

1 *Wittingham* v. *Burgoyne*, 3 Anst. 900, 904.
2 *Henderson* v. *Cook*, 4 Drew. 306.
3 *Brownsword* v. *Edwards*, 2 Ves. S. 245; *Henderson* v. *Cook*, 4 Drew. 306, 315.
4 *Edsell* v. *Buchannan*, 4 Bro. C. C. 254: 2 Ves. J. 83.
5 *Wood* v. *Midgley*, 5 De G. M. & G. 41; see also *Jones* v. *Charlemont*, 12 Jur. 532, V. C. E.
6 *Cawthorn* v *Chalie*, 2 S. & S., 127; *Davies* v *Williams*, 1 Sim. 5, 8.
7 *Barber* v *Barber*, 4 Drew. 666; 5 Jur. N. S. 1197.
8 *Harrison* v. *Hogg*, 2 Ves. J. 323; *Jones* v. *Frost*, 3 Mad. 1, 9; Jac. 466; *Cooper* v. *Earl Powis*, 3 De G. & S. 688.

are shown to the whole bill, the Court will treat it as one demurrer; and if one of the causes be considered sufficient, the order will be drawn up, as upon a complete allowance of the demurrer.[1] A defendant may also, at the hearing of his demurrer, orally assign another cause of demurrer, different 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, is called demurring "*ore tenus.*" A defendant cannot demur *ore tenus*, unless there is a demurrer on the record; and upon this ground, where a defendant had pleaded, and, upon the plea being overruled, offered to demur *ore tenus*, for want of parties, he was not permitted to do so;[2] neither can a defendant demur *ore tenus* for the same cause that has been expressed in the demurrer on record, and overruled;[3] nor can he, after a demurrer to the whole bill, demur *ore tenus* as to part.[4] It seems, however, that after a demurrer to part of the bill has been overruled, the defendant may demur *ore tenus* to the same part.[5]

It is to be noticed that, 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:[6] for, as we have seen before a demurrer cannot be good in part and bad in part; which would be the case if a demurrer, professing to go to the whole bill, could be supported by the allegation of a ground of demurrer which applies, to part only.

The consequence of demurring *ore tenus*, as regards costs, will be discussed in a future section.[7]

1 *Wellesley* v. *Wellesley*, 4 M. & C. 554, 558: 4 Jur. 2; see also, *Watts* v. *Lord Eglinton*, 1 C. P. Coop. t. Cott. 25, 27.
2 *Durdant* v. *Redman*, 1 Vern. 78; *Hook* v. *Dorman*, 1 S. & S. 227, 231.
3 *Bowman* v. *Lygon*, 1 Anst. 1; but see *Pratt* v. *Keith*, 10 Jur. N. S. 305, V. C. K., where a demurrer on the record, that there were not proper parties, having been overruled, a demurrer *ore tenus*, describing the necessary parties, was allowed.
4 *Shepherd* v. *Lloyd*, 2 Y. & J. 490.
5 *Crouch* v. *Hickin*, 1 Keen, 385, 389; see *contra*, *Shepherd* v. *Lloyd*, *ubi sup.*; and see *Scane* v. *Hartwrick*, 7 Grant, 161.
6 *Pitts* v. *Short*, 17 Ves. 213, 216; *Metcalfe* v. *Brown*, 5 Pri. 560; *Rump* v. *Greenhill*, 20 Beav. 512: 1 Jur. N. S. 123; *Henderson* v. *Cook*, 4 Drew. 306; *Gilbert* v. *Lewis*, 1 De G. F. & S. 38: 9 Jur. N. S. 187; *Thompson* v. *University of London*, 10 Jur. N. S. 669, 671: 33 L. J. Ch. 625, V. C. K.
7 See post.

The demurrer, having assigned the cause or causes of demurrer, then proceeds to demand judgment of the Court, whether the defendant ought to be compelled to put in any further or other answer to the bill, or to such part thereof as is specified as being the subject of demurrer; and concludes with a prayer, that the defendant may be dismissed with his reasonable costs in that behalf sustained.

If a demurrer is to part of the bill only, the answer (if any) to the remainder usually follows the statement of the causes of demurrer, and the submission to the judgment of the Court of the plaintiff's right to call upon the defendant to make further or other answer.[1]

It was formerly an invariable rule, that an answer to any part of a bill demurred to would overrule the demurrer,[2] even though the part answered was immaterial.[3] And this rule was carried so far, that where the demurrer did not in form extend to the part answered, yet, if the principle upon which the demurrer depended was such that it ought to have extended to the whole bill, then the answer to such part overruled the demurrer.[4] This is still the rule of the Court, but it has been modified to this extent: that the Court will not overrule a demurrer, merely on the ground that, by some slip or mistake, a small or immaterial part of the bill is covered by the answer or plea, as well as the demurrer.[5]

For information as to the nature of the answer (if any) to be put in to those parts of the bill to which the defendant does not demur, the reader is referred to the Chapter on Answers.[6] If the plaintiff conceives such answer to be insufficient, he may except to it, but he must not do so before the demurrer has been argued:[7] otherwise, he will admit the demurrer to be good.[8] It is said, however, that if the defendant demurs to the relief only, and answers the rest of the bill, the plaintiff may take exceptions to the answer before the demurrer is argued.[9]

1 See *ante*.
2 *Tidd* v. *Clare*, 2 Dick. 712; *Hester* v. *Weston*, 1 Vern. 463; *Roberts* v. *Clayton*, 3 Anst. 715.
3 *Ruspini* v. *Vickery*, cited Ld. Red. 211; *Savage* v. *Snalebroke*, 1 Vern 90.
4 *Dawson* v. *Sadler*, 1 S. & S. 542; *Sherwood* v. *Clark*, 9 Pri. 259; *Hester* v. *Weston*, 1 Vern. 463.
5 Ord. XIV. 9; *Lownds* v. *Garnett and Moseley Gold Mining Company*, 2 J. & H. 282; *Mansell* v. *Feeney*, *ib.* 313; *Gilbert* v. *Lewis*, 1 DeG. J. & S. 38: 9 Jur. N. S. 187: see also *Jones* v. *Earl of Strafford*. 3 P. Wms. 81. We have no order similar to this.
6 *Post*.
7 *London Assurance* v. *East India Company*, 3 P. Wms. 326.
8 Ld. Red. 317; *Boyd* v. *Mills*, 13 Ves. 85, 86. If necessary the plaintiff may obtain an extension of the time to file exceptions.
9 Ld. Red. 317: 3 P. Wms. 327.

A demurrer is put in without oath, as it asserts no fact, and relies merely upon matter apparent upon the face of the bill ;[1] and it need not be signed by the defendant.

A mere clerical error in a demurrer may be amended on an *ex parte* order, or at the hearing.[2]

SECTION IV.—*Filing, Setting Down, and Hearing Demurrers.*

AFTER the draft of the demurrer has been settled, it is copied on paper of the same description and size as that on which bills are printed ; the demurrer is then filed at the Record and Writ Clerks' Office, or in the Office of the Deputy Registrar with whom the bill is filed. Orders 40, 41, and 46, are to be observed in the endorsement and notice of filing.

A separate demurrer, by a married woman, must have an order to warrant it ; such a demurrer ought not, therefore, to be filed till an order to that effect has been procured.[3] A demurrer cannot be filed on behalf of an infant, or a person of unsound mind not so found by inquisition, until a guardian *ad litem* has been appointed; and it is the same in the case of a lunatic, when his committee has an adverse interest. The order appointing the guardian must be produced when the demurrer is presented for filing.[4]

Our order 120, as explained by order 550, provides, that "A defendant may demur to a bill of complaint at any time within one lunar month after service upon him of an office copy of the bill." In a case where a motion to take the bill *pro confesso* was pending, and a demurrer had been filed after notice had been given, it was HELD, in the absence of authority to the contrary, that if the demurrer be filed before judgment is pronounced in such case on the *pro con.* motion, it will be in time, and take precedence of an order to take the bill *pro con.*[5]

A demurrer, to which is annexed an answer to any material part

1 Ld. Red. 208.
2 *Osborn* v *Jullion*, 3 Drew. 552, 553.
3 *Barron* v. *Grillard*, 3 V. & B. 165 ; Braithwaite's Pr. 58 ; except, it is presumed, in those cases where a married woman is entitled to defend as a *feme sole* : see *ante*.
4 Braithwait 's Pr. 58.
5 *White* v. *Baskerville*, 2 Cham. R. 40.

of the bill, is considered an answer and demurrer, and may be filed within the time limited for pleading, answering, or demurring, not demurring alone.[1]

Further time to answer will not carry with it a right to demur after the usual time. Where a plaintiff's solicitor had given further time to answer, and instead of answering the defendant's solicitor filed a demurrer, it was ordered to be taken off the files.[2] The giving time to answer does not authorize the defendant to demur after the time for answering has expired.[3]

It is right here to advert to the distinction in practice between taking a demurrer and answer off the file, and simply overruling the demurrer, thereby leaving the answer on the file. The former course appears to be the one adopted, in all cases where there has been an irregularity in the formal parts or the filing of the demurrer, whether it be accompanied by an answer or not.[4] The latter course is adopted, wherever the demurrer has been properly filed, but the Court is of opinion that it is insufficient, or that it has been overruled by the answer.

The omission of any formal part in a demurrer (such as the heading thereof), is an irregularity which entitles the plaintiff to have the demurrer taken off the files, unless an amendment is permitted.[5]

Where a demurrer has been taken off the file 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; but the demurrer is not taken off the file by the mere pronouncing of the order; it must actually be withdrawn from the file.[6] To effect this, the order, when drawn up, should be carried to the Record and Writ Clerk: who will withdraw the demurrer, annexing the order to it.[7]

1 *Osborn* v. *Jullion*, 3 Drew. 552; see also Ld. Red. 208, 210; *Stephenton* v. *Gardiner*, 2 P. Wms. 286; *Tomkin* v. *Lethbridge*, 9 Ves. 178; *Taylor* v. *Milner*, 10 Ves 444, 446; *Baker* v. *Mellish*, 11 Ves. 73; *White* v. *Howard*, 2 De G. & S. 223; *Read* v. *Barton*, 3 K. & J. 166.
2 *Boultbee* v. *Cameron*, 2 Cham. R. 41.
3 *Chamberlain* v. *McDonald*, 2 Cham. R. 204.
4 Leave to amend the title of a joint demurrer and answer has been given, on the hearing of a motion to take it off the file for irregularity: *Osborn* v. *Jullion*, 3 Drew, 552, 554.
5 *Bennett* v. *O'Meara*, 2 Cham. R 167.
6 *Cust* v. *Boode*, 1 S. & S. 21.
7 *Ibid.*

Notice of filing the demurrer must be served on the plaintiff, or his solicitor, on the day on which it is filed, between ten in the morning and four o'clock in the evening, or, if on a Saturday, between ten in the morning and two o'clock in the afternoon. [1] Neglect to do so will not, however, render the demurrer inoperative; but the time allowed to the opposite party for taking the next step in the cause will be extended, so as to give him the benefit of the time he would otherwise lose by the delay in the service, as provided by order 411.

Upon the demurrer being filed, the plaintiff should take an office copy; [2] and if he apprehends that the demurrer will hold good, he should either obtain an order to dismiss his bill with costs, or, if he thinks the defect can be remedied by amendment, he may obtain an order of course, to amend his bill, in the usual way, upon payment of 20*s.* costs. This, however, can only be done before the demurrer has been set down: afterwards, the plaintiff must pay the defendant's taxed costs of amending, and of the demurrer; [3] and must make a special application, for leave to amend. [4] The 20*s.* cover all the costs of the demurrer; but when the demurrer has been prepared, though not actually on the file, before the amendment, the costs will be costs in the cause. [5]

Our order 121 directs, that "Where a demurrer is not set down for argument by the plaintiff, or the plaintiff does not obtain an order to amend, within eight days after notice of filing the demurrer is served, the defendant may set the same down, and serve notice thereof." And order 420, that "No cause set down for argument of demurrer, or by way of motion for decree, or on bill and answer, or on appeal from a Master's report, or on further directions, or on any petition mentioned in order 418, adjourned over from the day for which such cause was originally set down, is to be brought on for argument during the month of June; and, except on circuit, no cause is to be heard during the month of June unless counsel certify that no point is involved in it on which it may be necessary for the Court to reserve judgment."

1 Ord. 46, 410; and see Order 411.
2 Braithwaite's Pr. 491.
3 *Warburton* v. *London and Blackwall Railway Company*, 2 Beav. 253; *Hearn* v. *Way*, 6 Beav 368; *Hoflick* v. *Reynolds*, 9 W. R. 398 V. C. K. If he neglects to amend, within the proper time, the bill is gone: *ib.* 431.
4 *Hoflick* v. *Reynolds*, *ubi sup.*
5 *Bainbrigge* v. *Moss*, 3 K. & J. 62: 3 Jur. N. S. 107; *Martin* v. *Reid*, 6, U. C. L. J. 143.

In order to entitle a plaintiff to be relieved against the consequences of not setting down the demurrer, or obtaining an order to amend, within the periods fixed by the General Orders, he must make out a clear case of accident, mistake, or surprise.[1]

The times of vacation are not reckoned in the computation of time for setting down demurrers.[2]

As, in the event of a demurrer not being set down for argument within the limited period, the defendant derives the same benefit as by its allowance, the duty is cast upon the plaintiff, if he is desirous that it should be submitted to the judgment of the Court, of having it set down.

If the defendant is desirous of withdrawing his demurrer, he may do so, even after it has been set down, on payment of costs.[3]

In general, the Court will not advance a demurrer;[4] in cases, however, of bills for injunction, as an injunction will not usually be granted pending a demurrer, the Court will, upon application, where the matter is pressing, order the demurrer to be argued immediately.[5]

When a demurrer is called on for hearing, and the defendant omits to appear, the demurrer will be struck out of the paper, unless the plaintiff, if he has set down the demurrer, can produce an affidavit of service upon the defendant or his solicitor of the order to set it down; or, if the defendant set down the demurrer, unless the plaintiff can produce an affidavit of service upon himself of the order for setting down the demurrer. If the plaintiff can produce such an affidavit, it is conceived that the demurrer would be overruled, as in the case of a plea.[6] It has been held, however, that in such a case the demurrer is not necessarily overruled, but the plaintiff must be heard in support of the bill.[7] When the defendant

1 *Knight* v. *Marjoribanks*, 14 Sim. 198: decided, however, on the 34th Ord. of Aug., 1841: Sand. Ord. 884: 3 Beav. xxii.; *Matthews* v. *Chichester*, 11 Jur. 49, L. C.: decided on the 46th Ord. of May, 1845: San. Ord. 1000: 7 Beav xli.: 1 Phil lxxxvi., which was similar; overruling S. C. 5 Hare, 207.

2 Ord. 408.

3 *Downes* v. *East India Company*, 6 Ves. 586.

4 *Anon* 1 Mad. 557.

5 *Cousins* v. *Smith*, 13 Ves. 164, 167; *Jones* v. *Taylor*, 2 Mad. 181; *Const* v. *Harris*, T. & R. 510, n. Where justice requires it, an injunction will be granted pending a demurrer: *Wardle* v. *Claxton*, 9 Sim. 412.

6 *Mazarredo* v. *Maitland*, 2 Mad. 38. For form of order overruling demurrer, on non-appearance of defendant, see Seton, 1258, No. 13.

7 *Penfold* v. *Ramsbottom*, 1 Swanst 552.

appears, and the plaintiff does not, the demurrer will also be struck out of the paper, unless the defendant can produce an affidavit of service upon himself of the order for setting down the demurrer; or unless, in the event of the defendant having himself set down the demurrer, he can produce an affidavit of service by him, upon the plaintiff or his solicitor.[1] On the production of such an affidavit, in either case, the defendant may have the demurrer allowed with costs.[2]

The usual course of proceeding, when the demurrer comes on for hearing, and all parties appear, is for the counsel in support of the demurrer to be first heard, next the plaintiff's counsel, and then the leading counsel for the demurring party replies. 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.[3]

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:[4] 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.[5]

Where a demurrer is filed for want of parties as well as for want of equity, the question of parties must be disposed of before the demurrer for want of equity can be argued.[6]

Section V.—*The Effect of Allowing Demurrers.*

Strictly speaking, upon a demurrer to the whole bill being allowed, the bill is out of Court, and no subsequent proceeding can be taken in the cause.[7] The Court often, however, on hearing the demurrer, gives leave to amend, and there are cases in which it has

1 On an appeal from an order allowing a demurrer to the whole bill, the plaintiff is entitled to begin: *Attorney-General v. Aspinall*, 2 M. & C. 613.
2 *Jennings* v. *Pearce*, 1 Ves. J. 447.
3 *Ante*. For form of order on the hearing of a demurrer, see Seton, 1258, No. 12.
4 *Glegg* v. *Legh*, 4 Mad 193, 207.
5 *Thorpe* v. *Macauley*, 5 Mad. 218, 231.
6 *Malcolm* v. *Malcolm*, 2 Cham. R. 200.
7 *Smith* v. *Barnes*, 1 Dick. 67; *Watkins* v. *Bush*, 2 Dick. 701.

afterwards permitted an amendment to be made ;[1] and it seems that, even after a bill has been dismissed by order, it has been considered in the discretion of the Court to set the cause on foot again.[2]

Where the plaintiff, after a demurrer had been allowed, improperly obtained an order to amend his bill, and the defendant demurred, it was held, that by demurring the defendant had waived the irregularity, and that the course he ought to have taken was, to apply to discharge the order to amend for irregularity.[3]

Although the effect of allowing a demurrer to the whole bill is to put the cause out of Court, the allowance of a partial demurrer is not attended with such a consequence. The bill, or that part of of it which was not covered by the demurrer, still remains in Court, and the plaintiff may obtain an order to amend, or adopt any other proceedings in the cause, in the same manner that he might have done had there been no demurrer.[4]

On hearing the demurrer, the Court will, where it sees that the defect pointed out by the demurrer can be remedied by amendment, and substantial justice requires it, make a special order at the hearing of the demurrer, adapted to the circumstances of the case; [5] and where an order was made allowing the demurrer, and giving leave to amend, and no amendment was made within the proper time, it was held, that the bill was not out of Court.[6]

When the demurrer is allowed, and leave is given to amend, there is no rule that the defendant is to have his costs ; but they are in the discretion of the Court.[7]

A demurrer having been held good on one ground, though overruled as to the other, the defendant was allowed to answer without costs.[8]

1 *Lord Coningsby* v *Sir J. Jekyll*, 2 P. Wms. 300 ; *Lloyd* v. *Loaring*, 6 Ves. 773, 779.
2 Per Lord Eldon in *Baker* v. *Mellish*, 11 Ves. 68, 72. It is conceived that this *dictum* would not be followed, unless in a very special case.
3 *Watkins* v. *Bush*, 2 Dick, 701 ; but see *ib.* 702, n.
4 Ld. Red. 215.
5 *Ibid.*; *Wellesley* v. *Wellesley*, 4 M. & C. 554, 558 : 4 Jur 2 ; *Schneider* v. *Lizardi*, 9 Beav. 461, 468; *Rawlings* v *Lambert*, 1 J & H. 458 ; leave to amend is not given as a matter of course, *Osborne* v *Jullion*, 3 Drew. 596 ; and see *Watts* v. *Lord Eglinton*, 1 C. P. Coop. t. Cott. 29, and the cases therein collected ; and as to leave to amend given after demurrer for want of parties, see *Tyler* v. *Bell*, 2 M. & C. 89, 104, 110, and the cases there cited : 1 Jur. 20.
6 *Deeks* v. *Strathope*, 1 Jur. N. S. 413, V. C. K. ; see, however, *Hoflick* v. *Reynolds*, 9 W. R. 431, V. C. K.; and *Armitstead* v. *Durham*, 11 Beav. 428 : 13 Jur. 330.
7 *Schneider* v. *Lizardi*, *ubi sup.* ; *Bothomley* v. *Squires*, 1 Jur N. S. 694 V. C. K.; and see *Harding* v. *Tingey*, 12 W. R. 703, V. C. K.
8 *Paine* v. *Chapman*, 6 Grant 338.

Where, upon allowing the demurrer, leave is given to the plaintiff to amend his bill, he is not thereby prevented from appealing against the order;[1] but if the defendant is desirous of appealing from such order, he ought to apply to stay the amendment, until the appeal has been disposed of;[2] or, at any rate, he ought not to act upon the order giving the plaintiff leave to amend: as, for instance, by demurring to the amended bill.

After a demurrer had been argued, and the Court, instead of allowing the demurrer, gave the plaintiff liberty to amend on payment of costs; an application by the plaintiff for a commission to examine the defendant in Lower Canada, without having amended his bill, was refused with costs.[3]

It may be observed, that the amendment of a bill, in pursuance of an order made upon the hearing of a demurrer, if made before the defendant answers, will not preclude a plaintiff from making one amendment after answer, upon motion of course.[4]

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 upon the merits of the question between the parties, the decision may be pleaded in another suit.[5]

Where a demurrer for multifariousness was overruled, and a demurrer *ore tenus* for want of parties was allowed, the practice was *held* to be that the demurrer for multifariousness should be overruled with costs, and the demurrer *ore tenus* allowed without costs.[6] On demurrer *ore tenus*, held, that every material allegation in a bill must be positive. A demurrer to an allegation qualified by the words "so far as the plaintiff knew," was allowed, but without costs, as the objection was not taken on the record.[7]

In general, however, where the demurrer, *ore tenus*, has been allowed, and the Court has given the plaintiff leave to amend his

1 *Lidbetter* v. *Long*, 4 M. & C. 286; *Davis* v. *Chanter*, 2 Phil. 545, 547. For form of order on appeal, see Seton, 1152, No. 3.
2 *Wellesley* v. *Wellesley*, 4 M. & C. 554, 556: 4 Jur. 2.
3 *Chanee* v. *Henderson*, 1 Cham. R. 30.
4 *Pesheller* v. *Hammett*, 3 Sim. 389; *Bainbrigge* v. *Baddeley*, 12 Beav. 152: 13 Jur. 997.
5 Ld. Red. 216; and see *Londonderry (Lady)* v. *Baker*, 3 Giff, 128; affirmed 7 Jur. N. S. 811, L. JJ.; *Oriental Steam Company* v *Briggs*, 8 Jur. N S. 201, 204: 10 W. R. 125, L. C.
6 *Kelly* v. *Ardell*, 11 Grant 579.
7 *Yarrington* v. *Syon*, 2 Cham. R. 22.

bill, the course of the Court appears to be to make him liable to the costs of the demurrer.[1]

Where a demurrer is put in on two grounds, as to one of which it succeeds, but fails as to the other, no costs will in general be given.[2]

Where a demurrer to a bill is allowed, and afterwards the order allowing it is, upon re-argument, reversed, the defendant, if he has received the costs from the plaintiff, will be ordered to refund them, upon application by the plaintiff;[3] and so, if a demurrer has been overruled, and the order is reversed upon re-hearing, the plaintiff, if he has received costs from the defendant, must refund them.

One of several defendants who has demurred successfully, is entitled, as of right, to have his name struck out of the record; and may apply to the Court by motion for this purpose.[4]

SECTION VI.—*The Effect of overruling Demurrers.*

A DEMURRER being a mute thing, cannot be ordered to stand for an answer.[5]

After a demurrer to the whole bill has been overruled, a second demurrer to the same extent cannot be allowed, for it would be in effect to re-hear the case on the first demurrer: as, on argument of a demurrer, any cause of demurrer, though not shown in the demurrer as filed, may be alleged at the bar, and if good will support the demurrer.[6] A demurrer, however, of a less extensive nature, may, in some cases, be put in; and where the substance of a demurrer was good, but informally pleaded, liberty was given to take it off the file, and to demur again, on payment of costs;[7] and a defendant has been allowed to amend his demurrer, so as to make it less extensive.[8]

1 *Newton* v. *Lord Egmont*, 4 Sim. 574, 585.
2 *Benson* v. *Hadfield*, 5 Beav. 546, 554; and see *Allan* v. *Houlden*, 6 Beav. 143, 150; Morgan & Davey, 18.
3 *Oats* v. *Chapman*, 1 Ves. S. 542; S. C. 2 Ves. S. 100: 1 Dick. 148.
4 *Barry* v. *Croskey*, 2 J. & H. 136: 8 Jur. N. S. 10; Seton, 1258: *U. C. Mining Company* v *Attorney-General*, 2 Cham. R. 185.
5 *Anon.* 3 Atk. 530.
6 Ld. Red. 217.
7 *Devonsher* v. *Newenham*, 2 Sch. & Lef. 199.
8 *Glegg* v. *Legh*, 4 Mad. 193, 207; *Thorpe* v. *Macauley*, 5 Mad. 218, 231.

A second demurrer, however, though less extended than the first, cannot, after the first demurrer has been overruled, be put in without leave of the Court; but the case is different where the first has been taken off the file for irregularity. This leave is generally granted, upon hearing the first demurrer; but it has been permitted upon a subsequent application by motion.

Although a defendant cannot, after the Court has overruled his demurrer to the whole bill, again avail himself of the same method of defence, yet, as it sometimes happens that a bill which, if all the parts of the case were disclosed, would be open to a demurrer, is so artfully drawn as to avoid showing upon the face of it any ground for demurring, the defendant may, in such case, make the same defence by plea: stating the facts which are necessary to bring the case truly before the Court.[1] As it is, however, the rule of the Court not to allow two dilatories without leave, or, in other words, as the defendant is only permitted once to delay his answer by plea or demurrer, without leave of the Court, he must, previously to filing his plea, obtain the leave of the Court to do so; otherwise, his plea may be taken off the file.[2]

From what has been said it results that, after a demurrer to the whole bill has been overruled, the defendant, unless he obtains leave to put in a demurrer of a less extended nature, or a plea either to the whole bill or to some part of it, must, if required, put in a full answer; and the Court, on overruling the demurrer, will, on the application of the defendant, fix a time for his so doing; if no time is fixed, the defendant must put in his answer within the usual time (if it has not expired), or make a special application for further time.[3]

Where a demurrer is overruled, and the plaintiff amends his bill, the defendant is not precluded from appealing against the order overruling the demurrer;[4] but after the defendant has served the plaintiff with notice of the appeal, an order of course to amend the bill is irregular, and will be discharged with costs, and the amendments expunged.[5]

1 Ld. Red. 216.
2 *Rowley* v. *Eccles*, 1 S. & S. 511, 512.
3 *Trim* v. *Baker*, 1 S. & S. 469: T. & R. 253; *Waterton* v. *Croft*, 6 Sim. 431, 438.
4 *Jackson* v. *North Wales Railway Company*, 13 Jur. 69, L. C.
5 *Ainsley* v. *Sims*, 17 Beav. 174.

After a demurrer has been overruled, and notice of appeal given, the plaintiff cannot obtain an order of course to dismiss his bill, with costs.[1]

The Court will often, although it overrules the demurrer, reserve to the defendant the right of raising the same question at the hearing of the cause;[2] and where there is a doubtful question on a title, the Court will sometimes overrule the demurrer, without prejudice to any defence the defendant may make by way of answer.[3]

Where any demurrer is overruled, the defendant is to pay to the plaintiff the taxed costs occasioned thereby: unless the Court otherwise directs.

CHAPTER XII.

DISCLAIMERS.

A DISCLAIMER is, where a defendant denies that he has or claims any right to the thing in demand by the plaintiff's bill, and disclaims, that is, renounces all claim thereto.[4]

It has been before stated, that where a person who has no interest in the subject-matter of the 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 not of course hold, he should, except in cases of partial discovery, (to which, as will be presently shown, he may object by answer,) avoid putting in a full answer, by plea or disclaimer.[5] Therefore, where,

1 *Lewis* v. *Cooper*, 10 Beav. 32; S. C. *nom. Cooper* v. *Lewis*, 2 Phil. 178, 181.
2 *Wilson* v. *Stanhope*, 2 Coll. 629; *Jones* v. *Skipworth*, 9 Beav. 237; *Normna* v. *Stiby*, *ib.* 560, 566; *Earl of Shrewsbury* v. *North Staffordshire Railway Company*, 9 Jur. N. S. 787: 11 W. R. 742, V. C. K.; *Baxendale* v. *West Midland Railway Company*, 8 Jur. N. S. 1163, L. C.
3 *Brownsword* v. *Edwards*, 2 Ves. S. 243, 247; *Mortimer* v. *Hartley*, 3 DeG. & S. 316; *Evans* v. *Evans*, 18 Jur. 666, L. JJ., *Cochrane* v. *Willis*, 10 Jur. N. S. 162, L.JJ.; *Collingwood* v. *Russell*, 10 Jur. N. S. 1062: 13 W. R. 63 L.JJ.; *ante*.
4 Wyatt's P. R. 175.
5 *Ante*. A defendant may also, in a suit, disclaim by his counsel at the bar: *Teed* v. *Carruthers*, 2 Y. & C.C.C. 31, 38: 6 Jur 987. It seems doubtful whether he can by such a disclaimer, in the case of a petition under the statutory jurisdiction, divest himself of an estate in lands: see *Re Ellison*, 2 Jur. N. S. 62, V. C. W.; *Foster* v. *Dawber*, 1 Dr. & Sm. 172.

instead of disclaiming he supported the plaintiff's case, but was held not entitled to any part of the relief given to the plaintiff, he was left to bear his own costs.[1]

A disclaimer, however, cannot often be put in alone: for although, if a plaintiff, from a mistake, makes a person a party to a suit who is in no way interested in or liable to be sued touching the matters in question, a simple disclaimer by such person might be good, yet, as it is possible that the defendant may have had an interest which he may have parted with, the plaintiff has a right to require an answer, sufficient to ascertain whether that is the fact or not; and if a defendant has had an interest which he has parted with, an answer may also be necessary to enable the plaintiff to make the proper person a party, instead of the defendant.[2]

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 in it against him: he cannot disclaim his liability; therefore, a party to an account cannot, by disclaiming an interest in the account, protect himself, by such disclaimer, from setting out the account.[3] Nor, when the bill seeks to charge the defendant with the costs of the cause, can he, by disclaiming all interest in the subject of the suit, evade giving a discovery of those facts by which the plaintiff seeks to substantiate his charge.[4] So, if fraud is charged against the defendant seeking to disclaim, and interrogatories have been filed, a disclaimer alone is insufficient, and an answer must be given to the imputed fraud;[5] and it seems that, in such a case, although no personal decree can in general be made against a married woman, still she must answer fully: though it does not seem clear how far her answer can ultimately be used as evidence against her.[6]

It is to be observed also, that a disclaimer by one defendant cannot, in any case, be permitted to prejudice the plaintiff's right as against the others; and, therefore, where a bill was filed against the

1 *Rackham* v. *Siddall*, 1 Mc'N. & G. 607, 625.
2 Ld. Red. 318; *Oxenham* v. *Esdaile*, M'L. & Y. 540.
3 *Glassington* v. *Thwaites*, 2 Russ. 458, 462; *De Beauvoir* v. *Rhodes*, cited 3 M. & C. 643.
4 *Graham* v. *Coape*, 3 M. & C. 638, 643; 9 Sim. 93, 103.
5 *Bulkeley* v. *Dunbar*, 1 Anst. 37.
6 *Whiting* v. *Rush*, 2 Y. & C. Ex 546, 552; *Pemberton* v. *M'Gill*, 1 Jur. N. S. 1045, V. C. W.; and see *Silcock* v. *Roynon*, 2 Y. & C. C. C., 376: 7 Jur. 548; and *ante*.

lessees of tithes, under a parol demise, for an account, and the lessor, who was made a defendant thereto, disclaimed, the disclaimer of the lessor was not permitted to prejudice the rights of the plaintiff against the lessees, and a decree was made against them: although the plaintiff had, upon the disclaimer coming in, himself dismissed the bill against the lessor with costs.[1] Where a defendant claims any rights against his co-defendants, though not against the plaintiff, he should reserve such rights by his disclaimer: for if his disclaimer is absolute, the Court will only determine the rights and interests of the other parties; and will not consider any question which may arise between him and his co-defendants.[2]

Though a disclaimer is, in substance, distinct from an answer, yet it is, in point of form, an answer, containing simply an assertion that the defendant disclaims all right and title to the matter in demand; and in order to entitle the defendant to be dismissed with costs, the disclaimer should state that the defendant "does not and never did claim, and that he disclaims, all right and title in the subject matter of the suit."[3] Lord Redesdale observes, that in some instances, from the nature of the case, a simple disclaimer may perhaps be sufficient, but that the forms given in the books of practice are all of an answer and disclaimer.[4]

A disclaimer may, by order, be filed without oath, but not without oath and signature. The order is obtained on motion of course.[5] If the defendant applies by motion, the consent of counsel for the plaintiff is necessary.[6] Where the plaintiff applies, no consent by the defendant is required.[7]

The disclaimer must be sworn, filed, and an office copy taken in the same manner, and within the same time, as an answer.[8]

If a defendant puts in a disclaimer where he ought to answer, or accompanies his disclaimer by an answer which is considered insuf-

1 *Williams* v. *Jones*, Young 252, 255.
2 *Jolly* v. *Arbuthnot*, 4 DeG. & J. 224: 5 Jur. N. S. 689; 26 Beav. 283; 5 Jur. N. S. 80.
3 *Vale* v. *Merideth*, 18 Jur. 992, V. C. W. A defendant having the same interest as the plaintiff, should, if he disapprove of the suit, distinctly repudiate it: otherwise, the bill may be dismissed as against him, without costs, and with costs as against the other defendants: *Winthrop* v. *Murray*, 14 Jur. 302, V. C. Wigram.
4 Ld. Red. 319.
5 For ferm of order on motion, see *Pawson* v. *Smith*, cited Seton, 1254.
6 Braithwaite's Pr. 47, 57.
7 Braithwaite's Pr. 47, 57.
8 See *post;* Braithwaite's Pr. 57, 491.

ficient, the plaintiff may take the opinion of the Court upon its sufficiency, by taking exceptions to it, in the same manner as to an answer.[1] If, however, instead of applying in the first instance to the Court, by motion, to take the disclaimer off the file, the plaintiff delivers exceptions, he will be precluded from afterwards moving for that purpose.[2]

Where a defendant puts in a general disclaimer to the whole bill, the plaintiff ought not to reply to it: for then the defendant may go into evidence in support of it.[3] In a case where the plaintiff replied, the defendant was allowed to have his costs taxed against the plaintiff for vexation.[4] It is otherwise, however, where the disclaimer is to part, and there is an answer or plea to another part of the same bill: in such cases, there may be a replication to such plea or answer.[5]

The course to be pursued by the plaintiff, after a disclaimer to the whole bill has been filed, is either to dismiss the bill as against the party disclaiming with costs, or to amend it; or, if he thinks the defendant is not entitled to his costs, he may set the cause down upon the answer and disclaimer, and bring the defendant to a hearing.[6]

Where a defendant had occasioned the suit, in consequence of a claim to the fund set up by himself, which he refused to release or to verify, and afterwards put in a disclaimer, stating in his answer the facts upon which he had supposed himself to be entitled, as a ground for his not being ordered to pay the costs of the suit, which were prayed against him, in consequence of which the plaintiff examined a great number of witnesses to falsify such statement, but no witnesses were examined by the defendant: Sir Lancelot Shadwell, V. C., ordered him to pay the whole costs of the suit, as well as the plaintiff's costs as the costs which the plaintiff was ordered to pay to the co-defendants.[7]

1 *Glassington* v. *Thwaites*, 2 Russ, 458, 463; *Bulkeley* v. *Dunbar*, 1 Anst. 37; *Graham* v. *Coape*, 3 M. & C. 638; 9 Sim. 96, 103.
2 *Glassington* v. *Thwaites*, *ubi sup*
3 See the observations of Sir John Romilly, M. R., *in Ford* v. *Lord Chesterfield*, 16 Beav. 520.
4 *Williams* v. *Longfellow*, 3 Atk. 58[1].
5 *Ibid.*
6 *Cash* v. *Belcher*, 1 Hare, 310, 313; *Bailey* v. *Lambert*, 5 Hare, 178: 10 Jur. 109; *Wiggington* v. *Pateman*, 1 Jur. 89, V. C. E.; Wyatt's P. R. 176; Hinde, 209.
7 *Deacon* v. *Deacon*, 7 Sim. 378, 382.

It is to be remarked, that a defendant cannot, by answer, claim that to which, by his disclaimer, he admits he has no right; and if a disclaimer and answer are inconsistent, the matter will be taken most strongly against the defendant on the disclaimer.[1]

If a defendant puts in a disclaimer, and afterwards discovers that he had an interest, which he was not apprised of at the time he disclaimed, the Court will, upon the ground of ignorance or mistake, permit him to make his claim. It will not, however, allow a defendant to do so at the hearing of the cause: he must, in order to get rid of the effect of his disclaimer, make a distinct application, supported by affidavit, setting forth the fact in detail on which he founds his claim to such an indulgence;[2] and it seems that the Court will expect a strong case to be made out, before it will grant the application.[3]

If the defendant takes no steps to get rid of the effect of the disclaimer, he will be for ever barred: because it is matter of record.[4]

Questions of some nicety arise in suits for foreclosure, and in other suits of a similar description, for establishing equitable claims or demands against real or personal estate, as to the right to costs of persons made defendants in consequence of rights or interests which they might have in the estate, subject to those of the plaintiff, so that his title cannot be complete without their co-operation, but which rights or interests they absolutely disclaim. When a defendant states in his disclaimer that he never had, and never claimed, any right or interest in the subject-matter of the suit at or after the filing of the bill, he is entitled to be dismissed with costs.[5]

Where a defendant simply states that he does not claim any right or interest, he will be dismissed without costs;[6] but if, before bill

1 Ld. Red. 320
2 *Sidden* v. *Lediard*, 1 R. & M. 110.
3 *Seton* v. *Slade*, 7 Ves. 265. 267.
4 *Wood* v. *Taylor*, 3 W. R. 321: 3 Eq. Rep. 513, V. C. K.
5 *Silcock* v. *Roynon*, 2 V. & C. C. C. 376: 7 Jur. 548; *Hiorns* v. *Holtom*, 16 Jur. 1077. 1080, M. R.; *Gabriel* v. *Sturgis*, 5 Hare, 97, 100: 10 Jur. 215; *Teed* v. *Carruthers*, 2 Y. & C. C. C. 31, 41: 6 Jur. 987; *Benbow* v. *Davies*, 11 Beav. 369; *Glover* v. *Rogers*, 11 Jur. 1000, M. R.; *Higgins* v. *Frankis*, 15 Jur. 277, V. C. K. B.; *Vale* v. *Merideth*, 18 Jur. 992, V. C. W.; *Ford* v. *Lord Chesterfield*, 16 Beav. 516, 520; see *contra Buchanan* v. *Greenway*, 11 Beav. 58. For forms of decree against disclaiming defendants, in foreclosure suits, see Seton, 395.
6 *Cash* v. *Belcher*, 1 Hare 310, 312; *Tipping* v. *Power ib.* 405; *Grigg* v *Sturgis*, 5 Hare, 93, 96: 10 Jur. 133; *Ohly* v. *Jenkins*, 1 De G. & S. 543: 11 Jur. 1001; *Gibson* v. *Nicol*, 9 Beav. 403, 406: 10 Jur. 419; *Ford* v. *Lord Chesterfield*, *ubi sup.*; *Appleton* v. *Sturgis*, 10 W. R. 312, V. C. S.; *Vale* v. *Merideth*, *ubi sup.*; *Furber* v *Furber*, 30 Beav. 523; *Durham* v. *Crackles*, 8 Jur. N. S. 1174, V. C. W.

filed, he offers to release his claim, or, after bill filed, to release his claim, and consent to the bill being dismissed, as against him, without costs, he will, if the offer be refused, and the plaintiff still retain him as a party to the record, be entitled to be dismissed with his costs, incurred subsequently to the offer.[1] And it seems that the plaintiff is bound to bear the expense of the release.[2]

A creditor filed a bill to set aside a deed as fraudulent against creditors, and the grantee, by his answer, disclaimed and alleged that the deed was executed without his knowledge or consent, and that when he became aware of it he repudiated it. *Held*, that the grantee, having been properly made a defendant, was not entitled to his costs.[3] Where a defendant, having an interest in the property in question in a foreclosure suit at the time of the filing of the bill, put in a disclaimer, he will not be entitled to any costs.[4] A, an execution creditor of B, was made a defendant to a suit as claiming an interest in certain chattels, which the plaintiff claimed as prior mortgage. A. filed an answer and disclaimer; but it appeared that his solicitor had given instructions to the sheriff to seize the interest of the debtor therein, if any. It was *held* that before answering the bill he should have notified the plaintiff that he made no claim to the chattels, and that not having done so, he was not entitled to the costs of the suit.[5] A person interested in an Equity of Redemption, informed the mortgagee before suit that he was willing to release to him his interest in the property. The mortgagee, notwithstanding, made him a defendant to a bill for sale of the mortgaged premises, and he filed an answer setting forth his willingness to release, and that he had before suit informed the plaintiff of such willingness,—it was held that he was entitled to his costs.[6]

Where the plaintiff stated in his bill that, before the institution of the suit, he had applied to the defendant to release his claim, but

1 *Ford* v *Lord Chesterfield*, *ubi sup*; *Lock* v. *Lomas*, 15 Jur. 162, V. C. K. B.; *Talbot* v. *Kemshead*, 4 K. & J. 93; *Bellamy* v. *Brickenden*, *ib.* 670; *Bradley* v. *Borlase*, 7 W. R. 125, V. C. K.: *Ward* v. *Shakeshaft*, 1 Dr. & Sm 269; *Dillon* v. *Ashwin*, 10 Jur. N. S. 119: 12 W. R. 366, V. C. K.; but see *Gowing* v. *Mowberry*, 9 Jur. N. S 844: 11 W. R. 851, V. C. S.; *Davis* v. *Whitmore*, 28 Beav. 617: 6 Jur. N. S. 880.
2 *Furber* v. *Furber*, 30 Beav. 523, 525.
3 *Shuttleworth* v. *Roberts*, 11 Grant, 237.
4 *Berry* v. *Macklin*, 1 Cham R. 351.
5 *Symburner* v. *Clarke*, 12 Grant, 130.
6 *Waring* v. *Hubbs*, 12 Grant, 227.

the defendant refused to do so, and the defendant disclaimed and denied that any such application was made to him, and stated that if it had been made, he would have released his interest, Sir John Stuart, V.C., held that he was entitled to his costs.[1]

It may be here observed, that in questions of this description, there is no difference between the right of an assignee in bankruptcy and that of the party whose interest he represents.[2]

CHAPTER XIII.

ANSWERS.

SECTION I.—*General Nature of Answers.*

THE answer of a defendant consists of such statements, material to his case, as he may think it necessary or advisable to set forth; or, if he has put in a demurrer to such of them as relate to the parts of the bill not covered by such demurrer.

This twofold character of an answer is peculiar to pleadings in Equity, and is not found even in those that are formed on the same model in the Civil and Ecclesiastical Courts: the answer which the defendant is required to make upon oath, to the allegation and articles being, in those Courts, a wholly distinct instrument from the responsive allegation which contains the defence.[3]

Although an answer has, in general, the twofold property above stated, it is seldom possible, in framing one, to keep the parts separate from each other: though, when it is practicable to do so, such a course is generally desirable. It is, however, of great importance to the pleader, in preparing an answer, to bear in mind that, beside answering the plaintiff's case as made by the bill, he should

1 *Gurney* v. *Jackson*, 1 Sm. & G. 97: 17 Jur. 204; see, however, observations of the M. R. on this case, in *Ford* v. *Lord Chesterfield*, *ubi sup.*

2 *Grigg* v. *Sturgis*, 5 Hare, 93, 96: 10 Jur. 133; see also *Cash* v. *Belcher*, 1 Hare, 310, 312; *Appleby* v. *Duke*, 1 Phil. 272, 275: 7 Jur. 985; *Clarke* v. *Wilmot*, 1 Phil. 276; *Staffurth* v. *Pott*, 2 DeG. & S. 571.

3 Hare on Disc. 223; 3 Bla. Com. 100.

state to the Court, upon the answer, all the circumstances of which the defendant intends to avail himself by way of defence: for a defendant ought to apprize the plaintiff, by his answer, of the nature of the case he intends to set up, and that, too, in a clear, unambiguous manner; and, in strictness, he cannot avail himself of any matter in defence which is not stated in his answer, even though it should appear in his evidence.[1]

Order 123 provides that, "The silence of the answer as to any statement of the bill is not to be construed into an implied admission of its truth; and any allegation introduced into an answer for the purpose of preventing such implied admission, is to be considered impertinent."

A defendant is not bound to state, upon his answer, the conclusions in Law which he intends to deduce from the facts he has set out: that, as has been before stated,[2] would be contrary to the principles of good pleading. Indeed, the most correct method of pleading is, merely to state the facts intended to be proved, and to leave the inference of Law to be drawn from them upon the argument of the case; but the established rule is, that if the defendant states upon his answer certain facts as evidence of a particular case, which he represents to be the consequence of those facts, and upon which he rests his defence, he will not be permitted afterwards to make use of the same facts, for the purpose of establishing a different defence from that to which, by his answer, he has drawn the plaintiff's attention.[3]

A defendant may, by his answer, set up any number of defences, as the consequence of the same state of facts, which his case will allow, or the ingenuity of his legal advisers may suggest; thus, in setting up an immemorial payment in lieu of tithes, a defendant has been allowed to rely upon it, either as a *modus*, or as a composition real existing from time immemorial, or as a composition undetermined by notice.[4] In none of these cases were any facts stated in

1 *Stanley* v *Robinson*, 1 R. & M. 527, 529; *Harrison* v. *Borwell*, 10 Sim. 382; 4 Jur. 245; *Hodgson* v. Thornton, 1 Eq. Ca. Ab. 228, pl. 5.
2 *Ante*.
3 *Bennett* v. *Neale*, Wightw. 324.
4 *Atkyns* v. *Lord Willoughby de Brooke*, 2 Anst. 397; *Atkins* v. *Hatton*, *ib.* 386; *Wolley* v. *Brownhill*, M'Lel. 317; *Bishop* v. *Chichester*, 3 Gwill. 1316.

the answers which were inconsistent with any of the defences set up, and the evidence to prove them was, in either case, the same.

Although a defendant may be permitted to set up, by his answer, several defences as the consequence of the same state of facts, or of facts which are consistent with each other, a defendant cannot insist upon two defences which are inconsistent with each other, or are the consequences of inconsistent facts. And, in the application of this rule, it makes no difference whether the inconsistent defences are each substantially relied upon, or are set up in the alternative; "that answer is bad which either contains inconsistent defences, or an alternative of inconsistent defences."[1] Thus, although a defendant, in a tithe suit, might set up a payment, either as a *modus*, or as a composition real existing from time immemorial, he could not set up the same payment, either as a *modus* or as a composition real not alleged to be immemorial.[2]

From the cases of *Jesus College* v. *Gibbs* and *Leech* v. *Bailey*, above referred to, it is to be collected, that where a defendant sets up, by his answer, two inconsistent defences, the result will be to deprive him of the benefit of either, and to entitle the plaintiff to a decree.[3] Sometimes, indeed, the Court will, where, from redundant expression or other verbal inaccuracy, a defence has been rendered inconsistent, though evidently not intended to be so, either reject the redundant expressions as surplusage,[4] or direct them to be struck out:[5] such indulgence, however, is confined to cases of verbal inaccuracy only, which would not have embarrassed the plaintiff in the conduct of his case.

Although a defendant cannot, by his answer, set up, in opposition to the plaintiff's title, two inconsistent defences in the alternative, he will not be precluded from denying the plaintiff's general title, and also insisting that, in case the plaintiff 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

1 Per Alderson, B., in 1 Y. & C. Ex. 160.
2 *Jesus College* v. *Gibbs*, 1 Y. & C. Ex. 145, 160; and see *Leech* v. *Bailey*, 6 Pri. 504.
3 But see *Nagle* v. *Edwards*, 3 Anst. 702, and the observations upon that case, in *Jesus College* v. *Gibbs*, 1 Y. & C. Ex. 163.
4 *Ellis* v. *Saul*, 1 Anst. 332, 341; *Jenkinson* v. *Royston*, 5 Pri. 495; see also *Uthoff* v. *Lord Huntingfield*, 1 Pri. 237.
5 *Jesus College* v. *Gibbs*, 1 Y. & C. Ex. 145, 157.

the title might be actually vested. Thus, in a tithe suit, the defendant might have denied the plaintiff's title as rector or vicar, and at the same time have set up a *modus*.[1]

In stating a defendant's case, it is only necessary to use such a degree of certainty as will inform the plaintiff of the nature of the case to be made against him; it is not requisite that the same degree of accuracy should be observed in an answer as is required in a bill.

Order 124 provides that, "A defendant is to admit in his answer such of the allegations contained in the plaintiff's bill as are to the knowledge of such defendant true, or as he can readily ascertain to be true, or as he has reason to believe and does believe to be true: and it shall be sufficient if such admissions are expressed to be only for the purposes of the suit in which the same are made." Order 125, that, "Admissions are, in all cases where it is practicable, to be by reference to the numbers of the paragraphs in the bill to which they relate, with such qualifications as may be necessary or proper for protecting the interests of the party making such admissions; and it shall not be necessary or proper, in any answer, to allege ignorance of any fact stated in the bill, or answer, or any other reason for not admitting any fact therein alleged."

If the defence which can be made to a bill consists of a variety of circumstances, so that it is not proper to be offered by way of plea, or if it is 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.[2] Thus, 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.[3] 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 favourable to his case, and which he could not offer together with a plea, he may set forth the whole matter in the same manner. Thus, if a purchaser for a valuable consideration, clear of all charges of fraud or notice, can offer additional circumstances in his favour which he cannot set forth by

1 *Carte* v. *Ball*, 3 Atk. 496, 499.
2 Ld. Red. 308.
3 *Norton* v. *Turvill*, 2 P. Wms. 144.

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 plaintiff, it may be more prudent to set out 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 circumstance attending his title.[1]

Where the same benefit has been claimed, by answer, that the defendant would have been entitled to if he had demurred to the bill, or pleaded the matter, alleged in his answer, in bar, it is only at the hearing of the cause that any such benefit can be insisted upon; and then the defendant will, in general, be entitled to all 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.[2] In the case, however, of multifariousness, if the defendant does not take the objection *ad limine*, the Court, considering the mischief as already incurred, will not, except in a special case, allow it to prevail at the hearing: although it may protect the defendant from the costs incurred, if it should appear that he had been improperly subjected to them.[3]

Order 126 provides that, "A defendant may claim, by answer, any relief against the plaintiff which such defendant might claim by a cross bill; and for this purpose the facts necessary to make out the defendant's right to relief are to be stated in the answer as part of the defendant's case, and he is to pray such relief as he may think himself entitled to. The Court, in all such cases, may either grant such relief upon the answer, or it may direct or permit a separate suit to be instituted."

We now come to the consideration of the manner in which the interrogatories (if any) must be answered.

It must here be observed that as by our practice no interrogatories are used, some of the practice described in this chapter is inapplicable in this Province. We obtain by the examination of a defendant on his answer, before a Master or Special Examiner, the same objects which the plaintiff in England does by the more tedious, expensive

1 Ld. Red. 309.
2 *Wray* v. *Hutchinson*, 2 M. & K. 235, 238, 242; see also *Milligan* v. *Mitchell*, 1 M. & C. 433, 447.
3 *Benson* v. *Hadfield*, 4 Hare, 32, 39; *Cashell* v. *Kelley*, 2 Dr. & War. 181; *Raffety* v. *King*, 1 Keen, 601, 609, and see *ante*.

and unsatisfactory process of Interrogatories. The law as to how far he is bound to answer is, however, the same in both countries, excepting in so far as it is altered by our orders, which will be noticed in their proper places. If the reader will bear these remarks in mind he will find no difficulty in applying the English decisions to our practice without confusion.

Under the old practice of the Court, it was necessary that the defendant should answer all the statements and charges in the bill, whether specially interrogated thereto or not; but he was not bound to answer any interrogatories which were not founded upon the statements or charges contained in the bill:[1] though, if he did so, he thereby put them in issue. Under the present practice, a defendant may be required to answer any interrogatories which are pertinent to the case made by the bill, although they are not founded on specific charges or statements in the bill;[2] but he is not bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; nor is he bound to answer any of the interrogatories except those which he is required to answer. A defendant is not, however, prohibited from answering any statement, charge, or interrogatory which he may consider it necessary to his defence to answer; and he is left at complete liberty, in this respect, to act in such manner as may be thought advisable: subject to the restriction, that if he answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer will be deemed impertinent.

The plaintiff's right to discovery is not extended, by the present practice; so that all the objections which could formerly have been urged by the defendant, to protect himself from a discovery of any portion of the matter of the bill, can now be urged against a discovery of that concerning which the defendant is specially interrogated; and there have always existed certain special reasons upon which the defendant might object to the discovery sought by the plaintiff: either because the discovery might subject him to pains and penalties, or to a forfeiture, or to something in the nature of a

1 *Jerrard* v. *Saunders*, 2 Ves. J. 454, 458.
2 *Ante*. *Perrey* v. *Turpin*, Kay, App. 49; *Mausell* v. *Feeney*, 2 J. H. 313, 318; *Law* v. *London Indisputable Society*, 10 Hare, App. 20; *Bernard* v. *Hunter*, 1 Jur. N. S. 1065, V. C. S.; *Marsh* v. *Keith*, 1 Dr. & Sm. 342: 6 Jur. N.S. 1182; *Hudson* v. *Grenfell*, 3 Giff, 388: 8 Jur. N.S. 878.

forfeiture;[1] or because it was immaterial to the relief prayed;[2] or because it might lead to a disclosure of matter, the subject of professional confidence;[3] or of the defendant's own title, in cases where there is not a sufficient privity between him and the plaintiff to warrant the latter in requiring a disclosure of it.[4] In all these cases, although, as we have seen, the defendant may protect himself from discovery by plea or demurrer, yet he has also always been permitted to decline, by his answer, giving the objectionable discovery, and to state, in that form, the grounds upon which he claims protection; and he still retains the same privilege. He must, however, swear to his belief in the validity of such grounds;[5] and the Court must be satisfied, from the circumstances of the case, and the nature of the discovery which he is called upon to give, that the case falls within the above-mentioned grounds of objection.[6]

The principle upon which the Court proceeds, in exempting a defendant from a discovery under any of the above circumstances, has been fully discussed, in considering the grounds upon which a defendant, although he does not object to the relief, provided the plaintiff makes out a case which may entitle him to it, may demur to the discovery sought; it is only necessary, therefore, to repeat in this place what has been before stated, that if a defendant objects to any particular discovery, upon any of the grounds above stated, he may, even though the grounds upon which he may object appear upon the bill, decline making such discovery, by submission in his answer.[7]

It may be observed here, that the only difference occasioned by this method of objecting to the discovery is, that if the objection be taken by demurrer or plea, the validity of it is at once decided by the Court, upon argument of the plea or demurrer; whereas, if the objection be taken by answer, the validity of it can only come before the Court in the form of exceptions to the answer, which is certainly a more circuitous and expensive mode of trying the question than that afforded by demurring. It has, however, been held, that where the ground of objection is, that the discovery would render

1 *Ante.* 2 *Ante.* 3 *Ibid.*
4 *Ante*; and see *Cooke* v. *Turner*, 14 Sim. 218, 221: 8 Jur. 703.
5 *Scott* v. *Miller* (No. 2), Johns. 328: 5 Jur. N. S. 858; see *Balguy* v. *Broadhurst*, 1 Sim. N. S. 111.
6 *Sidebottom* v. *Adkins*, 3 Jur. N. S. 631: 5 W. R. 743, V. C. S.; see also *Reg.* v. *Boyes*, 1 B. & S. 311: 7 Jur. N. S. 1158; *Bunn* v. *Bunn*, 12 W. R., 561, L. J. J.; Taylor on Evid. s. 1311.
7 *Ante*; Ld. Red. 200, 307.

the defendant liable to pains and penalties, the proper course is to submit the point by answer: because, by demurring, the defendant admits the facts to be true.[1]

It is a general rule, that the defendant is only required to answer to those points which are necessary to enable the Court to make a decree against him;[2] and the objection arising from want of materiality is one that the defendant has always been allowed to raise by answer.

The application of this rule has been before discussed, in treating of demurrers to discovery, on the ground of want of materiality.[3] It may not be useless, however, in addition to the instances already referred to, to mention one or two cases where the defendant's right to exempt himself from answering to such parts of the bill has been recognized by the Court, upon exceptions. In *Codrington* v. *Codrington*,[4] a bill was filed by a person claiming under the limitations of a settlement, to set aside an appointment, by which his title was defeated, on the ground of fraud; and upon an answer being put in denying the fraud, the plaintiff amended his bill, by inserting certain inquiries as to the manner in which the appointment was attested, in order to show that it was not executed in the manner required by the settlement. These inquiries the defendant, by his answer, declined answering; and upon the question coming before the Court, Sir Lancelot Shadwell, V. C., held, that the defendant was not bound to answer the interrogatories in the amended bill; because the plaintiff, having by his bill set up a case of fraud, the fact, whether the appointment was executed in conformity with the power or not, was immaterial to the case so set up.

Upon the same principle, the Court holds that, where a bill is filed by a creditor or legatee, or other person claiming a definite sum out of the personal estate of a deceased person, against an executor or administrator, if the defendant admits assets in his hands sufficient to answer the plaintiff's demands, he need not set out an account of the estate,[5] or set out a schedule of the docu-

1 *Honeywood* v. *Selwin*, 3 Atk. 276; see *Attorney-General* v. *Lucas*, 2 Hare, 566, 569: 7 Jur. 1080; *Earl of Lichfield* v. *Bond*, 6 Beav. 88, 93: 7 Jur. 209.
2 Per Sir Thomas Plumer, V. C., in *Agar* v. *Regent's Canal Company*, G. Coop. 212, 214; see also *Wood* v. *Hitchings*, 3 Beav. 504, 510.
3 *Ante*.
4 3 Sim. 519, 524.
5 *Agar* v. *Regent's Canal Company*, *ubi sup.*

ments in his possession relating to the estate:[1] because the admission by the defendant that he has assets in his hands to answer the plaintiff's demands, is sufficient to give the plaintiff all the relief he can require, and any discovery would be useless and irrelevant.[2] So, also, the Court refused to compel discovery, where the executor of an executor admitted assets of the original testator come to the hands of his testator;[3] and so, discovery was not enforced where, in a suit by the holder of a policy, the directors of an insurance society admitted assets sufficient to pay the claims on the policy.[4]

The Court will not, in general, allow the circumstance of a plaintiff having a claim upon a defendant, to be used for the purpose of enabling the plaintiff to investigate all the private affairs of the defendant; thus, a vendor, in a bill for specific performance, cannot interrogate the vendee as to his property:[5] even though the bill should charge that the defendant was insolvent.[6] In order to entitle a plaintiff to an answer to such an enquiry, he must show some specific lien upon the defendant's property, and pray some relief respecting it;[7] and the Court will not, even then, compel the defendant to make such discovery, where the interest which the plaintiff may have in it is very remote in its bearings upon the real point in issue, and would be an oppressive inquisition.[8]

The above cases, and those before cited, point out in what instances the defendant may decline to make a particular discovery, when it is irrelevant to the general scope and object of the bill. A discovery may, however, be material to the plaintiff's general case, if made by one of the defendants, which would be wholly irrelevant if made by another: in such cases, the defendant from whom the discovery would be immaterial, is not obliged to make it; and, in general, a defendant is only obliged to answer such of the interrogatories as are necessary to enable the plaintiff to obtain a complete decree against him individually. Where, however, the defendant is involved in the whole case, and in that sense relief is asked

1 *Forbes* v. *Tanner*, 9 Jur. N. S. 455: 11 W. R. 414, V. C. K.
2 *Pullen* v. *Smith*, 5 Ves. 21, 23,
3 *Lander* v. *Weston*, 13 Jur. 877, V. C. E.
4 *Prichard* v. *Murray*, 12 Jur. 616, V. C. E.
5 *Francis* v. *Wigzell*; 1 Mad. 258 260.
6 See *Small* v. *Attwood*, as reported in Wigram on Disc. 168.
7 *Francis* v. *Wigzell*, *ubi sup.*
8 Wigram on Disc. 165; *Dos Santos* v. *Frietas*, cited *ib.*; *Webster* v. *Threlfall*, 2 S. & S. 190, 193; see also *Janson* v. *Solarte*, 2 Y. & C. Ex. 132, 136.

against him, he must answer: though the interrogatory might seem to be immaterial to the relief asked against him.[1]

With reference to the objection of immateriality, it must be understood that the defendant is only required to answer as 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 must answer whether a will, executed before the Wills Act,[2] was published by the testator in the presence of three witnesses; but he need not answer to an interrogatory requiring him to say whether the publication was such as by law is required 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.

All the objections to discovery that have hitherto been considered, are of a kind that the defendant has always been allowed to raise by answer, upon the principle that the Court does not oblige a defendant to answer such questions, even when the right to relief is admitted; but where these objections do not apply, it must be remembered that "there is no principle more clearly established in the Court than this: that, when a party answers, he is bound to answer fully, and for this, among other reasons, that if the defence which a party sets up by his answer should be decided against him, it is of the utmost importance that all consequential matters which are material for the purpose of the decree, should receive an answer."[3]

This rule is applicable to all cases where the defence intended to be set up by the defendant extends to the entire subject of the suit: such, for instance, as that the plaintiff has no right to equitable relief—or 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 consideration—that the bill does not declare a purpose for which equity will assume jurisdiction to compel discovery—or that

1 *Marsh* v. *Keith*, 1 Dr. & Sm. 342: 6 Jur. N. S. 1182. On the subject of immateriality, see also *Bleckley* v. *Rymer*, 4 Drew. 248; *Newton* v. *Dimes*, 3 Jur. N. S. 583, V. C. W.

2 7 Will. IV. & 1 Vic. c. 26.

3 Per Lord Lyndhurst in *Lancaster* v. *Evors*, 1 Phil. 351, 352; 8 Jur. 133; Hare on Disc. 255, 256; *Thorpe* v. *Macauley*, 5 Mad. 218, 229; *Faulder* v. *Stuart*, 11 Ves. 296, 301; *Mazarredo* v. *Maitland*, 3 Mad. 66, 70; *Swinborne* v. *Nelson*, 16 Beav. 416; *Potter* v *Waller*, 2 De G. & S. 410: Ambler, ed. Blunt, 353 (*n*); *Reade* v. *Woodroffe*, 24 Beav. 421; *Leigh* v. *Birch*, 32 Beav. 399: 9 Jur. N. S. 1265; *Swabey* v. *Sutton*, 1 H. & M. 514: 9 Jur. N. S. 1321.

the plaintiff is under some personal disability, by which he is incapacitated from suing.[1] 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, must answer fully.[2] Nor is a denial of the plaintiff's title a reason for refusing to set out accounts required by the interrogatories;[3] nor a denial of fraud a reason for refusing to discover the facts which are alleged to show it.[4] In some cases, however, where it has appeared that the discovery was not necessary to enable the plaintiff to obtain a decree, and where the information could be obtained in the proceedings under the decree, a full answer has not been enforced.[5]

A defendant may, however, as we have seen,[6] by answer decline answering any interrogatory, or part of an interrogatory, from answering which he might formerly have protected himself by demurrer; and he may so decline, notwithstanding he answers other parts of such interrogatory, or other interrogatories from which he might have protected himself from demurrer, or other parts of the bill as to which he is not interrogated;[7] but he cannot decline answering a particular interrogatory on the ground that the whole bill is demurrable;[8] nor can he protect himself from discovery by raising by answer a defence which he might have pleaded.[9]

A defendant must answer as to his knowledge, remembrance, information or belief. Where, however, a special cause is shown, so positive an answer may be dispensed with;[10] and in *Hall* v. *Bodly*[11] it is said, that a defendant having sworn in his answer that he had received no more than a certain sum, to his remembrance it was allowed to be a good answer. As to facts which have not happened

1 *Gilbert* v. *Lewis*, 1 De G. J. & S. 38: 9 Jur. N. S. 187.
2 Hare on Disc. 256.
3 *Dott* v. *Hoyes*, 15 Sim. 372: 10 Jur. 628; *Great Luxembourg Railway Company* v. *Magnay*, 23 Beav. 646; *Brookes* v. *Boucher*, 8 Jur. N. S. 639: 10 W. R. 768, V. C. W.; *Leigh* v. *Birch*, and *Swabey* v. *Sutton*, *ubi sup*
4 *Padley* v. *Lincoln Water Works Company*, 2 M'N. & G. 68, 72: 14 Jur. 299; —— v. *Harrison*, 4 Mad. 252.
5 *De la Rue* v. *Dickinson*, 3 K. & J. 388; *Swinburne* v. *Nelson*, reld. to *ib.* 389; *Clegg* v. *Edmonson*, 3 Jur. N. S. 299, L.JJ.
6 *Ante*.
7 *Padley* v. *Lincoln Water Works Company*, 2 M'N. & G. 68, 71: 14 Jur. 299; *Baddeley* v. *Curwen*, 2 Coll. 151, 155; *Fairthorne* v. *Western*, 3 Hare, 387, 391, 393: 8 Jur. 353; *Molesworth* v. *Howard*, 2 Coll. 145, 151; see, however, *Tipping* v *Clarke*, 2 Hare, 383, 392, *Drake* v. *Drake*, *ib.* 647: 8 Jur. 642; *Kaye* v. *Wall*, 4 Hare, 127; *Ingilby* v. *Shafto*, 33 Beav. 31: 9 Jur. N. S. 1141.
8 *Mason* v. *Wakeman*, 2 Phil 516; *Fisher* v. *Price*, 11 Beav. 194, 199; *Marsh* v. *Keith*, 1 Dr. & Sm. 342, 356: 6 Jur. N. S. 1182; *Bates* v. *Christ's College, Cambridge*, 8 De G. M. & G. 726: 3 Jur. N. S. 348, L.JJ.; *Leigh* v *Birch*, 32 Beav. 399: 9 Jur. N. S. 1265.
9 *Lancaster* v. *Evors*, 1 Phil. 349, 351: 8 Jur. 133; *Swabey* v. *Sutton*, 1 H. & M. 514: 9 Jur. N. S. 1321, V. C. W.
10 Wyatt's P. R. 13.
11 1 Vern. 470; and see *Nelson* v. *Ponsford*, 4 Beav. 41, 43.

within his own knowledge, the defendant must answer as to his information and belief, and not as to his information merely, without stating any belief either the one way or the other.[1] It is not, however, necessary to make use of the precise words "as to his information and belief": the defendant may make use of any expressions which are tantamount to them; thus, to say that the defendant cannot answer to facts inquired after, as to his belief or otherwise, is generally considered a sufficient denial; for though the word "information" is not used, the expression "belief or otherwise," is held to include it. And so, where an answer was in this form: "And this defendant further answering saith, it may be true for anything he knows to the contrary that," and after going through the several statements, it concluded thus: "but this defendant is an utter stranger to all and every such matters, and cannot form any belief concerning the same," Sir John Leach, V. C., was of opinion, that the defendant, in stating himself to be an utter stranger to all and every the matters in question, did answer as to his information, and did, in effect, deny that he had any information respecting them.[2] It may be collected from the above case, that a defendant cannot, by merely saying "that a matter may be true for anything he knows to the contrary," avoid stating what his recollection, information, or belief with reference to it is, or saying that he has no recollection or information, or that he cannot form any belief at all concerning it: either in these words or in equivalent expressions.

Where defendants have in their power the means of acquiring the information necessary to enable them to give the discovery called for, they are bound to make use of such means, whatever pains or trouble it may cost them;[3] therefore, where defendants, filling 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; they are bound to give the best account they can by their answer: not in an oppressive way, but by referring to books, &c., sufficiently to make them parts of their

1 Coop. Eq. Pl. 314.
2 *Amhurst* v. *King*, 2 S. & S. 183
3 See *Taylor* v. *Rundell*, C. & P. 104, 113: 5 Jur. 1129; *Earl of Glengall* v. *Frazer*, 2 Hare, 99, 103: 6 Jur. 1081; *Stuart* v. *Lord Bute*, 12 Sim. 460; *Attorney-General* v. *Rees*, 12 Beav. 50, 54; *M'Intosh* v. *Great Western Railway*, 4 De G. & Sm. 502; *Inglessi* v. *Spartali*, 29 Beav. 564; *Attorney-General* v. *Burgesses of East Retford*, 2 M. & K. 35, 40.

answer, and afford the plaintiff an opportunity of inspection, in order that he may be able to ascertain whether that is the best account the defendants can give.[1]

Where, however, the defendant has, since the filing of the bill, lost his interest in the suit, and has no longer access to the documents, he will not be required to refer to them.[2]

Where defendants are required to set out accounts, they may, for the purpose of rendering their schedules less burthensome, instead of going too much into particulars, refer to the original accounts in their possession in the manner above stated;[3] but 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.[4]

To such of the interrogatories as it is necessary and material for the defendant to answer, he must speak directly and without evasion;[5] and any interrogatory not intended to be admitted, ought to be traversed with accuracy.[6] Where a fact is alleged, with divers circumstances, the defendant must not deny or traverse it literally, as it is alleged in the bill; but must answer the point of substance, positively and certainly;[7] thus, if a defendant is interrogated whether he has in his possession, custody, or power, books, papers, or writings, a statement in his answer that there are certain books, papers, or writings in the West Indies, the particulars of which he is unable to set forth, without any answer as to the fact whether they are in the defendant's possession, custody, or power, will be insufficient: for if the defendant admits the books and writings to be in his possession, custody or power, the plaintiff may call upon the defendant to produce them; which the Court will order within a reasonable time.[8] The reference in the answer must describe the books or documents with such accuracy as to enable the plaintiff to

1 *White* v. *Williams*, 8 Ves. 193, 194
2 *Ellwand* v. *M'Donnell*, 8 Beav. 14.
3 *White* v. *Barker*, 5 De G. & S. 746: 17 Jur. 174; *Major* v. *Arnott*, 2 Jur. N. S. 387, V. C. K.; *Drake* v. *Symes*, Johns 647; *Telford* v. *Ruskin*, 1 Dr. & Sm. 148; *Christian* v. *Taylor*, 11 Sim. 401; *Bally* v. *Kenrick*, 13 Pri. 291.
4 *Telford* v. *Ruskin*, 1 Dr. & Sm. 148, arguendo *Alsager* v. *Johnson*, 4 Ves 224
5 Ld Red. 309
6 *Patrick* v. *Blackwell*, 17 Jur. 803. V. C. W., *Earp* v. *Lloyd*, 4 K. & J. 58.
7 Ld. Red. 309; *Bally* v. *Kenrick*, 13 Pri. 201; *Tipping* v. *Clarke*, 2 Hare, 383, 390.
8 *Farquharson* v. *Balfour*, T. & R. 190.

move for their production: otherwise, the answer will be open to exceptions for insufficiency.[1]

Where a defendant stated in his answer that he had not certain books, papers, and writings, in his possession, custody, or power, because they were coming over to this country, Lord Eldon held, that they were in his power, and that the defendant ought to have so stated in his answer.[2] Where books, papers, or writings, are in the custody or hands of the defendant's solicitor, they are considered to be in the defendant's own custody or power, and should be stated to be so in his answer.

If a defendant is called upon to set out a deed or other instrument, in the words or figures thereof, he should do so, or give some reason for not complying with the requisition:[3] he may, however, avoid this by admitting that he has the deed or instrument in his possession, and offering to give the plaintiff a copy of it.[4] Where a defendant sets out any deed or other instrument in his answer, whether in *hæc verba*, or by way of recital, it is always a proper precaution 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.

If the defendant deny a fact, he must traverse or deny it directly, and not by way of negative pregnant: as, for example, where he is interrogated whether he has received a sum of money, he must deny or traverse that he has received that sum, or any part thereof, or else set forth what part he has received.

Where the defendant is interrogated as to particular circumstances, a general denial must be accompanied by an answer as to such circumstances:[5] for although it is true that the general answer may include in it an answer to the particular inquiry, yet such a mode of answering might, in some cases, be resorted to, in order to escape from a material discovery;[6] and, therefore, a general denial

1 *Inman* v. *Whitley*, 4 Beav 548; *Phelps* v *O'ive*, *ib.* 549 n., where Lord Cottenham, M R, refused to order production of documents described as "a bundle of papers marked G."

2 *Farquharson* v. *Balfour*, *ubi sup*.

3 Wyatt's P. R 204 As to the cases in which it may be prudent to set out documents in *hæc verba*, see *ante*.

4 Harr. by Newl. 185.

5 Ld Red 309.

6 *Wharton* v. *Wharton*, 1 S. & S 235; *Tipping* v. *Clarke*, 2 Hare, 383 389; *Duke of Brunswick* v. *Duke of Cambridge*, 12 Beav. 281; *Jodrell* v. *Slaney*, 10 Beav. 225, *Patrick* v. *Blackwell*, 17 Jur. 803, V. C. W.; *Earp* v. *Lloyd*, 4 K. & J. 58, see also *Anon.* 2 Y. & C. Ex. 310; *Bridgewater* v. *De Winton*, 9 Jur. N. S. 1270; 12 W. R. 40, V. C. K.

is not enough, but there must be an answer to sifting inquiries upon the general question.[1] The advantage of this rule is strongly illustrated by the circumstance referred to in *Hibbert* v. *Durand*.[2] In that case, the defendant was interrogated whether he had not received certain sums of money, specified in the bill, in the character of a ship's husband; in his answer, he swore that he had not received any sums of money whatever, except those set forth in the schedule to his answer, in which schedule the sums specified in the bill were not comprised, but he did not otherwise answer the interrogatory. On the question of the sufficiency of the answer, Lord Thurlow said, that a man could not deny, generally, particular charges which tended to falsify such general denial, and, therefore, held the answer insufficient; and it appears by a note of the reporter, that it turned out, in point of fact, that the defendant afterwards recollected the receipt of the particular sums, and admitted them by his further answer. But, although the Court requires, that all the particular inquiries should be answered, as well as the general question, it will be no objection to the answer to the particular interrogatory, that the defendant has not answered it so particularly as to meet it in all its terms, provided it is, with reference to the object of the bill, fairly and substantially answered.[3]

It is, however, the general practice, where the defendant is required to set forth a general account, or to answer as to monies received, or documents in his possession, 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; and such practice is very convenient, and in many cases indispensable. The defendant must, however, be careful to avoid any inconsistency between the body of the answer and the schedule: for if there is any, the answer will be insufficient, and the defendant may be required to put in a further answer.[4] The defendant may also resort to a schedule for the purpose of showing the nature of his own case, or of strengthening it: even though there is nothing in the interrogatories which may render a schedule necessary.[5]

In general, a defendant must be careful not to frame his schedule,

1 Per Lord Eldon, in *Mountford* v. *Taylor*, 6 Ves. 792.
2 Cited in *Prout* v. *Underwood*, 2 Cox, 135; *Hepburn* v. *Durand*, 1 Bro. C. C. 503: Ld. Red 310.
3 *Bally* v. *Kenrick*, 13 Pri. 291; see also *Reade* v. *Woodrooffe*, 24 Beav. 421.
4 *Bridgewater* v. *De Winton*, 9 Jur. N. S. 1270: 12 W. R. 40, V. C. K.
5 *Parker* v. *Fairlie*, T. & R. 362: 1 S. & S. 295; *Lowe* v. *Williams*, 2 S & S. 574, 576.

in a manner which may be burthensome and oppressive to the plaintiff: otherwise it will be considered 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, the answer was held to be impertinent, and the Court said the defendant ought merely to have answered, that such a sum was due, and that it was due upon the balance of an account.[1] In the last case, although there was an inquiry how the defendant made out that there was a balance, there were no particular inquiries in the bill as to the items, constituting the account, from which the defendants made out that there was a balance due to them; and even where there has been such an inquiry, the Court has gone the length of saying, that a schedule containing such items will be impertinent, if the items are set out with a minuteness not called for by the nature of the case. Thus, where the bill called upon a defendant to set forth an account of all and every the quantities of ore, metals, and minerals dug in particular mines, and the full value thereof, and the costs and expenses of working the mines, and the clear profits made thereby, and the defendant put in a schedule to his answer, comprising 3,431 folios, wherein were set forth all the particular items of every tradesman's bill connected with the mines, the Court held the schedule to be impertinent.[2] In like manner, it seems that in the case of an executor called upon to account for his disbursements, it is not necessary to set out every separate item.[3] It is difficult, however, to point out any precise rules with regard to what will be considered impertinent in a schedule; much must depend upon the nature of each case, and the purposes for which the discovery is required. The cases above referred to, and the others which may be found in the books show, however, that even though the plaintiff, by the minuteness of his inquiries, in some measure affords an excuse for the defendant setting forth a long and burthensome schedule, the Court will not, unless in instances in which, from the nature of the case, great minuteness is required, permit a defen-

1 *French* v. *Jacko*, 1 Mer. 357, n.
2 *Norway* v. *Rowe*, 1 Mer. 347, 356; see also *M'Morris* v *Elliot*, 8 Pri. 674; *Slack* v. *Evans*, 7 Pri. 278, n.; *Alsager* v. *Johnson*, 4 Ves. 217, 225; *Byde* v. *Masterman*, C. & P, 265, 272: 5 Jur. 643; *Marshall* v. *Mellersh*, 6 Beav. 558; *Tench* v. *Cheese*, 1 Beav. 571, 574: 3 Jur. 768.
3 *Norway* v. *Rowe*, *ubi sup.*

dant to load the record with useless and impertinent matter, even though the introduction of such matter might be justified by the terms of the interrogatories. On the other hand, it is to be observed, that the Court will not, where the defendant, in complying with the requisitions of the bill, has *bona fide* given the information required, though in a manner rather more prolix than might perhaps be necessary, consider the answer as impertinent: for, although prolixity sometimes amounts to impertinence,[1] whether the Court will deal with it as such depends very much upon the degree in which it occurs.[2]

In answering an amended bill, the defendant, if he has answered the original bill, should answer those matters only which have been introduced by the amendments. In fact, the answer to an amended bill constitutes, together with the answer to the original bill, but one record:[3] in the same manner as an original and an amended bill; hence, 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.[4]

SECTION II.—*Form of Answers.*

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. The Court will not, however, before the hearing, and at a time when it cannot be known how the defence should be conducted, visit the defendants with costs as a penalty for not joining in their answer; and 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.[5] Where the same solicitor has been employed for two or more defendants, and separate answers have been filed, or other proceedings had by or for two or more of such defendants separately, the Taxing Master will consider, in the taxation of such solicitor's bill of costs, either between party and party, or between solicitor and client, whether such separate answers or other proceedings were necessary or proper; and if he is of opinion

1 *Slack* v. *Evans*, *ubi sup.*
2 *Gompertz* v. *Best*, 1 Y. & C. Ex. 114, 117.
3 Ld. Red. 318; *Hildyard* v. *Cressy*, 3 Atk. 303.
4 *Smith* v. *Serle*, 14 Ves 415.
5 *Vansandau* v. *Moore*, 1 Russ. 441, 454: 2 S. & S. 509, 512; and see *Woods* v. *Woods*, 5 Hare, 230.

that any part of the costs occasioned thereby has been unnecessarily or improperly incurred, the same will be disallowed.[1] No general rule can be laid down, determining when defendants, appearing by the same solicitor, may sever in their defence;[2] practically, the Taxing Master has to exercise his discretion in each particular case.

Where defendants have a joint interest only, they will not, in general, be allowed to sever in their defence; and there are many cases where only one set of costs has been allowed by the Court to two defendants, whose interest was so far joint as to have made a severance of their defence unnecessary. Thus, trustees will not, in general, be allowed costs consequent upon their separate defences, unless some of them have a beneficial interest or there is some special reason for their severance.[3] So, trustees and *cestuis que trust*, if they have no conflicting interests, will, in general, be only allowed one set of costs.[4] The same principle applies, as between a husband and his wife,[5] a bankrupt and his assignees,[5] and, in an administration suit, between an assignor and his assignee.[6] The severance will, however, be justifiable where the suit is against two trustees, one of whom only is charged with a breach of trust;[7] and, in some cases, where they reside at a distance from each other.[8]

Where only one set of costs is allowed, the Court does not, generally, declare to whom it is to be given;[9] but where one trustee only, in obedience to an order, paid a sum of money into Court, he was held entitled to the whole of the costs.[10]

If the defendants are permitted to sever, they will be allowed the costs of separate counsel, though they take the same line of defence.[11]

Our order 122 provides that "Answers may be in a form similar to the form set out in Schedule F to these orders, and are to consist

1 *Woods* v. *Woods*, 5 Hare, 229, 231.
2 *Greedy* v. *Lavender*, 11 Beav. 417, 420; *Remnant* v. *Hood* (No. 2), 27 Beav. 613.
3 *Gaunt* v. *Taylor*, 2 Beav. 346: 4 Jur 166; *Dudgeon* v. *Corley*, 4 Dr. & War. 158; *Tarbuck* v. *Woodcock*, 3 Beav. 289; *Hodson* v *Cash*, 1 Jur N. S. 864, V. C. W.; *Course* v. *Humphrey*, 26 Beav. 402: 5 Jur. N. S. 615, *Prince* v. *Hine*, 27 Beav 345; *Attorney-General* v. *Wyville*, 28 Beav. 464; and see Morgan & Davey, 87.
4 *Woods* v. *Woods*, *ubi sup.*; *Farr* v. *Sheriffe*, 4 Hare, 528: 10 Jur. 630; *Remnant* v. *Hood*, *ubi sup.*
5 *Garey* v. *Whittingham*, 5 Beav. 268, 270: 6 Jur. 545.
6 *Remnant* v. *Hood* (No. 2), 27 Beav. 613; *Greedy* v. *Lavender*, 11 Beav. 417, 420.
7 *Webb* v. *Webb*, 16 Sim. 55.
8 *Aldridge* v. *Westbrook*, 4 Beav. 212; *Wiles* v. *Cooper*, 9 Beav. 298; *Commins* v. *Brownfield*, 3 Jur. N. S. 657, V. C. W.
9 *Course* v. *Humphrey*, 26 Beav. 402: 5 Jur. N. S. 615; *Attorney-General* v. *Wyville*, 28 Beav. 464.
10 *Prince* v. *Hine*, 27 Beav. 345; and see Morgan & Davey, 87, 88.
11 *Bainbrigge* v. *Moss*, 3 Jur. N. S. 107, V. C. W.

of a clear and concise statement of such defences as the defendant desires to make. The signature of counsel is unnecessary; the answer is to be verified by the oath of the defendant, and the jurat may be in the form set forth in Schedule F."[1] The answer must not refer to another document, not on the files of the Court, as containing the statement of the defendant's case.[2] The fact that an answer had been sworn before a commissioner who had been formerly concerned as solicitor in the cause, was not held to be ground for taking the answer off the files; but where an answer had been irregularly transmitted, it was ordered to be re-sworn within a given time.[3] It may be remarked, as to the latter part of this decision, that it was made under Sec. 5 of Order 43, of the Orders of June, 1853, which required papers to be transmitted to the Registrar or Deputy Registrar by post, sealed, or by special messenger, who was required to swear that he delivered the document as he had received it. This order has been left out in the Consolidated Orders of June, 1868, and now an answer may be brought to be placed on file in the same way as any other paper.

An answer must be intituled in the cause, so as to agree with the names of the parties as they appear in the bill, at the time the answer is filed.[4] A defendant may not correct or alter the names of the parties as they appear in the bill; if there is a mistake in his own name, he must correct it in the part following the title of the cause, thus: "The answer of John Jones (in the bill by mistake called William Jones)".[5]

An answer is headed: "The answer of A. B., one of the above-named defendants, to the bill of complaint of the above-named plaintiff." If the bill has been amended, the heading states that the answer is "to the amended bill of complaint of the above named plaintiff.[6] If two or more defendants join in the same answer, it is headed: "The joint and several answer;" but if it be the answer of a man and his wife, it is headed "The joint answer." If a female defendant has married since the filing of the bill, but before answering, she must either obtain an order for leave to answer separately

1 For Schedule F. see Vol. of Forms.
2 *Falkland Island Company* v. *Lafone*, 3 K. & J. 267.
3 *Gordon* v. *Johnson*, 2 Cham. R. 205.
4 Braithwaite's Pr. 44.
5 *Ibid.*; *Attorney-General* v. *Worcester Corporation*, 1 C. P. Coop. t. Cott. 18.
6 *Rigby* v. *Rigby*, 9 Beav. 311, 313.

or answer jointly with her husband, who, although not named on the record as a defendant, may join in the answer: in which case, the answer should be headed "The answer of *A. B.*, and *C.* his wife, lately and in the bill called *C. D.*, spinster (or widow as the case may be)."[1] The answer of an infant, or other person answering by guardian, or of an idiot or lunatic answering by his committee, is so headed.

Any defect occurring in the heading of an answer, so that it does not appear distinctly whose answer it is, or to what bill it is an answer, is a ground for taking it off the file for irregularity. Thus, where an answer was intituled "the joint and several answer of *A B.* and *C. D.*, defendants, *E. F.* and *G. H.*, complainants," omitting the words, "to the bill of complaint of," it was, on motion, ordered to be taken off the file for irregularity.[2] So also, where the plaintiff was misnamed in the heading, an order was made to take the answer off the file;[3] and so, where the bill was filed by six persons, and the document filed purported to be an answer to the bill of five only, the answer was ordered to be taken off the file.[4] If, however, it is clear to whose bill it is intended to be an answer, this course will not now be followed.[5] The notice of motion, in such a case, should not describe the document as the answer of *A. B.*, &c., but as a certain paper writing, purporting to be the answer.[6] An answer with a defect of this sort in the title is, in fact, a nullity, and may be treated as such; and although a defendant may, if he pleases apply to the Court for leave to take the answer off the file and reswear it, it is not necessary that he should do so, but he may leave the answer upon the file, and put in another.[7]

Where an answer has been prepared for five defendants, it cannot be received as the answer of two only;[8] and where such an answer had been filed it was, upon the motion of the plaintiff, ordered to be taken off the file.[9] In an earlier case, however, before the same Judge, where a joint and several answer included in the title the

1 Braithwaite's Pr. 46.
2 *Pieters* v. *Thompson*, G. Coop. 249.
3 *Griffiths* v. *Wood*, 11 Ves. 62; *Fry* v. *Mantell*, 4 Beav. 485: S. C. *nom. Fry* v. *Martel*, 5 Jur. 1194; *Upton* v. *Sowten*, 12 Sim. 45: S. C. *nom Upton* v. *Lowten*, 5 Jur. 818.
4 *Cope* v. *Parry*, 1 Mad. 83. As to scandal and impertinence in the heading of an answer, see *Peck* v. *Peck*, Moss. 45
5 *Rabbeth* v. *Squire* 10 Hare, App. 3.
6 See 11 Ves. 64.
7 *Griffiths* v. *Wood*, *ubi sup.*
8 *Harris* v *James*, 3 Bro. C. C. 399.
9 *Cooke* v. *Westall*, 1 Mad. 265; and see *post.*

names of persons who refused to join in it, the answer was ordered to be received as the answer of those defendants who had sworn to it, without striking out the names of those who had not.[1] And an answer which has been prepared as the answer of several defendants, but only sworn to by some of them, may, by special order, be directed to be filed as the answer of those defendants only who have sworn to it; and an order may be subsequently made, that a defendant who has not sworn to it, (he being out of the jurisdiction when the answer was filed,) be sworn to it by the Record and Writ Clerk, without the answer being taken off the file, and that such answer, when so sworn, be treated as the joint answer of all the defendants whose answer it purports to be.[2]

Sometimes the Court has, under special circumstances, directed an answer to be received, though it has not been signed by the defendant; as, where a defendant went abroad, forgetting, or not having had time, to put in his answer;[3] and where a defendant had gone or was resident abroad, and had given a general power of attorney to defend suits.[4] Where an answer was put in under the authority of a power of attorney, the Court thought it better to take the answer without any signature, than that the person to whom the power is given should sign it in the name of the defendant; the power of attorney should be recited in any order authorising the answer to be put in under it.[5]

Unless the Court otherwise directs, the answers of all persons (except corporations aggregate) must be put in upon the oath of the parties putting in the same, where they are not exempted from taking an oath by any statute in that behalf.[6] Corporations aggregate put in their answer under their common seal.[7] There is no authority for allowing a corporation to file an answer without seal, except by consent.[8] The Attorney-General signs, but does not swear to his answer.

1 *Done* v. *Read*, 2 V. & B. 310.
2 *Lyons* v. *Read*, 4 & 15 Nov. 1856, cited Braithwaite's Pr. 51, 52. And see *Hayward* v. *Roberts* (1857. H. 152), 6 March, 1858; and *Lane* v. *London Bank of Scotland* (1864, L. 128), 16 March, 1865, in which like orders were made: the latter on petition of course, by consent of the plaintiff.
3 ——— v. *Lake*, 6 Ves. 171; ——— v. *Gwillim*, *ib.* 285: 10 Ves. 442.
4 *Bayley* v. *DeWalkiers*, 10 Ves. 441; *Harding* v. *Harding*, 12 Ves 159.
5 *Bayley* v. *DeWalkiers*, *ubi sup.*
6 See stat. 7 & 8 Will. III. c. 34, s. 1; 8 Geo. I. c. 6, s. 1; 22 Geo. II. c. 30, s. 1; *ib.* c. 46, s. 36; 9 Geo. IV. c. 32, s. 1; 3 & 4 Will. IV. c. 49; *ib.* c. 82; 1 & 2 Vic. c. 77; and see *ib.* c. 105. It is to be observed, that an affirmation cannot be taken under a commission authorizing the commissioners to take an answer upon oath: *Parke* v. *Christy*, 1 Y. & J. 533.
7 It is desirable, though not essential, that the affixing of the seal should be attested by some official of the corporation: Braithwaite's Pr. 53.
8 *Gildersleeve* v. *Wolfe Island R. & C. Company*, 3 Ch. R. 358.

The oath, when administered to a person professing the Christian religion, is upon the Holy Evangelists. But persons who do not believe the Christian oath, must, out of necessity, be put to swear according to their own notion of an oath;[1] therefore, a Jew may be sworn upon the Pentateuch with his hat on;[2] and a Heathen may be sworn in the manner most binding on his conscience. In *Ramkissenseat* v. *Barker*,[3] 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 commissioners to administer the oath in the most solemn manner as in their discretion should seem meet, and if they administered any other oath than the Christian, to certify to the Court what was done by them.

Our order 130 provides that "An answer or disclaimer, whether sworn within the jurisdiction of the Court, or out of the jurisdiction under a commission or otherwise, may be filed without the oath of a messenger, and without any further or other formality than is required in the swearing and filing of an affidavit." Order 131, that "Alterations or interlineations in an answer or disclaimer, made therein previously to the taking thereof are to be authenticated according to the practice in use with respect to affidavits." Order 132 that "It shall not be necessary to issue a commission to take the answer or disclaimer of a defendant resident out of the jurisdiction of the Court, but such answer or disclaimer may be sworn or affirmed before any of the persons named in the first and third sections of the Statute passed in the 26th year of the reign of Her Majesty Queen Victoria, and chaptered 41." And Order 133 that "An answer may be filed without oath or signature by consent, without order."

The Court will not permit the answer of a defendant, represented to be in a state of incapacity, to be received without oath or signature, though a mere trustee and without interest: the proper course, in such case, being for the Court to appoint a guardian by whom the defendant may answer.[4]

1 *Omychund* v. *Barker*, 1 Atk. 21, 46.
2 Hinde, 228. But, though the head be covered, the right hand in which the book is held, must be uncovered. A Jew may, if he pleases, be sworn while his head is uncovered: Braithwaite's Pr. 343.
3 1 Atk. 19, 20. For form of jurat in the case of a Hindoo, see Braithwaite's Oaths in Chan. 86.
4 *Wilson* v. *Grace*, 14 Ves. 172.

An answer put in without oath or signature, and accepted without either of those sanctions, gives the same authority to the Court to look to the circumstances denied or admitted in the answer so put in, for the purpose of administering civil justice between the parties, as if it was put in upon oath.[1]

SECTION III.—*Swearing and Filing Answers.*

Our order 88 provides that "A defendant who has been served with an office copy of a bill of complaint within the jurisdiction of the Court, is to answer or demur, within one month after the service of the office copy of the original or amended bill, as the case may be." (3rd. June 1853: Ord. 12. S. 2.).

By order 89 "Where a plaintiff amends his bill after answer, a defendant desiring to answer the same is to put in his answer thereto within seven days after service of the bill as amended." (3rd June, 1853; Ord. 12 S. 2.)

Order 90 provides that "The time within which a defendant, served out of the jurisdiction of the Court, with an office copy of a bill of complaint, shall be required to answer the same, or demur thereto, is as follows:—1 "If the defendant is served in the United States of America, in any city, town, or village, within ten miles of Lake Huron, the river St. Clair, Lake St. Clair, the river Detroit, Lake Erie, the river Niagara, Lake Ontario, or the river St. Lawrence, or in any part of Lower Canada, not below Quebec, he is to answer or demur within six weeks after such service.'"

2. "If served within any State of the United States of America, not within the limits above described, other than Florida, Texas, or California, he is to answer or demur within eight weeks after such service."

3. "If served within any part of Lower Canada, below Quebec, or in Nova Scotia, New Brunswick, or Prince Edward Island, he is to answer or demur within eight weeks after such service."

1 Per Lord Eldon, in *Curling* v. *Marquis Townshend*, 19 Ves. 628, 630.

4. "If served within any part of the United Kingdom, or of the Island of Newfoundland, he is to answer or demur within ten weeks after such service."

5. "If served elsewhere than within the limits above designated, he is to answer or demur within six calendar months after such service." (10th Jan., 1863; Ord. 7.)

By order 91 "Service of a bill of complaint within the jurisdiction of the Court upon a corporation aggregate, is to be effected by a personal service of an office copy thereof, on the warden, reeve, mayor, or clerk, in case of a municipal corporation, or on the president, manager, or other head officer, or the cashier, treasurer, or secretary at the head office, or at any branch or agency in Ontario, or on any other person discharging the like duties, in the case of any other corporation."

Order 92 provides that "Where a foreign corporation aggregate defendant to a bill of complaint, has no branch or agency in Ontario, service of the bill upon such corporation may be effected, out of the jurisdiction by personal service of an office copy thereof, on the warden, reeve, mayor, clerk, president, manager, or other head officer, or on the cashier, treasurer, or secretary of such corporation, or other person discharging the like duties. as in the case of service in Ontario."

It has been held that, under these orders, the time for answering is not changed by the consolidated orders. The period is four weeks, not a calendar month.[1]

A foreign company. having an office in Montreal and another in Toronto, an office copy bill, with an endorsement to answer in four weeks, served on the agent in Toronto was *held* sufficient service.[2]

The day on which an order that the plaintiff do give security for costs is served, and the time thenceforward, until and including the day on which such security is given, are not reckoned in the computation of time allowed a defendant to answer, or demur.[3]

1 *Irwin* v. *Lancashire Insurance Company*, 2 Cham. R. 291. 2 *Ibid.*
Ord. 409—and vacation is not to be reckened in the time allowed for answering either an original or amended bill, by order 408.

If a defendant, using due diligence, is unable to put in his answer to a bill within the time allowed, the Judge, on sufficient cause being shown, may, as often as he shall deem right, allow to such defendant such further time. and on such, if any, terms as to the Judge shall seem just.[1]

Applications for further time to answer are made by motion in Chambers or before the Deputy Registrar;[2] and should be supported by affidavit, that due dilligence has been used, and that further time is necessary.[3] If the defendant has not been interrogated, he or his solicitor must also swear, that he is advised and believes that it is necessary, for the purposes of his defence, that he should put in an answer, and that the application is not made for the purpose of delay.

An application for further time to answer, will not be granted *ex parte* :—Notice should be served on the plaintiff.[4] On a motion or leave to answer, notwithstanding an order *pro confesso*, the answer sought to be put on the files, should be produced to the Court duly sworn.[5] The Court is loth to debar a defendant from answering when he shows he has a good defence in the merits, and that to refuse would or might amount to a denial of justice. Leave was granted to a defendant, to answer under such circumstances, were after considerable delay on his part, he being put on terms as to costs; going to hearing and otherwise.[6]

The notice of motion must be served on the solicitor for the plaintiff two clear days before the return thereof, exclusive of Sunday,[7] and a copy of the bill, to be answered, must be produced at the hearing of the application. An affidavit in opposition to the application may be filed, and either party may use any affidavit previously filed. If the plaintiff's solicitor is not in attendance when the motion is called on, an order may be made in his absence, on a case for further time being shown, and subject to the production of the office copy of an affidavit of service on him of the summons.

1 See Order 412.
2 Under some special circumstances the application should be made to the Court: *Manchester and Sheffield Railway Company* v. *Workshop Board of Health*, 2 K. & J. 25. Orders 197, 36.
3 *Brown* v. *Lee*, 11 Beav. 162: 12 Jur. 687; in practice, however, further time is usually granted, on the first application, without an affidavit.
4 *Shanahan* v. *Fairbanks*, 1 Cham. R. 297.
5 *Merrill* v. *Ellis*, 1 Cham. R. 268.
6 *Ritchie* v. *Gilbert*, 3 Cham. R. 377
7 Ord. 263, 11. The summons must be served before two o'clock on a Saturday, and before four o'clock on any other day: Ord. 410, 411.

The order on the summons is drawn up in Chambers, or by the Deputy Registrar, and must be entered.

The written consent of the plaintiff's solicitor to further time being given will be acted on at Chambers, without his attendance; but care should be taken, in drawing up an order thereon, that the terms of the consent are strictly pursued; thus, a consent to further time "to answer," will not justify an order being drawn up for time "to plead, answer, or demur."[1]

The Judge is expressely empowered to impose terms, on an application for further time;[2] and, as a general rule, the costs of the first application will be made costs in the cause, but those of subsequent applications will be ordered to be paid by the defendant.

It may be well here to notice Order 196, which provides that "In all cases where a person, or party obtains an order from the Court, or from a Master, upon condition, and fails to perform or comply with the condition, he is to be considered to have waived or abandoned the order, as far as the same is beneficial to himself, and any other party or person interested in the matter, on the breach or nonperformance of the condition, may either take such proceedings as the order in such case may warrant, or such proceedings as might have been taken, if the order had not been made'.'[3]

Where the application for further time came on in open Court, and counsel certified that he required further time, it was given.[4] The necessity of the defendant being enabled to state his own defence, as well as give the discovery required by the plaintiff, will be taken into consideration.[5]

If the Court grants any further time to any defendant for pleading, answering or demurring to the bill, the plaintiff's right to move for a decree is, in the meantime, suspended.

The answer having been drawn, must be written, or printed, on paper of the same size and description as that on which bills are

1 *Ante*; *Newman* v. *White*, 16 Beav. 4; and see *Hunter* v. *Nockolds*, 2 Phil. 540: 12 Jur. 149.
2 Ord. 412, see on this point, *Zulueta* v. *Vinent*, 15 Beav. 575; see also, *Lee* v. *Read*, 5 Beav. 331, 336: 6 Jur. 1026.
3 See *Williams* v. *Atkinson*, 1 Cham. R. 34.
4 *Byng* v. *Clark*, 13 Beav. 92.
5 *York and North Midland Railway* v. *Hudson*, *ib.* 69.

printed.[1] Any schedules or documents annexed to the answer, must be written on paper of the same kind as the answer itself.[2] Dates and sums occurring in the answer should be expressed by figures instead of words.[3]

The Clerk of Records and Writs, or Deputy Registrar, may refuse to file an answer in which there is any knife erasure, or which is blotted so as to obliterate any word, or which is improperly written, or so altered as to cause any material disfigurement; or in which there is any interlineation: unless the person before whom the answer is sworn duly authenticates such interlineation with his initials, in such manner as to show that it was made before the answer was sworn, and so as to mark the extent of such interlineation.[4]

If, after the answer has been sworn, there is discovered any defect in the formal parts, such as the title or jurat, or any unauthenticated alteration or interlineation, the answer must be re-sworn, unless the plaintiff will consent that the answer be filed notwithstanding such defect. The consent may be indorsed by the plaintiff or his solicitor on the answer itself; or an order of course, may, with his consent, be obtained on a motion, of course allowing the answer to be filed; but the defect must be specified in the consent or order.[5]

As answers to be filed in England are sometimes required to be sworn here, it may be mentioned that, where the answer is taken in any place in Foreign parts under the dominion of Her Majesty,[6] it may be sworn before any judge, Court, notary public, or person legally authorised to administer oaths in such country or place respectively; and the Court of Chancery will take judicial notice of the seal or signature of such judge, Court, notary public, or person attached or subscribed to the answer.[7]

The jurat to an answer should be written, either at the end of the answer or of the schedule thereto;[8] it is usually placed at the right-

1 See Ord. 66, 67; but an answer not so written has been allowed to be filed, under special circumstances; the application in such case must always be made to the Court: *Harvey* v. *Bradley*, 10 W. R. 705, M. R.; *Whale* v *Griffiths*, 10 W. R. 571, L. J.J; *Morris* v. *Honeycombe*, 2 N. R. 16, V. C. W.

2 *Whale* v. *Griffiths*, *ubi. sup.*; under special circumstances, schedules not so written were allowed to be filed: S. C.

3 Ord. 66. 4 *Ante.*

5 Braithwaite's Pr. 48; but see *Pilkington* v. *Hinsworth*, 1 Y. & C. Ex. 612.

6 For a list of these places, see Braithwaite's Oaths in Chan. 18—20.

7 15 & 16 Vic. C. 86, s. 22. This section is retrospective: *Bateman* v. *Cook*, 3 De G. M. & G. 39; and see *Haggett* v. *Iniff*, 5 De G. M. & G. 910; 1 Jur.N. S. 49.

hand corner of the end of the answer. It may be written on either side of the page, or on the margin; but not on a page upon which no part of the statements in the answer appears. If there are many defendants who are sworn together, one jurat is sufficient. If the defendants are sworn at different times, there must be separate jurats for each defendant, or each set of defendants swearing. The jurat must correctly express the time when, and the place where the answer is sworn.[1] The defendant must sign his name or put his mark at the side of the jurat: not underneath it;[2] and the person before whom the answer is sworn must sign his name at the foot thereof. Any schedules should be signed, both by the defendant and the person before whom the answer is sworn.[3]

The answer of a person entitled to the privilege of peerage is taken upon his protestation of honour: that of a corporation aggregate, under their common seal; that of a Quaker, Moravian, ex-Quaker, ex-Moravian, or Separatist, upon his solemn affirmation.

If the defendant be blind, or a marksman, the answer must be first truly, distinctly, and audibly read over to him, either by the person before whom it is sworn or some other person: in the first case, it must be expressed in the jurat that the answer was so read over, and that the signature or mark of the defendant was affixed in the presence of the person taking the answer; in the second case, such other person must attest the signature or mark, and must be first sworn that he has so read over the answer, and that the signature or mark was made in his presence; and this must be expressed in the jurat.[4]

In the case of a foreigner, not sufficiently versed in the English language to answer in that tongue, and desiring to answer in a foreign language, an order, of course to do so must be obtained, on motion. The answer must be engrossed on paper, in the foreign language; and the defendant, together with an interpreter, must then attend before a person authorised to administer oaths in Chancery; the interpreter is first sworn in English that he well understands

1 *Ibid.* Order 130.
2 *Anderson* v. *Stather*, 9 Jur. 1085.
3 See *London* v. *London*, 2 Cham. R. 40. The omission in the jurat of the name of the deponent vitiates the affidavit: *Dickey* v. *Heron*, 1 Cham. R. 293.
4 The attestation may be written near the jurat: Braithwaite's Pr. 380, 396; and see *Wilton* v. *Clifton*, 2 Hare, 535: 7 Jur. 215.

the foreign language, and that he will truly interpret the oath about to be administered to the defendant; and the ordinary oath is next administered to the latter. The defendant must previously sign his name opposite the jurat; and the interpreter should do the same. Before the answer can be filed, it is necessary to obtain an order, of course, on motion, appointing the interpreter or another person to make, and swear to the truth of a translation thereof, and directing the answer to be filed, with such translation annexed.[1] The translator must then attend with the answer, translation and order before a person authorised to administer oaths in Chancery, and be sworn to the truth of the translation; after which, the answer and translation will be filed at the Record and Writ Clerks', or Deputy Registrar's Office on production of the order.[2]

A foreigner may also answer in English, although ignorant of that language. No order to do so is necessary; but where the defendant is not sufficiently versed in English to understand the language of the answer, and of the oath, the answer must be interpreted to him by some person skilled in a language understood by both; after which, both must attend before a person authorised to administer an oath in Chancery. The interpreter must first be sworn that he well understands the foreign language; that he has truly, distinctly and audibly interpreted the contents of the answer to the defendant; and that he will truly interpret the oath about to be administered to him; after which, the ordinary oath is administered to the defendant, through the interpreter.[3] The defendant must, and the interpreter should, first sign the answer, opposite the jurat.

In all the above cases, the jurat must express that the necessary formalities have been observed.

Formalities of a similar nature, by which it may appear that the defendant fully understands the contents of his answer before he is sworn to it, must be adopted where the defendant is deaf, or deaf and dumb, and in every like case.[4] In a case, however, which occurred in the 18th Geo. II. (1745), a different course appears to have been adopted: for there the Court, on motion (the defendant

1 *Simmonds* v. *DuBarre*, 3 Bro. C. C. 263; *Lord Belmore* v. *Anderson*, 4 Bro. C. C. 90.
2 Braithwaite's Pr. 45.
3 *St. Katharine's Dock Company* v. *Mantzgu*, 1 Coll. 94; 8 Jur. 237; Braithwaite's Pr. 45, 389.
4 *Reynolds* v. *Jones*, Trin Term, 181 ; Braithwaite's Pr. 383, 395.

being deaf, and incapable of giving instructions for his answer), ordered a commission for taking the answer to issue in the old way with the bill annexed, in order that the commissioners themselves might endeavour to take the answer.[1]

It is an universal principle, in all Courts, that any irregularity in a jurat may, unless expressly waived, be objected to in any stage of a cause. This does not depend upon any objection which the parties in a particular cause may waive, but upon the general rule that the document itself shall not be brought forward at all, if in any respect objectionable with reference to the rules of the Court;[2] and therefore a motion to take an answer off the file, on the ground of such irregularity was allowed, notwithstanding the plaintiff had taken an office copy of the answer.[3] If, by any accident, the jurat is cancelled, the answer must be resworn, and a new jurat added.[4]

Where the friends of an infant wish to defend the suit on his behalf, an order appointing a guardian *ad litem* may, as we have seen,[5] be obtained on motion of course; and where the defence of the infant is by an answer or plea requiring to be upon oath, the plea or answer must be sworn to by the guardian, unless an order has been obtained to take it without oath. The guardian, however, only swears to his belief in the truth of the defence of the infant.[6]

We have before seen, that a person who has been found a lunatic by inquisition, answers by his committee, and that, in such case, it is not necessary that there should be any order appointing a guardian, unless there be a conflict of interest between the committee and the lunatic: in which case, a guardian *ad litem* should be appointed.[7] A person of weak or unsound mind, not so found by inquisition, answers by his guardian, who is appointed in the same manner as the guardian *ad litem* of an infant defendant;[8] and, as in the case of infants, the guardian only swears to his belief in the truth of the defence, where an oath is required.

With respect to married women, we have before seen,[9] that where

1 *Gregory* v. *Weaver*, 2 Mad. Prac. 363.
2 *Pilkington* v. *Himsworth*, 1 Y & C. Ex. 612, 616.
3 *Ibid.*, and see *ante*.
4 *Attorney-General* v. *Hudson*, 9 Hare, App. 63; S. C. *nom. Attorney-General* v. *Henderson*, 17 Jur. 205, and see *Attorney-General* v. *Donnington Hospital*, 17 Jur. 206, V. C. W.
5 *Ante*.
6 Braithwaite's Pr. 393. 7 *Ante*.
8 *Ante*; Braithwaite's Pr. 393, n. 9 *Ante*.

a husband and wife are defendants to a bill, neither of them can regularly put in an answer without the other, except under an order granted for that purpose. Where, however, the wife is defendant to a bill filed by her husband,[1] or, being judicially separated, or, having obtained a protection order, is sued as a *feme sole*,[2] no order is requisite. Where she answers separately, under an order, her time for answering runs from the date of the order.[3]

Where a married woman is an infant, her answer cannot be taken, either jointly or separately, until a guardian has been assigned to her.[4]

An answer is filed in the Record and Writ Clerk's or Deputy Registrar's Office, in the same manner as an affidavit; and is not considered of record until filed.

The name and place of business or residence, as the case may be, of the solicitor or party filing the answer, and his address for service, if any, must be indorsed thereon, as in the case of other pleadings and proceedings.[5]

Unless the plaintiff has taken some step which prevents its reception, an answer will be filed by the Record and Writ Clerk or Deputy Registrar, after the expiration of the time for putting it in, where it is put in by a defendant who has been required to answer the bill, whether original or amended, or where, the plaintiff having amended his bill without requiring an answer, it is put in by a defendant who has already answered the bill. In all other cases, an answer will not be received, after the expiration of the time within which it ought to have been put in, except under the authority of an order: which must be produced at the time the answer is presented for filing. Such order must be applied for by notice of motion.

The certificate of the Record and Writ Clerk or Deputy Registrar is conclusive evidence as to the time at which the answer was filed.

Our order 46 provides that "Where a party or a solicitor causes

1 *Ante*; *Earl* v. *Ferris*, 19 Beav. 67: 1 Jur. N. S. 5. 2 *Ante*.
3 *Ante*; *Jackson* v. *Haworth*, 1 S. & S. 161: Braithwaite's Manual, 11, 12.
4 *Colman* v. *Northcote*, 2 Hare, 147: 7 Jur. 528.
5 Ord. 40, 41.
6 *Beaven* v. *Burgess*, 10 Jur. 63, V. C. E.

an answer, demurrer or replication to be filed, he is to give notice thereof on the same day, to the solicitor of the adverse party or to the adverse party himself if he act in person." Notwithstanding this order requiring notice to be served of filing any pleading, a party cannot move to take such pleadings off the files where no notice of filing has been served.[1]

The omission to give due notice of having filed the answer will not, however, render the latter inoperative; thus it will not deprive the defendant of his right to move to dismiss the bill for want of prosecution, at the expiration of the period allowed for that purpose, from the date of filing the answer.[2] It would seem that, in such a case, the time allowed the plaintiff for taking the next step in the cause will, on his motion, be extended, so as to give him the benefit of the time he would otherwise have lost in consequence of the omission.[3]

Where a defendant's solicitor files an answer, but neglects to give notice thereof, the Court will not order it to be taken off the files, but will extend to the plaintiff the time for taking the next step in the cause, by such time as has been lost by the neglect in giving notice.[4]

On receiving notice of the filing of the answer, the plaintiff should demand in writing, from the defendant's solicitor, or the defendant himself if acting in person, a copy of it.

Order 548 provides that "A party requiring a copy of any pleading or affidavit, is to make a written application for the same to the solicitor of the party by whom it has been filed, or on whose behalf it is to be used; and where the party has no solicitor, then to the party himself." And order 549, that "Where an application is made for a copy of any pleading or affidavit, it is to be delivered within forty-eight hours from the time of the demand; and any further time which may elapse before the delivery, is not to be computed against the party demanding the same."

1 *McDougall* v. *Bell*, 9 U. C. L. J. 133.
2 *Jones* v. *Jones*, 1 Jur. N. S. 863; 3 W. R. 638, V. C. S.; and see *Lowe* v. *Williams*, 12 Beav. 482, 484.
3 *Wright* v. *Angle*, 6 Hare, 107, 109; *Lord Suffield* v. *Bond*, 10 Beav. 146, 153; *Lowe* v. *Williams*, and *Jones* v. *Jones*, *ubi sup.*; *Lloyd* v. *Solicitors' Life Assurance Company*, 3 W.R. 648, V. C. W.; see, however, *Matthews* v. *Chichester*, 5 Hare, 207, 209; overruled on appeal, 11 Jur. 49, L. C.
4 *Parker* v. *Brown*, 3 Ch. R. 354.

The order to furnish office copies of pleadings is imperative, and the Court will enforce compliance with it. Where a defendant had answered, and an office copy answer had been demanded, but had not been furnished, the defendant afterwards moved to dismiss the bill. The order was refused with costs. The plaintiff then moved that the defendant be ordered to furnish the copy of answer, and the motion was granted with costs.[1] If office copies of affidavits are demanded, it is imperative on the parties filing the affidavits to furnish them, and the costs of any delay occasioned by his not doing so, falls on the party making such default.[2]

An answer to an amended bill, is in every respect similar to, and is considered as part of the answer to the original bill; and if a defendant, in an answer to an amended bill, 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 the defendant may be ordered to pay the costs occasioned by the introduction of such impertinent matter.

Answers to amended bills, must be prepared, signed, taken and filed, in the same manner as answers to original bills.[3]

SECTION IV.—*Amending Answers—and Supplemental Answers.*

After an answer has been put in upon oath, the Court will not, for obvious reasons, readily suffer any alteration to be made in it. There are, however, many instances in the books in which it appears that the Court upon special application, has allowed the defendant to reform his answer. Thus, where, in an answer to a tithe bill, the defendant had sworn that a certain close contained about nine acres, he was permitted to amend it by stating the close to contain seventeen acres, even though issue had been joined;[4] so where, owing to the mistake of the engrossing clerk, the words "*her* shares" had been introduced into an answer instead of "*ten* shares," the answer was

1 *Totten* v. *McIntyre*, 2 Cham. R. 80.
2 *Burrowes* v. *Hainey*, 2 Cham. R. 186.
3 See *ante*.
4 *Berney* v. *Chambers*, Bunb. 248; but see *Montague* v. ——, cited *ib.* n.; and 2 Gwil. 674, n. (*b*).

allowed to be taken off the file and amended, though a service had been made ;[1] and where there has been a mistake in the title of the answer, an amendment of it has been permitted,[2] even though opposed by the plaintiff.[3]

The Court has also allowed a defendant to amend his answer where new matter has come to his knowledge since it was put in,[4] or in cases of surprise, as where an addition has been made to the draft of the answer after the defendant has perused it.[5] In like manner, where a plaintiff, having drawn the defendant into an agreement, whereby, for £300, he was to relinquish to the plaintiff all his right and interest in a certain estate which had been left to him, filed a bill to have the agreement performed, to which the defendant put in an answer confessing the agreement, and submitting to have it performed, but, afterwards discovering that the estate was of several thousand pound's value, he applied for leave to take his answer off the file, and to put in another, leave was granted.[6] The Court has also permitted a defendant to amend an answer, by limiting the admission of assets contained therein, where it was clearly established that such admission had been made by mistake, and through the carelessness of the solicitor's clerk.[7]

The Court, however has never permitted amendments of this nature, 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 himself, permission to amend was refused.[8] 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 per-

1 *Countess of Gainsborough* v. *Gifford*, 2 P. Wms. 424, 427.
2 *White* v. *Godbold*, 1 Mad. 269 ; *Peacock* v. *Duke of Bedford*, 1 V. & B. 186 ; *Thatcher* v. *Lambert*, 5 Hare, 228.
3 *Attorney-General* v. *Corporation of Worcester*, 2 Phil. 3 : 1 C. P. Coop. t. Cott. 18.
4 *Patterson* v. *Slaughter*, Amb. 292 ; *Wells* v. *Wood*, 19 Ves. 401 ; and see remarks on *Patterson* v. *Slaughter*, in *Fulton* v. *Gilmore*, 1 Phil. 528.
5 *Chute* v. *Lady Dacre*, 1 Eq. Ca. Ab. 29, pl. 4.
6 *Alpha* v. *Payman*, 1 Dick. 33.
7 *Dagly* v. *Crump*, *ib.* 85 ; and see *Cooper* v. *Uttoxeter Burial Board*, 1 H. & M. 680.
8 *Rawlins* v. *Powel*, 1 P. Wms. 298; see, however, *Brown* v. *Lake*, 1 De G. & S. 144.

mitted 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.[1]

The Court will also refuse to permit an amendment of an answer, after an indictment for perjury preferred or threatened, even though it consider it to be clear that the defendant did not intend to perjure himself, and had no interest in so doing.[2]

From the above cases it appears, that it was formerly the general practice of the Court, if it saw a sufficient ground for so doing, to permit the defendant to amend his answer. Lord Thurlow however, as it seems, introduced a better course in cases of mistake: not taking the answer off the file, but permitting a sort of supplemental answer to be filed, and by that course leaving to the parties the effect of what has been sworn before, with the explanation given by the supplemental answer.[3]

This practice has been since adopted, in all cases in which it is wished to correct a mistake in an answer as to a matter of fact;[4] and it is not confined to cases 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,[5] even though the information was obtained by a violation of professional confidence.[6] And where a defendant has 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.[7] Again, where, subsequently to the filing of the answer, events had occurred which the defendant was advised ought, for the purposes of his defence, to appear on the record, he was allowed to state them by means of a supplemental answer.[8]

1 *Pearce* v. *Grove*, Amb. 65: 3 Atk. 522.
2 *Earl Verney* v. *Macnamara*, 1 Bro. C. C. 419; *Phelps* v. *Prothero*, 2 De G. & S. 274.
3 Per Lord Eldon, in *Dolder* v. *Bank of England*, 10 Ves. 285; and see *Jennings* v. *Merton College* 8 Ves. 79; *Wells* v. *Wood*, 10 Ves. 401; *Phelps* v. *Prothero*, 2 De G. & S. 274: 12 Jur. 733.
4 *Strange* v. *Collins*, 2 V. & B. 163, 167; *Taylor* v. *Obee*, 3 Pri 83; *Ridley* v *Obee*, Wightw 82; *Swallow* v. *Day*, 2 Coll. 133: 9 Jur. 805; *Bell* v. *Dunmore*, 7 Beav. 283, 287; *Cooper* v. *Uttoxeter Burial Board*, 1 H. & M. 680.
5 *Jackson* v. *Parish*, 1 Sim. 505, 509; *Tidswell* v. *Bowyer*, 7 Sim. 64; see *Const* v. *Barr*, 2 Mer. 57, 60; *Frankland* v. *Overend*, 9 Sim. 365: 2 Jur. 886; *Fulton* v. *Gilmore*, 8 Beav. 154; 9 Jur. 1; 1 Phil. 522, 528: 9 Jur. 265; *Chadwick* v. *Turner*, 34 L. J. Ch. 6, M. R.
6 *Raincock* v. *Young*, 16 Sim. 122.
7 *Nail* v. *Punter*, 4 Sim. 474, 483.
8 *Stamps* v. *Birmingham and Stour Valley Railway Company*, 2 Phil. 673, 677

A joint answer having been put in by a corporation under the corporate seal, and by their officer under oath, the defendants afterwards applied for leave to file a supplemental answer, alleging a material mistake in the original answer: and the Court granted leave to the corporation to file the supplemental answer on terms, but refused such leave to the officer, his explanation of the alleged mistake being unsatisfactory.[1] A defendant filed his answer in October 1857, and in August 1858 plaintiff filed a replication. An application by the defendant in February 1859 to be allowed to file a supplemental answer, for the purpose of setting up certain grounds of defence omitted from, but not in anywise contradicting the original answer, was granted on payment of costs, and the defendants' undertaking to go to a hearing at the next term.[2] A supplemental answer was allowed to be filed upon terms, where new matter has been discovered since the former answer was filed; the application being accounted for.[3] A supplemental answer will be allowed to be filed to correct an error in the original answer, or state facts discovered since answer filed, although some delay has taken place since the discovery of the new matter, and all the more readily if the plaintiff has himself not been urgent in pressing the cause.[4]

Although the Court will, in cases of mistake, or other cases of that description, permit a defendant to correct his answer by a supplemental answer, it always does so with great difficulty, where an addition is to be put upon the record prejudical to the plaintiff; though it will be inclined to yield to the application, if the object is to remove out of the plaintiff's way the effect of a denial, or to give him the benefit of a material admission.[5] Therefore, where the application was made for the purpose of enabling the defendant to raise the Statute of Limitations as a defence, leave to file a supplemental answer was refused;[6] and where the defendant had, by his original answer to a bill for the specific performance of a contract, admitted that he took possession of the whole property in pursuance of the contract, but afterwards applied for leave to put in a supplemental answer to limit the admission to part of the

1 *Walsh* v. *DeBlaquiere*, 12 Grant, 107, and see *Torrance* v. *Crooks*, 1 Grant. E. & A. R. 230.
2 *Cherry* v. *Morton*, 1 Cham. R. 25; and see *Weir* v. *Mathieson*, 1 Cham. R. 238.
3 *McKinnon* v. *McDonald*, 2 Cham. R. 23.
4 *Worts* v. *How*, 2 Cham. R. 111; and see *McKinnon* v. *McDonald*, 13 Grant. 152.
5 *Edwards* v. *M'Leay*, 2 V & B. 256; Lord Eldon, in this case, as well as in *Strange* v. *Collins*, *ib.* 166, appears to have been of opinion, that a supplemental answer ought not to have any effect upon an indictment for perjury upon the original answer; but see *King* v. *Carr*, 1 Sid. 418: 2 Keb. 516.
6 *Percival* v. *Caney*, 14 Jur. 473, V. C. K. B.

premises only, upon affidavits of mistake, the motion was refused: unless the defendant would state upon oath, that when he swore to the original answer, he meant to swear in the sense in which he, by the application, desired to be permitted to swear to it.[1]

Order 127 provides that "The Court may permit a supplemental answer to be filed at any period of the suit, for the purpose of putting new matter in issue, in furtherance of justice, and upon such terms as may seem proper." And order 128 that "Leave to file a supplemental answer is to be applied for by motion. The notice of motion is to set forth the proposed answer, and state the grounds upon which the indulgence is asked: and it must be supported by such evidence as satisfies the Court of the propriety of permitting the supplemental answer to be filed, under all the circumstances, having reference to the subject matter of the answer and the stage of the cause in which the application is made." In a suit of foreclosure after the cause had been at issue for more than three years, but no hearing or examination of witnesses had taken place, the Judge in Chambers allowed the personal representative of a deceased party to the cause, who has purchased from the mortgagor, and against whom the bill had been taken *pro confesso* to put in an answer, setting up what, in the opinion of the learned judge, was a meritorious defence.[2] Where service has been effected on an agent and it can be shown that the time allowed for answering is insufficient to enable him to communicate with his principal and to get in the answer, on an affidavit of a good defence on the merits, a defendant will be granted leave to file his answer, although an order *pro confesso* has been taken.[3]

An application for leave to file a supplemental answer is made upon motion. The notice of motion must be served on the plaintiff, and must specify the facts intended to be stated in the proposed supplemental answer, and be supported by affidavit verifying the truth of the proposed supplemental answer, specifically stating the facts intended to be placed on the record,[4] and showing a sufficient reason why they were not introduced into the original answer.[5]

1 *Livesey* v. *Wilson*, 1 V & B. 149; see also *Greenwood* v. *Atkinson*, 4 Sim. 54, 64
2 Anonymous, 12 Grant. 51.
3 *Irwin* v. *Lancashire Insurance Company*, 2 Cham. R. 293.
4 *Curling* v. *Marquis Townshend*, 19 Ves. 628, 631; *Smith* v. *Hartley*, 5 Beav. 432; *Haslar* v. *Hollis*, 2 Beav. 236; *Fulton* v. *Gilmore*, 8 Beav. 154, 9 Jur. 1; 1 Phil. 522, 527: 9 Jur. 265.
5 *Tennant* v. *Wilsmore*, 2 Anst., 362; *Scott* v. *Carter*, 1 Y. & J. 452; *Podmore* v. *Skipwith*, 2 Sim. 565.

The defendant must also, it seems, produce a full copy of the intended supplemental answer,[1] for the inspection of the plaintiff.[2]

A motion being made on notice for leave to file a supplemental answer, *Churten* v. *Frewen* 1. S. R. Eq., cases 238 was referred to where a similar application in Chambers was refused on the ground that the motion should be made in Court. The question first to be decided was, whether the old practice of applying in Chambers in these cases (*Cherry* v. *Morton* U. C. Cham. R. 25) has not been overruled by English decisions. The secretary, after consulting with the judges, held that the motion must be brought on in Court, under the authority of *Churton* v. *Frewen*.[3]

In making an application for leave to file a supplemental answer, the defendant must also make a case, shewing that justice requires that he should be permitted to alter the defence already on record ; and even where defendant applied for leave to file a supplemental answer for the purpose of making an admission in favor of the plaintiff, upon an affidavit that, from certain circumstances which had since occurred, he was satisfied he ought to have admitted a fact which he had denied, Lord Eldon held, that the affidavit ought to have stated that, at the time of putting in the answer the defendant did not know the circumstances upon which he made the application, or any other circumstances upon which he ought to have stated the fact otherwise.[4]

Where a defendant has obtained permission to file a supplemental answer, for the purpose of correcting a mistake in his original answer, he must confine a supplemental answer strictly to the correction of the mistake sworn to. 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. [5]

Where a defendant has, at the time of putting in his original answer, 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.[6]

1 *Bell* v. *Dunmore*, 7 Beav. 283 ; *Fulton* v. *Gilmore*, *ubi sup.*
2 *Fulton* v. *Gilmore*, *ubi sup.*
3 *Attorney-General* v. *Casey*, 2 Cham. R.
4 *Wells* v. *Wood*, 10 Ves. 401.
5 *Strange* v. *Collins*, 2 V. & B. 163, 167.
6 *Berkley* v. *Ryder*, 2 Ves. S. 533, 537.

There appears to be no particular limit to the time within which an application for leave to file a supplemental answer, to correct a mistake in an original answer, will be complied with: provided the cause is in such a state that the plaintiff may be placed in the same situation that he would have been in, had the answer been correct at first. Accordingly, we find several instances in the books in which such applications have been granted after replication,[1] and even after the cause has been set down, and in the paper for hearing.[2] Where, however, the plaintiff cannot be placed in the same situation that he would have been in, had the defence been stated on the record in due time, the Court will not permit a supplemental answer to be filed. Therefore, where, after the cause had been set down for hearing, an application was made for leave to file a supplemental answer, which set up a totally new defence, while it admitted the facts as stated in the original answer to be true, the Court refused the motion with costs.[3]

Order 129 provides that "At the hearing of a cause, the Court may permit a defendant to introduce new matter of defence by supplemental answer, under oath or otherwise, in the same manner as the Court permits an amendment of the bill at the hearing."

But although the rule of practice now is, that, in cases of mistake in the statement 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 amending the answer, may still be pursued in cases of error or mistake in matters of form. Thus, in *White* v. *Godbold*,[4] where the title of an answer was defective, a motion by the defendant to take it off the file and amend and reswear it, was granted; and so where, in the title of an answer, the name of the plaintiff was mistaken, a similar order was made.[5] The addition of the name of a party omitted in the title has also been permitted.[6] Where, however, an anwer had been prepared

1 *Jackson* v. *Parish*, 1 Sim. 505, 509; *Paincock* v. *Young*, 16 Sim. 122; *Parsons* v. *Hardy*, 21 L. J. Ch. 400, V. C. T.
2 *Fulton* v. *Gilmore*, 8 Beav. 154, 158: 9 Jur. 1: 1 Phil. 522, 525, 530: 9 Jur. 265; *Chadwick* v. *Turner*, 34 L. J. Ch. 62, M. R.
3 *McDougal* v. *Purrier*, 4 Russ. 486.
4 1 Mad. 269; the order was, however, made by consent in this case.
5 *Peacock* v. *Duke of Bedford*, 1 V. & B. 186; *Woodger* v. *Crumpton*, 1 Fowl. Ex. Pr. 388; *Lloyd* v. *Mytton*, *ib.* 389; *Keen* v. *Stanley*, *ib.*; *Rabbeth* v. *Squire*, 10 Hare, App. 3; but see *Fry* v. *Mantell*, 4 Beav. 485: S. C. *nom. Fry* v. *Martel*, 5 Jur. 1194.
6 *Wright* v. *Campbell*, 1 Fowl. Ex. Pr. 389.

for certain defendants, but only sworn to by some of them, it was directed to be received as the answer of those who had sworn it, without striking out the names of those who had not.[1] A defendant has, also, been permitted to add the schedules referred to in his answer, where they had been accidentally omitted;[2] and in several cases, where verbal inaccuracies have crept into answers, they have been ordered, at the hearing, to be struck out.[3] In like manner, where, in filing an answer, one skin had, by accident, been omitted, leave was given to the defendant to take it off the file, for the purpose of rectifying the omission, upon condition, however, of his reswearing it immediately.[4] A similar order was made, in a case where the defendant had omitted to sign some of the skins;[5] and, in general, the Court will not permit such amendments as those above mentioned, without making it part of the order that the answer shall be resworn, or, in case of a peer, again attested upon honour.[6] The Court has also permitted an answer to be amended, by adding to the record the name of the counsel who signed the draft.[7]

An order to amend an answer must state the particular amendment to be made; and may, by consent, be obtained on motion, as of course.[8] If the plaintiff will not consent, it seems that a special application must be made to the Court, on motion of which notice must be given, specifying the proposed amendment.[9]

The amendment will be made by the Clerk of Records and Writs, or Deputy Registrar, on the draft of the answer, as amended, together with the order to amend, being left with him for that purpose. Any copies of the answer which may have been taken should also be left, in order that they may be altered, so as to agree with the amended answer.[10]

1 *Done* v. *Read*, 2 V. & B. 310; and see *Lyons* v. *Read*, Braithwaite's Pr. 51; see also, *ante*.
2 *Bryan* v. *Truman*, 1 Fowl. Ex. Pr. 389.
3 *Ellis* v. *Saul*, 1 Anst. 332, 338, 341; and see *Jesus College* v. *Gibbs*, 1 Y. & C. Ex. 145, 162.
4 *Browning* v. *Sloman*, 6 Law J. N. S. Ex. Eq. 48: 1 Jur. 58.
5 *Lord Moncaster* v. *Braithwaite*, Younge, 382.
6 *Peacock* v. *Duke of Bedford*, 1 V. & B. 186.
7 *Harrison* v. *Delmont*, 1 Pri. 108; *Whitehead* v. *Cunliffe*, 2 Y. & C. Ex. 3; *ante*.
8 Braithwaite's Pr. 312; and see Wyatt's Pr. 19; Hinde, 206.
9 *Attorney-General* v. *Corporation of Worcester*, 2 Phil. 3: 1 C. P. Coop. t. Cott. 18.
10 Braithwaite's Pr. 312.

SECTION V.—*Taking Answers off the File*

If any irregularity has occurred, either in the frame or form of an answer, or in the taking or filing of it, the plaintiff may take advantage of such irregularity, by moving to take the answer off the file. Instances in which such motions may be made have been before pointed out.[1] If, however, the plaintiff intends to apply to the Court to take an answer off the file for irregularity, he must do so before he accepts the answer: otherwise, he will have waived his right to make the application;[2] unless in the case of an irregularity in the jurat, or of an omission of the oath or attestation of honor of the defendant, without an order to warrant such omission: in which cases, as we have seen, there must be an express waiver of the irregularity.[3]

The Court has sometimes also, as before stated,[4] allowed an answer to be taken off the file on an application on the part of the defendant, for the purpose of enabling him to correct a mistake in its form; but it does so only, as we have seen, upon condition that the defendant shall immediately cause the correction to be made and reswear and file the answer; and it will never make such an order where the plaintiff can be at all prejudiced by it.

Where an answer is evidently, on the face of it, evasive, the Court will order it to be taken off the file.[5]

The application to take an evasive answer off the file is made by motion, of which notice must be given to the defendant. The defendant will be ordered to pay the costs of the motion, and the costs of a copy of the document filed as the answer, and all other costs properly incurred by the plaintiff in consequence of the filing of the evasive answer.[6]

Lastly, it may be here observed, that the Court will, upon the consent of all parties, order pleadings, affidavits, and other docu-

1 *Ante*; and see *Fry* v. *Mantell*, 4 Beav. 485: S. C. *nom. Fry* v. *Martel*, 5 Jur. 1194; *Raistrick* v. *Elsworth*, 12 Jur. 782, V. C. K. B.; *Liverpool* v. *Chippendall*, 14 Jur. 391, V. C. E.

2 Taking an office copy of the answer, does not seem to be an acceptance for this purpose: *Fry* v. *Mantell*, *ubi sup.*; and see *Woodward* v. *Twimaine*, 9 Sim 301; *Attorney-General* v. *Shield*, 11 Beav. 441, 445: 13 Jur. 330.

3 *Ante*. 4 *Ante*.

5 *Lynch* v. *Leeesne*, 1 Hare, 626, 631: 7 Jur. 35; *Read* v. *Barton*, 3 K. & J. 166: 3 Jur. N. S. 263; see also *Tomkin* v. *Lethbridge*, 9 Ves. 179; *Smith* v. *Serle*, 14 Ves. 415; *Brooks* v. *Purton*, 1 Y. & C. C. C. 278; see *contra*, *Marsh* v. *Hunter*, 3 Mad. 437; *White* v. *Howard*, 2 De G. & S. 223.

6 *Read* v. *Barton*, 3 K. & J. 166; 3 Jur. N. S. 263.

ments to be taken off the file, where they contain matter which is scandalous, or which it is desirable should not remain recorded.[1]

Filing a replication waives all irregularities in any answer previously filed, but does not waive scandal therein. Where an answer is, in the opinion of the Court, *prima facie* scandalous on its face, the onus rests with the party filing it to show its relevancy to the question raised by the bill; in default of this being done the answer was ordered to be taken off the files for scandal, with costs.[2]

CHAPTER XIV.

THE JOINDER OF SEVERAL DEFENCES.

All or any of the several modes of defence before enumerated may be joined in the defence to a bill; thus a defendant may demur to one part of the bill, answer to another, and disclaim as to another.[3] A defendant may also, as we have seen, put in separate and distinct demurrers to separate and distinct parts of the same bill.[4] When this species of defence is adopted, the same rules which have been before laid down with reference to each mode of defence when adopted singly, must be observed when the same modes of defence are resorted to collectively. Lord Redesdale lays it down, that "all these defences must clearly refer to separate and distinct parts of the bill; for a defendant cannot answer to any part to which he has demurred. Nor can the defendant, by answer, claim what, by disclaimer, he has declared he has no right to. An answer will, therefore, overrule a demurrer; and if a disclaimer and answer are inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer."[5]

In all cases coming within these rules, the principles above quoted from Lord Redesdale apply; and, in addition thereto, it is to be remarked that, where a defendant adopts this mode of defence, not only should each defence in words be applicable to the distinct

1 *Tremaine* v *Tremaine*, 1 Vern. 189; *Walton* v. *Broadbent*, 3 Hare, 334; *Jewin* v. *Taylor*, 6 Beav. 120; *Clifton* v. *Bentall*, 9 Beav. 105; *Barritt* v. *Tidswell*, 7 W. R. 85, V. C. K.; *Makepeace* v. *Romieux*, 8 W. R. 687, V. C. K.; see also *Goddard* v. *Parr*, 24 L. J. Ch. 783, V. C. K.; *Kerniek* v. *Kernick*, 12 W. R. 335, V. C. W.

2 *Ruttan* v. *Smith*, 1 Cham. R. 184.

3 Ld. Red. 319. 4 *Ante*. 5 Ld. Red. 319.

part of the bill to which it professes to apply, but that it should also in substance, relate peculiarly to that part of the bill which it professes to cover; so that a defence, in words applicable to part of a bill only, but in reality applicable to the whole bill, is not good, and cannot stand in conjunction with another distinct defence applicable and applied to another distinct part of the bill.[1] Where, therefore, a defendant put in a joint demurrer and plea, each of which went to the whole bill, the demurrer was overruled;[2] and where a defendant, as to part of a bill, put in a plea that there was no outstanding term, and a demurrer as to the rest on the ground that the plaintiff had no title, Lord Langdale, M. R., although he held the plea to be good, was of opinion that the demurrer, being applicable to the whole bill, and consequently that part of it which was covered by the plea, was bad.[3]

When a demurrer is to part only of the bill, and is accompanied by an answer to the remainder, it should be entitled "The demurrer of *A. B.*, the above-named defendant, to part of the bill, and the answer of the said defendant to the remainder of the bill of complaint of the above-named plaintiff."[4]

Where a defence of this nature has been put in, the first thing is to dispose of the demurrer, and for this purpose, the demurrer must be set down for argument in the usual way.[5] The plaintiff must however, be careful not to amend his bill, before the demurrer has been disposed of: otherwise, it will be held sufficient.[6]

The proper course to be pursued, where a partial demurrer has been allowed to a bill, appears to be, 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, *ore tenus*, for want of parties, has been allowed, the bill may be amended by adding the necessary parties, or stating them to be out of the jurisdiction of the Court.[7]

1 *Crouch* v. *Hickin*, 1 Keen, 385, 389.
2 *Lowndes* v. *Garnett & Moseley Gold Mining Company*, 2 J. & H. 282: 8 Jur. N. S. 694; see also *Mansell* v. *Feeney*, 2 J. & H. 313.
3 *Crouch* v. *Hickin*, *ubi sup.* His Lordship, however, allowed a demurrer *ore tenus*, for want of equity, to that part of the bill which was not covered by the plea.
4 *Tomlinson* v. *Swinnerton*, 1 Keen, 9, 13; Braithwaite's Pr. 43.
5 *Ante.* 6 *Ante.*
7 *Taylor* v. *Bailey*, 3 M. & C. 677, 683: 3 Jur. 308; *Foster* v. *Fisher*, 4 Law J., N. S. 237, M. R. In *Osborne* v. *Jullion*, 3 Drew. 596, 609, the Court, on allowing a demurrer, refused leave to amend the bill.

CHAPTER XV.

DISMISSING BILLS, OTHERWISE THAN AT THE HEARING, AND STAYING PROCEEDINGS.

SECTION I.—*Generally.*

Before a defendant has answered, the plaintiff may dismiss the bill, as against him, without costs: on an order to be obtained upon motion of course.[1] Where, however, such an order was obtained in breach of faith of a compromise entered into with the defendant, it was discharged with costs.[2]

Our practice seems to be different, for it has been held that after service of a bill on a defendant the plaintiff cannot dismiss his bill on *precipe* against such defendant without costs, even though no answer has been filed.[3] Esten, V. C., giving as a reason that the defendant may have incurred costs by instructing solicitors and counsel.

After answer, and before decree, the plaintiff may, generally, obtain an order to dismiss the bill, but only upon payment of costs: unless the parties, against whom it is to be dismissed, consent to its being dismissed without costs.[4] The order may be obtained on *precipe*; and if the defendant's consent is required, it is signified by the appearance of counsel on his behalf on the motion, or by his solicitor subscribing a consent. The application is usually made *exparte.*[5] Where, however, there has been any proceeding in the cause which has given the defendant a right against the plaintiff, the plaintiff cannot dismiss his bill as of course; thus, where a general demurrer had been overruled on argument, Lord Cottenham was of opinion that the plaintiff could not dismiss his bill as of course: the de-

1 *Thompson* v. *Thompson*, 7 Beav. 350; Wyatt's P. R. 60, 61; Braithwaite's Pr. 566. For form of order, see Seton, 1277, No. 1.
2 *Betts* v. *Barton*, 3 Jur. N. S. 154, V. C. W.
3 *Coate* v. *Macbeth*, 1 Cham R. 200.
4 *Dixon* v. *Parks*, 1 Ves. J. 402; Wyatt's Pr. 61; Braithwaite's Pr. 566. These rules also apply where the plaintiff is suing on behalf of himself and others: *Handford* v. *Storie*, 2 S. & S. 196, 198 *Armstrong* v. *Storer*, 9 Beav. 277, 281; *ante.*
5 For form of order, see Seton, 1277, Nos. 1, 2.

fendant having a right to appeal against the order overruling the demurrer: which right he ought not to be deprived of, on an *ex parte* application.[1]

Under Order 25, the order of course is obtained from the Clerk of Records and Writs where the bill is filed in Toronto, and under Order 35, from the Deputy Registrar of the County where it is filed out of Toronto. The Court will not, after motion of the plaintiff, dismiss his bill without prejudice to his filing another.[2] Where a cause has been set down for hearing, the plaintiff is not entitled, as of course, to an order dismissing his bill, with leave to file another bill.[3]

It seems once to have been the privilege of the plaintiff to dismiss his bill, when the defendant had answered, upon payment of 20s. costs;[4] but that rule was altered;[5] and the Statute of Anne has since enacted,[6] that, upon the plaintiff's dismissing his own bill, or the defendant's dismissing the same for want of prosecution, the plaintiff in such suit shall pay to the defendant or defendants his or their full costs, to be taxed by the Master.[7] It seems, formerly, to have been considered, that the Court had no power to make an order, on the application of the plaintiff, dismissing the bill without costs, except upon the defendant's consent actually given in Court.[8] It has now, however, been decided, that the Court has power to make such an order in a proper case; and such orders have been made: where the defendant surrendered a lease, to obtain an assignment of which the bill was filed, and absconded:[9] where the bill was filed under a mistake, under which both plaintiffs and defendants were at the time:[10] where the defendants had assigned their interests to co-defendants, after the bill was filed, and had

1 *Cooper* v. *Lewis*, 2 Phil. 178, 181; and see *Ainslie* v. *Sims*, 17 Beav. 174; see also *Booth* v *Leycester*, 1 Keen, 247, 255, where a bill and cross bill had been set down to be heard together.
2 *Gwynne* v. *McNab*, 2 Grant, 124.
3 *Gardner* v. *Brennan*, 4 Grant, 199.
4 Gilb. For. Rom. 110; 2 Atk. 288.
5 *Anon.*, 1 Vern 116; *Anon*, *ib.* 334.
6 4 & 5 Ann. c. 16, s. 23.
7 The plaintiff seems to have been liable, notwithstanding the statute, to the payment of only 40*s.* costs where the cause was set down and dismissed on bill and answer: see *Newsham* v. *Gray*, 2 Atk. 288; but by General Order of 27 April, 1748, *ib.* 289: Sand. Ord. 628, it is provided, that, in such a case, the Court may dismiss the bill, either with 40*s.* costs, or with taxed costs, or without costs. This Order appears, in this respect, to be abrogated by the Cons. Ord.
8 *Dixon* v. *Parks*, 1 Ves. J. 402; *Anon*, *ib.* 140; *Fidelle* v. *Evans*, 1 Bro. C. C. 267: 1 Cox. 27.
9 *Knox* v. *Brown*, 2 Bro. C. C. 186: 1 Cox, 359; and see *Goodday* v. *Sleigh*, 1 Jur. N. S. 201: 3 W. R. 87, V. C. S.; *Wright* v. *Barlow*, 5 De G. & S. 43: 15 Jur. 1149.
10 *Broughton* v. *Lashmar*, 5 M. & C. 136, 144.

joined in an answer with such other defendants and disclaimed:[1] where the suit was rendered nugatory by the subsequent passing of an Act of Parliament, or by the reversal of a case on the authority of which the bill was filed, or by any subsequent matter:[2] and where the plaintiff had been misled by the act of the Court.[3]

The application to dismiss, in these cases, is usually made by special motion, of which notice must be served on the defendants, or such of them as are affected by the motion.

Where, however, the matters in dispute have been disposed of by an independant proceeding, but the bill has been dismissed for want of prosecution, with costs, as against some of the defendants, the plaintiff can no longer move to dismiss it, as against the others, without costs: the Court not being able to adjudicate as to the costs, in the absence of the dismissed parties, who might be prejudiced by the other defendants being entitled to add their costs to their securities, or otherwise. In such a case, the bill can only be dismissed with costs.[5]

Where the plaintiff moved to dismiss the bill with costs against some of the defendants who had disclaimed, without prejudice to the question by whom the costs should ultimately be borne, it was held by Sir James Wigram, V, C., that the order might be made without serving the other defendants, as they could not be prejudiced;[6] but Sir J. L. Knight Bruce, V. C., refused to make such an order, unless the other defendants were served.[7]

The course of proceeding to obtain the dismissal of the bill by a plaintiff who disavows the suit, has been before pointed out.[8] Where the suit is not disavowed, one co-plaintiff may, with the consent of the defendant, dismiss a bill with costs, so far as concerns himself, if it will not in any way injure the other plaintiffs: otherwise, the

1 *Hawkins* v. *Gardiner*, 17 Jur. 780, V. C. S.
2 *Sutton Harbour Company* v. *Hitchens*, 15 Beav. 161: 1 De G. M. & G. 161, 169; and see *ib.* 16 Beav. 381; *Robinson* v. *Rosher*, 1 V. & C. C. C. 7, 12: 5 Jur. 1006; but see *South Staffordshire Railway Company* v. *Hall*, 16 Jur. 160, V. C. K.; *Lancashire and Yorkshire Railway Company* v. *Evans*, 14 Beav. 529; *Ventilation and Sanitary Improvement Company* v. *Edelston*, 11 W. R. 613, V. C. S.; *Elsey* v. *Adams*, 10 Jur. N. S. 459: 12 W. R. 586, L. J. J.; *Riley* v *Croydon*, 10 Jur. N. S. 1251: 13 W. R. 223, V. C. K.
3 *Lister* v. *Leather*, 1 De G. & J. 361: 8 Jur. N. S. 848.
5 *Troward* v. *Attwood*, 27 Beav. 85.
6 *Baily* v. *Lambert*, 5 Hare, 178: 10 Jur. 109; and see *Collis* v. *Collis*, 14 L. J. Ch. 56, V. C. K. B.; *Styles* v. *Shipton*, 3 Eq. Rep. 224, V. C. W.
7 *Wigginon* v. *Pateman*, 12 Jur. 89.
8 *Ante.*

Court will refuse the order, unless upon terms, so framed as to protect the other plaintiffs in the suit from injury.[1] The mere circumstance, that the rights of the plaintiff applying to be dismissed are cocnurrent with those of the plaintiffs who remain, will not be a sufficient reason for refusing the application: since any defect which his withdrawal may make in the record may be supplied by making him a defendant, by amendment.[2]

A plaintiff may, in general, obtain an order to dismiss his own bill, with costs, as a matter of course, at any time before decree, and notwithstanding a pending motion which has been ordered to stand over.[3] Thus, in *Curtis* v. *Lloyd*,[4] after the cause had been called on for hearing, and had stood over at the request of counsel, the plaintiff obtained, as of course, an order to dismiss his bill with costs; the defendant afterwards objected to this course; but Lord Cottenham held, that the plaintiff was entitled to the order: observing, that he could not see why a plaintiff should be in a worse situation, because he informs the Court that he does not intend to proceed with the hearing of his cause, than if he made default.

After a cause has been heard, and is standing for judgment, the plaintiff cannot dismiss his bill on *precipe*, but only on special motion.[5] Our Order 184 (which is similar to the English Order 23, v. 13) provides that "If the plaintiff causes the bill to be dismissed on his own application, after it has been set down to be heard; or if the cause is called on to be heard, and the plaintiff makes default, and by reason thereof the bill is dismissed: in either case the dismissal is to be equivalent to a dismissal on the merits, unless the Court orders otherwise, and may be set up in bar to another suit for the same matter."

After a decree, however, the Court will not suffer a plaintiff to dismiss his own bill, unless upon consent: for all parties are interested in a decree, and any party may take such steps as he may be advised to have the effect of it.[6] The proper form of order after de-

1 *Holkirk* v. *Holkirk*, 4 Mad. 50; *Winthrop* v. *Murray*, 7 Hare, 152: 13 Jur. 955, and see *ante*; but see *Langdale* v. *Langdale*, 13 Ves 167.
2 *Holkirk* v *Holkirk*, *ubi sup.*
3 *Markwick* v. *Pawson*, 33 L. J. Ch. 703: 4 N. R. 528, L.J.J.
4 4 M. & C. 194: 2 Jur. 1058
5 *Smith* v. *Port Hope Harbor Co.*, 6 U. C. L. J. 189.
6 *Guilbert* v. *Hawles*, 1 Cha. Ca. 40; *Carrington* v. *Holly*. 1 Dick. 280.

cree is not to dismiss the bill, but to stay all further proceedings.[1] If, however, the decree merely directs accounts and enquiries,[2] in order to enable the Court to determine what is to be done, the bill may be dismissed.[3] And where, upon the hearing of the cause, the Court has merely directed an issue, the plaintiff may, before trial of the issue, obtain an order to dismiss the bill with costs: because the directing of an issue is only to satisfy the conscience of the Court, prefatory to its giving judgment. If, however, the issue has been tried and determined in favour of the defendant, the plaintiff 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 pleadable.[4]

After a decree has been made of such a kind that other persons, besides the parties on the record, are interested in the prosecution of it, neither the plaintiff nor defendant, on the consent of the other, can obtain an order for the dismissal of the bill. Thus, where a plaintiff sues on behalf of himself and all other persons of the same class: although he acts upon his own mere motion, and retains the absolute dominion of the suit until the decree, and may dismiss the bill at his pleasure, yet, after a decree, he cannot by his conduct deprive other persons of the same class of the benefit of the decree, if they think fit to prosecute it. "The reason of the distinction is, that, before decree, no other person of the class is bound to rely upon the diligence of him who has first instituted his suit, but may file a bill of his own; and that, after a decree, no second suit is permitted."[5]

Where a defendant submits to the whole demand of the plaintiff, and to pay the costs, he has a right to apply to the Court to dismiss the bill, or stay all further proceedings.[6] The application is usually made on motion, of which notice must be given. The Court will not, on such an application, go into the merits of the case; but will

1 *Egg* v. *Devey*, 11 Beav. 221; see also *Lashley* v. *Hogg*, 11 Ves 602, *Bluck* v. *Colnaghi*, 9 Sim. 411; *Handford* v. *Storie*, 2 S. & S 196, 198.
2 *Barton* v. *Barton*, 3 K. & J. 512: 3 Jur N. S. 808.
3 *Anon.*, 11 Ves. 169; *Barton* v. *Barton*, *ubi sup.*; and see *post*.
4 *Carrington* v. *Holly*, 1 Dick. 280
5 *Handford* v. *Storie*, 2 S. &. S. 196, 198; *York* v. *White*, 10 Jur. 168, M. R., *ante*; and see *post*.
6 Per Lord Langdale, in *Sivell* v. *Abraham*, 8 Beav. 599; see also *Pemberton* v. *Topham*, 1 Beav. 316: 2 Jur. 1009; *Holden* v. *Kynaston*, 2 Beav. 204, 206; *Field* v. *Robinson*, 7 Beav. 66; *Hennet* v. *Luard*, 12 Beav. 479; *Damer* v. *Lord Portarlington*, 2 Phil. 30, 35: 1 C. P. Coop. t. Cott, 229, 234: 10 Jur. 673; *Manton* v. *Roe*, 14 Sim. 353; *Paynter* v. *Carew*, Kay, App. 36: 18 Jur. 417; *Orton* v. *Bainbrigge*, 22 L. J. C. H. 979: 1 W. R. 487, M. R.

only consider the conduct of the parties in conducting the cause. It will not, therefore, entertain such an application, unless the defendant submits to pay the costs, as well as comply with all the plaintiff's demands :[1] though it has, in some cases, determined the question whether particular costs, incurred in proceedings collateral to the suit, are to be paid by the defendant.[2] The costs of suit which the defendants must submit to pay, include the costs of co-defendants, for which the plaintiff is liable.[3]

Where there are several defendants, and the plaintiff claims only part of the relief against one defendant, that defendant may apply, by special motion, to stay all further proceedings, on satisfying the whole demand made against him, and paying the plaintiff's costs incurred up to the time of making the application.[4]

In a foreclosure or redemption suit, the bill may be dismissed on the special motion of a subsequent incumbrancer, as against all the defendants except himself, on his paying into Court, by a specified day, a sum sufficient to cover the mortgage debt and interest, and the costs of the plaintiff and other defendants.[5] Where discovery is sought from the defendant, the plaintiff is entitled to continue his suit for that purpose ; and an application by the defendant before answer to stay proceedings, upon his submission to the plaintiff's demand and payment of the costs of the suit, is premature, and will not be entertained.[6]

The defendant may also, by submitting to pay the plaintiff's demands, and his costs of the suit, obtain an order to stay the proceedings, under a decree in which other persons are interested, as well as the parties to the suit ; but, in such a case, any one of the persons so interested may subsequently, on special motion,[7] with notice to the parties to the cause, obtain an order that the applicant may have either the conduct of the cause, or liberty to carry on the

1 *Wallis* v. *Wallis*, 4 Drew. 458; *Hennet* v. *Luard*, *ubi sup.*; see, however, *Holden* v. *Kynaston*, *ubi sup.*
2 *Penny* v. *Beavan*, 7 Hare 133 : 12 Jur. 936.
3 *Pemberton* v. *Topham*, and *Paynter* v. *Carew*, *ubi sup.*
4 *Sawyer* v. *Mills*, 1 M'N. & G. 390, 395 : 13 Jur. 1061; see also *Holden* v. *Kynaston*, *ubi sup.*
5 *Jones* v. *Tinney*, Kay. App. 45; *Challie* v. *Gwynne*, *ib.* 46 : where the forms of the orders are given; see also *Paynter* v. *Carew*, *ib* 36 : 18 Jur. 417; and *Paine* v. *Edwards*, 8 Jur. N. S. 1200, 1202 : 10 W. R. 709, V. C. S., where the motion was refused : the priorities being in dispute; *Wainwright* v. *Sewell*, 11 W. R. 560, V. C. S.
6 *Stevens* v. *Brett*, 12 W. R. 572, V. C. W.
7 15 & 16 Vic. c 80, s. 26.

proceedings under the decree, or the prosecution of particular accounts or enquiries.[1]

Orders to stay proceedings, on the ground that the defendant has submitted to the plaintiff's demands, have also been made on the application of the plaintiff, hostilely to the defendant;[2] but it seems that the defendant has a right to have the cause brought to a hearing, for the purpose of determining the question of costs; and that such an application by the plaintiff can, therefore, only be made by consent.[3] Where the question in dispute has been settled by compromise out of Court, without providing for the costs, the Court will not determine the question of costs, either on motion or at the hearing.[4]

An order will not be granted to stay proceedings or dismiss the bill in a suit merely because the subject matter of it has gone; the plaintiff has a right to proceed to a hearing to shew himself entitled to costs.[5]

By consent, the bill may be dismissed or the proceedings stayed, on motion of course, or on special motion,[6] on any terms which may be agreed upon;[7] and where an agreement to dismiss a bill was entered into at the trial of an action directed to be brought, and made a rule of the Court of Law, the Court of Chancery enforced it against the parties, on motion in the cause.[8] Where any of the parties are not *sui juris*, or are executors or trustees, the Court must be satisfied of the propriety of the agreement.[9]

Where a plaintiff has made default in payment of the costs of

1 See *Salter* v. *Tidesley*, 13 W. R. 376, M. R. See also *ante*.

2 *Nichols* v. *Elford*, 5 Jur. N. S. 264, V. C. W.; *North* v. *Great Northern Railway Company*, 2 Giff. 64: 6 Jur. N. S. 244; *Thompson* v. *Knights*, 7 Jur. N. S. 704: 9 W. R. 780, V. C. W.; *Brooksbank* v. *Higginbottom*, 31 Beav. 35; and see *Sivell* v. *Abraham*, 8 Beav. 598; *Hennet* v. *Luard*, 12 Beav. 479, 480.

3 *Langham* v. *Great Northern Railway Company*, 16 Sim. 173: 12 Jur. 574; *Burgess* v. *Hills*, 26 Beav. 244, 249: 5 Jur. N. S. 233; *Burgess* v. *Hately*, 26 Beav. 249; *M'Naughtan* v. *Hasker*, 12 Jur. 956, V. C. K. B.; *Wilde* v. *Wilde*, 10 W. R. 503, L J.J; *Morgan* v. *Great Eastern Railway Company*, 1 H. & M. 78; and see *Chester* v. *Metropolitan Railway Company*, 11 Jur. N. S. 214, M. R.

4 *Gibson* v. *Lord Cranley*, 6 Mad. 365; *Roberts* v. *Roberts*, 1 S. & S. 39; *Whalley* v. *Lord Suffield*, 12 Beav. 402; *Nichols* v. *Elford*, 5 Jur. N. S. 264, V. C. W.

5 *Wallace* v. *Ford*, 1 Cham. R. 282.

6 Where the terms are complicated, or a fund in Court is dealt with, the application is usually made on special motion: *see Winthrop* v. *Winthrop*, 1 C. P. Coop. t. Cott. 201; *Richardson* v. *Eyton*, 2 De G. M. & G. 79; *Harrison* v. *Lane*, 2 Sm. & G. 249; *Dawson* v. *Newsome*, 2 Giff. 272: 6 Jur. N. S. 625.

7 See *North* v. *Great Western Railway Company*, 2 Giff 64; *Troward* v. *Attwood*, 27 Beav. 85.

8 *Tebbutt* v. *Potter*, 4 Hare. 164; see also *Warwick* v. *Cox*, 9 Hare, App 14; *Dawson* v. *Newsome*, *ubi sup.*; see, however, *Askew* v *Millington*, 9 Hare, 65: 15 Jur. 532.

9 *Warwick* v. *Cox*, *ubi sup.*; and see *Lippiat* v. *Holley*, 1 Beav. 423: Seton, 691; *Follis* v. *Todd*, 1 Cham. R. 288.

a former suit against the same defendant, or the person whom he represents, for the same purpose, the defendant may obtain an order, on motion, with notice to the plaintiff, staying all further proceedings until the plaintiff has paid such costs;[1] and where, after great delay, the costs still continue unpaid, the Court will order the plaintiff to pay them within a limited time, or, in default, that the second bill stand dismissed.[2] Where, however, the two suits are not for the same matter, and the second bill could not be produced by a fair amendment of the first, such an order will be refused;[3] nor can it be obtained, where the plaintiff sues by his next friend;[4] nor, it seems, where the defendant has taken any step in the new cause, before making the application.[5]

Where the same object may be attained under two different modes of proceeding: if the first is adopted, and then abandoned and the second adopted, the proceedings in the second may be stayed until the costs of the first are paid.[6] It would seem that the amount of the costs should be ascertained by taxation or otherwise, before the application to stay procedings is made.[7]

Where a plaintiff is in contempt for non-payment of costs in the suit, an order to stay proceedings until the costs have been paid may be obtained on special motion;[8] and where he has failed to give security for costs pursuant to an order, the defendant may obtain, on motion with notice, an order that he give security within a limited time, or the bill be dismissed.[9]

Where security for costs is ordered to be perfected within a certain time, or the bill be dismissed, an order to dismiss may be

1 *Pickett* v. *Loggan*, 5 Ves 706; *Altree* v. *Hordern*, 5 Beav. 623 628: 7 Jur 247; *Lautour* v. *Holcombe*, 10 Beav. 256; *Spires* v. *Sewell*, 5 Sim. 193. *Onge* v. *Truelock*, 2 Moll. 41; *Long* v. *Storie*, 13 Jur. 1091, V. C. E; *Sprye* v *Reynell* 1 De G. M & G. 712; *Ernest* v. *Partridge*, 8 L. T. N S. 762, V. C. W.; see, however, *Wild* v. *Hobson*, 2 V. & B. 105, 108. The application should not be made until the amount of the costs has been ascertained by taxation: *Ernest* v. *Partridge*, *ubi sup.*

2 *Princess of Wales* v. *Lord Liverpool*, 3 Swanst. 567; *Lautour* v. *Holcombe*, 11 Beav. 624; *Ernest* v. *Govett*, 2 N. R. 486, V. C. W.

3 *Budge* v *Budge*, 12 Beav. 385, 387.

4 *Hind* v. *Whitmore*, 2 K. & J. 458.

5 *Onge* v *Truelock*, 2 Moll. 41.

6 *Foley* v *Smith*, 12 Beav. 154; *Davey* v. *Durrant*, 24 Beav. 411: 4 Jur. N. S. 398, see also *Oldfield* v. *Cobbett*, 12 Beav. 91, 95

7 *Ernest* v. *Partridge*, 8 L T. N S. 762, V. C. W.; and see *Foley* v. *Smith*, 12 Beav. 154: *Davey* v. *Durrant*, 24 Beav. 411: 4 Jur. N. S. 398; *Altree* v. *Hordern*. 5 Beav. 623, 628 : 7 Jur. 247; *Spiret* v. *Sewell*, 5 Sim. 193; *Long* v. *Storie*, 13 Jur. 1091, V. C. E.

8 *Bradbury* v. *Shawe*, 14 Jur. 1042, V. C. K. B.; *Wilson* v. *Bates*, 3 M. & C. 197, 204; 9 Sim. 54 : 2 Jur. 107, 319; *Futvoye* v. *Kennard*, 2 Giff. 533 : 7 Jur. N. S. 958; and see *Wild* v. *Hobson*, 4 Mad. 49: cited 3 M. & C. 202

9 *Kennedy* v. *Edwards*, 11 Jur. N. S. 153, V. C. W.

granted *ex parte*, on a certificate that no bond for security has been filed.[1]

There are also several cases in which, where there are two suits relating to the same subject-matter, the Court will, under certain circumstances, make an order staying the proceedings in one of them.[2] Thus, as we have seen, where two or more suits are instituted in the name of an infant by different persons, each acting as his next friend, the Court, on being satisfied by an inquiry, or otherwise, which suit is most for his benefit, will stay the proceedings in the other suit.[3] So, also, where two suits are instituted, for the administration of an estate: when the decree has been obtained in one suit, proceedings will be stayed in the other.

Where the second suit embraces an object not provided for in the decree pronounced in the first suit, the proceedings in the second suit will not be stayed:[4] as for instance, where the decree is made in a creditors' suit, and a bill is filed by a legatee.[5] But even in this case, it is often desirable to obtain a transfer and amalgamation of the two suits.[6] Where the second suit prayed additioual relief, the Court stayed proceedings in it, on the parties to the first suit undertaking to introduce into the decree in that suit, the additional relief which might be obtained in the second suit.[7] In another case, the Court stayed proceedings in the second suit, only so far as the relief sought could be obtained in the first suit;[8] and recently, the Court, on the parties consenting that an immediate decree should be made in the second suit, ordered the two suits to be consolidated, and decreed the further relief which could be obtained in the second suit;[9] but where, after a bill had been filed by one executor against his co-executor for administration, and asking special relief, but, before decree, the latter obtained, on summons, an order against the former

1 *McCarroll* v. *McCarroll*, 2 Cham. R. 380.
2 *Smith* v *Guy*, 2 C. P. Coop. t. Cott. 289, 296: 2 Phil. 159; *Rigby* v. *Strangways*, 2 Phil. 175, 177: 10 Jur. 998; *Underwood* v. *Jee*, 1 M'N & G. 276; 17 Sim. 119: 15 Jur. 99; and see Seton, 889.
3 *Ante*
4 *Underwood* v. *Jee. ubi sup.*; *Menzies* v. *Connor*, 3 M'N. & G. 648, 652; *Anson* v. *Towgood*, 6 Mad. 374; *Pickford* v *Hunter*, 5 Sim. 122, 129; *Ladbroke* v. *Sloane*, 3 De G. & S 291; *Smith* v. *Gay, ubi sup.*; *Rump* v. *Greenhill*, 20 Beav. 512: 1 Jur. N. S. 123; *Whittington* v. *Edwards*, 3 De G. & J. 243; *Taylor* v. *Southgate*, 4 M. & C. 203, 209.
5 *Golder* v. *Golder*, 9 Hare, 276; *Earl of Portarlington* v. *Damer*, 2 Phil. 262; *Plunkett* v. *Lewis*, 11 Sim. 379.
6 See *Cumming* v. *Slater*, 1 Y. & C. C. C. 484; *Godfrey* v. *Maw*, *ib.* 485; *Pott* v. *Gallini*, 1 S. & S. 206, 209; *Budgen* v. *Sage*, 3 M. & C. 683, 687.
7 *Gwyer* v. *Peterson* 26 Beav. 83; *Matthews* v. *Palmer*, 11 W. R. 610, V. C. K.
8 *Dryden* v. *Foster*, 6 Beav. 146.
9 *Hoskins* v. *Campbell*, 2 H. & M. 43.

to administer the same estate, the Court refused to discharge the order.[1] Where a decree has been made in both suits, the Court will direct the administration to proceed in that branch of the Court in which the decree is in the most perfect state, notwithstanding that it may be posterior in point of date.[2]

The pendency of another suit in which the plaintiff could obtain the relief he seeks in a bill was considered no answer to a motion to dismiss.[3]

It is the duty of the personal representative to make the application, as soon as a decree has been made in one suit;[4] but if he neglects to do so, the plaintiff in the suit in which the decree has been made,[5] or any person interested,[6] may obtain the order: although he is not a party to the other suit.

Where two suits for the administration of the same estate, one by the executor, and the other by the residuary legatee, come on together, the proceedings in the executor's suit will be stayed, and the decree made in the residuary legatee's suit.[7]

Where such an order is made, the costs of all parties to the second suit who are parties to the first suit, up to notice of the decree, are usually made costs in that suit, and the costs of any party who is not a party to the first suit, are ordered to be paid by the executor, and added to his own.[8] If the executor has no assets to pay them, liberty will be given to such party to go in and prove them in the first suit.[9]

If the plaintiff in the second suit proceed, after notice of the decree in the first suit, he will not be allowed the costs of such subsequent proceedings; but he will not be made to pay costs.[10] Where,

1 *Pifford* v. *Vanrenen*, 13 W. R. 425, V. C. S.; *sed qu.* if the plaintiff in the summons suit was entitled so to sue: see 15 & 16 Vic. c. 85, s. 45.
2 *Littlewood* v. *Collins*, 11 W. R. 387, L.J.J.
3 *Guthrie* v. *MacDonald*, 3 Cham. R. 99.
4 *Therry* v. *Henderson*, 1 Y. & C. C. C. 481, 483: 6 Jur. 386; *Stead* v. *Stead*, 2 C. P. Coop. t. Cott. 311; *Packwood* v. *Maddison*, 1 S. & S. 232, 234: 2 C. P. Coop. t. Cott. 312.
5 *Earl of Portarlington* v. *Damer*, 2 Phil. 262; and see *Swale* v. *Swale*, 22 Beav. 401.
6 *Smith* v. *Guy*, 2 C. P. Coop. t. Cott, 289, 297.
7 *Kelk* v. *Archer*, 16 Jur. 605, M. R.; and *Muller* v. *Powell*, V. C. K. B., 14 July, 1849, there referred to.
8 Seton, 888; *Golder* v. *Golder*, 9 Hare, 276, 279; *West* v. *Swinburne*, 14 Jur. 360, V. C. K. B.; and see *Therry* v. *Henderson*, 1 Y. & C. C. C. 481, 483: 6 Jur 386; *Frowd* v. *Baker*, 4 Beav. 76, 78; *Littlewood* v. *Collins*, 11 W. R 387, L.J.J.; and see form of order, Seton, 887.
9 *Canham* v. *Neale*, 26 Beav. 266: 5 Jur. N. S. 52; *Ladbroke* v. *Sloane*, 3 De G. & S. 291; *West* v. *Swinburne*, *ubi sup.*; see form of order, Seton, 887.
10 *Earl of Portarlington* v. *Damer*, 2 Phil. 262; and see Seton, 888.

however, the Court considered that the second suit was improperly instituted, the plaintiff in it was ordered to pay the costs of the order of transfer, and of the motion to stay proceedings.[1]

The rule, that when two suits are instituted for the administration of the same estate, that shall be prosecuted in which the earlier decree has been obtained, does not apply when it has not been obtained fairly; and the Court held this to have been the case where, on the same day on which notice had been given to an executor to appear to an administration summons, he appeared of his own accord at an earlier hour in Chambers of another Judge, and consented to an order on a summons then, and not previously, applied for, by another plaintiff.[2] But the Court, by consent, made an immediate decree in a cause not in the paper, for administration of the real and personal estate of an intestate, at the suit of a creditor, after a summons in Chambers for the administration of the personal estate had been taken out by another creditor, and which was returnable before the first day on which the cause could be heard as a short cause.[3]

Where the suit in which the decree was made was instituted by two executors against a third, the Court refused to stay the proceedings in a suit by a creditor whose case depended on vouchers and documents in the executor's hands, until they had put in their answer; and directed the motion to stay proceedings to stand over until that had been done; observing, that the Court would then know who ought to have the conduct of the litigation.[4]

When the order staying proceedings is made, if a sufficient reason for so doing appears, the Court will give the conduct of the decree to the plaintiff in the suit in which the proceedings are stayed;[5] but the mere fact that the plaintiff and defendants in the suit in which the decree has been made, appear by the same solicitor, is not a sufficient reason for so doing; and where a creditors' and a legatees' suit are amalgamated, the Court prefers giving the conduct

1 *Salter* v. *Tildesley*, 13 W. R. 376, M. R.
2 *Harris* v. *Gandy*, 1 De G. F. & J. 13; and see *Frost* v. *Wood*, 12 W. R. 2 5, L.J.J.
3 *Furze* v. *Hennet*, 4 De G. & J. 125.
4 *Macrae* v. *Smith*, 2 K. & J. 411; see also *Budgen* v. *Sage*, 3 M. & C. 683, 687.
5 See *Macrae* v. *Smith*, *ubi sup.*; *Norvall* v. *Pascoe*, 10 W. R. 338, V. C. K.; *Hawkes* v. *Barrett*, 5 Mad. 17; *Kelk* v. *Archer*, 16 Jur. 605, M. R., *M'Hardy* v. *Hitchcock*, 12 Jur. 781, L. C.; *Smith* v. *Guy*, 2 Phil. 159: 2 C. P. Coop. t. Cott. 289; *Wheelhouse* v. *Calvert*, cited Seton, 888; *Frost* v. *Wood*, *ubi sup.*

of the cause to the legatee, who is interested in reducing the expenses as much as possible, all persons being at liberty to attend and assert their claims: considering it very important that administration suits should be conducted in a friendly spirit.[1] Where there are no special circumstances giving the preference to either plaintiff, the plaintiff in the first suit in point of time will have the conduct of the proceedings.[2]

Where a decree or judgment has been obtained in a foreign country, in respect of the same matter for which a suit has been commenced in the Court of Chancery, proceedings in such suit will be stayed, if the Court is satisfied that the decree or judgment in the foreign Court does justice, and covers the whole subject of the suit.[3]

A party to a suit in the Court of Chancery, wherein a decree has been made under which he may obtain relief, will be restrained from prosecuting a suit in a foreign Court for the same object.[4]

Proceedings in a suit may also be stayed, pending a rehearing or appeal.

It may also be mentioned here, that when an oppressive number of bills has been filed, for infringement of the same patent, the Court will appoint some of the infringers to represent the others, and stay the proceedings in the remaining suits.[5]

Where a suit had been compromised, and the proceedings therein stayed, the Court, on setting aside the compromise as against one of the plaintiffs, gave him permission to proceed with the suit, although it remained stayed as against the other plaintiffs.[6]

1 Per S. J. Romilly, M. R., in *Penny* v. *Francis*, 7 Jur. N. S. 248: 9 W. R. 9; see also *Kelk* v. *Archher, ubi sup.*; *Harris* v. *Lightfoot*, 10 W R. 31, V. C K.
2 *Norvall* v. *Pascoe, ubi sup.*; and see *Salter* v. *Tildesley*, 13 W. R. 376, M. R.
3 *Ostell* v. *LePage*, 2 De G. M. & G. 892, 894; 16 Jur. 1134, V. C S.; see also *Stainton* v. *Carron Company* (No. 3), 21 Beav. 500.
4 *Harrison* v *Gurney*, 2 J. & W. 563; *Bushby* v. *Munday*, 5 Mad. 297; *Beauchamp* v. *Marquis of Huntley*, Jac. 546; *Booth* v. *Leycester*, 1 Keen, 579; *Wedderburn* v. *Wedderburn*, 2 Beav. 208, 214: 4 Jur. 66; 4 M. & C. 585, 594, 596; *Graham* v. *Maxwell*, 1 M'N. & G. 71: 13 Jur. 217; *Maclaren* v. *Stainton*, 16 Beav. 279: overruled by H. L., 5 H. L. Ca. 416; see also *Stainton* v. *Carron Company*, 21 Beav. 152, 500; 2 Jur. N. S. 49 L. C. & L J. J.; and upon conflict of jurisdiction, generally, see *Venning* v. *Lloyd*, 1 De G. F. & J. 193, 200: 6 Jur. N. S. 81; and Seton, 881.
5 *Foxwell* v. *Webster*, 10 Jur. N. S. 137 L. C.; 2 Dr & S 250: 9 Jur. N. S. 1189.
6 *Brooke* v. *Lord Mostyn*, 13 W. R. 248, L J.J.

SECTION II.—*For Want of Prosecution.*

Order 273 provides that "A defendant may move the Court upon notice, that the bill may be dismissed with costs for want of prosecution, and the Court may order the same accordingly, in the following cases:

"1.—If the plaintiff, not having obtained an order to enlarge the time, does not obtain and serve an order for leave to amend the bill, or does not file replication, or set down the cause to be heard on bill and answer, or serve notice of motion for a decree, within one month from after the answer, or the last of the answers has been filed:

"2.—If the plaintiff, not having obtained an order to enlarge the time, does not amend the bill within fourteen days after the date of the order for leave to amend:

"3—If the plaintiff, not having obtained an order to enlarge the time does not set down the cause to be heard, at the next sittings of the Court at the place where the venue is laid, in case issue has been joined three weeks before the commencement of such sittings."

The four weeks mentioned in this order (which is taken from an English one) expires at 12 o'clock at night on the last day.[1] If a bill is filed and no office copy served within the period limited for service (three months) the bill will, on application, be dismissed.[2] It is no answer to a motion to dismiss under such circumstances that the bill was filed before 1864, when the order limiting the time was passed.[3] After the twelve weeks allowed for the service of a bill of complaint, if the same has not been served, the defendant is entitled to an order to dismiss, unless the plaintiff shows such excuse for the delay in effecting service as would justify an order allowing service, notwithsanding the lapse of time.[4]

Where the plaintiff obtains an order for leave to amend his bill, and, having obtained no order to enlarge the time,[5] does not amend the bill within the time limited by the order to amend, or,

1 *Preston* v. *Collett*, 20 L. J. N. S., Ch. 228, and see *Ponsardin* v. *Stear*, 32 Beav. 666: 9 Jur. N.S. 885; *Ernest* v. *Govett*, 2 N. R. 486; *Hart* v. *Robarts*, 32 Beav. 231: 7 Jur. N. S. 669.
2 *Moore* v *Roseburgh*, 2 Cham. R. 406.
3 *Ibid.*
4 *Harvey* v. *Davidson*, 3 Cham. R. 495. 5. *Ante.*

if no time be so limited, within fourteen days from the date of such order, the order to amend is void, and the cause as to dismissal stands in the same position as if the order to amend had not been made.[1]

Order 274 provides that "Where the plaintiff has amended his bill, after answer, a defendant may move the Court upon notice, that the bill may be dismissed with costs for want of prosecution: if the plaintiff, not having obtained an order to enlarge the time, does not file the replication, or set down the cause to be heard on bill and answer, or serve notice of motion for a decree, within the times following:

"1.—Within fourteen days after the amendment of the bill, where no answer has been filed, and the defendant has not obtained or applied for time to answer:

"2.—Within fourteen days after the refusal of an application for further time, in cases where the defendant, desiring to answer, has not put in his answer within seven days after the amendment of the bill:

"3—Within fourteen days after the filing of the answer in cases where the defendant has put in an answer to the amendments, unless the plaintiff, within such fourteen days, has obtained leave to re-amend the bill." The order 275, that "In every other case, where the plaintiff is delaying the suit unnecessarily any defendant may move the Court upon notice, that the bill may be dismissed with costs, for want of prosecution after the expiration of one month from the time of filing his answer, in case the plaintiff, not having obtained an order to enlarge the time does not obtain and serve an order for leave to amend the bill, or does not file the replication, or set down the cause to be heard on bill and answer, or serve notice of motion for a decree within such month: and upon the hearing of the motion, the Court is to make such order for the dismissal of the bill, or for the expediting the suit, or as to costs, as under the circumstances of the case seems just." When a motion is made to dismiss the bill for want of prosecution, the party moving must show that notice of having put in an answer. has been duly

1 Ord. 83. This order applies to all orders to amend, whether of course or not: *Armitstead* v. *Durham*, 11 Beav. 428: 13 Jur. 330; *Bainbrigge* v. *Baddeley*, 12 Beav. 152: 13 Jur. 997.

served.[1] In moving to dismiss for want of prosecution, it is not sufficient for the certificate of the Registrar to state only that no replication has been filed; it must also state that no further proceedings have been had, and it must be shown when the office copy of the answer was served.[2] When a cause has been set down for hearing the plaintiff is not entitled as of course to an order dismissing his bill with leave to file another.[3] Where a question affected the right of the Government to the land granted in a Patent, the Attorney General was held to be a necessary party, and leave to amend was granted to enable him to be added as a party although the defendant was in a position to move and made a counter motion to dismiss; but the defendant was allowed costs.[4]

The right of a defendant to move to dismiss depends, in all cases, upon the proceedings of the plaintiff relative to the particular defendant making the motion, and not to the general proceedings in the cause as to other defendants. The form of order to be made upon such a motion is, however, within the discretion of the Court: which will, of course, be guided by the conduct of the cause relative to all the defendants.

The plaintiff, by obtaining and serving an order for leave to amend the bill, precludes the defendant from moving to dismiss.; and the order to amend is in time, if drawn up and served before the motion to dismiss is actually made, although after notice of the motion has been served.[5] And if, after service of the notice, the plaintiff files replication, it is also a complete answer to the motion.[6] But in such cases, and in others where a defendant's title to dismiss is intercepted by a step taken by the plaintiff between the notice of motion and its being heard, the plaintiff has to pay the costs of the defendant's application to dismiss the bill.[7]

This is the English practice, but it is modified by our order 276, which provides that "Where a defendant is entitled to give a notice to dismiss, it is not to be a sufficient answer to the motion for the plaintiff, after being served with the notice, to take out and serve an

1 *Kay* v. *Sanson*, 1 Cham. R. 71.
2 *Thompson* v. *Buchanan*, 3 Grant, 652.
3 *Gardner* v. *Brennan*, 4 Grant, 199.
4 *G. W. R. Co.* v. *Jones*, 2 Cham. R. 219.
5 *Peacock* v. *Sievier*, 5 Sim. 553; *Jones* v. *Lord Charlemont*, 12 Jur. 389, V. C. E.
6 *Story* v. *Official Manager of the National Insurance Society*, 2 N. R. 351, V. C. *W.*
7 *Ibid.*; *Waller* v. *Pedlington*, 4 Beav 124

order for amending the bill, or to file a replication, or to undertake to speed the cause: but it shall be necessary for the plaintiff to show that he has prosecuted his suit with due diligence, or that under all the circumstances the bill should not be dismissed." A motion to amend is no answer to a motion to dismiss for want of prosecution.[1] In moving to dismiss for want of prosecution, it is not sufficient for the certificate of the Registrar to state only that no replication has been filed, it must also state that no further proceedings have been had, and it must be shewn when the office copy of the answer was served.[2] A plaintiff having set down his cause to be heard, subsequently countermanded the notice of hearing which had been served upon the defendant; a motion to dismiss for want of prosecution was, under the circumstances, refused with costs.[3] This case seems to be overruled by a subsequent one,[4] where it was held that the fact that a replication has been filed and that the defendant himself is therefore in a position to set the cause down for examination and hearing, is no bar to a motion to dismiss for want of prosecution. After notice of motion to dismiss for want of prosecution had been served, the plaintiff set the cause down to be heard by way of motion for decree, and served notice on defendant. This was *held* to be a sufficient answer to the application, but the defendant was given his costs, he having been in the position to give the notice of motion to dismiss.[5] Where a plaintiff who had filed an irregular replication, afterwards obtained by consent, an order to amend the same, but did not do so, and a defendant moved to dismiss for want of prosecution, when the Court, treating the irregular replication as no replication, ordered a replication to be filed within two months, or that the bill should stand dismissed: at this time two of the defendants had not answered, and on the 12th of the month the replication was amended. Four days afterwards the plaintiff obtained an order *pro confesso* against the two defendants who had not answered. Under these circumstances a motion to remove the replication from the files and to dismiss the bill for want of prosecution was granted with costs.[6] A solicitor undertook to put in an answer which was not insisted upon, and the Solicitor for the plain-

1 *M'Nabb* v. *Gwynne*, 1 Grant, 127.
2 *Thompson* v. *Buchanan*, 3 Grant, 652.
3 *Richardson* v. *Moses* 1 Cham. R. 18.
4 *Spawn* v. *Nelles*, 1 Cham. R. 270; and see *Rice* v. *George*, 2 Cham. R. 74, where the same point was decided in the same way.
5 *Towers* v. *Scott*, 1 Cham. R. 32.
6 *Lewis* v. *Jones*, 1 Cham. R. 120.

tiff undertook to go down to examination, but failed to do so; a motion made by the defendant to dismiss was refused, but, under the circumstances, without costs.[1] On a motion to dismiss for want of prosecution after great delay, it is now the practice as established by Vankoughnet, C., with a view to enforce diligence in the prosecution of suits, to refuse an undertaking to speed where no explanation of the delay is given, and also to refuse to allow the motion to be intercepted by the filing of replication of the delay, anything to the contrary in the practice in England notwithstanding.[2] Spragge, V.C., however, held in opposition to this case, that on a first motion to dismiss for want of prosecution, it is the settled practice of the Court to accept the undertaking to speed, without regard to the delay which has taken place.[3] The practice as settled by Ruttan *v.* Burnham is now generally acted on, and it may be stated, under the order of things as they now stand, to be that if the plaintiff allows a hearing to pass, his bill be dismissed unless some satisfactory explanation of the delay is given. Otherwise the bill will not be arbitrarily dismissed at the expiration of the month, as provided by the Orders if no injury is worked by the delay. But the Court will exercise a discretion in view of the circumstances of the case.

Where the plaintiff has served an order to produce upon the defendant who had thereupon filed an affidavit on production, a copy of which had been demanded by the plaintiff, but had not been served; under these circumstances a motion by the defendant to dismiss for want of prosecution was refused with costs.[4] Where a defendant serves a notice of motion, but before the return thereof the plaintiff takes out on *præcipe*, and serves an order to dismiss his bill, the defendant cannot bring on his motion, but he is entitled to tax his costs thereof under the order to dismiss as costs in the cause.[5] Where on a motion to dismiss for want of prosecution, the only objection made was that the costs of a demurrer overruled had not been paid, the Court dismissed the bill with costs, the costs of the demurrer to be set off, and execution to go for the balance in favor of the party entitled thereto.[6] The bill will be dismissed with

1 *Cotton* v. *Cameron*, 1 Cham. R. 122.
2 *Ruttan* v. *Burnham*, 1 Cham. R. 191.
3 *Thompson* v. *Hind*, 1 Cham. R. 247.
4 *Proudfoot* v. *Thompson*, 1 Cham. R. 367.
5 *Purdy* v. *Ferris*, 1 Cham. R. 303.
6 *Bigelow* v. *Thompson*, 1 Cham. R. 307.

costs, where delay on the part of the plaintiff is shewn.[1] A motion to dismiss will be entertained even after replication filed.[2] It may here be noticed that by orders 144-145, a plaintiff refusing to attend and be examined before a Judge or Examiner, or to obey an order for the production of documents may, besides being punished as for a contempt, be further punished by having his bill dismissed. If a party wishes to discharge a proceeding for irregularity he must move promptly. Order 277 provides that "A notice of motion to set aside any proceeding for irregularity must specify clearly the irregularity complained of." A party complaining of an irregularity must come promptly and move against it.[3] The rule of this Court is similar to that at law, that a party to a cause who takes a fresh step in the cause after notice of an irregular proceeding on the part of his opponent, thereby waives the irregularity.[4] A bill was filed by church-wardens, and during the progress of the suit the church-wardens were changed at the vestry meeting: the new church-wardens were not made parties; the suit not being brought to a hearing within the time required by the practice, it was held that a notice to dismiss the bill, served on the plaintiff's solicitor, was regular.[5] On a motion to dismiss it appeared that the case had not been brought to a hearing through an error in judgment of the plaintiff's solicitor; held, that it was proper to take into account such error in considering the application in connection with the other circumstances of the case.[6]

An order to amend, if irregularly obtained, has been held to be a nullity, and not, therefore, to stop a motion to dismiss;[7] but this decision would seem to be overruled: the rule of the Court now being to treat all orders that have been made as valid, until they have been regularly discharged.[8]

If, upon the hearing of a cause, it is ordered to stand over, with liberty to the plaintiff, to amend his bill by adding parties: in pursuance of which the plaintiff amends, but does not proceed any

1 *Mulholland* v. *Brent*, 2 Cham. R. 31.
2 *Rice* v. *George*, 2 Cham. R. 82; and see *U. C. Mining Co.* v. *Attorney-General*, 2 Cham. R. 207; *M'Nab* v. *Morrison*, 2 Cham. R. 133.
3 *Miller* v. *Miller*, 9 U. C. L. J. 132.
4 *Manning* v. *Birely*, 2 U. C. L. J., N. S. 331.
5 *McFeeters* v. *Dixon*, 3 Cham. R. 84. 6 *Ibid.*
7 *DeGeneve* v. *Hannam*, 1 R. & M. 494.
8 *Blake* v. *Blake*, 7 Beav. 514; *Petty* v. *Lonsdale*, 4 M. & C. 545; 3 Jur. 1186, reversing *ib.* 1070 *Chuck* v. *Cremer*, 2 Phil. 113, 115: 1 C. P. Coop. t. Cott. 338, 342; and see observations in report last cited; *Whittington* v. *Edwards*, 3 De G. & J. 243, 249.

further, the defendant may move specially to dismiss the bill for want of prosecution, and is not bound to set the cause down again. [1] And where the order directs the cause to stand over for a limited time, within which the plaintiff is to add necessary parties, and that in default thereof the bill is to stand dismissed with costs, without further order: if the plaintiff 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;[2] but if the order does not contain a direction for taxation and payment of costs, an *ex parte* application for an order for such direction must be made. [3] Where the order does not direct the bill to be dismissed in case the bill is not amended within the time specified in the order, and the plaintiff omits to amend, the defendant may move, upon notice, that unless the bill be amended within a certain time, it may be dismissed with costs.[4]

Where a defendant had moved to dismiss, and the plaintiff asked for time, and time was granted, and the plaintiff failed to proceed within the time given, it was held that the defendant could move *ex parte*, for the order to dismiss.[5]

Where there is an irregularity in the notice of motion to dismiss, the Court will not make the plaintiff pay the costs of the application for dismissal.[6]

An order to dismiss a bill for want of prosecution, operates from the time of its being pronounced; and it would seem, therefore that the filing of replication on the same day does not prevent its effect;[7] although the contrary has been held, under the old practice, where the order was made *ex parte*.[8]

The defendant is not prevented, by an interlocutory application, from moving to dismiss for want of prosecution; and even the obtaining an injunction does not prevent the bill being dismissed. [9] The same was also held of showing cause, successfully, against dis-

1 *Mitchel* v. *Lowndes*, 2 Cox, 15.
2 See *Stevens* v. *Praed*, *ib.* 374.
3 *Dobede* v. *Edwards*, 11 Sim. 454, *Quære*, if the application should not be on notice, see Seton, 1116.
4 *Emerson* v. *Emerson*, 6 Hare, 442: 12 Jur. 973.
5 *Burns* v. *Chisholm*, 2 Cham. R. 88.
6 *Steedman* v. *Poole*, 10 Jur. 979: 11 Jur. 555, V. C. W.
7 *Lorimer* v. *Lorimer*, 1 J. & W. 284, 288; and see note of Registrars in *Hughes* v. *Lewis*, Johns. 698.
8 *Reynolds* v. *Nelson*, 5 Mad. 60; *Fox* v. *Morewood*, 2 S. & S. 325.
9 *Day* v. *Snee*, 3 V. & B. 170; *James* v. *Biou*, 3 Swanst. 234, 239; *Bliss* v. *Collins*, cited 2 Mer. 62.

solving an injunction ;[1] and an order to dismiss a bill for want of prosecution was held to be regular, although made after a notice had been given by the defendant of a motion to dissolve an injunction, but which motion was not made in consequence of the state of business in the Court.[2]

A motion by the plaintiff for leave to amend having been refused, the plaintiff had moved to discharge the order refusing leave to amend. Held, that a motion to dismiss, preceding the motion to discharge the order was irregular.[3] The Court has jurisdiction to relax its general as well as its special orders, and will, in its discretion, do so to further the ends of justice, or to relieve a suitor against difficulties occasioned by a solicitor. Where a defendant moved to dismiss the plaintiff's bill, the plaintiff having failed to comply with an undertaking, such failure having arisen through a slip of the plaintiff's solicitor, the application to dismiss was refused.[4]

There is one case, however, in which an order made upon an interlocutory application is considered as a sufficient proceeding to prevent the dismissal of a bill for want of prosecution, viz., where the bill having been filed for the specific performance of a contract, and the title only being in dispute, a reference is made, upon motion, to inquire into the title.[5] In such case, the order being in the nature of a decree, made upon the hearing of the cause, prevents the dismissal of the bill. The same rule applies to all decretal orders.[6]

It has always been a general rule, that 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.[7]

Where the defendant has obtained an order for security for costs, which has not been complied with, he should not move to dismiss the bill for want of prosecution, but that, unless security is given within a limited time, the bill may be dismissed.[8]

1 *Earl of Warwick* v. *Duke of Beaufort*, 1 Cox, 111.
2 *Farquharson* v. *Pitcher*, 3 Russ. 383.
3 *Cameron* v. *VanEvery*, 1 Cham. R. 217.
4 *Devlin* v. *Devlin*, 3 Cham. R. 491.
5 *Biscoe* v. *Brett*, 2 V. & B. 377; *Collins* v. *Greaves*, 5 Hare, 596; *Gregory* v. *Spencer*, 11 Beav. 143.
6 *Bluck* v. *Colnaghi*, 9 Sim. 411; *Anon.*, 11 Ves 169.
7 *DeGeneve* v. *Hannam*, 1 R. & M 494; and see *Ponsardin* v. *Stear*, 32 Beav. 666 : 9 Jur. N. S. 885.
8 *Kennedy* v. *Edwards*, 11 Jur. N. S. 153, V. C. W.

A defendant can only have the bill dismissed as against himself: not as against all the defendants;[1] and the notice of motion should be framed accordingly.

An order to dismiss a bill can only be drawn upon the production of the Record and Writ Clerk's or Deputy Registrar's certificate of the proceedings in the cause, for the purpose of showing what proceedings have been had. This certificate ought to be produced in Court at the time of the motion being made, or at all events before the rising of the Court on that day;[2] and the Registrar will not draw up the order until he sees that the certificate has been granted.[3] Sometimes, the certificate has been applied for, and obtained, after the order has been pronounced by the Court; so that it was dated subsequently to the order; which, although drawn up and entered afterwards is always dated on the day that it is pronounced by the Court.[4] This practice would seem to have been irregular, and, if objected to, not now to be permitted.[5]

Where either party does not appear on the motion, the affidavit of service of the notice of motion must be in Court; and where the defendant fails to move, the plaintiff may obtain an order for payment of his costs of the abandoned motion.

Upon hearing the motion, the Court usually either dismisses the bill with costs, or orders the plaintiff to pay the costs of the motion, and to enter into an undertaking to amend the bill, file replication, or set down the cause to be heard on motion for decree, or on bill and answer, within a limited period, according to the state of the suit;[6] or, as it is usually expressed, to "speed the cause."

An undertaking to speed is an undertaking to set the cause down on bill and answer, or to file a replication within three weeks. The fact that there is ample time to go to a hearing at the next sittings of the Court is no excuse for not filing the replication within the time mentioned.[7]

1 *Ward* v. *Ward*, 11 Beav. 159, 162: 12 Jur. 592.
2 *Freeston* v. *Claydon*, 17 Jur. 435, V. C. W.
3 *Wills* v. *Pugh*, 10 Ves. 402, 403.
4 *Ibid.*; *M'Mahon* v. *Sisson*, 12 Ves. 465; *Attorney-General* v. *Finch*, 1 V & B. 368; *King* v. *Noel*, 5 Mad. 13; *Re Risca Coal Company*, 10 W. R. 701, L. C.
5 *Bell* v. *Bell*, 14 Jur. 11:9, V. C. Ld. C., *Freeston* v. *Claydon*, *ubi sup.*
6 *Stinton* v. *Taylor*, 4 Hare, 608: 10 Jur. 386; *Earl of Morrington* v. *Smith*, 9 Beav. 251; *Hardy* v. *Hardy*, 1 C. P. Coop. t. Cott. 16; *Williams* v. *Rowland*, 3 Jur. N. S. 658, V. C. W.; *Hancock* v. *Rollison*, 5 Jur. N. S. 1199: 8 W. R. 18, V. C. S.; *Hand* v. *King* 10 Jur. N. S. 91, V. C. W.; *Jones* v. *Jones*, 10 Jur. N. S 1167, L.J.J.; *Forbes* v. *Preston*, 11 Jur. N. S. 198, V. C. S.; *Southampton, &c. Steamboat Company (Limited)* v. *Rawlins*, 13 W. R. 512, L.J.J.
7 *Burnham* v. *Burnham*, 1 Cham. R. 394.

The Court, however, sometimes directs the motion to stand over, in order to give the plaintiff an opportunity of taking a step in the cause, and so preventing the bill being dismissed; and upon his doing so, makes no other order on the motion than that the plaintiff pay the costs;[1] or, if satisfied that the plaintiff has used reasonable diligence, it has refused to make any order on the motion;[2] and after replication has been filed, the Court will, in a proper case, give the plaintiff further time.[3]

Where it appears that a defendant who was in a position to move to dismiss was aware of the residence of a co-defendant whom the plaintiff could not (though using reasonable diligence of which the defendant moving was aware) find to serve with the bill, a motion to dismiss for want of prosecution by such defendant was refused with costs.[4] Where one of the defendants had answered, and the time for replying had expired, a motion was then made to dismiss the bill as against him for want of prosecution: but it appearing that such defendant was President of an incorporated Company, whose answer had not yet been filed, the motion was refused with costs.[5] The Court will exercise a discretion in granting or refusing an order to dismiss and consider the peculiar circumstances of the case; where, therefore, the defendant has been dilatory in obeying the rrder to produce, and refused to go down to hearing by consent, when plaintiff being too late to go down otherwise, applied for a consent, an order to dismiss was refused, and under the same circumstances an order to open publication and for leave to set down cause for the following examination and hearing term granted.[6]

Notwithstanding the enactment that, upon the defendant's dismissing a bill for want of prosecution the plaintiff shall pay to the defendant his costs, to be taxed by the Master,[7] the Court has a discretion to make such order in respect of costs, as well as in other respects, as it thinks fit; and though, in most cases, where the defendant was in a position to move to dismiss at the time the notice

1 *Young* v *Quincy*, 9 Beav. 160; *Stinton* v. *Taylor*, 4 Hare, 608, 609; 10 Jur. 386.
2 *Ingle* v. *Partridge*, 12 W. R. 65. M. R.
3 *Pollard* v. *Doyle*, 2 W. R 509, V. C. K.; and see *Forbes* v. *Preston*, 11 Jur. N. S. 198, V. C. S.
4 *Shaver* v *Allison*, 1 Cham. R. 203.
5 *Rees* v *Jacques*, 1 Grant, 352.
6 *Jeffs* v. *Orr*, 2 Cham. R. 273.
7 4 & 5 Ann. c. 16, s. 23, *ante*. As to the form of order, where it is by an official manager or liquidator, see *Grand Trunk Company* v. *Brodie*, 3 De G. M. & G. 146; 17 Jur. 309; 9 Hare 823; 17 Jur. 205; *Official Manager of Consols Insurance Company* v. *Wood*, 13 W. R. 492, V. C. K.; and see Morgan & Davey, 226.

was served, the Court orders the plaintiff to pay the costs, whatever order it may make in other respects, it has refused to make any order upon the motion :[1] has dismissed the bill, without costs :[2] and has even gone the length of dismissing the motion with costs.[3]

Where the plaintiff becomes bankrupt,[4] the rule is to dismiss the bill without costs. Where the defendant becomes bankrupt, it seems to have been formerly considered that the bill if dismissed for want of prosecution, ought to be dismissed without costs ;[5] but it has since been held, that the fact of a defendant becoming a bankrupt is not of itself a sufficient reason for departing from the ordinary rule that, a bill dismissed for want of prosecution, is dismissed with costs.[6]

The Court will not enter into the merits of the case, for the purpose of determining whether the bill shall be dismissed with or without costs ; but will, for that purpose, only consider the conduct of the parties in the prosecution of the cause.[7]

Where a defendant, knowing that the plaintiff has used due diligence and been unable to get in the answers of other defendants, moves to dismiss the bill for want of prosecution, the motion will be dismissed with costs ;[8] and it is, therefore, prudent on the part of the plaintiff to give a defendant who is in a position to move to dismiss, notice that the other answers have not been got in, if such is the fact.[9]

Where the plaintiff undertakes to speed the cause, the order ought to go on to provide that, in default of his taking the appointed step within the prescribed period, the bill shall be dismissed with costs, without further notice.[10]

1 *Vent* v. *Pacey*, 3 Sim 382; and see *Ingle* v. *Partridge*, *ubi sup.*
2 *Pinfold* v. *Pinfold*, 9 Hare, App. 14 : 16 Jur. 1081, V. C. T.; and see *South Staffordshire Railway Company* v. *Hall*, 16 Jur. 160, V. C. K.; *Lancashire and Yorkshire Railway Company* v. *Evans*, 14 Beav. 529 ; *Kemball* v. *Walduck*, 1 Sm. & G. App. 27 : 18 Jur. 69, V. C. S.
3 *Partington* v. *Baillie*, 5 Sim 667; *Winthrop* v. *Murray*, 7 Hare, 150 : 13 Jur. 32.
4 *Meiklam* v. *Elmore*, 4 De G. & J. 208 : 5 Jur. N. S. 904.
5 *Blanchard* v. *Drew*, 10 Sim. 240; *Monteith* v. *Taylor*, 9 Ves. 615 : 1 M'N. & G. 81, n.; *Kemball* v. *Walduck*, 1 Sm. & G. App. 27 : 18 Jur. 69; *Findlay* v *Lawrence*, 2 De G. & S 303.
6 *Blackmore* v. *Smith*, 1 M'N. & G. 80 : 13 Jur. 218; *Robson* v. *Earl of Devon*, 3 Sm. & G. 227 : 2 Jur. N. S. 565; *Levi* v. *Heritage*, 26 Beav. 560; S. C. *nom. Lever* v. *Heritage*, 5 Jur. N. S. 215.
7 *Stagg* v. *Knowles*, 3 Hare, 241, 244; *South Staffordshire Railway Company* v. *Hall*, 16 Jur. 160, V. C. K., *Wallis* v. *Wallis*, 4 Drew. 458.
8 *Partington* v. *Baillie*, 5 Sim. 667; *Winthrop* v. *Murray*, 7 Hare, 150 : 13 Jur. 32; and see *Ingle* v. *Partridge*, 12 W. R. 65, M. R.; *Barker* v. *Piele*, 12 W. R. 460, V. C. K.
9 *Adair* v. *Barrington*, 2 W. R. 361 : 2 Eq Rep. 408, V. C. W.
10 *Emerson* v. *Emerson*, 6 Hare, 442: 12 Jur. 973 ; *Stephenson* v. *Mackay*, 24 Beav. 252; *Pearce* v. *Wrigton*, *ib.* 253; and see *Bartlett* v. *Harton*, 17 Beav. 479; 17 Jur. 1019; *Stevens* v. *Praed* 2 Cox, 374; *Dobede* v. *Edwards*, 11 Sim. 454. For form of order in such case, see Seton, 1278, No. 4.

If the plaintiff makes default in taking the next step within the time limited, no further indulgence will in general be granted him.[1] Where, however, the plaintiff considers he has a case entitling him to ask for further indulgence, he should make a special application for further time, by motion, before the expiration of the period limited;[2] or if the time has expired, the application must be to have the bill restored.[3] It is not, however, the ordinary course of the Court to restore a bill which has once been dismissed; it must be shewn that substantial justice requires that it should be done, and then, upon the particular circumstances, the Court will make the order.[4] The Court will not restore a bill which has been regularly dismissed, for the mere purpose of agitating the question of costs.[5]

After an order dismissing a bill for want of prosecution has been obtained upon notice, the plaintiff applied to discharge that order, alleging his intention of prosecuting the suit, and that he had not received any personal notice of the motion to dismiss. The application was granted upon payment of costs, and the terms of paying into Court certain instalments claimed to be due the defendant.[6] A motion to restore a bill dismissed for want of prosecution was refused where great delay had taken place on the part of the plaintiff.[7] *Semble*, a bill properly dismissed for want of prosecution will only be restored under strong and special circumstances; where an injunction bill had been dismissed which had been filed to restrain proceedings at law, and judgment at law had been confessed on obtaining the injunction, and afterwards on the dismissal of the bill, money paid under the pressure of the judgment which it was now alleged was in excess of any due, a motion to restore the bill and take accounts between the parties was refused.[8] Where a plaintiff swears to a good case, on the merits, the Court will, in its discretion, give him an opportunity to hear his case on the merits; even after an order to dismiss has been properly granted.[9]

1 *LaMert* v. *Stanhope*, 5 De G. & S. 247; *Stephenson* v. *Mackay*, *ubi sup.*; *Williams* v. *Page*, 24 Beav. 490; *Bartlett* v. *Harton*, *ubi sup.*
2 *LaMert* v. *Stanhope*, *ubi sup.*
3 *Bartlett* v. *Harton*, 17 Beav. 479: 17 Jur. 1019; *Jackson* v. *Purnell*, 16 Ves. 204; the application, in this case, should be made by motion.
4 See *Southampton Steam Boat Company* v. *Rawlins*, 11 Jur. N. S. 230: 13 W. R. 512, L.J.J., where the delay had been occasioned by a mistake.
5 *Hannam* v. *South London Water Works Company*, 2 Mer. 63, 64.
6 *Campbell* v. *Ferris*, 1 Cham. R. 50.
7 *Davy* v. *Davy*, 2 Cham. R. 26.
8 *Hodgson* v. *Paxton*, 2 Cham. R. 398.
9 *Rees* v. *Attorney-General*, 2 Cham. R 300.

It has been held, that it is no answer to a motion to dismiss that the plaintiff has not been able to get in the answers of other defendants;[1] or that the delay of the plaintiff was occasioned by difficulties in drawing up an order allowing a demurrer by other defendants, with leave to amend;[2] or that the plaintiff has applied for the production of documents, unless the application was made without delay;[3] or that proceedings had been stayed, against other defendants, till the plaintiff should pay them certain costs;[4] or that the plaintiff had offered to dismiss the bill without costs: the decision on which it had been filed having been overruled;[5] or that the defendant has become bankrupt.[6]

Where, however, in consequence of negotiations with the principal defendant, the plaintiff did not get in the answers of the other defendants, and the principal defendant, during the absence of the plaintiff abroad, moved to dismiss for want of prosecution, Lord Cottenham gave the plaintiff (on the 7th of July,) till the first day of the ensuing Michaelmas term, to file replication.[7] On a motion to dismiss the bill of a married woman the Court refused to count against her time which had been lost in consequence of an order obtained by the defendant requiring her to name a new next friend.[8] The omission on the part of the defendant to give notice of the filing of his answer,[9] does not affect his right to move to dismiss the bill for want of prosecution: though, of course, it may materially affect the order which the Court will make upon the motion.[10]

A defendant is not prevented from moving to dismiss by the suit having abated, through the death of another defendant.[11]

In bills to perpetuate testimony, it does not seem that the defendant has hitherto had, under any circumstances, a right to have the

1 *Lester* v. *Archdale*, 9 Beav. 156; *Earl of Mornington* v. *Smith*, *ib.* 251; *Baldwin* v. *Damer*, 11 Jur. 723, V C. E.; *Stinton* v. *Taylor*, 4 Hare, 608, 609: 10 Jur. 386: *Adair* v. *Barrington*, 2 W. R. 361: 2 Eq. Rep 408, V C. W.; *Briggs* v. *Beale*, 12 W. R. 934, V. C. W.; but see *ante*.
2 *Jones* v. *Morgan*, 12 Jur. 388, V. C. E; see also *Drioli* v. *Sedgwick*, 15 Jur. 284, V. C. Ld. C.
3 *Franco* v. *Meyer*, 2 H. & M. 42.
4 *Latour* v. *Holcombe*, 10 Beav. 256.
5 *Lancashire and Yorkshire Railway Company* v. *Evans*, 14 Beav. 529; the bill was, however, in this case, afterwards dismissed without costs; *South Staffordshire Railway Company* v. *Hall*, Jur. 160, V. C. K.
6 *Levi* v. *Heritage*, 26 Beav. 560, and cases there cited; S. C. *nom. Lever* v. *Heritage*. 5 Jur. N. S. 215.
7 *Hardy* v. *Hardy*, 1 C. P. Coop t Cott. 16.
8 *Poole* v. *Poole*, 2 Cham. R. 475.
9 Ord. 11I. 9: see *ante*.
10 *Jones* v. *Jones*, 1 Jur. N. S. 863: 3 W. R. 638, V. C. S.
11 *Williams* v. *Page*, 24 Beav. 490.

bill dismissed for want of prosecution. In *Beavan* v *Carpenter*,[1] a cause of this kind, a motion to dismiss before replication, was refused; but Sir Lancelot Shadwell, V.C., made an order, that the plaintiff should file a replication forthwith, and proceed to the examination of his witnesses, as prayed by his bill, and procure such examination to be completed on or before a certain day; and that, in default thereof, he should pay to the defendant his costs of the suit. And a similar order was made, on a like motion after replication.[2]

So, in the case of a bill for discovery, the defendant should not move to dismiss for want of prosecution, but should obtain, on motion, as of course, an order for his payment of the costs by the plaintiff.[3] And in a suit for a receiver, *pendente lite*, the motion should be for the payment of costs, to stay proceedings, and, if necessary, to discharge the receiver.[4]

After a decree, or even a decretal order, has been made, a bill cannot be dismissed for want of prosecution; thus, in the case of *Bluck* v. *Colnaghi*,[5] which was a suit for winding up the affairs of the partnership between the plaintiff and defendant, and in which an order had been made, by consent on motion, for taking the accounts of the partnership, but had not been drawn up, Sir Lancelot Shadwell, V.C., said, that the order which had been pronounced was a decretal order; and though it had not been drawn up, yet, either party was at liberty to draw it up; and that an order in the nature of a decree having been made in the cause, the bill could not be dismissed. But after a decree merely directing accounts and enquiries, to enable the Court to determine what is to be done, a bill can always be dismissed.[6]

An order to dismiss a bill for want of prosecution will not be granted after decree made in the cause.[7] A bill cannot be dismissed even by consent after a decree has been made in the cause.[8]

1 11 Sim. 22.
2 *Wright* v. *Tatham*, 2 Sim. 459; and *Barham* v. *Longman*, *ib.* 460; see also *Brigstocke* v. *Roch*, 7 Jur. N. S. 63, V. C. S.
3 *Woodcock* v. *King*, 1 Atk. 286; *Attorney-General* v. *Burch*, 4 Mad. 178; *Rhodes* v. *Hayne*, 9 Jur. 175, V. C. K. B.; *South-Eastern Railway Company* v. *Submarine Telegraph Company*, 18 Beav. 429; 17 Jur. 1044; *Fitzgerald* v. *Butt*, 9 Hare, App. 65.
4 *Edwards* v. *Edwards* 17 Jur 826, V. C. W.; *Anderson* v. *Guichard*, 9 Hare, 275; *Barton* v. *Rock* (No. 2), 22 Beav. 376; but see *Williams* v. *Attorney-General*, Seton, 1003.
5 9 Sim. 411; *Egg* v. *Devey*, 11 Beav. 221; and *Collins* v. *Greaves*, 5 Hare, 596; *Gregory* v. *Spencer*, 11 Beav. 143.
6 *Anon.*, 11 Ves. 169; *Barton* v *Barton*, 3 K. & J. 512: 3 Jur. N. S. 808; and see *ante*.
7 *Groves* v. *Ryves*, 1 Cham R. 272.
8 *Ontario Bank* v. *Campbell*, 1 Cham. R. 458.

It has been before stated, that an order to dismiss a bill for want of prosecution cannot be pleaded in bar to a new bill for the same matter.[1] Where, however, after a bill has been so dismissed, the plaintiff files another bill for the same purpose, the Court will suspend the proceedings on such new bill till the costs of the former suit have been paid; and where the defendant, in the suit which had been dismissed, died before he had received his costs, and the plaintiff filed a new bill against his executor for the same object, Sir Lancelot Shadwell, V.C., ordered the proceedings on the new bill to be stayed, until the plaintiff had paid the executor the costs of the dismissed suit.[2] This rule does not apply, where the plaintiff sues by a next friend.[3]

A motion to dismiss for want of prosecution had been refused with costs. *Held*, that another motion to dismiss could not be made till the costs of the prior one were paid, though it appeared that the plaintiff's solicitor had not taken out his certificate.[4]

An order to dismiss a bill for want of prosecution, effectually puts an end to every proceeding in the suit which has been dismissed, and no subsequent step can be taken in it, except such as may be necessary for carrying into effect the order of dismissal.[5] Therefore, where a defendant obtains an order to dismiss a bill for want of prosecution, without the plaintiff's having made a motion of which he has given notice, the defendant cannot afterwards obtain the costs of the motion, as an abandoned motion.

Where a bill is dismissed with costs, they may be taxed without any order referring them for taxation, unless the Court prohibits the taxation; and they will be recoverable by *fi fa*, in the usual manner. Where the dismissal takes place before the hearing, only those costs which are costs in the cause are included;[6] therefore, when the costs of a motion or other application in the cause are reserved, they should be made costs in the cause, or reserved "until the hearing or further order," and not simply "until the hearing."[7]

1 *Ante.*
2 *Long* v. *Storie*, 13 Jur. 1091 V. C. E.; and see *ante.*
3 *Hind* v. *Whitmore*, 2 K. & J. 458.
4 *Harvey* v. *Ferguson*, 1 Cham. R 218.
5 See *Lorimer* v. *Lorimer*, 1 J. & W. 224: *Bartlett* v. *Harton*, 17 Jur. 1019, M. R.
6 *Stevens* v. *Keating*, 1 M'N & G. 659, 663: 14 Jur. 157.
7 *Ruubold* v. *Forteath*, 4 Jur. N. S. 608, V. C. W.

Where a bill was dismissed for want of prosecution, in a suit in which the official manager of a company under process of winding up had, after institution of the suit, been substituted as plaintiff, the order provided that the defendants should be at liberty to prove for their costs in the winding up.[1]

The order dismissing a bill for want of prosecution, may be enrolled, although the only object in doing so be to prevent an appeal.[2]

SECTION III.—*Where the Suit has abated, or become otherwise Defective.*

Where a suit abates by the death of a sole plaintiff, the Court, upon motion of any defendant, made on notice served on the legal representative of the deceased plaintiff, may order that such legal representative do revive the suit within a limited time, or that the bill be dismissed.[3]

We have no order similar to this English one, but it is an embodiment merely of the old practice established in the time of Lord Eldon, and is, therefore, the practice in this Province. The practitioner may safely follow the English decisions on this order.

The words legal representative mean heir, or devisee, or executor, or administrator, according as the suit relates to real or personal estate.[4]

Where the sole plaintiff died after decree, and after an injunction to restrain waste, Lord Langdale, M. R., made an order, that all further proceedings should be stayed, and the injunction dissolved, unless the suit were revived within a limited time;[5] but Sir R. T. Kindersley, V.C., declined to follow this case,[6] on the ground that

1 *Caldwell* v. *Ernest*, (No. 2), 27 Beav. 42: 5 Jur. N. S. 667.
2 *Williams* v. *Page*, 1 De G. & J. 561.
3 Ord. XXXII. 4. This rule is only applicable to an abatement or defect occurring before decree. As to proceedings in the suit, after an abatement, but in ignorance of it, see *Smith* v. *Horsfall*, 24 Beav. 331; *Houston* v. *Briscoe*, 7 W. R. 394, V. C. K. For form of order under r. 4, see Seton, 1278, No. 5.
4 See *Price* v. *Berrington*, 11 Beav. 90.
5 *Ibid.*
6 *Mills* v. *Dudgeon*, 1 W. R. 514, V. C. K.

the defendant could himself revive.[1] And where an injunction had been obtained, restraining an action at law, and the sole plaintiff died, Sir John Romilly, M. R., said he had no jurisdiction to make an order that the suit be revived by the plaintiff's representatives, or the bill be dismissed.[2] If the bill is dismissed, it will be dismissed without costs.[3]

A suit does not abate by the death of a sole plaintiff, who is the public officer of a joint-stock company:[4] in such a case, therefore, the defendant should apply to dismiss the bill in the usual form, and not that it may be revived within a limited time or dismissed.[5]

Where a suit abates by the death of one of several co-plaintiffs the defendant may, on motion, obtain an order that the surviving plaintiffs do revive within a limited time, or, in default, that the bill stand dismissed with costs;[6] and it is no answer to such an application that there is no personal representative of the deceased plaintiff.[7] No order will be made as to the costs of the motion.[8]

Where a suit abates by the marriage of a female sole plaintiff, a similar order may be obtained against her husband;[9] and it seems that the order will be made with costs.[10]

Where the abatement is caused by the death of a defendant, his representatives may move that the plaintiff do revive the suit within a limited time, or, in default, that the bill may be dismissed as against them; and the order is, it seems, for the dismissal without costs.[11]

Where a suit is partially abated by the death of one of the defendants, the other defendant cannot move to dismiss the bill for want of prosecution, the proper course is to move that the plaintiff do re-

1 See *Devaynes* v. *Morris*, 1 M. & C. 213, 225.
2 *Odfield* v. *Cobbett*, 20 Beav. 563.
3 *Chowick* v. *Dimes*, 3 Beav. 290, 492, n.; and cases in *ib.* 294, n.; *Hill* v. *Gount*, 7 Jur. N. S. 42: 9 W. R. 68, N. C. W.
4 See 7 Geo. IV. c. 46, s. 9.
5 *Burmester* v. *Von Stenz*, 23 Beav. 32.
6 *Adamson* v. *Hall*, T. & R. 258, overruling S. C. 1 S. & S. 249; *Chichester* v. *Hunter*, 3 Beav. 491; *Lord Huntingtower* v. *Sherborn*, 5 Beav. 380; *Holcombe* v *Tratter*, 1 Coll. 654; *Norton* v. *White*, 2 De G. M. & G. 678: *Powell* v. *Powell*, *ib.* n.; *Pudge* v. *Pitt*, 3 W. R. 100, V. C. S.; *Pearce* v. *Wrighton*, 24 Beav. 253; *Hinde* v. *Morton*, 13 W. R. 401, V. C. W.
7 *Saner* v. *Deaven*, 16 Beav. 30.
8 *Hinde* v. *Morton*, *ubi sup.*
9 *Jonston* v. *Horlock*, 3 Beav. 294, n., *Wilkison* v. *Charlesworth*, *ib.* 297, n.
10 *Johnson* v. *Horlock*, *ubi sup.*; see however, *Wilkison* v. *Charlesworth*, *ubi sup.*, *contra*.
11 *Burnell* v. *Duke of Wellington*, 6 Sim. 451; *Norton* v. *White*, 2 De G. M. & G. 678; *Powell* v. *Powell*, *ib.* n.; *Cross* v. *Cross*, 11 W. R. 797, V. C. S.; *Reeves* v. *Baker*, 13 Beav. 115, is incorrectly reported: see 2 De G. M. & G. 679, n. (*b*).

vive within a limited time.[1] This case must not now be considered as governing the practice of the Court, for it has since been decided that one of the surviving defendants may properly move to dismiss, though the suit has become abated by the death of another defendant.[2]

Where a suit becomes defective by the bankruptcy of a sole plaintiff, the defendant may obtain, on special motion,[3] an order that the assignee do within a limited time (usually three weeks), take proper supplemental proceedings for the purpose of prosecuting the suit against the defendant, or, in default, that the bill be dismissed, without costs.[4] And where one of several co-plaintiffs becomes bankrupt, a similar order may be obtained against the other co-plaintiffs;[5] but in this case, the dismissal will be with costs.[6]

If the plaintiff becomes bankrupt after decree, the Court will, on the motion of the defendant, order that the assignees elect within a limited time, whether they will prosecute the suit, and, in default, that all further proceedings be stayed.[7] And a similar order has been made, with respect to a trustee under the act to facilitate arrangements with creditors.[8]

The order to dismiss on occasion of abatement, or of the suit becoming defective must not be confounded with an ordinary order to dismiss for want of prosecution. The two orders differ from one another materially, both in the circumstances in which they may be obtained and the form of the order when it is made. After a suit has abated, or after it has become defective by the bankruptcy of the plaintiff, it is irregular to move for the ordinary order to dismiss the bill for want of prosecution;[9] and such an order, if made will be discharged for irregularity.[10]

1 *B. U. C.* v. *Nichol*, 1 Cham. R. 294; and see *Rice* v. *George*, 2 Cham. R. 74.
2 *Kelley* v. *Macklem*, 2 Cham. R. 132.
3 As to serving notice of the motion on the bankrupt, as well as on the assignees, see *Vestris* v. *Hooper*, 8 Sim. 570.
4 *Ante*; *Sharpe* v. *Hullett*, 2 S. & S. 496; *Wheeler* v. *Malins*, 4 Mad. 171; *Porter* v. *Cox*, 5 Mad. 80; *Lord Huntingtower* v. *Sherborn*, *ubi sup.*; *Robinson* v. *Norton*, 10 Beav. 484; *Fisher* v. *Fisher*, 6 Hare, 628; 2 Phil. 236; *Meiklam* v. *Elmore*, 4 DeG. & J. 208: 5 Jur. N.S. 904; *Jackson* v. *Riga Railway*, 28 Beav. 75; *Boucicault* v. *Delafield*, 10 Jur. N.S. 937: 12 W.R. 1025, V. C. W.; 10 Jur. N. S. 1063: 13 W. R. 64, L. JJ.; where the bankruptcy has occurred in a foreign country, see *Bourbaud* v. *Bourbaud*, 12 W. R. 1024, V. C. W. As to the effect of a trust deed by the plaintiff, under 24 & 25 Vic. c. 134, sec s. 197. For form of order, see Seton, 1278, No. 6.
5 *Ward* v. *Ward*, 8 Beav. 397: 11 Beav. 159: 12 Jur. 592; *Kilminster* v. *Pratt*, 1 Hare, 632; see, however, *Caddick* v. *Masson*, 1 Sim. 501.
6 *Ward* v. *Ward*, and *Kilminster* v. *Pratt*, *ubi sup.*
7 *Whitmore* v. *Oxborrow*, 1 Coll. 91; *Clarke* v. *Tipping*, 16 Beav. 12.
8 *Hardy* v. *Dartnell*, 4 De. G. & S. 568; see 7 & 8 Vic. c. 70; 24 & 25 Vic. c. 134, s. 197.
9 *Robinson* v. *Morton*, 10 Beav. 484.
10 *Boddy* v. *Kent*, 1 Mer. 361, 365; *Sellers* v. *Dawson*, 2 Dick, 738, 2 Anst. 458, n.

Where a suit becomes defective by the bankruptcy of a defendant, he may, as we have seen, notwithstanding his bankruptcy, obtain the usual order to dismiss the bill for want of prosecution, with costs;[1] but he cannot obtain an order of a similar kind to that granted on the bankruptcy of a plaintiff.[2]

SECTION IV.—*Cases of Election.*

Where the plaintiff is suing both at Law and Equity, at the same time, for the same matter, the defendant is entitled to an order that the plaintiff do elect whether he will proceed with the suit in Equity, or with the action at Law.[3] Thus, the Court will generally compel a plaintiff to elect between a suit in Equity for the specific performance of an agreement, and an action at Law brought in respect of the same agreement.[4] So also, as a general rule, a party suing in Equity will not be allowed to sue at Law for the same debt. The case of a mortgagee is an exception to this rule: it is frequently said, that he may pursue all his remedies concurrently at any rate, he can proceed on his mortgage in Equity, and on his bond or covenant at Law at the same time.[5] In the case of *Barker* v. *Smark*,[6] however Lord Langdale, M. R., refused to extend the exception to a case of a vendor, who had commenced an action at Law upon a bond for his unpaid purchase-money, and at the same time was suing in Equity to establish a lien upon the estate for the same sum.

The principle of election has also been applied where there was one suit in this country, and another for the same matter in a foreign court of competent jurisdiction.[7]

1 *Blackmore* v. *Smith*, 1 M'N. & G. 80: 13 Jur. 218; *Robson* v. *Earl of Devon*, 3 Sm. & G. 227: 2 Jur. N. S. 565, *Levi* v. *Heritage*, 26 Beav. 560; S. C., *nom. Lever* v. *Heritage*, 5 Jur. N. S. 215; but see *Kemball* v. *Walduck*, 1 S. M. & G. 27: 18 Jur. 69, V C. S., where the dismissal was without costs.
2 *Mason* v. *Burton*, 1 Y. & C. C. C. 626.
3 Ld. Red. 249.
4 *Carrick* v. *Young*, 4 Mad. 437; *Ambrose* v. *Nott*, 2 Hare, 649, 651; see also *Fennings* v. *Humphrey*, 4 Beav. 1: 5 Jur. 455; *Faulkner* v. *Llewellyn*, 10 W. R. 506, V. C. K.; *Gedye* v. *Duke of Montrose*, 5 W R. 537: S. C. 26 Beav. 45, 47.
5 *Schoole* v. *Sall*, 1 Sch. & Lef. 176; *Booth* v. *Booth*, 2 Atk. 343; *Willes* v. *Levett*, 1 De G. & S. 392.
6 3 Beav. 64.
7 *Pieters* v. *Thompson*, G. Coop. 294.

The plaintiff, in an interpleader issue at law, having filed his bill for relief in this Court while the interpleader is pending, is not bound to elect.[1] A defendant is not entitled to an order calling upon the plaintiff to elect whether he will proceed in this Court or at law, until after he has answered the bill; and a demurrer is not such a proceeding as will entitle the defendant to the order.[2] Defendants, sued at law and in this Court for the same matters, are entitled, on filing their answer, to obtain an order against the plaintiff to elect on *precipe*; and it is not necessary that all the defendants should apply for such order. The motion to discharge such order should be made in Chambers; if made in Court it will be refused or referred to Chambers, and the costs of the day given to the defendants. The Court in its discretion, will allow both suits to proceed only when the proceedings at law are ancillary to those in equity. It is not necessary that such an order should be obtained by all the defendants.[3]

It seems that, in a particular case, the plaintiff may be allowed to proceed partially in Equity, and partially at Law, and compelled to enter into a special election.[4]

The order must be served on the plaintiff or his solicitor, and attorney at Law; and within eight days after such service, the plaintiff must make his election in which Court he will proceed; and if he elect to proceed in this Court, then his proceedings at Law are thereby stayed by injunction; but if he elect to proceed at Law, or in default of his making his election within the specified time, then his bill from thenceforth stands dismissed out of this Court, with costs to be taxed by the Taxing Master, without further order: such costs to be paid by the plaintiff to the defendant. It is not the practice to issue an injunction: the service of the order being sufficient.[5]

When the defendant has obtained such an order, the plaintiff may move, on notice to the defendant, to discharge it, either for irregularity or upon the merits confessed in the answer, or proved by affidavit. If, upon such a motion, there should be any doubt as

1 *McLean* v. *Beaty*, 1 Cham. R. 84.
2 *G. W. R. Co.* v. *Desjardins Canal Co.*, 1 Cham. R. 39.
3 *Winter* v *Hamburgh*, 1 Cham R. 123; and see *Woodside* v. *Dickey*, 1 Cham. R. 170.
4 *Barker* v. *Dumaresque*, 2 Atk. 119: Seton, 949; *Anon.*, 1 Vern. 104: 3 Atk. 129; *Trimleston* v *Kennis*, Ll. & Goold 29; *Mills* v. *Fry*. G. Coop 107: 19 Ves. 277.
5 Braithwaite's Pr. 229; see *Fennings* v. *Humphrey*, 4 Beav. 1, 7, 8: 5 Jur. 455.

to whether the suit in Equity, and the action at Law, are for the same matter, it is the usual course to direct an enquiry into that fact.[1] In the event of such an enquiry being directed, it seems that all the proceedings in both Courts are stayed in the mean time,[2] unless the plaintiff can show that justice will be better done by permitting proceedings to some extent: in which case, special leave will be given him to proceed.[3]

If the common order cannot, under the circumstances, be obtained, it seems that the Court will, if necessary, make a special order, and grant an injunction in the meantime.[4]

The election must be in writing, and signed by the plaintiff or his solicitor, and be filed; and notice thereof must be given to the defendant's solicitor: who thereupon obtains an office copy.[5]

The dismissal of the bill, in consequence of an election by the plaintiff to proceed at Law, cannot be pleaded in bar to another suit for the same matter.[6]

If the plaintiff requires further time to make his election, he must apply to the Court by motion, on notice, to have the time enlarged.[7]

After decree, it is not the practice to make an order to elect; but the plaintiff will be restrained, on the motion of the defendant, from proceeding in another Court, in respect of the same matter: even though such proceedings are merely auxiliary to the proceedings in Equity.[8]

If the plaintiff elect to proceed in Equity, the defendant will either be allowed to recover the costs of the action in the Court of Law,[9] or the plaintiff will be directed by the Court of Chancery to

1 *Mousley* v. *Basnett*, 1 V. & B. 382, n.; and for form of order for inquiry, see Seton, 948, No. 3.
2 *Mills* v. *Fry*, 3 Ves & B. 9: *Anon*, 2 Mad. 395.
3 *Amory* v *Brodrick*, Jac. 530, 533; *Carwick* v *Young*, 2 Swanst. 239, 243; *Mousley* v. *Basnett*, *ubi sup.*; see, however, *Fennings* v. *Humphery*, 4 Beav. 1, 8: 5 Jur. 455.
4 *Hogue* v. *Curtis*, 1 J. & W. 449.
5 We have no order similar to this, but it is presumed that the Court will adopt the practice.
6 *Countess of Plymouth* v. *Bladon*, 2 Vern. 32
7 For form of order enlarging the time, see Seton, 948, No. 2.
8 *Wilson* v. *Wetherherd*, 2 Mer. 406, 408; *Frank* v *Basnett*, 2 M. & K. 618, 620; *Wedderburn* v. *Wedderburn*, 2 Beav 208, 213: 4 Jur. 66; 4 M. & C. 585, 596; *Phelps* v. *Prothero*, 7 De G. M. & G. 722: 2 Jur. N. S. 173. Going in under an administration decree to prove a debt, is not such an election to proceed in Equity, as prevents an action at law: *Sexton* v. *Smith*, 3 De G. & S. 694.
9 *Simpson* v. *Sadd*, 3 W. R. 191, L. C.; see also, S. C. 16 C. B. 26; 1 Jur. N. S. 736; and *Mortimore* v. *Soares*, 5 Jur N. S. 574, Q. B.

pay them ;[1] and if he elect to proceed at Law, the bill is as we have seen, by the order dismissed with costs.[2]

Our order 465 provides that "Where a mortgagee has proceeded at Law upon his security, he shall not be entitled to his costs both at Law and in Equity, unless the Court sees fit to order otherwise." It has been held under this order that where a mortgagee proceeds at Law and in Equity, he cannot, in the absence of special circumstances to justify the proceedings, elect to take the Chancery costs instead of those at law, if the defendant objects thereto.[3] And where it was shewn that a mortgagee had for the *bona fide* purpose of preserving the mortgage premises from destruction or delapidation, instituted proceedings at Law to obtain possession of the property, he was not deprived of his costs in Equity.[4] A defendant having allowed the plaintiff to proceed with his suit in this Court as well as at Law for the same object, afterwards applied for an order on the plaintiff to elect in which Court he would proceed. The Court granted the order, but directed the defendant to pay so much of the costs at Law as had been incurred after the defendant became aware that the relief sought in both suits was the same.[5]

CHAPTER XVI.

MOTION FOR A DECREE.

Our Order 270 provides that: "The plaintiff, at any time after the period allowed for answering has expired, but before replication, may move the Court for such order as he thinks himself entitled to, in the three following classes of cases:

I. Where there is no evidence.

II. Where the evidence consists only of documents, and such affidavits as are necessary to prove their execution or identity, without the necessity of any cross-examination.

1 See *Carwick* v. *Young*, 2 Swanst. 239, 242.
2 *Ante*.
3 *Weir* v. *Taylor*, 1 Cham. R. 371.
4 *Dallas* v. *Gow*, 1 Cham. R. 65.
5 *Ausman* v. *Montgomery*, 5 Grant, 175.

III. Where infants are concerned, and evidence is necessary only so far as they are concerned, for the purpose of proving facts which are not disputed.

This order is not to apply to cases in which the Court gives leave to serve short notice of motion for decree."

This order is taken from the Imp. Sta. 15 and 16 Vic., c. 86, s. 15, and it has been held in England under the Act, that if the plaintiff moves for a decree, replication need not afterwards be filed.[1] On a motion for a decree, the plaintiff was assumed, for the purposes of the motion to admit all the statements of the answer, of which proof will be receivable at a hearing in term.[2]

Where, at the hearing, a cause was ordered to stand over for the purpose of adding parties by amendment, the cause was allowed to be heard on motion for decree against the new defendants: though replication had been filed against the original defendants.[3]

An order of course to amend the bill may be obtained after notice of motion for a decree has been served, but before it has been set down: although the defendant has filed affidavits in opposition.[4]

The form of notice of motion for decree commonly adopted is to the effect, that the Court will be moved for a decree, "according to the prayer of the plaintiff's bill;" and where this form is used, the plaintiff is entitled to have the same relief as he might have had if the cause had been brought to a hearing, in the ordinary way.[5]

The plaintiff and defendant respectively are at liberty to file affidavits in support of, and in opposition to the motion; and to use the same on the hearing thereof. The evidence in chief on such motion is ordinarily taken upon affidavit; and where the motion is made after answer filed, the answer is, for the purposes of the motion, to be treated as an affidavit; and the plaintiff has been allowed to cross-examine the defendant thereon.[6]

1 *Duffield* v. *Sturges*, 9 Hare, App. 87; *Blake* v. *Cox*, 1 W. R. 124, V. C. W.
2 *Wilson* v. *Cossey*, 14 Grant, 80.
3 *Gwyon* v. *Gwyon*, 1 K. & J. 211.
4 *Gill* v *Rayner*, 1 K. & J. 395.
5 *Norton* v. *Steinkopf*, Kay, 45; *ib.* App. 10.
6 *Wightman* v. *Wheelton*, 23 Beav. 397: 3 Jur. N. S. 124 | *Rehden* v. *Wesley*, 26 Beav. 432; *Brumfit* v. *Hart*, 9 Jur. N. S. 12: 11 W. R. 53. V. C. S.

Order 271 provides that "Where it is made to appear to the Court that it would be conducive to the ends of justice to permit a notice of motion for decree to be served before the time for answering has expired, the plaintiff may apply to the Court or a Judge, *exparte* for that purpose, at any time after the bill has been filed, and the Court, if it thinks fit, may order the same accordingly, and when such permission is granted, the Court is to give directions, as to the service of the notice of motion and filing of the affidavit, as it deems expedient." This order is taken from Order 17 of the Orders of June 1853, under which it has been held that a plaintiff is not entitled, as of course to a decree before the time for answering the bill has expired: some special ground must be shewn to induce the Court to grant it.[1] A plaintiff after giving notice of motion for a decree cannot abandon such proceeding, and set the cause down for hearing in the usual way:—if he desires to do so, he must apply to the Court for leave.[2] Motions for decree may be set down at any time before the Court enters on the paper.[3] Where a defendant by his answer sets up a stated account, the plaintiff does not admit the defence by bringing on the cause by way of motion for decree: and the proper decree in such a case is a reference as to such alleged account.[4]

If, after the times allowed for filing affidavits have elapsed, it is desirable to file an affidavit, or a further affidavit, an order for leave to do so will be necessary. Such order may be obtained on a special application, supported by an affidavit showing a case for the indulgence; and the applicant will usually have to pay the costs of the application.

If the defendant desires to read his own, or a co-defendant's answer, in support of his case, he must give notice thereof to the plaintiff;[5] but if the plaintiff reads part of a defendant's answer against him, without notice, the defendant may read the whole of his answer, without notice.[6]

1 *Davidson* v. *McKillop*, 4 Grant, 146.
2 *McLaughlin* v. *Whitesides*, 1 Cham. R. 56.
3 *Clarke* v. *Hall*, 7 Grant, 339.
4 *Neil* v. *Neil*, 15 Grant, 110.
5 *Stephens* v. *Heathcote*, 1 Dr. & S. 138; 5 Jur. N. S. 312; and see *Barrack* v. *M'Cullough*, 3 K. & J. 110; *Rushout* v. *Turner*, 1 Dr. & S. 140, n.; *Wightman* v. *Wheelton*, 23 Beav. 397: 3 Jur. N. S. 124.
6 *Stephens* v. *Heathcote ubi sup.*

Order 272 provides that, "Upon the hearing of a motion for a decree, the Court may, instead of either granting or refusing the application, give such directions for the examination of either parties or witnesses, or for the making of further enquiries, or with respect to the further prosecution of the suit, as the circumstances of the case may require, and upon such terms as to costs as it may think right." It may here be mentioned that a notice of motion for a decree is not to be treated as an ordinary motion in the course of a cause which the plaintiff is at liberty to abandon on the usual terms. The plaintiff having given a notice of motion for a decree cannot without leave abandon that mode of hearing the cause, and proceed to a hearing in the ordinary way.[1] Where, in a mortgage suit, a defendant by answer admitted the making of the mortgage, but denied an alleged agreement to pay an increased rate of interest, and set up a tender of the amount he contended was properly due on the mortgage, and claimed his costs, it was held not to be a case where the plaintiff was entitled to a *præcipe* decree. The plaintiff's solicitor asked that if the referee considered the decree erroneous, it might be amended by inserting a direction for the Master to enquire as to the alleged tender—*held* that such an amendment could not be made, the decree being one which could not be issued on *præcipe*, and that a decree so issued could contain no special directions or provisions.[2]

All witnesses who have made affidavits, either on behalf of the plaintiff or of the defendant, are liable to cross examination.[3] The plaintiff is entitled to cross-examine any defendant upon his answer;[4] and where the plaintiff gives notice of his intention to use a defendant's answer against a co-defendant, the co-defendant may cross-examine upon the answer;[5] and where a defendant gives notice to use his or a co-defendants's answer against the plaintiff, he, or the co-defendant as the case may be, may be cross-examined by the plaintiff;[6] the answer in such cases being treated as an affidavit. And even where the plaintiff had given notice to use the defendant's answers as affidavits, in support of his motion for a decree, he

1 *McLaughlin* v *Whitesides*, 7 Grant, 515.
2 *Ross* v. *Vader*, 3 Cham. R. 236.
3 Order 268; *Williams* v. *Williams*, 17 Beav. 156: 17 Jur. 434.
4 *Wightman v. Wheelton*, 23 Beav. 397: 3 Jur. N. S. 124; *Rehden* v. *Wesley*, 26 Beav. 432; *Brumfit* v. *Hart*, 9 Jur. N. S. 12: 11 W. R. 53, V. C. S.
5 *Rehden* v. *Wesley*, and *Wightman* v. *Wheelton*, *ubi sup.*; *Dawkins* v. *Mortan*, 1 J. & H. 339.
6 See *Rehden* v. *Wesley*, and *Wightman* v. *Wheelton*, *ubi sup.*

was allowed to cross-examine the defendants on the answers, without prejudice to the right of the other defendants to object to the cross-examination being used against them;[1] but when no notice is given of the intention to read the answer of the defendant, and it is read as an admission, and not as an affidavit, he cannot be cross-examined upon it.[2]

If the plaintiff fails to appear when the motion is called on, the defendant's counsel may apply to have the bill dismissed with costs, and need not, it seems, for this purpose produce an affidavit of the defendant's having been served with the notice of motion.[3] Where the defendant fails to appear, the plaintiff may move for the decree in his absence, subject to the production of an affidavit of service of the notice; but the Court has, in such case, allowed the decree to be reopened on motion.[4] The affidavit, in either case, should be filed at the Record and Writ Clerk's Office, and an office copy be produced to the Registrar, at the latest before the rising of the Court on the day on which the application is made.[5] If neither party appears on the motion, it will be struck out of the paper.

Upon hearing a motion for a decree, it is discretionary with the Court to grant or refuse the motion, or to make an order giving such directions with respect to the further prosecution of the suit as the circumstances of the case may require, and to make such order as to costs as it may think right.[6] The decree or order is drawn up, passed, and entered in the manner hereafter explained, in treating of decrees made on the hearing of the cause.[7] After an unsuccessful motion for a decree, the bill has been allowed to be amended.[8]

Upon an appeal from the whole decree, made on motion for decree, the plaintiff has the right to begin.[9]

1 *Rehden* v. *Wesley, ubi sup.*
2 See *Dawkins* v. *Mortan*, 1 J. & H. 339, 341; *Cousins* v. *Vasey*, 9 Hare, App. 61; *Stephens* v. *Heathcote*, 1 Dr. & S. 138: 5 Jur. N. S. 312.
3 *Marter* v. *Marter*, 12 W. R. 34, M. R.
4 *Hughes* v. *Jones*, 26 Beav. 24.
5 *Lord Milltown* v. *Stuart*, 8 Sim. 34; Seton, 29.
6 Order 272. See *Thomas* v. *Bernard*, 5 Jur. N. S. 31: 7 W. R. 86, V. C. K.; *Warde* v. *Dickson*, 5, Jur. N. S. 898: 7 W. R. 148, V. C. K.; *Raworth* v. *Parker*, 2 K. & J. 163; *Norton* v. *Steinkopf*, Kay, 45; *ib.* App. 10; *Robinson* v. *Lowater*, 2 Eq Rep. 1072, L J.J.
7 For form of decree on motion, see Seton, 26.
8 *Thomas* v. *Bernard*, 5 Jur. N. S. 31: 7 W. R. 86, V. C. K.
9 *Birkenhead Docks* v. *Laird*, 4 De G. M. & G. 732.

By bringing a cause to a hearing on a motion for a decree, considerable delay is saved; it is, therefore, the better course for a plaintiff to follow, where he expects to be able to prove his case by affidavit; but where he desires to examine witnesses in chief, orally, he should file replication.[1]

CHAPTER XXI.

REPLICATION.

After the defendant has fully answered the bill the plaintiff, if he determine not to move for a decree, or his motion has been refused, must file a replication:[2] unless, where an answer has been filed, he decides to go to a hearing of the cause on bill and answer.

Our Order 149 provides that "One replication only is to be filed in a cause, unless the Court orders otherwise; it is to be in the form set forth in Schedule H hereunder written, or as near thereto as circumstances admit, and require; and upon the filing of the replication the cause is to be deemed at issue."

If, upon the answer alone, without further proof, there is sufficient ground for a final order or decree, the plaintiff must proceed to a hearing on bill and answer, without entering into evidence: as where the plaintiff makes his title by a will or other conveyance in the defendant's hands, and the defendant, by his answer, confesses it, or where a trust is confessed by the answer, and nothing further is required than to have the accounts taken.[3]

Order 152 provides that, "Where the plaintiff has not obtained an order to amend his bill, he is either to file his replication, or set down the cause to be heard on bill and answer, within one month after the filing of the last answer."

1 See *ante*.
2 Ord. 149, *Duffield* v. *Sturges*, 9 Hare, App. 87; *Blake* v. *Cox*, 1 W. R. 124, V. C. W.
3 Wyatt's P. R. 374.

A cause is now, however, rarely heard on bill and answer. The only advantage in doing so, instead of hearing it on motion for decree, is, that the month's notice is thereby saved; but, on the other hand, where a cause is heard upon bill and answer, the answer must be admitted to be true in all points, and no other evidence will be admitted: unless it be matter of record to which the answer refers, and which is proveable by the record itself,[1] or documents proved as exhibits at the hearing.[2] It therefore behoves the plaintiff to look attentively into the answer; and if he finds that the effect of the defendant's admissions is avoided by any new matter there introduced, he should serve notice of motion for a decree,[3] or reply to the answer, and proceed to establish his case by proofs.[4] If the plaintiff decides upon having the cause heard upon bill and answer against one or all of the defendants, he must proceed in the manner hereafter pointed out.

We have seen before, that a replication to a general disclaimer to the whole bill is improper: although, when a disclaimer to part of the bill is accompanied by a plea or answer to another part, there may be a replication to such plea or answer.[5]

A replication is the plaintiff's answer or reply to the defendant's answer. By replying to the answer, the plaintiff does not preclude himself from reading any part of the answer he may consider essential to assist his case.

Only one replication is to be filed in each cause, unless the Court otherwise directs.[6]

The Court will not as of course, or except in cases of necessity, give the plaintiff leave to file more than one replication;[7] but where the replication only applied to some defendants, and as to the others the cause was not at issue, leave was given to file a second replication against such other defendants;[8] and where upon notice of motion to dismiss for want of prosecution, by one of two defendants, the

1 *Legard* v. *Sheffield*, 2 Atk. 377; see, however, *Stanton* v. *Percival*, 3 W. R. 391: 24 L. J. Ch. 369, H. L.
2 *Post; Rowland* v. *Sturgis*, 2 Hare, 520; *Chalk* v. *Raine*, 7 Hare, 393: 13 Jur. 981; *Neville* v. *Fitzgerald* 2 Dr. & War. 530; *contra*, *Jones* v. *Griffith*, 14 Sim. 262: 8 Jur. 733.
3 See *ante*.
4 Wyatt's P R. 375.
5 *Ibid.*
6 Ord. 149.
7 *Stanton* v. *Taylor*, 4 Hare, 608, 610: 10 Jur. 386.
8 *Rogers* v. *Hooper*, 2 Drew, 97.

plaintiff filed replication against such defendant alone, the other defendant not having appeared, the Court refused the motion, on the plaintiff undertaking to dismiss the bill against the defendant who had not appeared, but ordered the plaintiff to pay the costs of the motion. [1]

Upon filing the replication, the cause is deemed to be completely at issue; and each defendant may, without any rule or order, proceed to verify his case by evidence; and the plaintiff may, in like manner, proceed to verify his case by evidence: so soon as notice of the replication being filed has been duly served on all the defendants who have filed an answer.

The form of the replication in the General Orders assumes a case where the plaintiff desires to join issue as to one of the defendants; to hear the cause on bill and answer as to another; and to take the bill as confessed as against a third.[2] Where, however, the plaintiff does not desire to join issue with any defendant, no replication can be filed.[3] The full title of the cause, as it stands at the time the replication is filed, must be set forth in the heading of the replication, but only the names of such of the defendants as have appeared should be inserted or referred to in the body.[4] If a defendants name has been misspelt by the plaintiff, and such defendant has corrected the same by his answer, but the plaintiff has not afterwards amended his bill with respect to such name, the correction should be shown in the title of the replication;[5] in the body of the replication, however, the correct name only should be inserted. Where any defendant has died since the bill was filed, the words "since deceased" should follow his name in the title, but his name should be omitted in the body of the replication. If the plaintiff joins issue with all the defendants, their names need not be repeated in the body: it is sufficient, in such case, to designate them as "all the defendants"; but if he does not join issue with all, the names of the defendants must be set out in the body. The names of those defendants who are stated in the bill to be out of the jurisdiction, and who have not answered, must be inserted in the title, but not in the body; and

1 *Heanley* v. *Abraham*, 5 Hare, 214. As to when a second or further replication may be filed, without special leave, see Braithwaite's Pr. 73.
2 Ord. 149. 3 Braithwaite's Pr. 72. 4 But see Order 597.
5 Thus: "John Jones (in the bill called William Jones)."

the names of such formal defendants as have been served with a copy of the bill must be inserted in the title of the replication, but only such of them as have answered should be named in the body.[1]

Our order 150 provides that "A plaintiff is to admit in his replication such facts alleged by the answer as are to the knowledge of the plaintiff true: or as he can readily ascertain to be true, or as he has reason to believe and doth believe to be true; and it shall be sufficient if such admissions are expressed to be only for the purpose of the suit in which the same are made." Our order 151, that "Admissions are in all cases where it is practicable to be by reference to the numbers of the paragraphs in the answers to which they relate, with such qualifications as may be necessary or proper for protecting the interests of the party making the admissions; and it shall not be necessary or proper to allege ignorance of any fact stated in the answer, or any other reason for not admitting any fact therein alleged."

The replication is prepared by the solicitor of the plaintiff; it must be written on paper of the same description and size as that on which bills are printed, and be underwritten with the name and place of business of the plaintiff's solicitor, and of his agent, if any, or with the name and place of residence of the plaintiff where he acts in person, and, in either case, with the address for service, if any; and the replication must then be filed at the Deputy Registrar or Record and Writ Clerk's office. It does not require the signature of counsel.

Our Order 153 provides that: "Where the plaintiff amends his bill, and no answer is put in thereto, and no notice of an application for further time is served within seven days after service of the bill as amended, the plaintiff, after the expiration of such seven days, but within fourteen days from the time of the service of the bill, is either to file his replication, or set down the cause to be heard upon bill and answer, or serve notice of motion for a decree." Our Order 154 that "Where the plaintiff amends his bill after answer, and a defendant, within seven days after the service of the bill as amended, serves notice of an application for further time to

1 Braithwaite's Pr. 75.

answer the amendments, but such application is refused, the plaintiff is, within fourteen days after such refusal, either to file his replication, or set down the cause to be heard on bill and answer, or serve notice of motion for a decree."

Any error in the replication, except the omission of the names of any defendants, may be corrected by amendment; but an order to amend is necessary. The order may be obtained on special motion at Chambers, or, by consent. Against the defendants whose names have been omitted, another replication must be filed, or leave obtained to withdraw the existing replication and file another; and an order for leave so to do, in either case, must be obtained in like manner, or upon special motion with notice.[1]

The solicitor must give notice of the filing of the replication to the solicitor of the adverse party, or to the adverse party himself if he acts in person, on the same day on which it is filed.[2] If he neglects to do so, the opposite party should move that the time for him to take the next step may be extended:[3] not that the replication may be taken off the file. Where a replication was filed several years after the filing of the answer by a different solicitor from the one who had filed the bill, but no order changing the solicitor had been taken out and no notice of filing replication given, the replication was ordered to be taken off the files and the bill dismissed.[4]

The notice must be served before four o'clock in the evening, except on Saturday, when it must be served before two o'clock in the afternoon. If served after these hours, the service will be considered to have been made on the following day, or Monday, as the case may be.[5]

In giving notice of the filing of replication, the most convenient course is to serve a copy of the replication; but it is not essential to do so; and if not done, the notice must show the purport of the replication.[6] The time for closing the evidence is computed from the day on which the replication is filed.

1 *Stinton* v. *Taylor*, 4 Hare, 608, 610: 10 Jur. 386; Braithwaite's Pr. 318.
2 Ord 46. In practice, it is usual to serve the notice on all the defendants, or their solicitors, who have appeared: Braithwaite's Pr. 79.
3 *Wright* v. *Angle*, 6 Hare, 107: 11 Jur. 987; *Lloyd* v. *Solicitors' Life Assurance Company*, 3 W. R. 640, V. C. W.; *contra*, *Johnson* v. *Tucker*, 15 Sim. 599: 11 Jur. 466.
4 *Rathburn* v. *Hughes*, 3 Cham. R. 160.
5 Ord. 410, 411.
6 Braithwaite's Pr. 79.

Order 155 provides that "Where a defendant puts in an answer to amendments, the plaintiff must either file his replication, or set down the cause to be heard on bill and answer, or serve notice of motion for a decree, within fourteen days after the filing of such answer, unless he obtains in the meantime an order for leave to amend the bill." It may here be mentioned that Order 408 declares that the time of vacation is not to be reckoned in the computation of the times appointed or allowed for filing replications or setting down causes, under the directions of Orders 152, 153, 154, or 155.

The plaintiff may, however, in all these cases apply by motion, in Chambers, upon notice to the defendants, for an order to enlarge the time for filing replication.[1]

By not filing replication within the time allowed for so doing, the plaintiff subjects himself to an application for the dismissal of his bill for want of prosecution; but the replication will be received and filed at any time at the Deputy Registrar's or Record and Writ Clerks' Office, if it appears by the books of that office that the cause is in a state to admit of its being filed, even after notice of motion to dismiss has been served; and, indeed, to do so, and tender the costs of the motion, is generally the best way of meeting it.[2]

A plaintiff has been permitted, on motion, to withdraw his replication, and set his cause down for hearing upon bill and answer.[3]

Where replication is withdrawn, after evidence under it has been entered into, the order should provide that the withdrawal is to be without prejudice to such evidence.

It has sometimes happened that, even after witnesses have been examined, it has been discovered that, owing to a mistake, no replication has been filed: in such cases, the Court has permitted the replication to be filed *nunc pro tunc*.[4] And it seems that the Court has permitted this to be done after the cause has come on for hearing, and the reading of the proofs has been commenced.[5]

1 Ord. 412; See *Stinton* v. *Taylor*, 4 Hare, 608, 610: 10 Jur. 386; *Dalton* v. *Hayter*, 9 Jur. 1000 M. R.
2 Braithwaite's Pr. 78; and see *ante*.
3 *Rogers* v. *Goore*, 17 Ves. 130.
4 Wyatt's P. R. 376.
5 *Rodney* v. *Hare*, Mos. 296; see also *Healey* v. *Jagger*, 3 Sim. 494, 497.

Where the plaintiff had proceeded in the cause as if a replication had been filed, and no motion was made by the defendant to have the mistake rectified; the Court, after service of the rule to produce, and notice of the examination of witnesses, allowed a replication to be filed *nunc pro tunc*, on payment of costs. [1]

Replication may be filed to an answer put in to a supplemental statement.[2]

CHAPTER XXII.

EVIDENCE.

SECTION I.—*Admissions.*

The cause being at issue, by the filing of the replication, the next step to be taken by the plaintiff is to prepare his proofs. The defendant also, if he has any case to establish in opposition to that made by the plaintiff, must, in like manner, prepare to substantiate it by evidence. For this purpose, both parties must first consider: what is necessary to be proved; and then, the manner in which the proof is to be effected; and, in treating of these subjects, it will be convenient to consider, shortly, the general rules of evidence. With respect to the first point, it may be laid down as an indisputable proposition, that whatever is necessary to support the case of the plaintiff, so as to entitle him to a decree against the defendant, or of a defendant, to support his own case against that of the plaintiff, must be proved: unless it is admitted by the other party.

Our object at present, therefore, must be to consider what admissions by the parties will preclude the necessity of proofs; and it is to be observed that, if evidence is gone into to prove what is admitted, or at an unnecessary or improper length, the costs of such evidence will be disallowed.[3]

1 *Beckett* v. *Rees*, 1 Grant, 434.
2 Braithwaite's Pr. 74.
3 *Harvey* v. *Mount*, 8 Beav. 439: 9 Jur. 741; *Smith* v. *Chambers*, 2 Phil. 221, 226: 11 Jur. 359 *Mayor, &c., of Berwick* v. *Murray*, 7 De G. M. & G. 497, 514: 3 Jur. N. S. 1, 5.

Admissions are either:—I. Upon the Record; or, II. By Agreement between the Parties.[1]

I. Admissions on the Record may be: Constructive, namely, those which are the necessary consequence of the form of pleading adopted; or, Actual, namely, those which are positively contained in the pleading.

Actual admissions on the record are those which appear, either in the bill, or in the answer.

The facts alleged in a bill, where they are alleged positively, are admissions, in favour of the defendants, of the facts so alleged; and, therefore, need not be proved by other evidence: for whether they are true or not, the plaintiff, by introducing them into his bill, and making them part of the record, precludes himself from afterwards disputing their truth.

The plaintiff, of course, cannot read any part of his own bill as evidence in support of his case, unless where it is corroborated by the answer; as, where the bill states a deed, or a will, and the defendant, in his answer, admits the deed or will to have been properly executed, and to be to the tenor and effect set forth in the bill: in such case, the plaintiff, having read the admission from the answer, may read his bill, to show the extent of the admission made by the defendant. In strictness, however, this can hardly be called reading the bill on the part of the plaintiff: since the reading is only allowed because the defendant, by admitting the statement to be true as set forth in the bill, has to that extent, made that portion of the bill a part of his answer.

In general, where a defendant refers to a document for greater certainty, he has a right to insist upon the document itself being read;[2] but the plaintiff need not, on that ground, reply to the answer, but may set the cause down for hearing on bill and answer, and obtain an order to prove the document *viva voce* or by affidavit at the hearing.[3]

1 As to admissions generally, see the following works on evidence: Taylor, s. 653, *et seq.*; Best, ss. 543, 632; Gresley, Pt. I. Chaps. 1, 2; Powell, 151.
2 *Cox* v. *Allingham*, Jac. 337, 339; *Lett* v. *Morris*, 4 Sim. 607, 611.
3 *Fields* v. *Cage*, cited Wyatt's P. R. 219; our order 176.

With respect to the right of a defendant to make use of the plaintiff's bill as an admission of the facts therein stated, it is to be observed, that, at Common Law, the general rule is, that a bill in Chancery will not be evidence except to show that such a bill did exist, and that certain facts were in issue between the parties, in order to introduce the answer, or the depositions of witnesses; and that it cannot be admitted as evidence to prove any facts, either alleged or denied in the bill.[1] In Courts of Equity, however, a different rule prevails, and the bill may be read as evidence, for the defendant, of any of the matters there positively averred.[2]

But although a defendant has a right to read the plaintiff's bill as evidence against him, such right is confined to the bill as it stands on the record. If the bill has been amended, the amended bill is the only one upon the record, and the defendant has no right, in that case, to read the original bill in evidence.[3] It seems, however, that where the consequence of the amendment has been to alter the effect of the answer to the original bill, or to render it obscure, the defendant has a right to read the original bill, for the purpose of explaining the answer;[4] and in a cause in the Court of Chancery in Ireland, Sir Anthony Hart, L. C., in deciding upon the question of costs, read from the defendant's office-copy certain charges in the original bill which had been expunged by amendment, for the purpose of ascertaining *quo animo* the bill had been filed.[5]

A bill may also be read in evidence against a plaintiff, although filed by him in another suit. In such case, however, it will be necessary to prove that it was exhibited by the direction, or with the privity, of the party plaintiff in it: "for any person may file a bill in another person's name."[6]

Although a plaintiff, by his replication, denies the truth of the whole of the defendant's answer, he does not thereby preclude himself from reading whatever portion of it he thinks will support his case: except the answer be that of an infant, which, as we have seen, can never be read to establish a fact which it is against the infant's interest to admit.[7] The answer of the person under whom

1 *Boileau* v. *Rutlin*, 2 Exch. R. 665; 2 Phil. on Evid. 37, 38; Taylor on Evid. s. 786.
2 *Ives* v. *Medcalfe*, 1 Atk. 63, 65.
3 *Hales* v. *Pomfret*, Dan 141. 4 *Ibid.*
5 *Fitzgerald* v. *O'Flaherty*, 1 Moll. 347.
6 *Wollet* v. *Roberts*, 1 Ch. Ca. 64. 7 *Ante.*

he derives title, may, however, be so read; and therefore it has been held, that if, in a suit to establish a will against the heir, the heir puts in his answer admitting the will, and dies before the hearing, the derivative heir, though an infant, will be bound by the admission, and the execution of the will need not, in such case, be proved.[1] Of course, if an infant heir is bound by the admission of his ancestor, such an admission will be equally binding upon an adult.

Where a plaintiff proposes to read a passage from the defendant's answer as an admission, he must read all the circumstances stated in the passage; and if the passage contains a reference to any other passage, that other passage must be read also.[2] But where a plaintiff in reading a passage from a defendant's answer has been obliged to read an allegation which makes against his case, he will be permitted to read evidence to disprove such allegation.[3]

With respect to what will be considered as such an admission by an answer as will dispense with the necessity of other proof, it may be stated, that, besides those expressions which in words admit the fact alleged to be true, a statement by the defendant that "he believes," or that he has been "informed and believes," that such fact is true, will be sufficient: unless such statement is coupled by some clause to prevent its being considered as an admission.[4] A mere statement, however, in an answer, that a defendant has been informed that a fact is as stated, without an answer as to his belief concerning it, will not be such an admission as can be read as evidence of the fact. Such an answer is, in effect, insufficient; and if the plaintiff, upon reading the pleadings, finds such a statement as to a fact with respect to which it is important to have the defendant's belief, he should cross examine him on the answer.

It has been before stated, that the answer of an infant, being in fact the answer of his guardian cannot be read against him.[5] The answer, however, may, it seems, be read against the guardian; and in *Beasley* v. *Magrath*,[6] the answer of an infant, by his mother and

1 *Robinson* v. *Cooper*, 4 Sim. 131; *Lock* v. *Foote*, *ib.* 132; *ante*.
2 *Bartlett* v. *Gillard*, 3 Russ. 149; see also *Lady Ormond* v. *Hutchinson*, 13 Ves. 47, 53; *Rude* v. *Whitchurch*, 3 Sim. 562; *Nurse* v. *Bunn*, 5 Sim. 225; *Freeman* v. *Tatham*, 5 Hare, 329, 335: 10 Jur. 685; and see Taylor on Evid. s. 660.
3 *Price* v. *Lytton*, 3 Russ. 206.
4 See *Potter* v. *Potter*, 1 Ves. S. 274; *Hill* v. *Binney*, 6 Ves. 738; and see *Woodhatch* v. *Freeland*, 11 W. R. 398, V. C. K.; see also *Bird* v. *Lake*, 1 H. & M. 111.
5 *Ante*.
6 2 Sch. & Lef. 34.

guardian in another cause, was read against the mother in her own capacity. And it seems, that where a defendant, being an infant, answers by guardian, and, at full age, neither amends nor makes a new answer, as he may do, but prays a hearing of the cause *de novo*, his answer is evidence against him.[1]

The answer of an idiot or lunatic, put in by his committee, may be read against him; and it has been held, that the answer of a person of weak intellect, put in by his guardian, could also be read against him;[2] but it is doubtful if this decision would now be followed.[3]

For the rules of practice with regard to reading the answer of married persons, the reader is referred to a former portion of this Treatise.[4]

Cases have occurred, in which a defendant, has by the form of his answer, made the answer of a co-defendant evidence against himself; as, where a defendant stated in his answer that he was much in years, and could not remember the matter charged in the bill, but that *J. S.* was his attorney and transacted the matter, whereupon *J. S.* was made a defendant, the answer was allowed to be read against the original defendant: Lord Cowper being of opinion, that the words in the first answer amounted to a reference to the co-defendant's answer.[5]

Interpleader suits form an exception to this rule; and the answer of one defendant may be read against a co-defendant, to show that adverse claims are made.[6]

It is to be observed that, where an answer has been replied to generally, it cannot (except by consent,) be read as evidence on the part of the defendant himself.[7] In disposing of the question of costs, however, the Court will permit the defendant's answer to be read in his own behalf;[8] and it has been held that a peer's answer upon protestation of honour may also be read on the question of costs, on behalf of the defendant who has put it in.[9] Moreover, the Court itself

1 Hinde, 422.
2 *Leving* v. *Caverley*, Prec. in Ch. 227.
3 *Ante*; *Micklethwaite* v. *Atkinson*, 1 Coll. 173; *Percival* v. *Caney*, 4 De G. & S. 610: 14 Jur. 1056, 1062; S. C. *nom. Stanton* v. *Percival*, 3 W. R. 391: 24 L. J. Ch. 369, H. L.
4 *Ante*. 5 *Anon*, 1 P. Wms. 301.
6 *Masterman* v. *Price*, 1 C. P. Coop. t. Cott. 383; *Chervet* v. *Jones*, *ib.*: 6 Mad. 267.
7 Where a defendant has filed an answer, and it has been replied to, it is now a common practice to file a short affidavit by him, verifying the statements of his answer, in order to make it evidence on his own behalf: *Barrack* v. *M'Culloch*, 3 K. & J. 110: 3 Jur. N. S. 180; and see *Williams* v. *Williams*, 10 Jur. N. S. 608: 12 W. R. 663, V. C. K.
8 *Vancouver* v. *Bliss*, 11 Ves. 458; *Howell* v. *George*, 1 Mad. 1, 13; and see *Morgan & Davey*, 85.
9 *Dawson* v. *Ellis*, 1 J. & W. 524, 526.

will look at the answer: not as evidence but as what may regulate its discretion with respect to the further investigation of particular facts.[1]

Although a defendant cannot read his own answer as evidence for himself, as to any other point than that of costs, he is entitled to have the benefit of his answer, so far as it amounts to a denial of the plaintiff's case, unless the denial by the answer is contradicted by the evidence of more than one witness: the rule of Courts of Equity being, that where the defendant, in express terms, negatives the allegations in the bill, and the evidence is that of only one person affirming what has been so negatived, the Court will not make a decree.[2] The denial, however, by the answer, must in such cases be positive: otherwise, the rule will not apply; as where a defendant, by his answer, denies a fact as to his belief only;[3] or where it is a mere constructive denial, by the filing of a traversing note.[4]

The reason for the adoption of this rule, by the Courts, was: because, there being a single deposition only, against the oath of the defendant in his answer, the denial of facts by the answer was equally strong with the affirmation of them by the deposition.[5] Where, therefore, there were any corroborative circumstances in favour of the plaintiff's case, which gave a preponderance in his favour, the Court departed from the rule, and either made a decree, or directed an issue.[6] Thus, where a bill was filed for the specific performance of an agreement, which the defendant denied by his answer, but an agreement was proved by one witness, and there was also evidence to prove the defendant's confession of it, besides other corroborative circumstances, a decree was made.[7] So, where a defendant had denied notice of a previous mortgage, which, however, was proved by a single witness, and it was also proved, by other evidence, that upon an application being made to the defendant on

1 *Miller* v. *Gow*, 1 Y. & C. C. C. 56, 59.
2 *Pember* v. *Mathers*, 1 Bro. C. C. 52; see also *Kingdome* v. *Boakes*, Prec. in Ch. 19: *Wakelin* v. *Walthal*, 2 Ch. Ca. 8; *Alam* v. *Jourdan*, 1 Vern. 161; *Christ's Coll. Cam.* v. *Widdrington*, 2 Vern. 283; *Hime* v. *Dodd*, 2 Atk. 276; *Glynn* v. *Bank of England*, 2 Ves. S. 38; *Mortimer* v. *Orchard*, 2 Ves. J. 243; *Lord Cranstown* v. *Johnston*, 3 Ves. 170: *Cooth* v. *Jackson*, 6 Ves. 40; *Evans* v. *Bicknell*, *ib.* 174, 183: *Cooke* v. *Clayworth*, 18 Ves. 12, *Holdernesse* v. *Rankin*, 2 De G. F. & J. 258, 272; 6 Jur. N. S. 903; and see *Williams* v. *Williams*, 10 Jur. N. S. 608; 12 W. R. 663, V. C. K.
3 *Arnot* v. *Biscoe*, 1 Ves S. 95, 97: *Hughes* v. *Garner*, 2 Y. & C., Ex. 328, 335.
4 See *ante*.
5 *Walton* v. *Hobbs*, 2 Atk. 19.
6 *Pember* v. *Mathers* *Walton* v. *Hobbs*, *Hine* v. *Dodd*, and *Janson* v. *Rany*, 2 Atk. 140; see also *Re Barr's Trust*, 4 K. & J. 219.
7 *Only* v. *Walker*, 3 Atk. 407, 408.

behalf of the previous mortgagee for an account, he observed: "You have no right, for your mortgage is not registered," Lord Redesdale held, that the testimony of the witness, who proved the notice directly, was confirmed by that observation, which showed that the defendant had investigated the subject, and relied on the neglect to register the mortgage.[1]

Upon the same principle, where a parol agreement, with part performance, is insisted upon in a bill, and the agreement is denied by the answer, yet, if it is proved by one witness, and supported by circumstances of part performance, such as delivery of possession, the specific performance of the agreement has been decreed.[2] In such cases, however, if the defendant, by his answer, denies the agreement set up by the bill, and his denial is confirmed by circumstances, the Court will not decree a specific performance, although the case made by the bill is corroborated by one witness.[3] And where a particular agreement by parol, namely, an agreement to grant a lease for three lives, was stated in the bill, and proved by one witness, and confirmed by acts of part performance, but the answer admitted an agreement for one life only, and was supported by the testimony of one witness, the Court refused to decree for the plaintiff: the evidence of part performance being equally applicable to either agreement.[4]

Sometimes, the Court gave the defendant an opportunity of trying the case at Law, when the plaintiff's case was supported by the evidence of only one witness and corroborating circumstances;[5] and sometimes the Court directed the answer of the defendant to be read as evidence.[6] As the practice of directing an issue, in a case of this description, was intended solely for the satisfaction of the defendant, it was by no means compulsory upon the defendant to take one; and if the defendant declined an issue, the Court itself was bound to give judgment upon the question whether the circumstances outweighed the effect of the rule, so as to authorise a decree against the denial in the answer.

1 *Biddulph* v. *St. John*, 2 Sch. & Lef. 532.
2 *Morphett* v *Jones*, 1 Swanst. 172, 182.
3 *Pilling* v. *Armitage*, 12 Ves. 78, 79; *Money* v. *Jordan*, 2 De G. M. & G. 318; S. C. *nom. Jordan* v. *Money*, 5 H. L. Ca. 185.
4 *Lindsay* v. *Lynch*, 2 Sch. & Lef. 1, 7.
5 *East India Company* v. *Donald*, 9 Ves. 275, 223, 284; *Ibbottson* v. *Rhodes*, 1 Eq. Ca. Ab. 229, pl 13: 2 Vern. 554; *Pember* v. *Mathers*, 1 Bro. C. C. 52: *Savage* v. *Brocksopp*, 18 Ves. 335—337.
6 *Ibbottson* v. *Rhodes ubi sup.*

II. Admissions by agreement between the parties are those which, for the sake of saving expense or preventing delay, the parties, or their solicitors, agree upon between themselves.

With respect to admissions of this description, as they must depend entirely upon the circumstances of each case, little can now be said respecting them, beyond drawing to the practitioner's notice the necessity there exists that they should be clear and distinct. In general, they ought to be in writing, and signed either by the parties or their solicitors; and the signature of the solicitor employed by the party is considered sufficient to bind his principal: the Court inferring that he had authority for that purpose.[1] It does not, however, appear to be necessary that an agreement to admit a particular fact should be in writing; and where, at Law, the plaintiff's attorney swore that he had proposed that the defendant should acknowledge a warrant of attorney, so as to enable the deponent, if it should become necessary, to enter up judgment thereon, and that the defendant had accepted his offer, it was considered well proved that the defendant had agreed to acknowledge the instrument for all purposes, and that the plaintiff was at liberty to act upon the instrument without the necessity of producing the subscribing witness.[2]

It is to be remarked, that although the Courts are disposed to give every encouragement to the practice of parties or their solicitors agreeing upon admissions among themselves, they will not sanction an agreement for an admission by which any of the known principles of the Law are evaded; and, therefore, where a husband was willing that his wife should be examined as a witness in an action against him for a malicious prosecution, Lord Hardwicke refused to allow her examination: because it was against the policy of the Law to allow a woman to be a witness, either for or against her husband.[3] Upon the same principle, where the Law requires an instrument to be stamped, the Court will not give effect to an agreement between the solicitors to waive the objection arising from its not being stamped.[4]

1 *Young* v. *Wright*, 1 Camp. N. P. 139: *Gainsford* v. *Gammer*, 2 *ib.* 9; *Laing* v. *Kaine*, 2 Bos. & P. 85.
2 *Marshall* v. *Cliff*, 4 Camp. N P. 133.
3 *Barker* v. *Dixie*, Rep. t. Hardwicke, 264.
4 *Owen* v. *Thomas* 3 M. & K. 353, 357; see, however, *Orange* v. *Pickford*, and *Thompson* v. *Webster* cited Seton 16.

To save expense, it has been recently enacted in England, that where all the parties to a suit are competent to make admissions, any party may call on any other, by notice, to admit any document saving all just exceptions.[1]

SECTION II.—*The Onus Probandi.*

Having ascertained what matters are to be considered as admitted between the parties, either by the pleadings or by agreement, the next step is to consider what proofs are to be adduced in support of those points which are not so admitted.

In considering the question of: what matters are to be proved in a cause, the first point to be ascertained is, upon whom the burthen of the proof lies? And here it may be laid down, as a general proposition, that the point in issue is to be proved by the party who asserts the affirmative, according to the maxim of the Civil Law: "*Ei incumbit probatio qui dicit, non qui negat.*"[2] This rule is common, as well to Courts of Equity as to Courts of Law; and, accordingly, when a defendant insists upon a purchase for a valuable consideration, without notice, the fact of the defendant, or those under whom he claims, having had notice of the plaintiff's title, must be proved by the plaintiff.[3] So, where a *feme covert*, having a separate property, had joined with her husband in a security for money which it was the object of the bill to recover from her, (her husband being dead,) and the defendant, by her answer, admitted that she had signed the security, but alleged that she had done so, not of her own free will, but under the influence of her husband, Sir John Leach, M. R., held, that it lay upon the wife to repel the effect of her signature, by evidence of undue influence, and not upon the plaintiff to prove a negative.[4]

In general, it may be taken for granted, that wherever a *prima facie* right is proved, or admitted by the pleadings, the *onus probandi* is

1 21 & 22 Vic. c. 27, s. 7; see our Order 158.
2 On this subject, see the following works on evidence: 1 Phillips, 552: Taylor, s. 337, *et seq.*; Best, s. 271; Gresley, 388; Starkie, 586; Powell, 180.
3 *Eyre*, v. *Dolphin*, 2 Ball & B. 303; *Saunders* v. *Leslie*, *ib.* 515; *ante*.
4 *Field* v. *Sowle*, 4 Russ. 112.

always upon the person calling such right in question.[1] And here it may be observed, that a Court will always treat a deed or instrument as being the thing which it purports to be, unless the contrary is shown; and, therefore it is incumbent upon the party impeaching it, to show that the deed or instrument in question is not what it purports to be; thus, where a bond, which was upon the face of it a simple money-bond was impeached as being intended merely as an indemnity-bond, it was held, that the burthen of proving it to be an indemnity-bond lay on the party impeaching it.[2] So, if a party claims two legacies under two different instruments, the burthen of showing that he is only entitled to one, will lie upon the person attempting to make out that proposition; for the Court will assume that the testator, having given the two lagacies by different documents, meant to do so, till the contrary is established.[3]

Indeed, in all cases where the presumption of Law is in favour of a party, it will be incumbent on the other party to disprove it: though in so doing he may have to prove a negative; therefore, where the question turns on the legitimacy of a child, if a legal marriage is proved, the legitimacy is presumed, and the party asserting the illegitimacy ought to prove it: for the presumption of Law is that a child born of a married woman whose husband is within the four seas, is legitimate, unless there is irresistible evidence against the possibility of sexual intercourse having taken place[4]

It is important, in this place to notice, that in cases where it is sought to impeach a will, or other instrument, on the ground of insanity, the rule as to the *onus probandi* is: that "where a party has ever been subject to a commission, or to any restraint permitted by Law, even a domestic restraint, clearly and plainly imposed upon him in consequence of undisputed insanity, the proof, showing sanity, is thrown upon him. On the other hand, where insanity has not been imputed by relations or friends, or even by common fame, the proof of insanity, which does not appear to have ever existed, is thrown upon the other side: which is not to be made out by rambling through

1 *Banbury Peerage*, 1 S. & S. 153, 155.
2 *Nicol* v. *Vaughan*, 6 Bligh. N. R. 104; 1 Cl. & F. 49.
3 *Lee* v. *Pain*, 4 Hare, 216; *Hooley* v. *Hatton*, 2 Dick, 461. Where two legacies are given to the same legatee, by the same instrument, the presumption is the other way: *ib.* 462.
4 *Head* v. *Head*, 1 S. & S. 150: T. & R. 138; see also *Bury* v. *Phillpott*, 2 M. & K. 349, 352; *Hargrave* v. *Hargrave*, 9 Beav. 552: 10 Jur. 957; *Plowes* v. *Bossey*, 2 Dr. & S. 145; 8 Jur. N. S. 352, V. C. K. As to other instances of presumptions of law, see the following works on evidence: 1 Phillips, 467, *et seq.*; Taylor, s. 61, *et seq.*; Best, s. 305, *et seq*; Gresley, 473; Powell, 47.

the whole of the party, but must be applied to the particular date of the transaction.[1]

It has also been held, that where general lunacy has been established, and a party insists upon an act done during a lucid interval, the proof is thrown upon the party alleging the lucid interval; and that, in order to establish such an interval, he must prove not merely a cessation of violent symptoms, but a restoration of mind to the party, sufficient to enable him to judge soundly of the act.[2]

It may also be stated, generally, that whenever a person obtains by voluntary donation a benefit from another, the *onus probandi* is upon the former, if the transaction be questioned, to prove that the transaction was righteous,[3] and that the donor voluntarily and deliberately did the act, knowing its nature and effect. Moreover, where the relation of the parties is such that undue influence might have been used, the *onus probandi*, to show that such influence was not exerted, is upon the person receivingthe benefit.[4]

Section III.—*Confined to Matters in Issue.*

It is a fundamental maxim, both in this Court and in Courts of Law, that no proof can be admitted of any matter which is not noticed in the pleadings.[5] This maxim has been adopted, in order to obviate the great inconvenience to which parties would be exposed, if they were liable to be affected by evidence at the hearing, of the intention to produce of which they had received no notice. In a former part of this Treatise, the operation of this rule, in requiring the introduction into a bill of every fact which the plaintiff intends to prove, has been pointed out.[6] It has also been shown, that the same rule applies to answers, and that a defendant who has put in an

1 *White* v. *Wilson*, 13 Ves. 87, 88; and see *The Attorney-General* v. *Parnther*, 3 Bro. C. C. 441, 443; *Jacobs* v. *Richards*, 18 Beav. 300: 18 Jur. 527.
2 *Hall* v. *Warren*, 9 Ves. 605, 611.
3 *Cooke* v. *Lamotte*, 15 Beav, 234.
4 *Hoghton* v. *Hoghton*, *ib.* 278; *Nottidge* v. *Prince*, 2 Giff. 246; 6 Jur. N. S. 1066; *Walker* v. *Smith*, 29 Beav. 394.
5 *Whaley* v. *Norton*, 1 Vern. 484; *Gordon* v. *Gordon* 3 Swanst. 472; *Clarke* v. *Turton*, 11 Ves. 240; *Williams* v. *Llewellyn*, 2 Y. & J. 68; *Hall* v. *Maltby*, 6 Pri. 240, 259; *Powys* v. *Mansfield*, 6 Sim. 565; and see the following works on evidence: Taylor s. 239, *et seq.*; Best, s. 253, *et seq.*; Gresley, 230; Powell, 220.
6 *Ante.*

answer, cannot in strictness avail himself of any matter in his defence which is not stated in his answer, although it appears in his evidence.[1] In certain cases, however, evidence of particular facts may be given under general allegations, and, in such cases, therefore, it is not necessary that the particular facts intended to be proved should be stated in the pleadings. The cases in which this exception to the general rule is principally applicable, are those where the character of an individual, or his general behaviour, or quality of mind comes in question : as where, for example, it is alleged that a man is *non compos*, particular acts of madness may be given in evidence, and not general evidence only that he is insane.[2] So, also, where it is alleged that a man is addicted to drinking, and liable to be imposed upon, the evidence should not be confined to his being a drunkard, but particular instances may be given.[3] In like manner, where the charge in a bill was, that the defendant was a lewd woman, evidence of particular acts of incontinence was allowed to be read.[4] In cases of this nature, however, it is necessary, in order to entitle the party to read evidence of particular facts, that they should point directly to the charge ; and therefore it has been held, that an allegation in a bill, that a wife had misbehaved herself, did not imply that she was an adulteress, and that a deposition to prove her one ought not to be read.[5] And so, the mere saying that a wife did not behave herself as a virtuous woman, will not entitle her husband to prove that she has committed adultery, unless there is an express charge of the kind :[6] for the virtue of a woman does not consist merely in her chastity.[7]

The question, how far particular acts of misconduct can be given in evidence under a general charge of misbehaviour, appears to have been much discussed before Lord Talbot, in *Wheeler* v. *Trotter* :[8] which was the case of a bill filed for the specific performance of an agreement to grant a deputation of the office of Registrar of the Consistory Court; and, amongst other defences set up by the de-

1 *Ante ; Smith* v. *Clarke*, 12 Ves. 477, 480. From the case of *The London and Birmingham Railway Company* v. *Winter*, C. & P. 57, 62 it seems, that a fact brought to the attention of the Court by the evidence, but not stated upon the answer, will under some circumstances, afford a ground for inquiry, before a final decree.
2 *Clarke* v. *Periam*, 2 Atk. 333, 340.
3 *Ibid.*
4 *Clarke* v. *Periam*, *ubi sup.*, and the cases there cited.
5 *Ibid. ; Sidney* v. *Sidney*, 3 P. Wms. 269, 276 ; 1 C. P. Coop. t. Cott. 514, n.
6 *Lord Donerail* v. *Lady Donerail*, cited 2 Atk. 338.
7 Per Lord Hardwicke, in 2 Atk. 339.
8 3 Swanst. 174, n.

fendant's answer, it was alleged that the plaintiff was not entitled to the assistance of the Court, because he had not accounted for divers fees which he had received under a deputation authorizing him to execute the office, and had taken several fees which were not due, and concealed several instruments and writings belonging to the office. Upon the defendant's attempting to read proofs as to the misbehaviour alleged in such general terms by his answer, it was objected on the part of the plaintiff, that the charges were too general, as the plaintiff could not tell what proof to make against them, unless he examined every particular fee he had received, and also every instrument that had come to his hands; and that the defendant should have pointed out the particular facts in his answer, so that the plaintiff might be enabled to know how to clear himself by his proof: and the case was assimilated to that of an action at Common Law for a breach of covenant to repair, where, if the defendant pleads that he left the premises in repair, the plaintiff must, in his replication, show particularly what part is out of repair; and to an indictment for barratry, which may be general, yet the prosecutor is always obliged to give the defendant a list, upon oath, of the particular matters that are intended to be proved: but the Lord Chancellor held, that although the matters intended to be proved might have been more precisely put in issue, by enumerating the particular facts, yet as they were not intended to charge the plaintiff with any particular sums received more than were accounted for, but to show a general misbehaviour of the plaintiff in his office, so that a Court of Equity should not help him, he thought that, for this purpose, they were sufficiently put in issue.

The cases in which evidence of particular facts may be given under a general allegation or charge, are not confined to cases in which the character, or quality of mind, or general behaviour of a party comes in issue. The same thing may be done, where the question of notice is raised in the pleadings by a general allegation or charge. Thus, where the defence was a purchase for a valuable consideration, without notice of a particular deed, but, in order to meet that case by anticipation, the bill had suggested that the defendant pretended that she was a purchaser for a valuable consideration, without notice, and simply charged the contrary: the depo-

sition of a witness, who proved a conversation to have taken place between himself and a third person, who was the solicitor of the defendant, and the consequent production of the deed, was allowed to be read as evidence of notice.[1] In such a case, the question whether the party has notice or not, is a fact, which should be put in issue, but the mode in which it is to be proved need not be put upon the record: for the rule that no evidence will be admitted, in support of any facts but those which are mentioned in the pleadings, requires that the facts only intended to be proved should be put in issue, and not the materials of which the proof of those facts is to consist.[2] Thus, in a case of pedigree, if Robert Stiles is alleged to be the son of John Stiles, that fact may be proved in any mode which the rules of evidence will allow, and it is not necessary to state that mode upon the record.

It is upon this principle that documentary evidence, or letters themselves, are not specifically put in issue.[3] Indeed, a party may prove his case by written or parol evidence, indifferently, and is under no more restrictions in one case than in another. It is not necessary to put every written document in issue;[4] thus, where a bill charges an agreement for the purpose of establishing a lien, the general rule has been laid down that whatever would be evidence of the agreement at Law is evidence in Equity; subject to this: that if one party should keep back evidence which the other might explain, and thereby take him by surprise, the Court will give no effect to such evidence, without first giving the party to be affected by it an opportunity of controverting it.[5]

Although letters and writings in the hands of a party may be proved and used as evidence of facts, yet, if they are intended to be used as admissions or confessions of facts by the opposite party, they ought to be mentioned in the pleadings,[6] in order that the party against whom they are intended to be read, may have an opportunity to meet them by evidence or explanation.[7] In *M'Mahon* v. *Burchell*,[8] however, Lord Cottenham allowed certain

1 *Hughes* v. *Garner*, 2 Y. & C. Ex. 328, 335.
2 *Blacker* v. *Phepoe*, 1 Moll. 354.
3 *Ibid.*
4 Per Sir Anthony Hart, in *Fitzgerald* v. *O'Flaherty*, 1 Moll. 350; see also *Lord Cranstown* v. *Johnston*, 3 Ves. 170, 176.
5 *Malcolm* v. *Scott*, 3 Hare, 63; S. C. *nom. Scott* v. *Malcolm*, 8 Jur. 1059.
6 *Houlditch* v. *Marquis of Donegal*, 1 Moll. 364; *Whitley* v. *Martin*, 3 Beav. 226.
7 *Blacker* v *Phepoe*, *ubi sup.*
8 2 Phil. 127, 133; 1 C. P. Coop. t. Cott. 475.

letters to be used as evidence of admissions, though not mentioned in the pleadings: observing, that "he could not go the length of saying that evidence of an admission was not admissible, merely because it was not put in issue."

This principle is not confined to writings, but applies to every case where the admission or confession of a party is to be made use of against him; thus, it has been held, that evidence of a confession by a party that he was guilty of a fraud, could not be read: because it was not distinctly put in issue.[1] So, also, evidence of alleged conversations between a witness and a party to the suit, in which such party admitted that he had defrauded the other, was rejected: because such alleged conversations had not been noticed in the pleadings.[2] "No man," observes Sir Anthony Hart, "would be safe, if he could not be affected by such evidence. Lord Talbot said, long ago, that if you are to oust a defendant for fraud alleged against him, and the fraud is proved by the acknowledgement of the defendant that he had no right to the matter in litigation, the plaintiff must charge that, on the record, to give him the opportunity to deny or explain and avoid it."[3]

It is only when conversations are to be used as admissions, that the rule, which requires them to be stated on the record, applies. Where the conversation is in itself the evidence of the fact, it need not be specially alluded to: as in the case of *Hughes* v. *Garner*,[4] where the notice was communicated to the defendant by a conversation, which was made use of to prove the fact of the conversation having taken place, and not as an admission by the party that he had received notice.

Another rule of evidence, which may be noticed in this place, is, that the substance of the case made by the pleadings must be proved; that is, all the facts alleged upon the pleadings which are necessary to the case of the party alleging them, and which are not the subject of admissions, either in the pleadings or by agreement, must be established by evidence.[5] In the case of a plaintiff, how-

1 *Hall* v. *Maltby*, 6 Pri. 240; *Mulholland* v. *Hendrick*, 1 Moll. 359.
2 *Farrell* v. ——, 1 Moll. 363; *M'Mahon* v. *Burchell*, 2 Phil. 127; 1 C. P. Coop. t. Cott. 475; *Langley* v. *Fisher*, 9 Beav. 90, 101; *Graham* v. *Oliver*, 3 Beav. 124, 129.
3 *Farrell* v. ——, *ubi sup.*
4 2 Y. & C. Ex. 328, 335; *Graham* v. *Oliver*, *ubi sup.*
5 See the following works on evidence: Taylor, s 173, *et seq.*; Best, s. 280, *et seq.*; Gresley, 289; Powell, 187, *et seq.*

ever, it is sufficient to prove so much only of the allegations in the bill as are necessary to entitle him to a decree.[1] Thus, where the suit is for an account, all the evidence necessary to be read at the hearing is that which proves the defendant to be an accounting party, and then the decree to account follows of course; and any evidence as to the particular items of an account, however useful they may be in a subsequent stage of the cause, would be irrelevant at the original hearing. For this reason, where the suit is against an administrator, or an executor, all that is necessary to prove, on the part of the plaintiff, is, that the defendant fills and has acted in that character. This point was much discussed before Lord Gifford, M. R., in *Law* v. *Hunter*.[2] There the defendant, who had principally acted as executor of the testator, admitted that he had received personal estate of the testator to the amount of from 35,000*l.* to 45,000*l.*; and the plaintiff, having gone into very voluminous evidence to show how much of the personal estate of the testator had come into the defendant's hands, in order to prove that he had received assets to a much larger amount than that admitted by the answer, proposed to enter such evidence as read; but the Master of the Rolls would not permit it to be done, as the only tendency of such evidence was to show the state of the account, which the Court itself could not inquire into, but must refer to the Master, as the proper person for taking the account. The same principle was afterwards acted upon, by the same learned Judge, in *Walker* v. *Woodward*,[3] where, upon a bill for an account, the liability to account having been admitted by the defendant, he had entered into evidence to prove items of his discharge, but was not suffered to read them at the hearing.

Where, however, through inadvertence or negligence, the plaintiff has omitted to prove some particular fact which is necessary to support his case, the Court sometimes will permit him to supply the defect, by giving him leave to prove the fact omitted.[4] This is frequently done in the case of wills disposing of real estates,[5] where either the plaintiff has relied upon an admission of the will by answer,

1 See, however, *Edney* v. *Jewell*, 6 Mad. 165, where an unnecessary statement was required to be proved.
2 1 Russ. 100, 102.
3 1 Russ. 107, 110; *Smith* v. *Chambers*, 2 Phil. 221, 226; 11 Jur. 359; see, however, the observations of Sir J. Wigram, V. C., in *Tomlin* v. *Tomlin*, 1 Hare, 241, 245; and see *ib.* 241, n.; see also *Forsyth* v. *Ellice*, 2 M'N. & G. 209, 214.
4 See Seton, 1118
5 *Lechmere* v. *Brasier*, 2 J. & W. 288; *Chichester*, v. *Chichester*, 24 Beav. 289.

which the Court thinks not sufficiently full,[1] or where the absence or death of one of the witnesses to the will,[2] or the testator's sanity,[3] has not been proved. The practice of the Court, in this respect, is not confined to cases of wills: a cause has been ordered to stand over, for the purpose of allowing proof of the due execution of a deed, or the death of a party,[4] or the fact of trading;[5] and we have before seen,[6] that where the plaintiff has omitted to give due proof at the hearing of the fact of a defendant being out of the jurisdiction, he has been allowed to prove it. So, where the plaintiff had relied upon the admission of facts by the answers, and it was held that, some of the defendants being married women, the admissions in their answers would not bind them, the Court of Exchequer allowed the cause to stand over, with liberty to the plaintiff to supply the requisite proof.[7] And where the evidence read at the hearing, to prove the loss of a deed, was held not sufficiently strong to entitle the party to read secondary evidence of its contents, Sir Thomas Plumer, M.R., gave the plaintiff leave to prove the loss of the deed more strictly.[8]

In general, orders of this nature are made upon a simple application by counsel at the hearing of the cause; the application may, however, be made before the hearing:[9] in which case it may be made by motion,[10] in Chambers. Formerly, when the evidence in causes was taken on interrogatories, the plaintiff was permitted to exhibit an interrogatory to prove the fact desired; now, he is permitted to prove it, either *viva voce*, or by affidavit.

In *Edney* v. *Jewell*,[11] the Court, instead of directing an interrogatory to be exhibited to prove the fact omitted, directed an inquiry into the fact; and it seems that, in some cases, the deficiency of proof against infants may be supplied in the same manner.[12] It is not, however, the practice to direct inquiries as to any facts which

1 *Potter* v. *Potter*, 1 Ves. S. 274; Belt's Sup. 147; and see *Hood* v. *Pimm*, 4 Sim. 101, 110.
2 *Wood* v. *Stane*, 8 Pri. 613.
3 *Abrams* v. *Winshup*, 1 Russ. 526; *Wallis* v. *Hodgson*, *ib.* 527, n.; 2 Atk. 56.
4 *Moons* v. *De Bernales* 1 Russ. 301.
5 *Lechmere* v. *Brasier*, *ubi sup.*
6 *Ante*; *Hughes* v. *Eades*, 1 Hare, 486, 488; 6 Jur. 455.
7 *Hodgson* v. *Merest*, 9 Pri. 563.
8 *Cox* v *Allingham*, Jac. 337, 341, 345.
9 *Douglas* v. *Archbutt*, 23 Beav. 293.
10 *Ibid.*
11 6 Mad. 165.
12 See *Quantock* v. *Bullen*, 5 Mad. 81, 82; *Gascoyne* v. *Lamb*, 11 Jur. 902, V. C. K. B.

are the foundation of the relief: such as the execution of a will, or the fact of trading.[1] The course, in such cases, is to order the cause to stand over, and direct the proofs to be supplied: in which case the cause must be again set down.[2] In *Miller* v. *Priddon*,[3] however, where the plaintiffs claimed to be the children of a certain marriage, but did not prove that they were so, an inquiry was directed.

In some cases, the Court, instead of ordering the cause to stand over for the purpose of supplying the deficient evidence, will make a decree as to all that part of the case which is in a situation to be decided upon, and give liberty to prove the rest. This has been frequently done in the case of a will, where, although it was not sufficiently proved to effect the real estate, the Court has decreed an account of the personal estate, with liberty to supply the deficiency of proof.[4] In *Marten* v. *Whichelo*,[5] Lord Cottenham, in reference to cases on this subject, said: "It is impossible to reconcile the cases, or to extract any principle upon which any fixed rule can be founded. The Court has exercised a wide discretion in giving or refusing leave to supply the defect of evidence: in doing which, the merits of the case, upon the plaintiff's own showing, ought to have a leading influence." The last-mentioned case was a creditor's suit, where the plaintiff had taken a bill *pro confesso* against one of the defendants, who was the executor, but had adduced no evidence of his debt as against the other defendants, who were the devisees of the testator's real estate, and who did not sufficiently admit the debt; and his Lordship refused to allow the plaintiff an opportunity of going into new evidence against the devisees, and dismissed the bill with costs against them: as the plaintiff, on her own statement, appeared to be a simple contract debtor, suing the devisees of the real estate more than six years after the debt accrued: although the personal representative had received ample assets, and a judgment *de bonis testatoris, et, si non, de bonis propriis*, had been obtained against him. In *Davis* v. *Davies*,[6] Sir J. L. Knight Bruce, V.C.,

1 *Lechmere* v. *Brasier*, 2 J. & W. 289; *Holden* v. *Hearn*, 1 Beav. 445, 456: *Chapman* v. *Chapman*, 13 Beav. 308.
2 *Lechmere* v. *Brasier*, *ubi sup.*
1 M'N. & G. 687; and see observations of Lord Truro in *Fowler* v. *Reynall*, 2 M'N. & G., 500, 511: 15 Jur 1019, 1021.
4 *Lechmere* v. *Brasier*, 2 J. & W. 289; *Rossiter* v. *Pitt*, 2 Mad. 165.
5 C. & P. 257, 261; see also *Simmons* v. *Simmons*, 6 Hare, 360: 12 Jur. 8, 11; *Williams* v. *Knipe*, 5 Beav. 273, 276.
6 3 De G. & S. 698.

allowed evidence of the due execution of a will to be supplied; but thought that the defendants were entitled to have the evidence supplied in whatever manner they might elect; and, in accordance with their desire, directed the plaintiffs to bring an action of ejectment.[1]

SECTION IV.—*Of the Effect of a Variance.*

IT is not only necessary that the substance of the case made by each party should be proved, but it must be substantially the same case as that which he has stated upon the record: for the Court will not allow a party to be taken by surprise, by the other side proving a case different from that set up in the pleadings.[2] Thus, the specific performance of an agreement, to grant a lease for three lives, cannot be decreed upon what amounts to evidence of an agreement to grant only for one life.[3] The principles which guide the Court, in matters of this description, are clearly stated by Lord Redesdale, in his judgment in *Deniston* v. *Little* [4], where his Lordship observes, that the general practice of the Court is to compel parties, who come for the execution of agreements, to state them as they ought to be stated, and not to set up titles which, when the cause comes to a hearing, they cannot support.

We have seen, in a former part of this Treatise, that, in bills where the rights asserted are founded on prescription, a considerable degree of certainty is required in setting out the plaintiff's case[5]; to which may be added, that, in general, the proof must correspond in certainty with the case so set out. Thus, the Court of Exchequer, in deciding upon tithe questions, was in the habit of requiring that the proof of a *modus* should correspond with the *modus* as laid in the bill.[6] And so, in other cases, where particular customs are prescribed for, the evidence is, in general, required to be in conformity

1 See Seton, 1117, where the cases on the subject of supplying defective evidence are collected.
2 As to variance generally, see the following works on evidence: 1 Phillips, 569, *et seq*; Taylor, s. 172, *et seq.*; Best, s. 287; Greslev, 242; Powell, 193.
3 *Lindsay* v. *Lynch*, 2 Sch. & Lef. 1; see also *Mortimer* v. *Orchard*, 2 Ves. J. 243; *Legh* v *Haverfield*, 5 Ves. 453, 457; *Woollam* v. *Hearn*, 7 Ves 211; *Deniston* v. *Little*, 2 Sch. & Lef. 11, n.; *Savage*, v. *Carroll*, 2 Ball & B. 451; *Daniels* v. *Davison*, 16 Ves. 249, 256
4 2 S Sch. & Lef. 11, n.
5 *Ante.*
6 *Scott* v. *Fenwick*, 3 Eagle & Y. 1318; *Uhthoff* v. *Lord Huntingfield*; 2 *ib.* 649; cited 1 Pri. 237; *Prevost* v. *Benett*, 3 Eagle & Y. 705: 1 Pri. 236; *Blake* v. *Veysie*, 3 Dow, 189: 2 Eagle & Y. 699; *Miller* v. *Jackson*, 1 Y. & J. 65.

with the statement in the pleadings. In *The Dean and Chapter of Ely* v. *Warren* [1], however, Lord Hardwicke said, that the Court of Chancery would not put persons to set forth a custom with so much exactness as is requisite at Law, or with so much nicety as the Court of Exchequer expects.

We have seen before that, in some cases, where a plaintiff has alleged a different agreement, in his bill, from that which has been admitted by the answer, the Court has permitted the plaintiff to amend his bill, by abandoning the first agreement and insisting upon that stated upon the answer[2]; and when the defendant sets up a parol variation from the written contract, it will depend on the particular circumstances of each case whether that is to defeat the plaintiff's title to specific performance, or whether the Court will perform the contract: taking care that the subject-matter of this parol agreement or understanding is carried into effect, so that all parties may have the benefit of what they contracted for.[3] When, however, there it a material variance in a written agreement, it is the ordinary practice to dismiss the bill with costs, without prejudice to the plaintiff's bringing a new bill.[4] In *Mortimer* v. *Orchard*,[5] however, where the plaintiff had prayed the specific performance of an agreement stated in the bill, but proved a parol agreement which was quite different, Lord Rosslyn, although he thought the bill ought to be dismissed, yet, as there had been a partial execution of some agreement between the parties, by the building of a house, directed a reference to the Master, to settle a lease pursuant to the agreement confessed in the answer.

The rules which have just been discussed, relate to the general aim or tendency of the proof to be adduced. There are other rules relating to the medium of proof, independently of its tendency, which might properly be introduced in this place, such as the General Rules: that the best evidence which the nature of the case admits, ought to be produced, and that hearsay of a fact is not admissible; but a discussion of these rules would extend this Treatise beyond all reasonable limits. The reader is, therefore, referred to

1 2 Atk 190.
2 *Ante.*
3 *London and Birmingham Railway Company* v. *Winter*, C. & P. 62; and see *Benston* v *Glastonbury Canal Company*, 1 C. P. Coop. t. Cott. 350; C. P. Coop. 42.
4 *Lindsay* v. *Lynch*, 2 Sch. & Lef 1; *Woollam* v. *Hearn*, 7 Ves. 211, 222; *Deniston* v. *Little*, 2 Sch. & Lef. 11, n
5 2 Ves. J. 243.

the Treatises on the Law of Evidence[1]; and it is to be observed, that what he will find to be laid down in any of those Treatises to be the rule of evidence in Courts of Law, will generally be applicable to cases in Courts of Equity.[2]

SECTION V.—*Documentary Evidence which proves itself.*

Having endeavoured to direct the practitioner's attention to the matters which it will be necessary for him to prove in the cause, the next thing to be considered is the evidence by which such matters are to be substantiated. This evidence may be either:—I. Documentary; or, II. The testimony of witnesses.

Documentary evidence consists of all those matters which are submitted to the Court in the shape of written documents. It is not, of course, intended to include in this definition the depositions of witnesses examined in the cause: for although, by the practice of Courts of Equity in England, the evidence to be derived from the parol examination of witnesses is set down in writing, and brought before the Court in that form, yet this does not vary the nature of the evidence itself: which, being spoken by the witness *viva voce* to the person by whom he was examined, does not, from the circumstances of its being committed to writing, for more convenient use before the Judge, lose its parol character. Neither is it intended to include evidence by affidavit. Such evidence is, in fact, a simple and easier mode by which the parol evidence of witnesses is communicated to the Court.

Some descriptions of documentary evidence are admitted by the Court, without the necessity of any proof being gone into to establish their validity; whilst others require the support of parol testimony, before they can be received. It is proposed, in this section, to consider documentary evidence of the first description; and, in the next section, to treat of documents which require parol proof.

1 AS TO BEST EVIDENCE: SEE 1 Phillips, Chap. IX; Taylor, ss. 363, 397; Best, ss. 87, 107; Gresley, 247; AS TO HEARSAY: see 1 Phillips, Chap. VIII; Taylor ss. 507, 542; Best, s. 407; Hubback, 648, 711. Gresley, 304, 325; Powell, 84, 93.

2 *Manning* v. *Lechmere*, 1 Atk. 453; *Glynn* v. *Bank of England*, 2 Ves. *S.* 41.

All copies of public or private Acts of Parliament, purporting to be printed by the Queen's printer, are admitted as evidence thereof.[1]

Exemplified copies of records in other Courts of Justice, and of the superior Courts of Justice, and of the Courts established here by Acts of Parliament, are admitted in evidence, without extrinsic proof of their genuineness.[2]

It may be observed here, that questions of Foreign law are questions of fact, which must be determined, in each case, on the evidence adduced in it; and for this purpose, a decision on a former case, or the evidence then made use of, is not available.[3]

All Courts, Judges, and other judicial officers, are bound to take judicial notice of the signature of any of the Equity or Common Law Judges of the Superior Circuits or County Courts in Upper or Lower Canada where such signature is attached or appended to any decree, order, certificate, or other judicial or official document.[4]

Amongst the records of other Courts of Justice, copies of which the Court of Chancery is in the habit of receiving as evidence, may be ranked the depositions of witnesses, and proceedings taken in causes in other Courts of Equity of concurrent jurisdiction. The rules by which the Court is governed, in receiving evidence of this description, are the same as those adopted by it in cases where depositions taken in the Court of Chancery in one cause are offered to be read in another.[5]

It has been before stated, that the Court of Chancery pays attention to its own proceedings, although they are not actually recorded:[6] in illustration of which it may be stated, that all the proceedings of the Court, in the cause, which are required as evidence, may be used as such, without further testimony to establish them than the

1 Con. Stat. of Canada, C. 5, S. 6; Taylor on Evid. ss. 1368, 1371, 1372; 2 Phil. on Evid. 135, 194.
2 2 Phil. on Evid. 197; Taylor, ss. 409, 1378; and see Con. Stat. of Canada, Ch. 80.
3 *Earl Nelson* v. *Lord Bridport*, 8 Beav. 527, 554; *M'Cormick* v. *Garnett*, 5 De G. M. & G. 278; and see *Sussex Peerage Case*, 11 Cl. & F. 85; *Di Sora* v. *Phillips*, 10 H. L. Ca. 624; Taylor ss. 1280, 1281, 1370. English Courts may now ascertain what the foreign law is, by sending cases for the opinion of foreign courts; but, unless they are in countries under the government of the Queen, a convention must first be entered into with the foreign government: 22 & 23 Vic. c. 63; 24 & 25 Vic c. 11. It is believed that no such convention has yet been made.
4 Con. Stat. of Canada, C. 80, S. 6.
5 See *post*.
6 *Ante*.

production of the proceeding itself, or of an office-copy of it, signed by the officer in whose custody such proceeding properly is, according to the practice of the Court.

According to the former practice of the Court, it was necessary, when any proceedings in one cause were to be given in evidence in another, that the foundation for the production of them should be laid, by proving the bill and answer in the cause in which they were taken. Gradually, however, this rule has been relaxed, and,

Our Order 175 provides, that "A party shall be entitled upon notice without order, to use depositions taken in another suit, in cases where under the former practice he was entitled, upon obtaining the common order for that purpose to use such depositions."

A decree or order of the Court of Chancery, determining a matter of right, is good evidence as to that right, not only against the party against whom the decree was made, but against all those claiming under him.[1] But although a decree between other parties cannot be read as evidence, yet it may be read as a precedent.[2] And it is not in any case necessary, in order that it should be admissible as evidence, that the parties to it should have filled the relative situations of plaintiff and defendant: if the present plaintiff and defendant were co-defendants in the former cause, the decree in that cause may be read, though not as conclusive evidence.[3] "It frequently happens," observes Lord Hardwicke, "that there are several defendants, all claiming against the plaintiff, and having also different rights and claims among one another: the Court then makes a decree, settling the rights of all the parties; but a declaration for that purpose could not be made, if this objection (viz., to receiving the decree as evidence, because made between co-defendants,) holds: which would be very fatal, as it would occasion the splitting one cause into several."[4]

The depositions of witnesses, which have been taken in another cause, may, as well as other proceedings, be read at the hearing, under an order to be obtained for that purpose, if the two suits are

1 *Borough* v. *Whichcote*, 3 Bro. P. C ed. Toml. 595.
2 *Austen* v. *Nicholas*, 7 *ib.* 9.
3 *Askew* v. *Poulterers' Company*. 2 Ves. S. 89; Belt's Sup. 299.
4 *Ibid.*; see also, *Chamley* v. *Lord Dunsany*, 2 Sch. & Lef. 710, H. L.; *Farquarson* v. *Seton*, 5 Russ. 45, 63.

between the same parties or their privies, and the issue is the same;[1] and such depositions are admissible in evidence in the former cause.[2] Thus, evidence which has been taken in a cross cause may be read at the hearing of the original cause,[3] and *vice versa*, provided the point in issue is the same in each case. Where the matter in issue is not the same, the depositions taken in one cause cannot be read in the other;[4] and even where two suits related substantially to the same matters, one suit being instituted by the first tenant for life in remainder, and the other by the first tenant in tail in remainder, Sir J. L. Knight-Bruce, V.C., refused to allow the evidence, taken in one suit, to be used in the other.[5] Where the person, against whom the evidence is offered, was neither a party to such other cause, nor privy to a person who was a party, the depositions taken in that cause cannot be read; thus, where a father is tenant for life only, depositions taken in a cause to which he was a party, cannot be read against his son who claims as tenant in tail.[6] The rule with regard to reading depositions in another suit, appears to be the same as that with respect to reading verdicts at Common Law, namely, "that no body can take a benefit by it, who had not been prejudiced by it had it gone contrary."[7] Thus, it has been held, that if *A.* prefers his bill against *B.*, and *B.* exhibits his bill against *A.* and *C.*, in relation to the same matter, and a trial at Law is directed, *C.* cannot give in evidence the depositions in the cause between *A.* and *B.*, but the trial must be entirely as of a new cause.[8]

This rule appears to be somewhat at variance with what is stated in *Coke* v. *Fountain*[9] to be a common one, namely, that where one legatee has brought his bill against an executor, and proved assets, and afterwards another legatee brings his bill, that the last-named legatee should have the benefit of the depositions in the former suit, though he was not a party to it; but it is to be observed, that the case of the legatee is different from the case of a plaintiff in ordinary

1 *Mackworth* v. *Penrose*, 1 Dick. 50; *Lade* v. *Lingood*, 1 Atk. 203; *Humphreys* v. *Pensam*, 1 M. & C. 580, 586; *Hope* v. *Liddell* (No. 2), 21 Beav. 180; *Williams* v. *Williams*, 10 Jur. N. S. 608: 12 W. R. 663 V. C. K.

2 *Williams* v. *Williams*, 10 Jur N S. 608: 12 W. R. 663, V. C. K.

3 *Lubiere* v. *Genou*, 2 Ves. S. 579, in which case the cross bill had been dismissed. For form of Order see Seton, 1275, No. 2.

4 *Christian* v. *Wrenn*, Bunb. 321.

5 *Blagrave* v. *Blagrave*, 1 De G. & S. 252, 259: 11 Jur. 744; and see *Hope* v. *Liddell*, 21 Beav. 180.

6 *Peterborough* v. *Norfolk*, Prec in Ch. 212; *Coke* v. *Fountain*, 1 Vern. 413.

7 Gilb. on Evid. 28; Buller, N. P. 229; 2 Phil. on Evid. 8.

8 *Rushworth* v. *Countess of Pembroke*, Hardres, 472 For the reason, why a verdict is not evidence for or against a person who was not a party to it, see 2 Phil. on Evid. 8.

9 *Ubi sup.*

circumstances; for although the legatee was not actually a party to the original suit, yet he was so virtually: his interest in the first suit having been represented by the executor. In fact, in the case of the legatee, the suit is in *pari materia;* and, with respect to the subject in dispute, the plaintiff in the second suit stands in the same situation, with regard to the defendant as the plaintiff in the first.

The same principle appears to have been acted upon in other cases, besides those of legatees. Thus, in *Terwit* v. *Gresham*,[1] depositions taken in an old cause, where the same matters were under examination and in issue, were permitted to be read, although the plaintiff and those under whom he claimed were not parties to the former cause: inasmuch as the *terre tenants* of the same lands were then parties; and so even at Law, in the case of tithes, an answer to a bill filed in the Court of Exchequer, in a suit instituted by a vicar against the rector and others, owners of the lands, was evidence in an action for tithes, by a succeeding rector, against the owners and occupiers of the same lands.[2] In like manner, in a case before Sir Anthony Hart, in Ireland,[3] depositions which had been taken in a suit by one tenant in common against another were admitted in evidence, in a suit by another tenant in common, against the same defendant. In such cases, however, it must be proved, that the depositions are touching the same land or tithe.[4]

It seems not to be important what character the individual, against whom the depositions in the former suit are offered, filled in that suit, whether that of plaintiff or defendant, provided he had, in such character, an opportunity of cross-examining the witness. If he was a party to the first suit as a co-defendant, and becomes a plaintiff in the second suit, making his co-defendant in the first suit a defendant, he may, if such co-defendant sets up the same defence that he did in the original suit, read the evidence taken in that suit against such co-defendant. Thus, where the creditors of a testator filed their bill against the residuary legatees, and also against a purchaser from the testator, praying to have their debts paid, and the conveyances, alleged to have been executed by the testator to

1 1 Cha. Ca. 73.
2 *Lady Dartmouth* v. *Roberts*, 16 East, 334; see also *Travis* v. *Challenor*, 3 Gwill. 1237; *Ashby* v. *Power*, *ib.* 1239; *Benson* v. *Olive*, 2 Gwill. 701; *Earl of Sussex* v. *Temple*, 1 Lord Raym. 310.
3 *Byrne* v. *Frere*, 2 Moll. 157; and see *Bishop of Lincoln* v. *Ellis*, Bunb. 110.
4 *Benson* v. *Olive*, Bunb. 284.

the purchaser, set aside for fraud, and obtained a degree accordingly, and afterwards the residuary legatees filed another bill against the purchaser, praying for an account of the residue, and to set aside the conveyances: upon the question arising, whether the depositions taken in the former cause, as to the fraud in obtaining the conveyances, could be read in the second cause, for the legatees against the purchasers, who were co-defendants in the former cause, it was held, that as there was the same question and the same defence in both the causes, the depositions ought to be read.[1]

Where a cause had been set down for hearing on motion for a decree, the Court allowed the plaintiff to use the examination of the defendant, taken in another cause; but gave leave to the defendant to file affidavits in explanation, subject to the right of cross-examination.[2]

It may be stated here, that where the depositions of witnesses in another suit are offered to be read at the hearing, against persons who were parties to such other suit, or those claiming under them, it does not appear to be necessary that the witnesses, whose depositions were offered to be read, should be proved to be dead. This appears to have been the effect of the determination of the House of Lords in the *City of London* v. *Perkins*,[3] and of Sir John Leach, V.C., in *Williams* v. *Broadhead*.[4] In the subsequent case of *Carrington* v. *Cornock*,[5] however, Sir Lancelot Shadwell, V. C., seems to have entertained a different opinion from that expressed by Sir John Leach, in *Williams* v. *Broadhead*; and it is to be remarked, that at Law, the depositions of a witness, taken in a suit in Chancery, cannot, without special order, be read, if the witness is alive, even though he is unable to attend by reason of sickness.[6]

Some doubt seems to have been, at one time, entertained whether the depositions of witnesses, taken in a cause where the bill had been subsequently dismissed, could be read at the hearing of another cause; and the rule appears to have been laid down, that if the dismissal was upon merits, evidence of the facts which have been proved in the cause may be used as evidence of the same facts,

1 *Nevil* v. *Johnson*, 2 Vern. 447; and see *Askew* v. *Poulterers' Company*, 2 Ves. S. 89, 90.
2 *Watson* v. *Cleaver*, 20 Beav. 137.
3 3 Bro. P. C. ed. Toml. 602. 4 1 Sim. 151.
5 2 Sim. 567; and see *Blagrave* v. *Blagrave*, 1 De G. & S. 252: 11 Jur. 744; *Lawrence* v. *Maule*, 4 Drew. 472, 480.
6 2 Phil. on Evid. 124; Taylor, s. 445.

in another cause between the same parties[1]; but where a cause has been dismissed, not upon merits, but upon the ground of irregularity, (as, for instance, because it comes on by revivor, where it ought to have come on by original bill,) so that regularly there was no cause in Court, and consequently no proofs properly taken, such proofs cannot be used.[2] If, however, upon a bill to perpetuate testimony, the cause should be set down for hearing, and the bill dismissed because it ought not to have been set down, the plaintiff may, notwithstanding the dismissal, have the benefit of the depositions.[3]

When proceedings or depositions in another cause, in the Court of Chancery, are to be read as evidence at the hearing, it will be sufficient to produce the copies of them. Such copies, however, must be signed by the proper officer: otherwise, they cannot be read; and if, at the hearing of a cause, it is found that the copy of a proceeding, which one party relied upon as evidence, has not been properly signed, the Court will allow the cause to stand over for the purpose of procuring the proper signature.[4]

Where a record or other document, in the custody of the Record and Writ Clerks, is required to be produced out of the Court of Chancery or its offices, an order authorising such production must be obtained, on motion of course, supported by an affidavit to the effect that such production is necessary as evidence;[5] but, as a rule, no such order will be made for the production of original documents, if certified or examined copies will answer the purpose.[6] No *subpœna* need be issued; but the officer will attend on the order, and a memorandum bespeaking his attendance, being left with him, and on the office fees, and his reasonable expenses (if any) being paid.[7]

With respect to the production of proceedings in Chancery, upon trials in Common Law Courts, it may here be observed, that there is a difference between criminal and civil cases: in the former, it is necessary that the original record should be procured; in the latter, a copy signed and certified by the officer to whose custody the ori-

1 *Lubiere* v. *Genou* 2 Ves. S 579; *M'Intosh* v. *Great Western Railway Company*, 7 De G. M. & G. 737.
2 *Backhouse* v. *Middleton*, 1 Cha. Ca. 173, 175; 3 Cha. Rep. 22.
3 *Hall* v. *Hoddesdon*, 2 P. Wms. 162; see also *Vaughan* v. *Fitzgerald*, 1 Sch. & Lef. 316.
4 *Attorney-General* v, *Milward*, *ubi sup.*
5 Braithwaite's Pr. 514; Gresley. 192.
6 Braithwaite's Pr. 514; *Attorneg-General* v. *Ray*, 6 Beav 335; *Anon*, 13 Beav. 420; *Biddulph* v. *Lord Camoys*, 19 Beav. 467.
7 Braithwaite's Pr. 513, 514.

ginal is entrusted,[1] or proved by the person putting it in to have been examined with the original record, is sufficient[2]; and for this reason, an application for production of the original depositions, at the trial of a civil action, was refused.[3]

The documents which have been before enumerated as requiring no evidence to prove them, are all, either in a greater or less degree, public documents. Private documents which are thirty years old from the time of their date, also prove themselves.[4] This rule applies, generally, to deeds concerning lands, and to bonds, receipts, letters, and all other writings: the execution of which need not be proved, provided they have been so acted upon, or brought from such a place, as to afford a reasonable presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty.[5] Lord Chief Baron Gilbert, however, upon this point, says, that "if possession hath not gone along with a deed, some account ought to be given of the deed; because the presumption fails where there is no possession"[6]; and he adds a caution, that "if there is any blemish in an ancient deed, it ought to be regularly proved; or where it imports a fraud: as, where a man conveys a reversion to one, and afterwards conveys it to another."[7]

The rule of computing the thirty years from the date of a deed, is equally applicable to a will.[8] Some doubt appears formerly to have been entertained on this point, on the ground that deeds take effect from their execution, but wills from the death of the testator.[9] In *Rancliff* v. *Parkins*,[10] Lord Eldon observes, that, in a Court of Law, "a will thirty years old, if the possession has gone under it, and sometimes without the possession, but always with possession, if the signing is sufficiently recorded, proves itself. But if the signing is not sufficiently recorded, it would be a question whether the age proves its validity; and then, possession under the will, and

1 14 & 15 Vic. c. 99, s. 14; *Reeve* v. *Hodson*, 10 Hare, App. 19; *ante*.
2 2 Phil. on Evid. 208, 209; Taylor, ss. 1379, 1382—1384.
3 *Attorney-General* v. *Ray*, 6 Beav. 336; see 3 Hare, 335.
4 2 Phil. on Evid. 245; Taylor. ss. 74, 75.
5 2 Phil. on Evid. 246; Taylor, s. 75; see also, as to letters, *Fenwick* v. *Reed*, 6 Mad 7, 8; *Attorney-General* v *Stephens*, 6 De G. M. & G. 111: 2 Jur. N. S. 51
6 Gilb. on Evid. 89; and see Taylor, ss. 74, 599. 600.
7 Gilb. on Evid. 89; and see Taylor, s. 74.
8 *Man* v. *Ricketts*, 7 Beav. 93, 101; *Orange* v. *Pickford*, 4 Jur. N. S. 649, V. C. K.: *Doe* v. *Burdett*, 4 Ad. & El. 1; *Doe* v. *Wolley*, 8 B. & C. 22.
9 2 Phil. on Evid. 246; *M'Kenire* v. *Fraser*, 9 Ves. 5.
10 Dow, 202.

claiming and dealing with the property as if it had passed under the will, would be cogent evidence to prove the due signing of the will, though it should not be recorded."

It appears to be doubted, whether the seal of a Court or corporation is within the rule as to thirty years; and in *Rex* v. *The Inhabitants of Barthwick*,[1] Lord Tenterden said, "that it might be argued that it was not within the principle of the rule: because, although the witnesses to a private deed, or persons acquainted with a private seal, may be supposed to be dead, or not capable of being accounted for, after such a lapse of time, yet the seals of Courts and of corporations, being of a permanent character, may be proved by persons at any distance of time from the date of the instrument to which they are affixed."[2]

SECTION VI.—*Documentary Evidence which does not prove itself.*

Having pointed out the species of documentary proofs which may be used in Courts of Equity, without the aid of any other evidence to authenticate them, or which, in other words, "prove themselves:" the next subject for consideration is the nature of the proofs requisite, to enable a party to make use of documents which do not come under the same description. The rules upon this subject are, in general, the same in Equity as at Common Law; and will be found more fully set forth in any Treatise upon the Law of Evidence.[3]

With respect to the cases in which different rules prevail in Courts of Equity, from those which are adopted at Law, the most important are those of wills devising real estates. At Law, it is sufficient to examine one witness to prove a will, if he can prove the due execution of it, unless it is impeached[4]; but, in Equity, in order to establish the will against the heir, all the witnesses must be examined.[5]

1 2 B. & Ad. 648.
2 2 Phil. on Evid. 247; Taylor, s. 74.
3 2 Phil. on Evid. 242, *et seq.*: Taylor, ss. 1368—1472, 1660—1679: Best, ss. 245—250: Gresley, 173, *et seq.*
4 Seton, 227, citing Peake's Evid 401.
5 *Bootle* v. *Blundell*, 19 Ves. 505; G. Coop. 136, 137; see also *Ogle* v. *Cook*, 1 Ves. S. 177; *Townshend* v. *Ives*, 1 Wils. 216; *Bullen* v. *Michel*, 2 Pri. 491.

This rule, although general, admits of necessary exceptions, and perhaps does not apply where the will is not wholly, but only partially, in question.[1] The rule also does not apply, in cases where one of the witnesses is dead, or is abroad[2]: in which cases, proof of his handwriting has been held sufficient.[3] It seems, however, that in such a case, the more regular course is not to declare the will proved, but to enter the evidence of the witnesses as read, and then to direct the trusts of the will to be carried into execution.[4] Where a witness has become insane,[5] or has not been heard of for many years, and cannot be found, his evidence has been dispensed with.[6] It is also necessary, in Equity, where the object of the suit is to establish a will against the heir, to prove the sanity of the testator.[7]

We have seen before,[8] that in some cases, where the proof of a will is defective, leave will be given to supply the defect at the hearing;[9] and we have also seen, that it is the common practice of the Court to carry the trusts of a will into execution, without declaring the will well proved.[10] Where the heir admits the will, the Court will establish it, without declaring it well proved;[11] but the admission of a will in the separate answer of a married woman, who was the heiress at law, has been held insufficient to enable the Court to declare the will established.[12]

The Court of Chancery will establish a will made and proved in the colonies, on the production of a duly authenticated copy of it: provided the due execution and attestation of the original are proved by the attesting witnesses.[13]

The rule that, where a will is to be established against an heir, it must be proved by all the witnesses, or by producing evidence of

1 Per Lord Eldon, in *Bootle* v. *Blundell*, *ubi sup.*
2 *Ibid.*
3 *Lord Carrington* v. *Payne*, 5 Ves. 404, 411; see also *Billing* v. *Brooksbank*, cited 19 Ves. 505; *Fitzherbert* v. *Fitzherbert*, 4 Bro. C. C. 231; and *Grayson* v. *Atkinson*, 2 Ves. S. 454, where it was held, that a commission should have been sent to examine the witness abroad; but the rule in *Lord Carrington* v. *Payne* seems to be the one now acted upon: Seton, 227.
4 *Hare* v *Hare*, 5 Beav. 629 630: 7 Jur. 326.
5 *Bernett* v. *Taylor*. 9 Ves. 381.
6 *James* v. *Parnell*, T & R. 417; *M'Kenire* v. *Fraser*, 9 Ves. 5.
7 *Harris* v. *Ingledew*, 3 P. Wms. 93; *Wallis* v. *Hodgeson*, 2 Atk. 56; Seton 228.
8 *Ante.*
9 *Chichester* v. *Chichester*, 24 Beav. 289, where the will was allowed to be proved *viva voce* at the hearing; see however Seton, 228; and *Smith* v. *Blackman*, *ante.*
10 See *Ante*: Ord. VII. 1; Seton, 228; *Binfield* v. *Lambert*, 1 Dick 337; *Bird* v. *Butler*, *ib.* n.; *Fitzherbert* v. *Fitzherbert*, 4 Bro. C. C. 231; *Wood* v. *Stane*, 8 Pri. 613; *Boyse* v. *Rossborough*, Kay, 71: 3 De G. M. & G. 617: 18 Jur 205; S. C. *nom. Colclough* v. *Boyse*, 6 H. L. Ca. 1: 3 Jur. N. S 373.
11 Seton, 222. For form of decree in such case, see *ib.* 224, No. 2.
12 *Brown* v. *Hayward*, 1 Hare, 432; *ante.*
13 *Rand* v. *Macmahon*, 12 Sim. 553; 6 Jur. 450.

their death and handwriting, does not apply when proof of the will is required for other purposes: in such cases, one witness to prove it is sufficient.[1]

The rule, that all the witnesses must be examined, extends also to the trial of an issue *devisavit vel non* before a jury.[2] In *Tatham* v. *Wright*,[3] however, where the bill was not filed by the devisee to establish the will, but by the heir to set it aside, the defendant called one witness, and produced the other two, offering them to the plaintiff to call and examine them, which he declined, not wishing to make them his own witnesses: upon a motion for a new trial, the cause was held to have been sufficiently tried.

Formerly, whenever the heir at law was a party to the suit, he was entitled, as a general rule, to an issue *devisavit vel non*;[4] but under the present practice, the Court of Chancery has power,[5] to determine the question itself, either with or without a jury, as it may think fit: though it may direct the question to be tried at the assizes.

Where an original will is required to be produced in the Court of Chancery, the attendance with it of the proper officer, in whose custody it is deposited,[6] may be procured, as in the other cases where the production of an original record, or instrument in the nature of a record, is required.

There are several cases in which a Court of Equity has established a will, without the production of the original, where the fact of the will having been proved and retained abroad, or other circumstances,[7] have rendered it impossible to bring the original before the Court; but it seems that, in such cases, strict proof of the execution and attestation must be given, unless they are admitted, or unless the will is old enough to prove itself.[8] The contents of the will must be proved to the satisfaction of the Court; and, in the absence of the original, there are various means of secondary evidence appli-

1 *Concannon* v. *Cruise*, 2 Moll. 332.
2 *Pemberton* v. *Pemberton*, 11 Ves. 53; *Bootle* v. *Blundell*, 19 Ves. 505: G. Coop. 137.
3 2 R. & M. 1, 17.
4 See *Man* v. *Ricketts*, 7 Beav. 93, 102: 8 Jur. 159, S C. *nom. Ricketts* v. *Turquhand*. 1 H.L. Ca. 472.
5 Con. Stat U. C. chap. 12.
6 A *subpœna duces tecum* will be issued for this purpose: *Wigan* v. *Rowland*, 10 Hare, Ap. 18, 19: 17 Jur. 816.
7 *Ellis* v. *Mcdlicott*, cited 4 Beav. 144.
8 *Rand* v. *Macmahon*, 12 Sim. 553, 556: 6 Jur. 450.

cable for this purpose. In *Pullan* v. *Rawlins*,[1] sufficient secondary evidence was given, by means of a copy admitted to probate in this country, certified by the Registrar of the place where the original was deposited.

Secondary evidence of the contents of written documents is admitted, both at Law and in Equity, when the party has not the means of producing them, because they are either lost or destroyed, or in the possession or power of the adverse party. At Law, where it is not known till the time of trial what evidence will be offered on either side, a party, in order to entitle himself to give secondary evidence of the contents of a written document, on the ground of its being in the possession of his adversary, ought to give him notice to produce it: for otherwise, *non constat*, that the best evidence might not be had. But even at Law, when, from the nature of the proceeding, the party must know that the contents of a written instrument in his possession will come into question, it is not necessary to give any notice for its production; and, therefore, in an action of trover for a deed,[2] or upon an indictment for stealing a bill of exchange,[3] it has been held, that, without previous notice, parol evidence may be given of the contents of the instrument which is the foundation of the proceeding.[4]

The same exception to the general rule appears to be equally applicable in the Courts of Equity: for there it is held, that when, either from the pleadings or depositions, a party is apprized that it is the intention of the opposite party to make use of secondary evidence of the contents of a document in his possession, such secondary evidence may be used at the hearing, without serving the party in whose possession it is with notice to produce it. This point was much considered by Sir William Grant, M. R., in *Wood* v. *Strickland*,[5] where a witness, who had been examined on the part of the defendant, deposed to the contents of a certain letter which had been written by the plaintiff to the witness, which the witness stated that he had himself subsequently returned to the plaintiff, who immediately threw it into the fire and destroyed it. At the hearing, an objection was taken, on the part of the plaintiff, to the

1 4 Beav. 142, where the cases are collected.
2 *How* v *Hall*, 14 East, 274.
3 *Aickles'* case, 1 Leach, 294.
4 See Taylor on Evid. ss. 378: 379.
5 2 Mer. 461, 465: and see *Lyne* v. *Lockwood*, 2 Moll. 321; *Davison* v. *Robison*, 6 W. R. 673, L. C.

admissibility of this evidence, on the ground that there was no proof of the letter being lost or destroyed, nor of any notice given to the plaintiff to produce it; but the objection was overruled by the Master of the Rolls, on the ground that the plaintiff must have seen, by the depositions, that the evidence of the case, set up as a defence to the bill, consisted of certain written communications which had taken place on the subject of the suit, and that it was impossible, therefore, that he could have been taken by surprise, or could not be prepared to produce any letter that might be in his possession It is right, however, to state, that, in *Hawksworth* v. *Dewsnap*,[1] Sir Lancelot Shadwell, V.C., came to a decision which was contrary to that in *Wood* v. *Strickland*[2]; and that, in *Stulz* v. *Stulz*,[3] he referred with approbation to his own decision in *Hawksworth* v. *Dewsnap*: though he expressed himself willing to have the point again argued, in order that the practice might be settled. The point, however, was not argued, the objection having been waived.

It may be mentioned, with reference to this subject, that, in *Parkhurst* v. *Lowten*,[4] Lord Eldon appears to have thought, that when a defendant admitted a deed to be in his possession, but declined to produce it, on the ground that it might convict him of simony, or any other criminal offence, secondary evidence of its contents might be received.

Where written documents are not admitted, and do not prove themselves, they must be proved by the same evidence as at law[5]: the evidence, however, being taken according to the practice of the Court of Chancery.

Where an instrument, to the validity of which attestation is not requisite, has been attested, such instrument may be proved by admission, or otherwise, as if there had been no attesting witness thereto[6]; and it is not requisite to prove it by the attesting witness, except in the case of *ex parte* applications: on which the evidence of the attesting witness will still be required,[7] unless it can be shown that there is a difficulty in procuring it.[8]

1 Cited 5 Sim. 460.
2 2 Mer. 461.
3 5 Sim. 460.
4 2 Swanst. 213.
5 See *ante*.
6 Com. Law Procedure Act, s. 212.
7 *Re Reay*, 1 Jur. N. S. 222; 3 W. R. 312, V. C. K.; *Pedder* v. *Pedder*, cited Seton, 16.
8 *Re Dierden*, 10 Jur. N. S. 673: 12 W. R. 978, V. C. W.; *Jearrard* v. *Tracey*, 11 W. R. 97. V. C. K. In *Re Hall*, 9 W. R. 776, V. C. K., where no solemnities were required for the execution of a power, a fund was directed to be paid out of Court, without the evidence of the attesting witness; and see Taylor, s. 1640.

Order 156 provides that "After replication is filed, any party may call on the other by notice to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the hearing the Judge certifies that the neglect or refusal to admit was reasonable; and no costs of proving any document are to be allowed, unless such notice is given, except in cases where the omission to give the notice was in the opinion of the taxing officer a saving of expense." Our order 157 that "The notice may be in the form set forth in schedule I. hereunder written, and is to be served not less than two clear days before the day appointed for inspection."[1] These orders are taken from the Imp. Stat. 21 & 22 Vic. c. 27, s. 7, which however is limited to cases "in which all parties to the suit are competent to make admissions." Admissions cannot be made on the part of an infant, unless perhaps where the admissions are for his benefit[2]; but assignees in bankruptcy, and a married woman whose husband was a co-defendant, were held to be competent under the corresponding section of the English Act.[3] The order has been held to apply to all documents the party intends to adduce in evidence, and is not confined to such only as are in his custody or control[4]; including foreign judgments[5]; and documents the validity of which is directly in issue.[6]

1 For hedule 1. see Orders
2 Daniell's Pr. 167.
3 *Churchill* v. *Collier*, 1 N. R. 82.
4 *Rutter* v. *Chapman*, 8 M. & W. 388.
5 *Smith* v. *Bird*, 3 Dowl. 641.
6 *Spencer* v. *Borough*, 9 M. & W. 425.

SECTION VII.—*Proving Exhibits at the Hearing, under an Order.*

Written documents, essential to the justice of the cause, may in certain cases be proved at the hearing as exhibits, *viva voce*, or by affidavit.[1] This course may be adopted, where the cause is heard on bill and answer,[2] or where the documents have not been proved before the evidence in the cause is closed.

In this manner may be proved, as exhibits, office-copies of records[3] from any of the Superior Courts, or of grants or enrolments from the rolls or other records deposited in the Public Record Offices, or of records or proceedings from Courts of inferior jurisdiction.

Deeds, bonds, promissory notes, bills of exchange, letters, or receipts, of which proof must be made of the handwriting of the persons writing or executing the same, are all considered as exhibits, and may be proved at the hearing.[4]

With the exception of documents coming out of the custody 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 thus be proved that requires more than the proof of the execution, or of handwriting to substantiate it: if it be anything that admits of cross-examination, or that requires any evidence besides that of handwriting, it cannot be received.[5] This rule is strictly adhered to; and 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 *Earl Pomfert* v. *Lord Windsor*,[6] Lord Hardwicke

1 The practice of proving such documents by affidavit was introduced by the 43rd Order of August, 1841: Sand. Ord. 886: 3 Beav. xxv., which directed that, "In cases in which any exhibit may, by the present practice of the Court, be proved *viva voce* at the hearing of a cause, the same may be proved by the affidavit of the witness who would be competent to prove the same *viva voce* at the hearing." This order is not included in the Consolidated Orders; but the Prel. Ord. r. 5, which preserves any established practice originated in, or sanctioned by, the Orders thereby abrogated, would, it is conceived, authorise the adoption of the practice, where necessary: see Seton, 14. A similar practice prevailed in England when the English practice was established in this Province, and it is presumed, is still in force. See *Killaly* v. *Graham*, 2 Grant, 281, to this effect.

2 *Ante*; *Rowland* v. *Sturgis*, 2 Hare, 520; *Chalk* v. *Raine*, 7 Hare, 393: 13 Jur. 981; *Neville* v. *Fitzgerald*, 2 Dr. & War. 530; Wyatt's P. R. 219; *contra*, *Jones* v. *Griffith*, 14 Sim. 262: 8 Jur. 733.

3 The office-copies here mentioned are the copies of those records of which it is the duty of proper officers, appointed by the law, to furnish copies for general use, and are not those copies which it is the duty of the officer of the Court to make for the convenience of suitors in that Court, such as the ordinary office-copies of pleadings and depositions in the Court of Chancery: which, although they are admissible in the Courts to which the officer belongs, are not admissible in other Courts without further proof of their accuracy: 2 Phil. on Evid. 197: Taylor, s. 1382.

4 *Ibid.*; Hinde, 370.

5 *Lake* v. *Skinner*, 1 J. & W. 9, 15; *Bowser* v. *Colby*, 1 Hare, 109, 132. It seems, however, that the Court will, upon the suggestion of counsel, put questions to the witness: see *Turner* v. *Burleigh*, 17 Ves. 354.

6 2 Ves. S. 472, 479; and see *Bloxton* v. *Drewit*, Prec. in Ch. 64.

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 a right to controvert and cross-examine upon. So also, where a power was required to be exercised by a deed executed in the presence of, and attested by witnesses, it was held that the deed by which the power was exercised could not be proved *viva voce* at the hearing of the cause;[1] and where a book, in which the collector of a former rector had kept accounts of the receipt of tithes, was offered to be proved *viva voce*, it was rejected, because, besides proving the handwriting, it would be necessary to prove that it came out of the proper custody, and that the writer was the collector of the tithes.[2]

For the same reason, a will of real estate cannot be proved as an exhibit at the hearing: because, besides the mere execution of the will, the sanity of the testator must be established, and the heir has a right to cross-examine the witnesses.[3] Under the present practice, however, a will has been allowed to be proved at the hearing, with liberty to the heir to cross-examine the witnesses.[4]

If a document is impeached by the answer of a defendant, it cannot be proved *viva voce*, on the part of the plaintiff, 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, Sir John Leach, M.R., refused to admit such deed to be proved *viva voce* against the defendant: although he held, that it might have been so proved against the other defendant, who had not impeached its authenticity.[5] 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 plaintiff was not allowed to prove the deed *viva voce* as an exhibit; but leave was given to file interrogatories for that purpose.[6]

It is only, however, where the execution or the authenticity of a deed is impeached, that it cannot be proved as an exhibit: if the validity of it only is disputed, it may be so proved;[7] and upon this

1 *Brace* v. *Blick*, 7 Sim. 619.
2 *Lake* v. *Skinner*, *ubi sup.*
3 *Harris* v. *Ingledew*. 3 P. Wms. 93; *Niblett* v. *Daniel*, Bumb. 310: 2 Fowl. Ex. Pr. 158; *ante*.
4 *Chichester* v. *Chichester*, 24 Beav. 289; see also *Hope* v. *Liddell*, 20 Beav. 438.
5 *Barfield* v. *Kelly*, 4 Russ. 355, 357; *Joly* v. *Swift*, 3 Jo. & Lat. 126; *Hitchcock* v. *Carew*, Kay, App. 14.
6 *Maber* v. *Hobbs*, 1 Y. & C. Ex. 585, 586.
7 *Attorney-General* v *Pearson*, 7 Sim. 309.

principle, in the case of *Rowland* v. *Sturgis*,[1] the plaintiff, in a foreclosure suit, was allowed to prove by affidavit the mortgage deed under which he claimed, where it was neither admitted nor denied by the defendant.

Order 176 provides, that "At the hearing of any cause, or of any further directions therein, affidavits of particular witnesses, or affidavits as to particular facts and circumstances, may be used by consent, or by leave of the Court; and such consent may be given on behalf of persons under disability, with the approbation of the Court."

It is however, necessary, in order to authorise the proving of an exhibit at the hearing of a cause, that the party intending to make use of the exhibit should previously obtain an order for that purpose.[2] This order is never made on the application of the adverse party, but may be obtained, by the party requiring it, on motion of course,[3] and it may be granted during the hearing of the cause:[4] in which case, the cause will either be ordered to stand over for the purpose of enabling the order to be served and acted upon, or, if the witness is in Court, it may be acted upon immediately.

The order, when drawn up, must describe minutely, the exhibits to be proved;[5] and it is always made, as of course, "saving all just exceptions."[6]

The order being drawn up, passed, and entered, a copy thereof must be served, in the usual manner, upon the adverse solicitor two days previous to the hearing of the cause.[7]

When the cause is called on, the original order, the exhibit described therein, and the witness to prove the same, must be produced in Court; and the Registrar then administers the usual oath and examines the witness;[8] or, if proved by affidavit, the order and exhibit, must be produced with the affidavit.[9]

1 2 Hare, 520; *contra*, *Jones* v. *Griffith*, 14 Sim. 262; 8 Jur. 733; and see *Chalk* v. *Raine*, 7 Hare, 393; 13 Jur. 981.
2 Hinde, 370; *Clare* v. *Wood*, 1 Hare, 314. The order may be obtained after the affidavit, in proof of the exhibits, is made: S. C.
3 See *Graves* v. *Budgel*, 1 Atk. 444. For form of order, see Seton, 1237, No. 3.
4 *Bank* v. *Farques*, Amb. 145.
5 As, if a deed, the date and parties' names; if a letter, the date, and the names of the parties by whom it was written, and to whom it was addressed; Gresley, 188.
6 Hinde, 370.
7 *Ibid.*; Gresley, 188; Ord. III. 1.
8 Hinde, 371; *Bowser* v. *Colby*, 1 Hare, 132 n. (*a.*) A witness may be examined to prove exhibits, though examined before in the cause: *Neep* v. *Abbot*, C. P. Coop. 191.
9 The order should be entered as read in the decree: Seton, 14; *ib.* 24, No. 9. The Registrar will indorse each exhibit produced in evidence; for a form, see Seton, 26.

No documents but those mentioned or described in the order, can be thus proved at the hearing;[1] and as the order saves just exceptions, all objections which can be taken to the admissibility of the document as evidence, may then be urged by the opposing party.

The attendance of an unwilling witness, to prove an exhibit at the hearing, may be enforced by *subpœna*,[2] and unless an order to prove *viva voce* at the hearing has been obtained, an order for leave to issue the *subpœna* appears to be necessary, and may be obtained on motion of course.[3] The *subpœena* is prepared and issued in the manner hereafter explained;[4] and is made returnable at the time and place specified in it; being usually the day on which the cause will be in the paper for hearing, and the Court of the Judge who is to hear it.[5] The order to prove *viva voce*, or to issue the *subpœna*, as the case may be, must be produced at the time the *subpœna* is sealed. Personal service is necessary, and a tender of expenses, as in the case of an ordinary *subpœna ad testificandum*.[6]

The adverse party has no right, in the absence of special circumstances, to compel the production of an exhibit, however it has been proved;[7] unless, perhaps, where the deposition proving it sets it out *verbatim*;[8] nor even to inspect it; for he is not, before the hearing, to "see the strength of the cause, or any deed to pick holes in it."[9]

Section VIII.—*Who may be Witnesses.*

All persons are competent to be witnesses in Equity, except: 1. Where the witness labours under a defect of understanding; 2. Where he does not believe in a future state of rewards and punishments.[10]

1 Hinde, 371; Wyatt's P. R. 186.
2 Hinde, 371.
3 *Ibid.*; Gresley, 191; *Holden* v. *Holden*, 5 W. R. 217, V. C. K.; but see S. C. 7 De G. M. & G. 397; Seton, 14; *Vorley* v. *Jerram*, 6 W. R. 734; *Raymond* v. *Brown*, 4 De G. & J 530.
4 See *post.*
5 Sched. to Ord. E. No. 2.
6 See *post.*
7 *Forrester* v. *Helme* M'Cl. 558; *Lord* v. *Colvin*, 2 Drew. 205: 5 De G. M. & G. 47; 18 Jur. 253.
8 *Hodson* v. *Earl of Warrington*, 3 P. Wms. 34.
9 Gresley, 192, citing *Davers* v. *Davers*, 2 P. Wms. 410: 2 Str. 764; *Wiley* v. *Pistor*, 7 Ves. 411; *Fencott* v. *Clarke*, 6 Sim. 8; *Lord* v. *Colvin*, *ubi sup*; and see *post.*
10 *Maden* v. *Catanach*, 7 H. & N. 360: 7 Jur. N. S. 1107. As to the competency of the witnesses, see Taylor on Evid. ss. 1210—1257; Best, ss. 132—188; Powell, 20 *et seq.*

Formerly, persons interested in the matters in question in the suit, or parties thereto, or who had been found guilty of certain crimes, were incompetent to give evidence; but these restrictions have been removed.[1]

The witnesses should be sworn in such form, and with such ceremonies, as they may declare to be binding on their consciences; and any person competent to be a witness may, if he has a conscientious objection to be sworn, give evidence upon a solemn affirmation. A peer, although privileged to put in his answer upon his attestation of honour, must, when called upon to give evidence as a witness, do so upon oath.[2]

It is a contempt of Court to publish, while a cause is pending, articles in a newspaper which, by holding the witnesses up to public execration, may tend to hinder the course of justice.[3]

SECTION IX.—*Manner of, and time for, taking Evidence.*

Formerly, the general mode of examining witnesses in Equity was by interrogatories in writing, exhibited by the party, plaintiff or defendant, or directed by the Court to be proposed to or asked of the witnesses in a cause. This practice has been abolished, and a new system substituted in its place. The Court may, however, if it shall think fit, order any particular witness, either within or out of the jurisdiction, to be examined upon interrogatories; and with respect to such witness or witnesses, the former practice of the Court in relation to the examination of witnesses continues in full force.

It frequently happens, that a plaintiff may desire to examine a defendant, or that a defendant may wish to examine a plaintiff, before the cause comes on for examination and hearing before the Judge, or this may be desired to be done before the Judge at Examination and Hearing Term. This is provided for by Order 138,

1 See Taylor, ss. 1211—1219, and Con. Stat. U. C. ch. 32.
2 Taylor, s. 1245.
3 *Felkin* v. *Lord Herbert*, 10 Jur. N. S. 62; 12 W. R. 241, V. C. K.

which declares, that "Any party to a suit may be examined by the party adverse in point of interest, without any special order for that purpose; and may be compelled to attend and testify in the same manner, upon the same terms, and subject to the same rules of examination, as any witness, except as hereinafter provided."

The examination of a defendant under Order 138 is the substitute for discovery by interrogatories, and to entitle a plaintiff to examine on any particular subject, he must make a case for it in his bill. Where a defendant refused to answer questions not founded on any case or charge or allegation made in the bill, an application to compel him to attend and answer was refused, with costs.[1]

Order 139 provides that, "A person for whose immediate benefit a suit is prosecuted or defended, is to be regarded as a party for the purpose of Order 138." And Order 140 provides that, "A plaintiff may be so examined at any time after answer, and before and at the hearing of the cause; and a defendant may be examined at any time after answer, or after the time for answering has expired."

Under these orders, the defendant may examine the plaintiff before an examiner, though the cause may be set down, and notice of examination and hearing served.[2] A defendant has a right to examine the plaintiff as soon as his own answer is filed, though there may be other defendants who have not answered; and it is not necessary to serve such other defendants with notice of examination: and the plaintiff, by amending his bill, does not postpone his liability to be examined until after the time for answering the amendment expires. Service on the solicitor, in such a case, of a copy of the examiner's appointment for the examination of a party, is a sufficient notice to the solicitor, and it is not necessary that the appointment should name the parties at length.[3] An examination of a defendant under these orders is a substitute for the discovery by answer; the depositions of the defendant taken under them may be read at the hearing, and it is not necessary to call him as a witness at the examination of witnesses; and the examination of a plaintiff by a defendant would be equally admissible at the hearing.[4]

1 *Dickson* v. *Covert*, 2 Cham. R. 342.
2 *Clarke* v. *Hawke*, 1 Cham. R. 346.
3 *Fowler* v *Boulton*, 12 Grant, 437.
4 *Proctor* v. *Grant*, 9 Grant, 31.

Where a defendant has been examined on his answer: the answer and examination may be read in connection, and used as an affidavit in support of a motion for decree.[1]

Where a party has been examined under the Orders 138, 139, 140, it is provided by Order 141, that, "A party so examined may be further examined in his own behalf, in relation to any matter respecting which he has been examined in chief."

In this Court, a party called and examined as a witness by the opposite party, cannot go on to give evidence on his own behalf; his counsel can ask him questions only in explanation of his evidence in chief. In this respect, the practice differs from that at Common Law, where a party called by the opposite party is allowed to give evidence on his own behalf, his interest going only to affect his credibility. The decisions of the Courts of Law on this subject are, however, contradictory. It has been held by the Court of Common Pleas, that one party called by the opposite one is thereby made a general witness, and his incapacity by reason of interest is removed;[2] while the Court of Queen's Bench held (Burns, J., dissenting), that he could be asked questions in explanation only.[3]

Order 142 provides, that, "Where one of several plaintiffs or defendants, who are joint contractors, or united in interest, has been examined, any other plaintiff or defendant, united in interest, may also be examined on his own behalf, or on behalf of those united with him in interest, to the same extent as the party actually examined." And Order 143, that, "Such explanatory examination must be proceeded with immediately after the examination in chief, and not at any future period, except by leave of the court." Order 146 provides, that, "Where the examining party uses any portion of the examination so taken, it shall be competent for the party against whom it is used to put in the entire evidence so taken, as well as that given in chief, as that explanation." Order 147 provides, that "A party to the record who admits, upon his examination, that he has in his custody or power any deed, paper, writing, or document relating to the matters in question in the cause, is to produce the same for the inspection of the party examining him,

1 *Mather* v. *Short*, 14 Grant, 254.
2 *Wickson* v. *Pinch*, 11 U. C. C. P. R. 146.
3 *Lamb* v. *Ward*, 18 U. C. Q. B. 304; *Mutual Fire Ins. Co.* v. *Palmer*, 20 U. C. Q. B. 441.

upon the order of the Court, or of the Master, or Examiner, before whom he is examined, and for that purpose a reasonable time is to be allowed. But no party shall be obliged to produce any deed, paper, writing or document, which would have been protected under the former practice." And Order 148, that, "Either party may appeal from the order of the Master or Examiner, and thereupon, such Master or Examiner, is to certify under his hand the question raised, and the order made thereon; and the costs of appeal are to be in the discretion of the Court." The plaintiff has a right to examine the defendant at the examination and hearing of the cause, although the plaintiff may have already cross-examined him on his answer, and on an affidavit which he has made in the cause.[1] An application for an order for the defendant to attend at his own expense, he having failed to attend an appointment of the Master, previously made, may be made *ex parte*.[2]

The evidence on interlocutory applications, in causes and matters depending in the Court, is usually taken by affidavit; but it may be taken by oral examination before an Examiner.[3]

Witnesses who have made affidavits, or been examined *ex parte*, before the examiner, are liable to cross-examination;[4] and where a party has given notice to read an affidavit, he will not be allowed to withdraw the affidavit, and so prevent the witness from being cross-examined upon it.[5] There can be no cross-examination, however, upon an affidavit of documents.[6]

SECTION X.—*Affidavits, and ex-parte Examinations before an Examiner.*

An affidavit is a statement in writing sworn to, or affirmed before some person having authority to administer oaths. It must be made in some cause or matter actually pending at the time it is sworn; otherwise, it cannot be received.[7] An affidavit will be

1 *Thompson* v. *Hind*, 1 Cham. R. 247.
2 *Harrison* v. *Greer*, 2 Cham. R. 438.
3 Order 266.
4 Order 268.
5 *Clarke* v. *Law*, 2 K. & J. 28; 2 Jur. N. S. 221; *National Insurance Association* v. *Carstairs*, 9 Jur. N. S. 955, M. R.
6 *Manby* v. *Bewicke*, (No. 2), 8 De G. M. & G. 470: 2 Jur. N. S. 672; overruling *Kay* v. *Smith*, 20 Beav. 566, and see *Curtis* v. *Dale*, 12 Grant, 244.
7 *Francome* v. *Francome*, 11 Jur. N. S. 123: 13 W. R. 355, L. C.; overruling *Fennall* v. *Brown*, 18 Jur. 1051, V. C. W.

received, although the deponent has died since it was sworn; but the Court will not attach so much weight to it as it would have done, if an opportunity for the cross-examination of the deponent thereon had been afforded.[1]

Affidavits may be sworn before any of the persons authorised to take answers in Chancery. Who these persons are, and the nature and extent of their authority, has been already stated.[2]

The Commissioner before whom the affidavit is sworn, must not be a solicitor in the cause. In a case before Lord Hardwicke, where the affidavits, in support of a petition, had been sworn before the petitioner's solicitor, the petition was dismissed, and the costs were directed to come out of the solicitor's pocket.[3] And in the case of *Wood* v. *Harpur*,[4] Lord Langdale, M. R., rejected affidavits, because they had been sworn before a solicitor who acted as clerk to the plaintiff's solicitor; but an affidavit may be sworn before a Commissioner acting as clerk to the plaintiff in the cause, where the plaintiff, though a solicitor, does not act as such in the cause.[5]

The Court of Chancery is also in the habit of receiving affidavits made by parties resident out of the jurisdiction, though not sworn to before any of the functionaries before referred to, provided it is shown that the persons before whom they are sworn are persons who, by the law of the country in which the affidavit is sworn, are authorised to administer an oath, and the signature of such person is properly verified. Thus in *Chicot* v. *Lequesne*,[6] the Court ordered an affidavit to be sworn before a notary public in Amsterdam, with the intervention of a proper magistrate, if necessary, by the law of Holland, to the administration of the oath.

It is, however, to be observed that, although the Court will, in cases of this description, give credit to the fact, as certified under

1 *Abadom* v. *Abadom*, 24 Beav. 243; *Williams* v. *Williams*, 10 Jur. N. S. 608; 12 W. R. 663, V.C.K.; *Davis* v. *Otty*, 13 W. R. 484, M. R.: and see *Morley* v. *Morley*, 5 De G. M. & G. 610, 613, 614: 1 Jur. N. S. 1097, 1098; see also *Tanswell* v. *Scurrah*, 11 L. T. N. S. 761, M. R.

2 *Ante*.

3 *In re Hogan*, 3 Atk. 812; but see *ante*.

4 3 Beav. 290; *Hopkin* v. *Hopkin*, 10 Hare, App. 2; and see cases collected, 2 C. P. Coop. t. Cott. 174, n.

5 Per Turner, L. J., in *Foster* v. *Harvey*, 3 N. R. 98: affirming S. C. 11 W. R. 899, V. C. W.; diss. Knight-Bruce, L. J.

6 1 Dick. 150; see also *Warren* v. *Swinburne*, 9 Jur. 510, Bail Court; *Pinkerton* v. *The Barnsley Canal Company*, 3 Y. & J. 277, n.; *Hutcheon* v. *Mannington*, 6 Ves. 823; *Garvey* v. *Hibbert*, 1 J. & W. 180. If there is a difficulty in taking the affidavit before the foreign authority, the Court will, it seems, appoint a special examiner, and the evidence must be taken as a deposition: *Drevon* v. *Drevon*, 12 W. R. 66, V. C. K. As to the mode of taking evidence before an examiner, see *post*.

the seal or signature of a notary public or other person authorised to administer an oath,[1] it will require some evidence that the person, whose seal or signature is affixed, actually fills the character he assumes. This may be effected, either by the production of an affidavit by some person resident in this country who can depose to the fact of his filling that character, or by the certificate of some British minister or consular agent, or of some public officer of the country in which the transaction took place, competent to give such certificate; and in the latter case, the certificate must be verified by the certificate of some British minister or consular agent, or by the affidavit of some impartial person, cognizant of the fact that such public officer is what he assumes to be.[2]

Where it appeared that no commissioner under the statute for taking affidavits in Lower Canada to be used in Upper Canada resided nearer than 210 miles from a place in Lower Canada where an affidavit of service was to be made, an order was made directing the affidavit to be sworn before one of the ordinary commissioners for taking affidavits in Lower Canada.[3]

This Statute (26 Vic. C. 41. S. 1.) provides that the Governor may appoint persons to receive affidavits in Great Britain and Ireland, or in any colony or dependency thereof, to be used in any of the Courts of Canada. Sec. 3 provides; 1. That oaths administered out of Canada before any commissioner authorised by the Lord Chancellor to administer oaths in Chancery in England: or, 2. That oaths administered before a *Notary Public* or Mayor, or chief Magistrate of any City, Borough, or Town Corporate in Great Britain or Ireland, or in any colony of Her Majesty, *or in any foreign country*, and certified under the Common Seal of such City, Borough, or Town Corporate, or before a judge of any Court of superior jurisdiction in any colony, belonging to the Crown of Great Britain, or any dependency thereof, or before any Consul, Vice-Consul, Acting-

1 *Hutcheon* v. *Mannington*, 6 Ves. 823.

2 *Haggett* v. *Iniff*, 5 De G. M. & G. 910: 1 Jur. N. S. 49; *Re Earl's Trust*, 4 K. & J. 300; Seton. 20. Thus, in *Purkis* v. *Date*, M. R. in Chambers, 6 May, 1864, an affidavit was received and filed, which had been sworn before H., the clerk of the Circuit Court of Burton County, in the State of Indiana, America; who had subscribed his name to the jurat, and affixed thereto the seal of that Court; to which was appended a certificate under the hand of A., as Secretary of that State, and the seal thereof, that H. was such clerk, and was authorised to administer oaths; and a certificate, under the hand and seal of office of the British acting Consul at Chicago, that A. was such Secretary, and that his signature and the State seal were genuine. In *Mayne* v. *Butter*, 13 W. R. 128, V. C. K., the verification of the signature of a foreign notary was dispensed with: the fund being small, and the solicitor personally undertaking to apply it. See 26 Vic. c. 41. *Gould* v. *Hutchinson*, 1 Cham. R. 188.

Consul, Pro-Consul, or Consular agent of Her Majesty exercising his functions in any foreign place, shall be as valid as if taken before a commissioner in this Province. Sec. 4. provides that no proof of the signature or seal of any such officer, or the seal of the Corporation need be given. And Sec. 6. provides that no informality in the hearing or other formal requisites to such an affidavit shall be any objection to its reception in evidence, if the Court or Judge thinks proper to receive it.[1]

An affidavit must be correctly intituled in the cause or matter in which it is made; it will, however, be sufficient if it was correctly entitled when it was sworn, although the title of the cause may have been subsequently altered by amendment.[2] Where a mistake occurred in the title of affidavits, by omitting the name of one of the defendants, they were received on its being shown by affidavit that there was no other suit pending to which they could relate;[3] and where the names of the plaintiffs and defendants were reversed, the Court allowed the affidavits to be taken off the file and re-sworn, and then filed without affixing fresh stamps.[4] In another case,[5] the affidavits were allowed to be made exhibits to an affidavit properly intituled.

Affidavits need not in their entitling distinguish the parties by original and amended bill,—it is sufficient to describe them as the new parties to the suit.[6]

An affidavit made in one cause or matter cannot be used, to obtain an order in another cause or matter. The Court will, however, in some cases, specially direct this to be done: thus, where affidavits have been filed in a cause proving a pedigree, they were allowed to be used on the hearing of a petition under the Trustee Act, 1850.[7]

In all affidavits, the true place of residence, description, and addition of every person swearing the same must be inserted.[8] This rule, however, will not apply to affidavits by parties in the cause:

1 *Graham* v. *Macpherson*, 1 Cham. R. 85, is opposed to this Statute, but so far as can be gathered from the Vol. of Reports it was decided in 1859—some years before this Statute was passed.
2 *Hawes* v. *Bamford*, 9 Sim. 653.
3 *Fisher* v. *Coffey*, 1 Jur. N. S. 956, V. C. W.; and see *Re Harris*, 8 Jur. N. S. 166, V. C. K.
4 *Pearson* v. *Wilcox*, 10 Hare, App. 35.
5 *Re Varteg Chapel*, 13 Hare, App. 37.
6 *Somerville* v. *Kerr*, 2 Chamb. R. 154.
7 *Re Picance*, 10 Hare, App. 35; *Jones* v. *Turnbull*, *In re Turnbull*, 17 Jur. 851, V. C. W.: which is apparently the same case, under a different name.
8 Hinde, 451; Wyatt's P. R. 9.

who may describe themselves, in the affidavit, as the above-named plaintiff, or defendant, without specifying any residence, or addition, or other description; and even where a plaintiff 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.[1] In that case, also, there were several plaintiffs, and the plaintiff making the affidavit described himself as "the above-named plaintiff:" whereas, it was objected, that he ought to have called himself "one of the above-named plaintiffs;" but the objection was overruled.

Our Order 258 provides that "All affidavits are to be taken and expressed in the first person of the deponent, and his name at the commencement of the affidavit is to be written in full, and not designated by any initial letter merely; and the jurat may be in the form or to the effect set forth in the schedule M hereunder written. No costs are to be allowed in respect of an affidavit, which has not been drawn in conformity with this order." And Order 259 that "Each statement in an affidavit, which is to be used as evidence on any proceeding before the Court or before a Judge, or before an officer of the Court, is to shew the means of knowledge of the person making the statement."[2]

The affidavit must commence by stating, that the party "makes oath and says:" for even though the jurat express that the party was sworn, it will not be sufficient, unless the affidavit also state that the party makes oath.[3]

An affidavit must be pertinent and material. Scandalous and irrelevant matter should be carefully avoided, and, if any is inserted, the affidavit may be ordered to be taken off the file;[4] or if the affidavit is intended to be used before the Court, the scandalous matter may be expunged, by the same process as scandal in a bill or other pleading;[5] or if it is intended to be used in Chambers, a motion may he made to have the matter examined and expunged.[6]

1 *Crockett* v. *Bishton*, 2 Mad. 446.
2 See *Woodhatch* v. *Freeland*, 11 W. R. 393; and see Orders 68, 69, 70.
3 *Phillips* v. *Prentice*, 2 Hare, 542; *Re Newton*, 2 De G. F. & J. 3. In the case of an affirmation, the words "do solemnly, sincerely, and truly affirm and declare," are usually substituted for "make oath and say."
4 *Goddard* v. *Parr*, 24 L. J. Ch. 783: 3 W. R. 633, V. C. K.; *Kernick* v. *Kernick*, 12 W. R. 335, V. C. W.
5 See *ante*.
6 Ord. 69, 70.

If an affidavit contain impertinent matter, or be of improper length, the Court may at once disallow the costs of the improper part, or may disallow the costs of the part which the Taxing Master may distinguish as being improper.[1]

The application for the costs of impertinent matter in an affidavit should be made when the affidavit is used.[2] The Court generally leaves it to the Taxing Master to determine what part of the affidavit is unnecessary: merely expressing an opinion that it is of improper length.[3]

Affidavits ought to be fairly written upon foolscap paper book-wise; but the Clerks of Records and Writs may receive and file affidavits written otherwise, if in their opinion it is, under the circumstances, desirable or necessary.[4] The Clerks of Records and Writs may refuse to file any affidavit in which there is any knife erasure, or which is blotted so as to obliterate any word, or which is improperly written, or so altered as to cause any material disfigurement, or in which there is any interlineation: unless the person before whom it is sworn authenticate such interlineation with his initials, so as to show that it was made before the affidavit was sworn, and to mark the extent of the interlineation.

An affidavit in which there are interlineations or alterations, not so marked, may, however, be filed with the consent of the solicitors of all parties against whom it is intended to be used: such consent being endorsed on the affidavit and signed by the solicitors.[5] And where two affidavits, by *A.* and *B.*, were written on the same paper and there were unauthenticated alterations in the affidavit of *A.*, the document was allowed to be filed as the affidavit of *B.*: that of *A.* being rejected.[6]

Dates and sums may be written, either in words or in figures;[7] but every quotation should be placed between inverted commas.

1 Ord. 71; as to this order, see *Moore* v. *Smith*, 14 Beav. 393, 396; *Mayor of Berwick* v. *Murray*, 7 De G. M. & G. 497, 514, 515; 3 Jur. N. S. 1, 5; *Scottish Union Insurance Company* v. *Steele*, 9 L. T. N. S. 677, V. C. W. For form of order, see Seton, 89, No. 17.

2 *Horner* v. *Wheelwright*, 2 Jur. N. S. 367, V. C. S.

3 *Moore* v. *Smith*, *ubi sup.*; *Re Radcliffe*, Seton, 89, No. 17: *Re Skidmore's Trusts*, 1 Jur. N. S. 696, V. C. S.; *Hanslip*, v. *Kitton*, 8 Jur. N. S. 835, 481, V. C. S.; on appeal, *ib.* 1113; *Scottish Union Insurance Company* v. *Steele*, *ubi sup.*

4 Braithwaite's Oaths in Chan. 42.

5 Braithwrite's Pr. 340. But an irregularity in the jurat cannot be waived, see *post*.

6 *Gill* v. *Gilbard*, 9 Hare, App. 16.

7 The present practice in the Record and Writ Clerk's Office of allowing affidavits to be filed, notwithstanding that dates and sums are written therein in figures, instead of in words, was adopted with the sanction of Lord Chancellor Campbell. A previous usage in the office to the contrary was recognised in *Crook* v. *Crook*, 1 Jur. N. S. 654, V. C. S.; Braithwaite's Pr. 340.

Schedules referred to in an affidavit as "hereunder written," should be placed after the jurat; and the commissioner, or other person before whom the affidavit is sworn, must sign his name at the end of each schedule. If a schedule is placed before the jurat, it should not be referred to as "hereunder written," but as "the schedule (or, first, &c., schedule) set forth in this my affidavit." The schedules may also be embodied in the affidavit.[1]

Alterations in schedules, or in accounts made exhibits to affidavits, should be authenticated in the same manner as in the body of the affidavits.[2]

A document may be referred to in an affidavit, either as an exhibit, thus: "produced and shown to me at the time of swearing this my affidavit, and marked with the letter *A*," or as, "hereunto annexed." If "produced and shown," the document is not filed with the affidavit; if "hereunto annexed," the affidavit cannot properly be filed without it; and it is therefore generally more convenient not to refer to it as "hereunto annexed."[3]

Any document referred to, must be distinguished by some mark placed upon it, and signed by the person before whom the affidavit is sworn.[4]

It is the usual practice, in all cases, to write the short title of the cause or matter on the exhibit; and this must be done in the case of documents made exhibits, and intended to be used in Chambers.

Where a document is referred to as being produced and shown to the deponent, the person before whom the affidavit is sworn must inquire whether the deponent has seen the document, and is aware of the contents thereof; but this need not be done where the document is referred to as hereunto annexed: the document being annexed at the time the affidavit is sworn.[5]

Where one party has proved written documents in a cause, the other side has no right, upon that ground, and in the absence of

1 Braithwaite's Pr. 341.
2 See Regul. 8 Aug. 1857, r. 10.
3 Braithwaite's Pr. 341.
4 *Hewetson* v. *Todhunter*, 2 Sm. & Giff. App. 2.
5 Braithwaite's Pr. 341.

special circumstances,[1] to require them to be produced before the hearing; unless, perhaps, where the affidavit proving them sets them out verbatim:[2] for a party can have no right to see the strength of his adversary's case, or the evidence of his title before the hearing.[3] The documents may, however, be ordered to be produced, in order that the other side may cross-examine upon them.[4]

The jurat should be written at the end of the affidavit, and is usually placed at the right-hand corner; it may, however, be written on either side of the page, or, if necessary, in the margin; but not on a page upon which no part of the statements in the affidavit appears.[5] It must also correctly express the time when, and the place where, the affidavit is sworn, including the name of the city, borough, or county.[6]

The deponent must sign his name, or make his mark, at the side of the jurat: not underneath it.[7] The person before whom the affidavit is sworn must sign his name at the foot of the jurat: to which must be added his official character as Commissioner, not necessarily, however, in his own handwriting.[8]

If the deponent be a marksman or blind, the affidavit must be first truly, distinctly, and audibly read over to him: either by the person before whom the affidavit is sworn, or by some other person. In the first case, it must be expressed in the jurat that the affidavit was so read over, or that the mark or signature was affixed in the presence of the person taking the affidavit; in the second case, such other person must attest the mark or signature, and must be first sworn that he has so read over the affidavit, and that the mark or signature was made in his presence, and this must be expressed in the jurat.[9]

1 *Lord* v. *Colvin*, 2 Drew. 205: 5 De G. M. & G. 47; 18 Jur. 253; see also *Forrester* v. *Helme*, M'Clel. 558.
2 *Hodson* v. *Earl of Warrington*, 3 P. Wms. 34.
3 *Davers* v. *Davers*, 2 P. Wms. 410: *Hodson* v. *Earl of Warrington*, *ubi sup.*; *Wiley* v. *Pistor*, 7 Ves. 411; *Fencott* v. *Clarke*, 6 Sim 8: *Lord* v. *Colvin*, *ubi sup.*; Gre ley, 192; *ante*.
4 *Bell* v. *Johnson*, 1 J & H. 682.
5 Braithwaite's Pr. 342.
6 *Ibid*; but see *Gates* v. *Buckland*, 13 W. R. 67, V. C. S.
7 *Anderson* v. *Stather*, 9 Jur. 1085, V. C. K. B.
8 Braithwaite's Pr. 342; but see *Gates* v. *Buckland*, 13 W. R. 67, V. C. S. The words "before me" must precede the commissioner's signature; see *Graham* v. *Ingleby*, cited Braithwaite's Oaths in Chan. 46.
9 The attestation should be written near the jurat: *Wilton* v. *Clifton*, 2 Hare, 535: 7 Jur. 215; Braithwaite's Pr. 380. Where a marksman signed an affidavit with his name at length, his hand having been guided on the occasion, it was ordered to be taken off the file: ——— v. *Christopher*, 11 Sim. 409.

If the deponent be a foreigner, the contents of the affidavit must be interpreted to him; and the interpreter must be sworn that he has truly, distinctly, and audibly done so, and that he will truly interpret the oath about to be administered, and then the deponent may be sworn; and that these formalities have been complied with, must be expressed in the jurat.[1]

Formalities of a similar kind, by which it may appear that the deponent has fully understood the contents of his affidavit, before he is sworn, must be adopted, in the case of a deaf, or deaf and dumb person, or in other similar cases.[2]

The oath should be administered in a reverent manner; and, if not administered in the usual form, the authority for administering it should appear in the jurat.[3]

Quakers, Moravians, and Separatists give their evidence on their solemn affirmation; and any person who objects, from conscientious motives, to be sworn, may now give his evidence upon his solemn affirmation; but the person qualified to make affirmation, must be satisfied of the sincerity of the objection, and this must appear in the affirmat.

It is an universal principle in all Courts, that jurats and affidavits, when contrary to practice, are open to objection in any stage of a cause. This does not depend upon any objection which the parties in a particular cause may waive, but upon the general rule that the document itself shall not be brought forward at all if in any respect objectionable with reference to the rule of the Court. Where, therefore, there was an irregularity in the jurat of an answer, a motion by the plaintiff to take it off the file, on the ground of such irregularity, was allowed, notwithstanding that he had taken an office-copy of the answer.[4] Where, however, in the case of an affidavit sworn abroad, before a notary, the place where it was sworn was omitted in the jurat, it was ordered to be filed: the Vice-Chancellor observing, that he thought the Court must assume

1 Braithwaite's Oaths in Chan. 35.
2 *Reynolds* v. *Jones*, Trin. Term, 1818; Braithwaite's Pr. 383,
3 See Braithwaite's Pr. 383, 384.
4 *Pilkington* v. *Himsworth*, 1 Y. & C. Ex 612, 616; but see Braithwaite's Pr. 48, and *ante*.

that the notary was acting in pursuance of his duty, and that he would not perform a notarial act out of the jurisdiction in which alone he had authority.[1]

Order 260 provides that: "Affidavits, either in support of, or in opposition to, any special motion or petition, are to be filed, with the Clerk of Records and Writs. This order is not to be taken to warrant the taxation of the costs of obtaining office copies of affidavits, for use upon the hearing of any matter, by the party on whose behalf they are filed." And Order 261 that "All the affidavits upon which a notice of motion, or petition is founded, must be filed before the service of the notice of motion or petition; and affidavits in answer must be filed not later than the day before that appointed for the hearing of the motion or petition."

Before any affidavit is used for any purpose, it must have been filed in the Office of the Clerks of Records and Writs, or of the Deputy Registrar.[2] Sometimes in vacation, however, when the matter was pressing, the Court has taken affidavits into its own hands, and then considered them as filed.[3]

Formerly, any party who required a copy of an affidavit, had to obtain an office-copy at the Record and Writ Clerks' Office; but now, where any party requires a copy of an affidavit filed by the adverse party, he is to make written application to the party by whom the copy ought to be delivered, or his solicitor, and thereupon such party, or his solicitor, is to make such copy, and deliver the same on demand within forty-eight hours.[4]

SECTION XI.—*Of viva voce Evidence.*

The *viva voce* examination of witnesses may take place, either before the Court, a Judge, in Chambers, an Examiner of the Court, a Master or an Examiner specially appointed.

1 *Meek* v. *Ward*, 10 Hare, App. 1; *Gates* v. *Buckland*, 13 W. R. 67; V. C. S.
2 *Jackson* v. *Cassidy*, 10 Sim. 326; *Darley* v. *Nicholson*, Dr. & War. 66, 70; *Elsey* v. *Adams*, 4 Giff. 398; 9 Jur. N. S. 788.
3 Per Lord Langdale, in *Attorney-General* v. *Lewis*, 8 Beav. 179.
4 Ord. 548-549.

The most usual instances of *viva voce* examinations are where they are heard before a Judge on Circuit preparatory to the hearing of the cause: an Examiner, either special or otherwise,[1] and a Master on references brought into his office. In the first case the examination is taken as at *nisi prius*, with this difference that the depositions are taken down by the Judge, or the Registrar, or Deputy Registrar under his directions in open Court, and are read over to the witness and signed by him; in the second case the depositions are usually taken to be used on some interlocutory application: or the examination is the cross examination of a party to the suit which may be used at the hearing or not at the option of the party at whose instance it is taken: and in the third, it is the usual practice in the Masters' Office to take all evidence *viva voce*; and in fact it can be taken in no other way except by consent.

The details of the practice in these cases will be found under other more appropriate heads, but there are some points common to all which it will be convenient to notice here.

Where it is intended to examine witnesses before an Examiner, an appointment must be obtained from him, and notice thereof given to the witness; and where there is reason to suppose a witness will not voluntarily attend to be examined, recourse must be had to the compulsory process of a writ 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.[2] In case the witness is required to bring with him any written document in his possession, then the writ must be a *subpœna duces tecum*.[3]

Every *subpœna*, or *subpœna duces tecum* may contain any number of names, and the party suing out the same is at liberty to sue out a *subpœna* for each person, if it is deemed necessary or desirable to do so. In a *subpœna* a husband and his wife are considered as two distinct persons, and her christian and surname must be inserted accordingly.[4]

1 It may here be mentioned, that all Masters are Examiners by their commission—but there are in Toronto two "Special Examiners."
2 Hinde, 326.
3 As to the degree of particularity with which the documents must be described, see *Attorney-General* v. *Wilson*, 9 Sim. 526.
4 Hinde, 327: Braithwaite's Pr. 264, n.

The *subpœna* must be endorsed with the name or firm, and place of business of the solicitor issuing the same, and of his agent, if any, or with the name and place of residence of the party issuing the same, when he acts in person; and, in either case, with the address for service, if any.[1]

On obtaining a *subpœna*, a *precipe*, in the usual form, must be filed at the Record and Writ Clerks' or Deputy Registrar's Office.

The service of this *subpœna* must, in all cases, be personal;[2] and is effected by delivering a copy of the writ and of the indorsement thereon to the witness, and at the same time producing the original writ. At the time he is served with the writ, the witness should be served with a notice in writing, specifying the purpose for which he is to attend the Examiner in pursuance of it.[3]

No witness is not bound to attend, unless his reasonable expenses are paid or tendered to him; nor, if he appears, is he bound to give evidence until such charges are actually paid him;[4] and the rule is the same, where the witness is a party to the cause.[5] A public officer who has charge of documents for which he is responsible, and attends as a witness in his public capacity and in relation to matters connected with his office, will be allowed professional witness fees of $4 per day.[6] A witness, or a party is not obliged to attend and give evidence or submit to cross-examination, except he be duly notified or subpœnaed, even if he happens to be present when the proceedings are going on. Where therefore a party to a suit who had made an affidavit was present in the Masters' Office, and the solicitor for the opposite party proposed to cross-examine him on his affidavit and he refused to answer, a motion *ex parte* to compel him to attend and be examined was refused.[7]

If the witness whose attendance is required is a married woman, the *subpœna* should be served upon her personally, and the tender of the expenses made to her, and not to her husband.[8]

1 Ord. 40, 44, 45.
2 *Spicer* v *Dawson*, 22 Beav. 282.
3 Where the examination is adjourned, the witness is bound to attend the adjournment, without being served with a new *subpœna*; but he should be served with notice of the adjourned time; and see *Lawson* v. *Stoddart*, 10 Jur. N. S. 33; 12 W. R. 286. V. C. K.
4 The amount payable is according to the scale fixed by the Common Law Judges: Taylor on Evid. s. 1126, n.: Chitty's Arch. 1765; see also *Clark* v *Gill*, 1 K. & J. 19; *Nokes* v. *Gibbon*, 3 Jur. N. S. 282, V C. K.; *Brocas* v. *Lloyd*, 23 Beav. 129: 2 Jur. N. S. 555; *Turner* v. *Turner*, 5 Jur. N. S. 839; 7 W. R. 573, V. C. K.; Morgan & Davey, 29.
5 *Davey* v. *Durrant*, 24 Beav. 493: 4 Jur. N. S. 230, a case of cross-examination on affidavit.
6 *Re Nelson*, 2 Cham. R. 252.
7 *Robins* v *Carson*, 2 Cham. R. 343; and see *Waddle* v. *McGinty*, 2 Cham. R. 242. As to privilege of witness in refusing to attend and answer, see *Grainger* v. *Latham*, 2 Cham. R. 313.
8 2 Phil on Evid. 428; Taylor on Evid s. 1129.

If the witness, upon being duly served with the *subpœna* and notice, neglects or refuses to attend to be examined, a certificate of his non-attendance may be procured from the examiner and filed in the Record and Writ Clerks' Office;[1] and an application made to the Court, that the witness may be ordered to attend and be sworn and examined, at such time and place as the examiner may appoint.[2] This application is made by motion, which may be made either *ex parte*, or on notice to the witness.[3] The application must be supported by an affidavit of due service of the *subpœna* and notice, and by production of the examiner's certificate of non-attendance.[4]

When the order is made *ex parte* it contains a clause that in default of attendance the witness do stand committed, and shall not direct him to pay the costs of the application.[5] Where a plaintiff though duly served with a *subpœna*, and the Examiner's appointment, does not appear to be examined, the defendant's motion that he do attend or stand committed is made *ex parte*, unless the Court sees fit to direct notice to be given.[6] But in a subsequent case it was decided that an application for an order that a party to a suit do submit to be examined at his own expense, or in default be committed will not be granted *ex parte*,—notice must be served. The right to examine a party to the cause is not affected by No. 2 of the orders of 10th January 1863.[7] An application for an order for the defendant to attend at his own expense, and be examined, on his answer may be made *ex parte*.[8] To compel the attendance of a witness, or a party whom it is sought to examine, he must be duly *subpœnaed*, or served with an appointment eight days previous to an examination

A further appointment must next be obtained from the examiner, and notice thereof, and a copy of the order, duly served on the witness.[9] If the witness still neglect or refuse to attend, a further certificate of non-attendance must be obtained from the examiner and filed, as before explained. An attachment may then, if the

1 Seton, 1234; but see *Cast* v. *Poyser*, 3 Sm. & G. 369, where an attachment was held regular, though the certificate had not been filed.
2 Braithwaite's Pr. 144. For forms of orders *nisi* and absolute, see Seton, 1233, 1234.
3 *Wisden* v. *Wisden*, 6 Hare, 549, 550.
4 Seton, 1234.
5 Seton, 1234; *Nokes* v. *Gibbon*, 3 Jur. N. S. 282; *Brook* v. *Biddall*, 2 Eq. Rep. 637, 2 W. R. 443.
6 *Fowler* v. *Boulton*, 12 Grant, 437.
7 *Weir* v. *Matheson*, 1 Cham. R. 224. This Order is similar to Order 166 of the Con. G. Orders.
8 *Harrison* v. *Greer*, 2 Cham R. 438.
9 The copy of the order must be indorsed according to the provisions of Ord. 203, and served in the same manner as in other cases.

order has been made on notice, be issued against him on production to the Record and Writ Clerk of an affidavit of due service of the order and notice, and of non-attendance.[1]

Our Order 144 provides that "A person refusing or neglecting to attend at the time and place appointed for his examination, or refusing or neglecting to obey an order for production of documents, may be punished as for a contempt: and the party who desires the examination, or production, in addition to any other remedy to which he may be entitled, may apply to the Court, upon motion, either to have the bill taken *pro confesso*, or to have it dismissed, according to circumstances." And Order 145, that "The Court upon such application may, if it think fit, order either that the bill be taken *pro confesso*, or that it be dismissed, as the case may be: or make such order as seems just."

After the witness has been examined, he will, upon his motion, and production of the Examiner's certificate of his examination being complete, be ordered to be discharged by the Court, on paying or tendering the costs of his contempt; or he may be discharged by the party at whose instance he was committed, if the goaler can be prevailed upon to take such discharge.[2]

The method is, *mulatis mutandis*, the same, where a witness, having attended in obedience to the *subpœna*, refuses to be sworn, or to wait till his examination can be taken.[3]

If a witness, attending upon a *subpœna duces tecum*, refuse, without sufficient cause, to produce the document mentioned in the writ, when required, he may be ordered, upon special motion, to attend again and produce it, and to pay the plaintiff all the costs occasioned by his refusal.[4]

If a witness is in prison, under a common law process, he may be brought up under a writ of *habeas corpus ad testificandum*.[5] The

1 Ord. 288; Seton, 1234.
2 *Ibid.* 330; Seton, 1237.
3 *Hennegal* v. *Evance*, 12 Ves. 201.
4 *Bradshaw* v *Bradshaw*, 1 R. & M. 358; *Hope* v. *Liddell*, 20 Beav. 438: 7 De G. M & G. 331; *Re Cameron's Coalbrook Railway Company*, 25 Beav. 1.
5 *Buckeridge* v. *Whalley*, 6 W. R. 180, V. C. K., where the officer was ordered to attend with the witness *de die in diem*.

writ of *habeas corpus* is never issued without an order: the order may be obtained upon motion of course, supported by an affidavit of the facts, and must be produced at the time the writ is sealed.[1]

The Examiner or Master may, in such a case, if he think proper, attend the prison and take the examination of the prisoner there,[2] but another mode of obtaining the evidence of a prisoner, is pointed, out by S. 76 of the Con. Stat. of C., c. 99, which enacts that "When the attendance of any person confined in the Penitentiary, or in any other prison or goal in this Province, or upon the limits of any goal is required in any Court of Assize and *Nisi Prius*, or of Oyer and Terminer or General Goal Delivery, or other Court, the Court, before whom such prisoner is required to attend may make order upon the Warden of the Penitentiary, or upon the Sheriff, Goaler, or other person having the custody of such prisoner, to deliver such prisoner to the person named in such order to receive him, and such person shall thereupon instantly convey such prisoner to the place where the Court issuing such order is sitting, there to receive and obey such further order as to the said Court may seem meet; but no prisoner confined for any debt or damages in a civil suit shall be thereby removed out of the District or County where he is so confined."

When the examination of witnesses before the examiner has been concluded, the original depositions, authenticated by his signature, are transmitted by him to the Record and Writ Clerk's Office to be there filed; and any party to the suit may have a copy of the whole, or any part.

If the examiner dies before signing the depositions, they must be signed by his successor.[3] Where the examiner omits to sign the depositions, the Court has power, if it thinks fit, to order them to be filed.[4]

The practice as to the examination of witnesses out of the jurisdiction, by Commission would naturally be given here. It has, however, become almost absolute in England, where the mode of

1 Braithwaite's Pr 224.
2 1 Daniell, 842.
3 *Bryson* v. *Warwick and Birmingham Canal Co.*, 1 W. R. 124, V. C. S.
4 *Stephens* v. *Wanklin*, 19 Beav. 585. As to what error in the title will invalidate depositions, see *Harford* v. *Rees*, 9 Hare, App. 68, and the case there referred to.

obtaining such evidence by the appointment of a special examiner has been adopted under the provisions of the Imp. Sta. 15 & 16, Vic. C. 86. This Act has much simplified the practice, and reduced the expenses of taking evidence. No interrogatories or cross interrogatories are now used, the evidence being taken as it is with us before a Judge, Master, or Special Examiner. As it is probable that this improvement will shortly be made by our own Legislature, it has been thought unadvisable to introduce the lengthy and minute practice attending foreign Commissions under the old system; the more especially as it is now common for the parties to consent to the appointment of a Special Examiner here who proceeds with the counsel to the place where it is desired to take the evidence, and there take the depositions in the same way as they would be taken before him in this country. This course will not, probably, be adopted when the distance is very great; in such cases the old practice will require to be followed, as the reader will find it in the Second Edition of Daniel, page 872, *et seq*: though it is not clear that the Court has not the power under Sec. 75 of the Chancery Act Con. Sta. of U. C., C. 12 to substitute Special Examiners for Foreign Commissions. Order 167 provides that "Witnesses resident out of the jurisdiction may be examined, as heretofore, upon commission." Provision is made for the issue of subpœnas from any part, to any part of Canada by Con. Sta. of C., Chapter 79. S. 4 provides that "If in any action or suit depending in any of Her Majesty's Superior Courts of Law or Equity in Canada, it appears to the Court, or when not sitting, it appears to any Judge of the Court, that it is proper to compel the personal attendance at any trial or *enquete*, or examination of witnesses, of any person who may not be within the jurisdiction of the Court in which the action or suit is pending, the Court or Judge, in their or his discretion, may order that a Writ called a Writ of *subpœna ad testificandum*, or of *subpœna duces tecum*, shall issue in special form, commanding such person to attend as a witness of such trial, or enquete, or examination of witnesses wherever he may be in Canada." It has been held under this Statute that this Court has authority to grant an order for a subpœna to issue to Lower Canada, though the evidence of the proposed witness is not intended to be used at the hearing of the cause.[1] Where a defendant asks for an order for a *subpœna* to

1 *McKerchie* v. *Montgomery*, 1 Cham. R. 225.

examine plaintiff, it is unnecessary for him to show that there is no cause of action for the same matter pending in Lower Canada.[1]

It may here be noticed that the costs of a Commission to take evidence in a foreign country form part of the costs of the cause.[2]

Section XII.—*Examination of Witnesses de bene esse.*

The Court of Chancery, in its original institution, participated much in the practice adopted by the Courts of Civil Law. The civilians had a manner of examining witnesses *in perpetuam rei memoriam*, which was two-fold: either the common examination, or *in meliori forma*. The common examination was where the witnesses were very old and infirm, sick, in danger of death, or were going into distant countries. In this case, it was usual to file a libel, and without staying for the *litis contestatio*, the plaintiff examined his witnesses: immediately giving notice, if it were possible, to the other side, of the time and place of the examination, that he might come and cross-examine such witnesses if he thought fit; and these depositions stood good in case the witness died, or went abroad; but the plaintiff was obliged *edere actionem* within a year: otherwise the depositions went for nothing. If the witness lived, or did not go abroad into distant countries, then they were to be examined *post litem contestatam*.[3] The examination *in perpetuam rei memoriam in meliori* was *ad transumenda instrumenta;* and in that case, there must have been a *litis contestatio* before the examination: because there was no need of so much celerity in proving the instruments as there was where the witnesses were likely to die, or were going into remote parts. In these cases, the plaintiff was not bound to proceed in any action upon those instruments within the year. But in both cases, it seems that *publicatio testium* took place, when the judgment was begun before the ordinary judge, or, which is the same thing, when there was a *litis contestatio*.[4] The examination *in perpetuam rei memoriam in meliori forma*, has been adopted by the

1 *Daly* v. *Robinson*, 1 Cham. R. 271
2 *Colborne* v. *Thomas*, 4 Grant, 169.
3 Gilb. For. Rom. 118, 119; Hinde, 365.
4 *Ibid.*

Court of Chancery; and the practice in regard to it will be considered when we treat of suits instituted for the purpose of perpetuating the testimony of witnesses. The common examination *in perpetuam rei memoriam* has likewise been adopted by Courts of Equity, in their practice of examining witnesses *de bene esse*:[1] which forms the subject of the present section.

The examination of a witness *de bene esse* ordinarily takes place: where there is danger of losing the testimony of an important witness from death, by reason of age (as where the witness is seventy years old and upwards;[2]) or dangerous illness;[3] or where he is about to go abroad;[4] or where he is the only witness to an important fact.[5] 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 depositions so taken may be used at the hearing.[6]

An order to examine a witness *de bene esse* on the ground of illness, will not be granted *ex parte*, unless the illness is dangerous: if there is no immediate danger notice should be given.[7] An application was made by the plaintiff on notice, supported by his own affidavit, to examine a witness *de bene esse*, who was about to go abroad:—the case had been heard but no judgment pronounced, and the plaintiff presuming the decree would be in his favor proposed to examine the witness with a view of using his evidence in the Master's office in taking the accounts. The affidavit shewed that the witness was going abroad,—that the plaintiff could not prevent him, and that he was the only person within the jurisdiction who could give testimony in regard to the matters in which it was proposed to examine him, and also stated the grounds for the plaintiff so considering him. The motion was unopposed. Esten V.C, made the order on the ground that although such orders are only granted

1 Hinde, 368.
2 *Rowe* v. ——, 13 Ves. 261; *Forbes* v. *Forbes*, 9 Hare, 461, where the witness was a party to the cause.
3 *Bellamy* v. *Jones*, 8 Ves. 31.
4 *Bown* v. *Child*, 3 Sim. 457; *Grove* v. *Young*, 3 De G. & S. 397: 13 Jur. 847; *M'Intosh* v. *Great Western Railway Company*, 1 Hare, 328.
5 *Shirley* v. *Earl Ferrers*, 3 P. Wms. 77; *Pearson* v. *Ward*, 2 Dick. 648: *Hankin* v. *Middleditch*, 2 Bro. C. C. 641: *Brydges* v. *Hatch*, 1 Cox, 423. In *Earl of Cholmondely* v. *Earl of Orford*, 4 Bro. C. C. 157, two witnesses were ordered to be examined *de bene esse*; being the only persons who knew the material facts.
6 Hinde, 368; Gilb. For. Rom. 140.
7 *Anderson* v. *Anderson*, 1 Cham. R. 291.

where it is shown that the evidence is to be used for some definite purpose, yet that the Court will make such an order where it considers that justice requires it.[1] An application was made for an order to examine a witness *de bene esse*, on account of ill health. The order was granted *ex parte*.[2] But an application to examine a witness *de bene esse* on the ground that he is about to leave the jurisdiction will not be granted *ex parte*:—notice must be served.[3] On applying for an order to examine a witness *de bene esse*, it should be clearly shown that the witness is the only witness as to the fact sought to be proved by him. An application, supported by an affidavit of the Solicitor as to his belief was refused.[4]

The examination of a witness *de bene esse* may be incidental to every suit; whereas the examination for the purpose of perpetuating the testimony, is the fruit of a suit instituted for that particular purpose. It may even be incidental to a suit to perpetuate testimony, where there is danger of the evidence of the witnesses, whose testimony is intended to be perpetuated, being lost before the suit for perpetuating is ripe for a regular examination.[5]

In general, the Court will not allow the examination of a witness *de bene esse* after the closing of the evidence; and, therefore, where, upon a hearing, an issue had been directed, and an order made that the depositions of the plaintiff's witnesses might be read at the trial, in case such witnesses, or either of them, should be dead, and an application was afterwards made that the trial should be postponed, and that the plaintiff should be at liberty to examine another witness *de bene esse*: Lord Eldon, after consulting with Sir William Grant, M. R., said, that the motion was one which could not be made with effect, without laying before the Court very strong circumstances to induce it to permit the examination; and, although he would not say that it could not be granted in any case, he refused it in the one before him.[6] It seems, however, that where a witness, who has not been before examined in this Court, has been produced at 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 wit-

1 *Whitehead* v. *B. & L. H. Railway Co.*, 5 U. C L. J 232.
2 *Oliver* v. *Dickey*, 2 Cham. R. 87, citing *Tomkins* v. *Harrison*, 6 Mad 315; *Hope* v. *Hope*, 3 Beav. 317; *McKinnon* v. *Everitt*, 2 Beav. 188; *Bellamy* v. *Jones*, 8 Ves. 31. Ayckbourne's Prac. 165.
3 *Early* v. *McGill*, 1 Cham. R. 257.
4 *Jameson* v. *Jones*, 3 Cham. R. 98.
5 *Frere* v. *Green*, 19 Ves. 319.
6 *Palmer* v. *Lord Aylesbury*, 15 Ves. 299.

ness *de bene esse*, with view to such second trial.[1] And so, after the trial of an issue in the cause, an application, on the part of the plaintiff, 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.[2]

Sometimes it is required to examine a witness *de bene esse*, either in support of, or in defence to, an action at Law: in such case, it was formerly necessary that a bill should be filed in this Court, with the proper affidavit annexed to it, praying specifically that the witness might be examined *de bene esse*;[3] and this may still be done, although the Courts of law have now power themselves to take such evidence.[4] It is to be observed, that an order of this nature, in aid of a proceeding at Law, cannot be obtained upon a bill filed for any other purpose; and that where a bill was filed for a commission to examine witnesses abroad in aid of a trial at Law and a commission had been sent out accordingly, but, before it reached its destination, one of the witnesses returned to England, whereupon an application was made for leave to examine him *de bene esse*, upon the ground that he was about to leave the country again before the trial could be had, Sir John Leach, V. C., refused the motion: observing, that this was a different relief, and that the bill must be amended.[5]

The cases in which the Court will make an order for the examination of witnesses *de bene esse* are not confined to those of age or sickness, or in which the witness is the only person who can speak to the fact intended to be proved. The Court will give permission for such an examination of witnesses in other cases which come within the same principle; indeed it will do so, 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 America, and that the surviving witness was greatly afflicted with the gravel, the order was made, although the witness was only stated to be more than

1 *Anon.*, cited by Lord Eldon, 15 Ves. 300.
2 *Anon.*, 6 Ves. 573.
3 Ld. Red. 150; *Phillips* v. *Carew*, 1 P. Wms 116; *Andrews* v. *Palmer*, 1 V. & B. 21, 23; 1 Newl 450; *ante*; *post*, *Bills to Perpetuate Testimony*.
4 See Taylor, s. 472, *et seq.*; Chitty's Arch. 329, *et seq.*
5 *Atkins* v. *Palmer*, 5 Mad. 19.

"upwards of sixty years old."[1] 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*.[2] In like manner, where a witness is about to go abroad, an order may be obtained for his examination *de bene esse*.[3] The Court, however, will not permit the examination of witnesses *de bene esse*, on the ground of their being about to go abroad, where it is in the power of the party applying to detain them till they have been examined in the ordinary course. Upon this ground, the Court of Exchequer refused to make an order, on the application of the East India Company, for the examination of witnesses *de bene esse*, who were going to the East Indies: because they were the Company's servants, they might have kept them at home.[4]

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 is in danger of being lost, either from age or serious illness.[5]

The rule, however, that the examination of a witness *de bene esse* will be permitted where the individual 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; therefore, 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

1 *Fitzhugh* v. *Lee*, Amb. 65; but, in such cases, an *ex parte* order is irregular; see *M'Kenna* v. *Everitt*, 2 Beav. 188; *Hope* v. *Hope*, 3 Beav. 317, 323; *ib.* n.
2 *Jepson* v. *Greenaway*, 2 Fowl. Ex. Pr. 103.
3 *Bown* v. *Child*, 2 Sim. 457; *M'Intosh* v. *Great Western Railway Company*, 1 Hare, 328; *M'Kenna* v. *Everitt*, 2 Beav. 188; *Grove* v. *Young*, 3 De G. & S. 397; 13 Jur. 847.
4 *East India Company* v. *Naish*, Bunb. 320.
5 *Shelley* v. ——, 13 Ves. 56, 58; *Shirley* v. *Earl Ferrers*, 3 P. Wms. 77; *Hope* v. *Hope*, 3 Beav. 317, 323.

dangerous illness, on the ground that he was a prisoner in the Castle of York, charged with capital felony, no order was made.[1]

From an observation which appears to have been made by Lord Eldon in *Freer* v. *Green*,[2] it may be inferred that an order of this nature cannot be obtained before appearance, unless the defendant is in contempt; but the practice is not so, and an order to examine a witness *de bene esse*, upon either of the grounds above stated, will be granted, upon an affidavit of the facts, immediately after the filing of the bill, without waiting either for the defendant's appearance, or for his being in contempt for non-appearance.[3] There seems, however, to be no doubt that the contempt of a defendant in not appearing would, at any time, be a reason for giving permission to a plaintiff 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 above mentioned.[4]

The Court ordered a commission for the examination of an aged witness to issue, without requiring the bill to be served in the first instance; the object of the suit being to perpetuate testimony, and it having been sworn that there was danger of the testimony being lost; but directed notice of the execution of the commission to be served on the defendants.[5]

In *Bown* v. *Child*,[6] an order to examine, *de bene esse*, a witness about to go abroad, was made on a special application by the defendants, before answer.

An order for leave to examine a witness *de bene esse*, upon the ground of the witness being seventy years of age, or dangerously ill, or about to go abroad, may be obtained by motion in Court, without notice[7]; but where the application is not made on the ground of the age or dangerous illness of the witness, or that he is about to go abroad, the Court will not make an order for his examination *de bene esse* as of course: so that, if a party wishes to examine a witness *de bene esse*, upon a ground which cannot be arranged under

1 *Anon.*, 19 Ves. 321.
2 19 Ves. 320.
3 *Dew* v. *Clarke*, 1 S. & S. 108, 115.
4 *Coveny* v. *Athill*, 1 Dick. 355; *Pritchard* v. *Gee*, 5 Mad. 364.
5 *Hunt* v. *Prentiss*, 4 Grant, 487.
6 3 Sim. 457.
7 *Bellamy* v. *Jones*, 8 Ves. 31; *Tomkins* v. *Harrison*, 6 Mad. 315; *M'Kenna* v. *Everitt*, 2 Beav. 188; *M'Intosh* v. *Great Western Railway Company*, 1 Hare, 328, 330; *Grove* v *Young*, 3 De G. & S. 397: 13 Jur. 847.

either of those classes, he must apply by motion in Court, of which notice must be giver to the other side.[1] In the case of *Hope* v. *Hope*,[2] Lord Langdale, M. R., had to consider, whether an order for the examination *de bene esse* of a person alleged to be the sole witness to a material fact, could be regularly obtained *ex parte*, and he came to the conclusion that, in such a case, the application should be made on notice; and it seems that the affidavit, in support of such an application, ought to show the facts as to which it is proposed to examine the witness. If the order has been obtained as of course, in a case where a special application for it should have been made, the adverse party may move, on notice, to discharge it.[3]

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 *Frere* v. *Green*,[4] were the defendants were infants and in contempt, and it appeared by the messenger's return that they had absconded and were not to be found, Lord Eldon, upon the usual affidavit of the materiality of the evidence of the witnesses, and the plaintiffs' 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 plaintiffs should be at liberty to examine them *de bene esse;* but he provided, by the order, that, before publication of the depositions of such witnesses should be allowed to pass, proper evidence should be produced to satisfy the Court that the plaintiffs had complied with the above undertaking.

Although, in the instance above mentioned, an order to examine a witness *de bene esse* may be obtained upon motion without notice, notice of the examination of the witnesses must, in all cases, be given, in order that the other side may have the power of cross-examination.[5]

The application for leave to examine a witness *de bene esse* must, in every instance, whether made by motion to the Court, with no-

1 *Bellamy* v. *Jones*, 8 Ves. 31.
2 3 Beav. 317, 323, n.; and see *Pearson* v. *Ward*, 1 Cox 177.
3 See *M'Kenna* v. *Everitt*, *ubi sup.*; *Hope* v *Hope*, 3 Beav. 317.
4 19 Ves. 319 320; see also *Shelley* v.——, 13 Ves. 56.
5 *Loveden* v. *Milford*, 4 Bro. C. C. 540; Ord. 5 Feb. 1861, r. 22; *ante*, pp. 835, 848.

tice or without, be supported by an affidavit of the facts which form the ground of the application: such as, the age of the witness, and that he is a material witness for the party making the application[1]; and also by the Record and Writ Clerk's certificate that the bill has been filed, where the defendant has not answered, or of such answer, where one has been filed. 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[2]; and should show the ground which the person who makes it has for believing that the witness is the only person.[3]

The order to examine witnesses *de bene esse* names the witnesses to be examined, and only authorises the examination of the persons named therein. Where the order is obtained without notice after answer, it must be served upon the solicitor on the other side; but where it has been obtained before answer, so that there is no adverse solicitor upon whom it can be served, the order usually directs, that notice of the order be given to the defendant, or a copy thereof be left at his dwelling-house or usual place of abode, with his servant, agent, or other person residing there, a specified number of days before the examination of the witness.[4] This is done, in order to afford the adverse party an opportunity for cross-examination of the witnesses.

The examination of witnesses *de bene esse* is taken before an Examiner of the Court, or a special Examiner, and the depositions are transmitted by him to the Record and Writ Clerks' Office, to be there filed.[5]

Formerly, it was necessary to give three days' notice, of the time and place of the examination, to the other side.[6] Now, it is presumed, forty-eight hours will be sufficient; but the notice must also state the name and description of the witness to be examined, and the time and place of examination.

1 *Grove* v. *Young*, 3 De G. & S. 397: 13 Jur. 847.
2 *Pearson* v. *Ward*, 1 Cox, 177: 2 Dick. 648; *Hope* v. *Hope*, 3 Beav. 317, 322.
3 *Rowe* v. ——, 13 Ves. 261.
4 See order in *Hope* v. *Hope*, 3 Beav. 317; but see form of order in Seton, 1236, No. 2, which differs as to the notice.
5 Office copies of the depositions may be obtained at that office, as soon as they are filed: Braithwaite's Pr. 122.
6 *Tomkins* v. *Harrison*, 6 Mad. 315; *M'Intosh* v. *Great Western Railway Company*, 1 Hare, 328.

As the examination of witnesses *de bene esse* is only a provisional measure, to guard against the loss of important evidence before the cause is in a state in which a regular examination can take place, it is the duty of the party examining to take the earliest opportunity to examine in the ordinary course, and if he is guilty of any *laches* in so doing, the benefit of the examination *de bene esse* will be forfeited.[1] In the *Duke of Hamilton* v. *Meynal*,[2] however, Lord Hardwicke made an order for the publication of depositions taken *de bene esse*, although the original bill was filed, and the examination taken, above thirty years before the cause was brought to an issue; but it seems that this was done under particular circumstances, and that the delay was accounted for. We have seen before,[3] that in the instance of an application to examine witnesses *de bene esse*, to prove a case against infant defendants who were in contempt for non-appearance, Lord Eldon made the order, upon the plaintiffs' expressly undertaking to proceed with all due diligence to bring the cause to issue, and to examine the witnesses in chief.

Depositions, taken *de bene esse*, cannot be made use of without an order. The ordinary course of the Court is not to allow of their use unless the witness dies before issue is joined in the cause, so that there has been no opportunity to examine him in the ordinary course; or unless he is at a great distance, so that it is impossible to have him examined again. These, however, although the usual are not the only cases in which the Court will order depositions taken *de bene esse* to be used. It is in the discretion of the Court to determine whether the order shall be made or not; and whenever it can be established, to the satisfaction of the Court, that there is a moral impossibility in the examination of witnesses in chief taking place, it will make the order. Therefore, in *Gason* v. *Wordsworth*,[4] where a commission was sent to Sweden, to examine witnesses there, which the Government of Sweden refused to permit, the Court allowed the depositions of those witnesses who had been examined *de bene esse* to be read at the hearing: because it was morally impossible to have them examined in chief. So also the Court has permitted depositions taken *de bene esse* to be read,

1 See *Forsyth* v. *Ellice*, 2 M'N. & G 209, 213; overruling S. C. 7 Hare, 290.
2 2 Dick. 788; S. C. *nom. Anon.*, 2 Ves. S. 497.
3 *Frere* v. *Green*, 19 Ves. 319.
4 2 Ves. S. 325, 336; Amb. 108.

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.[1]

Sometimes the Court will allow depositions taken *de bene esse* to be made use of upon a trial at Law, on the ground that the witness, though alive, will be unable, from age or sickness or other infirmity, to attend at the trial.[2] In such cases, however, the more usual course is (especially where there is any doubt whether the grounds upon which the application is to be made are such as will be sufficient, in a Court of Law, to authorise the admission of the evidence), 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, the depositions should be tendered to be read:[3] 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.[4] 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.[5]

Depositions of a witness, examined *de bene esse*, can only be used for the purpose of supplying the want of an examination in chief. Applications for leave to use them, for other purposes, have been refused.[6] In *Pegge* v. *Burnell*,[7] an application was made to the Court to allow a deposition *de bene esse* to be read at Law, in order to confront the witness and invalidate his testimony *viva voce*, upon a new trial, on the ground that on his examination, at the first trial, his evidence differed materially from what he had before uniformly declared the fact to be; and as the case made in support of the motion was a very strong one, and abundantly sufficient to justify a departure

1 *Anon.*, 2 Ves. 497; S. C. *nom. Duke of Hamilton* v. *Meynal*, 2 Dick. 788; *Marsden* v. *Bound*, 1 Vern. 331; see also *M'Intosh* v. *Great Western Railway Company*, 7 De G. M & G. 737.
2 *Bradley* v. *Crackenthorp*, 1 Dick. 182.
3 *Andrews* v. *Palmer*, 1 V. & B. 21; see also *Corbett* v. *Corbett*, *ib.* 335; *Palmer* v. *Lord Aylesbury*, 15 Ves. 176; *Attorney-General* v. *Ray*, 2 Hare, 518, and form of order, *ib.* 519, n.; *Gompertz* v. *Ansdell*, 1 Smith's Pr. 876.
4 *Jones* v. *Jones*, 1 Cox, 184.
5 Hinde, 390.
6 *Cann* v. *Cann*, 1 P. Wms. 567.
7 Cited, Hinde, 391; Pasch. 1781.

from the strict practice, if it were possible in any case to dispense with it, Lord Thurlow at first made the order, but upon further consideration, and before the order was delivered out, he altered his opinion, and refused it.

An order for leave to use a deposition, taken *de bene esse*, of a witness dying before he could be examined in chief, may be obtained on special motion with notice, supported by evidence proving his death, in the ordinary way.[1]

Where the application is made upon the ground that a witness is gone to parts beyond sea, or upon any other grounds, it must be supported by an affidavit of the facts relied upon as the foundation of the application.

The proper stage of the suit wherein this application should be made, seems to be after the closing of the evidence,[2] unless it is in a suit, the sole object of which is the examination of a witness *de bene esse*, for the purpose of using his depositions on a trial at Law: in which case, the application should be made before the trial of the action. The party moving should be prepared with an affidavit of service of the notice of motion, in order that, if the other side does not attend, the order may, notwithstanding, be obtained.

If any irregularity be discovered, or the adverse party be advised of any ground of objection to the reading of the depositions, he should give notice in writing to the adverse solicitor, and move to discharge the order immediately upon the service of it, or on the earliest opportunity: for it seems that, although depositions taken *de bene esse* are irregular, yet it is too late to object to them, on the ground of irregularity, at the hearing of the cause[3]; and on this account, when the time between the closing of the evidence and the hearing of the cause is short, the Court will extend it, for the purpose of allowing the party an opportunity of examining whether the depositions are regularly taken or not.[4] And so, where depositions taken *de bene esse* are read at the hearing of the cause, it is a

1 Hinde, 388.
2 Hinde, 388.
3 *Dean and Chapter of Ely* v. *Warren*, 2 Atk. 189; Hinde, 389.
4 *Gordon* v. *Gordon*, 1 Swanst. 171.

matter of course, if an issue is directed, to order them to be read at the trial of the issue, notwithstanding an irregularity in the examination.[1]

With respect to the costs of examinations *de bene esse*, no specific rule appears to have been laid down, which makes any distinction between them and the costs of examinations under ordinary circumstances: except, indeed, in the case of bills filed for the purpose of having witnesses examined *de bene esse*, in order to render their evidence available on a trial at Law. In such cases, it is presumed, the costs must be regulated by the rule of the Court with regard to bills of a similar description, namely, bills to examine witnesses *in perpetuam rei memoriam:* in which case, a defendant is entitled to apply for his costs immediately after the examination of the witnesses has been perfected, upon the simple allegation that he did not examine any witnesses himself.[2] It may be mentioned, that in *Dew* v. *Clarke*,[3] where the plaintiff had filed a bill for the purpose of obtaining the examination of witnesses *de bene esse* in aid of a proceeding at Law, and obtained an order, *ex parte*, for the examination of such witnesses, but afterwards the bill was demurred to, and the demurrer allowed, the Court, besides the usual costs of the demurrer, allowed the defendant his costs of the examination, but not those occasioned by his cross-examination of the witnesses.

SECTION XIII.—*Demurrers by Witnesses.*

A witness examined before an examiner may protect himself, by demurrer, from answering any question to which he has a legal objection. The word "demurrer," however, is not, in this instance, used in a very appropriate sense: since it here signifies merely the witness's tender of reasons why he should not answer the question;[4] and is not, like a demurrer in pleading, confined to the facts appearing upon the record, but states the facts upon which the witness relies as the ground of his objection.

The grounds upon which a witness may protect himself from answering are, principally: 1. That the answer may subject him to

1 *Ibid*, 166.
2 *Foulds* v. *Midgley*, 1 V. & B. 138; Morgan & Davey, 53, 149.
3 1 S. & S. 108, 115.
4 *Parkhurst* v. *Lowten*, 2 Swanst. 194, 203.

pains and penalties, or to a forfeiture, or something in the nature of a forfeiture; 2. That he cannot answer the question without a breach of professional confidence.

1. With respect to the first ground of objection, namely, that the answer may expose the witness to pains and penalties, or to a forfeiture, or something in the nature of a forfeiture, the reader is referred to a former part of this Treatise,[1] where the privilege of a defendant, to be protected from making the discovery required by the bill on this ground, has been discussed. It will be there found, that the privilege in such cases arises from an acknowledged principle of Law, that no man is bound to answer, so as to subject himself to punishment; and as this principle is applicable as well to witnesses as to defendants, the rules which are there found laid down with regard to its application to the latter case are equally applicable to the former.[2]

2. The rules of exemption from discovery, on the ground of professional confidence, proceed upon the same principles as are applicable to the case of defendants; and the reader is, therefore, referred for information upon this head to a former portion of this Treatise, where these rules have been discussed with reference to the protection of a defendant from answering the bill.[3] It may, however, be noticed here, that the refusal of a client to allow his solicitor to disclose professional communications is not a reason for treating him as if he had kept a material witness out of the way, or refused or prevented the production of a document in his possession.[4]

Where the witness is served with a *subœna duces tecum* to produce a deed or other document, and, upon being asked to produce it, objects to do so, either upon the ground of his having an interest in the deed, or upon any other ground,[5] he may refuse, without a

1 *Ante.*

2 See 2 Phil. on Evid. 487, *et seq.*; Taylor on Evid. s. 1308, *et seq.*; Best on Evid. s 126, *et seq.*; Gresley on Evid. 80, *et seq.*; *Osborne* v. *The London Dock Company*, 10 Exch. 698, 701: 1 Jur. N. S. 93; *Sidebottom* v. *Adkins*, 3 Jur. N. S. 631: 5 W. R. 743, V. C. S; *Reg* v. *Boyes*, 1 B. & S. 311: 7 Jur. N. S. 1158; *Re Aston*, 27 Beav. 474: 5 Jur. N. S. 615; 4 De G. & J. 320: 5 Jur. N. S. 779.

3 *Ante*; see also *Greenough* v. *Gaskell*, 1 M. & K. 98, 101; C P. Coop. t. Brough. 96; *Lord Walsingham* v. *Goodricke*, 3 Hare, 122, 130; *Gore* v. *Bowser*, 5 De G. & S. 30; S. C. *nom. Gore* v. *Harris*, 15 Jur. 1168: *Carpmael* v *Powis*, 1 Phil. 687; 9 Beav. 16; *Thomas* v. *Rawlings*, 27 Beav. 140; 5 Jur. N. S. 667; *Marsh* v. *Keith*, 1 Dr. & S. 342; 6 Jur. N. S. 1182; *Ford* v. *Tennant*, 32 Beav. 162; 9 Jur. N. S. 292; *Charlton* v. *Coombes*, 4 Giff. 372; 9 Jur. N S. 534, V. C. S.

4 *Wentworth* v. *Lloyd*, 10 H. L. Ca. 589: 10 Jur. N. S. 961; and see Taylor on Evid s. 101; *Bolton* v. *Corporation of Liverpool*, 1 M, & K. 88, 94, 95.

5 Such as, that the production of it may prove him to be guilty of a crime: see *Parkhurst* v. *Lowten*, 2 Swanst 214.

formal demurrer. The course to be adopted by the party seeking production, in such case, is to move, on notice to the witness, that he do attend and produce the deed, and pay the costs occasioned by his previous refusal: upon the hearing of which motion, the Court will decide whether the reasons alleged by the witness, for his refusal, are satisfactory or not.[1]

The question or questions put, and the demurrer or objection of the witness thereto, must be taken down by the examiner,[2] on paper, separate and distinct from the evidence; but there does not seem ever to have been any particular form for a demurrer by a witness.[3] The witness should state clearly the grounds of his refusal to answer; thus, a witness, demurring on the ground that his answer would violate the confidence reposed in him as a solicitor, must name the party to whom he was solicitor.[4] 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 to a particular person: for a solicitor, like any other witness, is bound to discover all secrets of his client which he did not come to the knowledge of in his relation of solicitor to his client.[5] It must also appear, that the knowledge came to him in the character of a professional adviser, and in such character only; and, therefore, where a demurrer stated that the witness was the attorney or agent for a person, it was considered not to be sufficiently precise: for an agent may be only a steward or servant.[6]

In taking down a demurrer, the examiner ought to take the witness's statement upon oath; and it was held, under the former practice, that where this was not done, the demurrer must be supported by affidavit: as it is necessary the Court should, in some way or other, have the sanction of an oath to the facts on which the objection is founded.[7]

The demurrer is transmitted by the examiner to the Record and Writs Clerks' Office, and there filed; and copy should be taken by

1 *Bradshaw* v. *Bradshaw*, 1 R. & M. 358; *Hope* v. *Liddell*, 20 Beav. 438, 439: 1 Jur. N. S 665; 7 De G. M. & G. 331.
2 For the former practice, see *Tippins* v. *Coates*, 6 Hare 16; 11 Jur. 1075.
3 *Morris* v. *Williams*, 2 Moll. 342.
4 *Parkhurst* v. *Lowten*, 2 Swanst. 201.
5 *Morgan* v. *Shaw*, 4 Mad 54, 58; *Thomas* v. *Rawlings*, *ubi sup.*
6 *Vaillant* v. *Dodemead*, 2 Atk. 524; and see *Reid* v. *Langlois*, 1 M'N & G. 627, 637: 14 Jur. 467.
7 *Parkhurst* v. *Lowten*, 2 Swanst. 201; *Morgan* v. *Shaw*, 4 Mad. 54; *Bowman* v. *Rodwell*, 1 Mad. 266; *Davis* v. *Reid*, 5 Sim. 443; *Goodale* v. *Gawthorn*, 4 De G. & S. 97. As to the course, where a witness summoned before a Chief Clerk refuses to be sworn, see *The Electric Telegraph Company of Ireland, Ex parte Bunn*, 24 Beav. 137; 3 Jur. N. S. 1013.

the party to the cause who put the question objected to.[1] The demurrer may then be set down for hearing, under an order of course, in like manner as demurrers to bills;[2] and the validity of the demurrer will be decided by the Court. The order to set down the demurrer need only be served on the witness demurring,[3] except where the witness, being the solicitor of the party in the cause, claims privilege on behalf of his client: in which case, it would seem, the client should also be served with the order.[4]

If the Court, upon argument, considers the demurrer to be bad, it will overrule it: in which case, an order will be made that the witness attend the Examiner, and be examined, or stand committed.[5]

Sometimes, however, where the ground for overruling the demurrer has been its informality, and the Court has considered that the witness may have a good reason to be excused from answering, it has ordered the demurrer to be overruled, without prejudice to the witness, upon his re-examination, objecting or demurring to the question, as he may be advised, upon such grounds as he shall state in such objection or demurrer.[6]

Sometimes the Court will allow a demurrer partially; thus, in *Davis* v. *Reid*,[7] where a demurrer was put in to two interrogatories, Sir Lancelot Shadwell, V. C., allowed the demurrer as to one, and part of the other; and directed that half the costs should be paid by the witness: in analogy to the practice when two exceptions are taken, one of which succeeds and the other fails.

Instead of setting down the demurrer for hearing, the party who asked the question objected to, may move that the witness may attend the Examiner at his own expense, and be further examined. Notice of this motion must be served upon the witness.[8] Upon hearing this motion, the Court either allows the objection;[9] or directs the witness to attend before the Examiner at his own expense.[10]

1 Braithwaite's Pr. 539.
2 Braithwaite's Pr. 539. For form of order to set down, see Seton, 1257, No. 10.
3 Braithwaite's Pr. 539; 6 Hare, 22, 24.
4 *Marriott* v. *Anchor Reversionary Company (Limited)*, 3 Giff. 304: 8 Jur. N. S. 51: and see *Tippins* v. *Coates*, 6 Hare, 16, 23; 11 Jur. 1075.
5 *Parkhurst* v. *Lowten*, 2 Swanst. 205, 206.
6 *Morgan* v. *Shaw*, and *Parkhurst* v. *Lowten*, *ubi sup.*
7 5 Sim. 443, 448.
8 *Re Aston*, 27 Beav. 474; Jur. N. S. 615; 4 De G. & J. 320: 5 Jur. N. S. 779; *Marriott* v. *Anchor Reversionary Company (Limited)*, 3 Giff. 304; 8 Jur. N. S. 51. As to service, where the witness is a solicitor claiming privilege for his client, see *ib.*; *ante*.
9 *Marriott* v. *Anchor Reversionary Company (Limited)*, *ubi sup.*
10 *Re Aston*, *ubi sup.*

The costs of and occasioned by the demurrer, or objection, are in the discretion of the Court;[1] and will be disposed of at the hearing of the demurrer or motion: the general rule being, that they follow the result.[2]

CHAPTER XIX.

SETTING DOWN THE CAUSE FOR HEARING.

By the present English practice the evidence is taken before Examiners, of whom there are two permanent ones, or before special Examiners, who are appointed as occasion may require. Under the old practice the depositions were taken on interrogatories and cross interrogatories, but they are now taken as the pleadings simply. The evidence being closed, the next step was to set the cause down for hearing. Our practice differs; for the evidence is taken before the Judge as at *Nisi Prius;* the cause is heard immediately afterwards, and if possible judgment is at once given.[3]

Our Order 159 provides that "Where issue has been joined three weeks before the commencement of the next ensuing hearing term at the place where the venue is laid, publication is to pass at the close of the term." It may here be mentioned that the expression "publication is to pass," means that the evidence in the case is to be closed, that no more, nor any (if there have been none given,) shall now be received. It arose from the old practice of having the evidence taking by Examiners, who when it was taken, sealed it up, and it was not allowed to be opened or "published," as the phrase was, until the hearing. After this, no further evidence could be given, and "publication" was then said to have "passed"—meaning that the time for receiving evidence having passed, the evidence already taken (if there were any) would be now opened, or made public, and that if there were none taken, the time for taking any had elapsed.

1 See *Sawyer* v. *Birchmore*, 3 M. & K. 572; *Langley* v. *Fisher*, 5 Beav. 443: 7 Jur. 164; 14 L. J. N. S Ch. 30; L. C.
2 *Wright* v. *Wilkin*, 4 Jur. N. S. 527, V. C. K. . *Lee* v. *Hammerton*, 12 W. R. 975, V. C. K.
3 Chancery Act, s. 23. Orders 168, 169.

As the time for passing publication depends on the place where the venue is laid, Order 158 provides that "Any party to the suit may apply to the Court upon notice to all parties to change the venue, and thereupon the Court is to make such order as the circumstances of the case requires, and the order is to be made upon such terms and conditions as to costs and otherwise, as the Court thinks right to impose." Order 160 provides that "Where issue has been joined less than three weeks before the commencement of the next ensuing hearing term at the place where the venue is laid, publication is to pass at the close of the following term." And Order 161, that "At any time after issue joined, the cause may be set down for hearing by any party to the cause." Order 162 provides that "If the plaintiff neglects to set down the cause for hearing, at the next sittings, at the place where the venue is laid, in case issue has been joined three weeks before the commencement of such sittings, the defendant may set the cause down for hearing at the next ensuing sittings, or at Toronto, on any Monday on which the Court sits for hearing causes, and may serve notice of hearing on the other parties to the cause."

The practice as to changing the venue is similar to that at Common Law, and the special grounds necessary to induce a Court of Law to change the venue will in general required to be shewn to this Court. On an application to change the venue, it was objected that publication having passed, the motion should have been to open publication, and to amend the bill by introducing words, changing the venue. A similar case having been mentioned as heard before V. C. Spragge, in which he gave effect to the objection, but allowed a new motion to be made at once without notice, Mowat, V.C., followed the same course, and on a new motion being made, granted the application on terms.[1] The application should not be made until after issue joined, or until it can be clearly seen what the issue will be.[2] As to the circumstances necessary to be shewn to obtain an order changing the venue, see Archibald Pr.

The mode of setting a cause down for hearing is pointed out by Order 163, which provides, that "Causes set down for hearing are to be entered with the Clerk of the Records and Writs, or a Deputy

1 *Baxter* v. *Campbell*, 2 Cham. R. 39.
2 *Begg* v. *Forbes*, 23 L. J. C. 222; *Hodge* v *Churchward*, 5 C. B. 495; *Dewler* v. *Callis*, 4 M. & W. 531.

Registrar, at least fourteen days before the commencement of the next ensuing term,[1] at the place where the venue has been laid; and notice is to be served by the party setting the same down, upon all parties at least fourteen days before the commencement of the term." Where a defendant set down a cause for hearing before the time limited by the Orders of 1853 (Sec. 4 of Order 25, which directed, that "If the plaintiff neglects to set down the cause to be heard within one month after publication has passed, any defendant may cause the same to be set down, and may serve notice of hearing on the parties to the cause") and the plaintiff moved to strike the cause out of the list of causes for hearing for irregularity. The case was ordered to be struck out with costs; notwithstanding that by the delay on the part of the plaintiff's solicitor to give notice of the irregularity, the defendant was unable to set the cause down again for the ensuing hearing term; although had the matter been *res integra*, the application would have been refused.[2]

Order 414 provides, that "Terms for the hearing of causes (including examination of witnesses), are to be held twice a year at Toronto, and at such other places as the Court from time to time appoints."

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

In pursuance of the authority given by Sec. 23 of the Chancery Act (C. 12, Con. Stat. U. C.), the Court has divided the Province into three Circuits, and has appointed a number of County Towns

1 These are "clear" days. *Beard* v. *Gray*, 3 Cham. R. 104.
2 *City of Toronto* v. *M'Gill*, 1 Cham. R. 16.

as places where witnesses may be examined and causes heard. The time of holding these Courts (which are very similar to the Courts of Assize and Nisi Prius), is fixed from time to time by the Court, and this time is known as "Examination and Hearing Term." At the time appointed, the Judge who has been assigned to the particular Town appears, with the Deputy-Registrar (in an outer County), and the Registrar in Toronto; and proceeds to hear the pleadings read, and to receive the evidence *viva voce*, as at Nisi Prius. Order 166 provides, that "No evidence is to be used on the hearing of a cause other than the examination of a party under Order 138, is to be taken before any Examiner or Officer of the Court, unless by the order first had of the Court, or a Judge thereof, upon special grounds adduced for that purpose." And Order 168, that "When a cause is called on to be heard, the witnesses of all parties are to be examined, unless the Court, upon a previous examination, has postponed the examination; or unless the Judge before whom the cause is brought on sees fit to postpone the examination, or to allow time for the production of further evidence; and where the examination is postponed, or where time is allowed for the production of further evidence, the order is to be upon such terms as to the costs or otherwise, as the Court thinks right to impose."

Order 170 provides, that "A defendant may be examined as a witness without an order for that purpose, on behalf either of the plaintiff or of a co-defendant, upon points as to which the party to be examined is not interested. A plaintiff may be examined, without an order, under singular circumstances, by a co-plaintiff or by a defendant." Order 171, that "Such examination is not to preclude the Court from making a decree either for or against the party examined, and the evidence given on such examination may be rebutted by adverse testimony." By Order 172 it is directed, that "A witness may be re-called for further examination, as in trials at *nisi prius*, without any order of the Court having been obtained for that purpose."

It was formerly the practice in England when the evidence was taken by interrogatories and cross-interrogatories, to discredit a witness by filing objections, or as they were called "Articles," against him, in which he was charged with such conduct as would damage his character, and tend to shake or destroy confidence in his testi-

mony. These "Articles" were in the nature of an indictment, and witnesses were called to substantiate them. This was of course done between the time of taking the depositions and the hearing; but this practice is discontinued, and our Order 173 provides, that "Articles are not to be filed for the purpose of discrediting a witness; but witnesses may be called for that purpose, without leave of the Court, and they are to be examined at the same time as the other witnesses, unless the Court otherwise orders." This Order assimilates the practice to that of the Common Law Courts at *nisi prius*. Order 174 provides, that "Any party is to be at liberty to make use of the evidence of a witness adduced by another party to the suit." Orders 175 and 176 have already been noticed.

As to the evidence, it may be said generally, that the practice as to the taking of evidence,—the right to begin,—the examination in chief,—cross-examination, and evidence in reply.—evidence as to the credit or character for credibility of witnesses,—examinations on the *voir dire* as to interest is the same as obtained at Nisi Prius, except where the difference has already been specially pointed out. After the evidence is closed the argument is heard. Order 169 provides, that "Causes are to be argued at the same time that the witnesses are examined."

Before proceeding to consider the Hearing, there are some orders of minor importance, which, however, require notice. Order 177 provides, that "Exhibits put in at the hearing of a cause are to be marked thus: 'In Chancery (short title). This Exhibit (the property of————) is produced by the plaintiff (*or defendant C., as the case may be*), this——day of————186 , A.B. (*Registrar* or *Deputy Registrar*). Order 178 provides, that "Where a party or witness is examined at the hearing of a cause, or a document is put in as evidence, and marked by the Registrar or the Deputy Registrar, the deposition of the party or witness so examined, or the document so put in, is not to be withdrawn as evidence without the leave of the Court." And Order 179, that "Where judgment is reserved, the exhibits used upon the hearing must be deposited with the Registrar or Deputy Registrar, for the use of the Court. All exhibits deposited under this order must be described in a schedule, to be prepared by the party depositing the same. The schedule shall be in duplicate, one copy of which, signed by the

Registrar or Deputy Registrar, shall be handed to the party depositing the exhibits, and the other retained for the use of the Court. Where this order has not been complied with, the case will not be considered as standing for judgment." Order 180 provides, that "Where it becomes necessary to adduce evidence, or to incur expense otherwise, in order to establish or prove facts, which in the judgment of the Court, upon the hearing of the cause, ought to have been admitted, it shall be competent to the court to make such order in respect to the costs occasioned by the proof of such facts, as under all the circumstances appears to be just."

With regard to the marking of exhibits, care should be taken that this be done, for it has been decided that documents used on the examination of witnesses before an examiner must be properly marked by that officer, and referred to in the evidence, otherwise they cannot be read at the hearing.[1]

Referring to the practice in "publication," the Court will, in a proper case allow the examination of witnesses after the passing of publication; and this is called "opening publication," or they will enlarge it. Where publication had passed shortly before a motion to open was made by the plaintiff, and it appeared on the motion that the defendant had examined witnesses, but the plaintiff had not examined any, and the plaintiff and others swore that his evidence was material and that the delay had arisen from the poverty of the plaintiff, publication was opened on payment of costs.[2] Where on the examination of a witness on 24th January, a person's name was mentioned as having been resident on the lot adjoining the premises in question in the cause, and on the 28th of March, after publication had passed, the cause set down for hearing, and a *subpœna* to hear judgment served, the defendant moved for leave to open publication and examine as a witness the person whose name had been mentioned, and who, he had sworn, could give material evidence; but the motion was refused with costs.[3] *Quœre*, whether upon an application by the plaintiff for a stay of proceedings, to which the Court considered him not entitled, an enlargement of publication can be ordered, when an order in that form would par-

1 *Hollywood* v. *Waters*, 6 Grant, 329.
2 *Taylor* v. *Shoff*, 3 Grant 153.
3 *Waters* v. *Shade*, 2 Grant, 218. See the particulars required in a petition to be allowed to put in newly discovered evidence after the hearing of a cause, stated in *Mason* v. *Seney*, 12 Grant, 143.

tially accomplish what the plaintiff desired by his motion. *Quære*, also, whether this Court would enlarge publication so as to enable a plaintiff to be present at the *viva voce* examination of the defendant, where such examination had been postponed by an accident of which the defendant or his solicitor was the unintentional cause, till after the plaintiff's departure from the Province on pressing business, and the plaintiff swore that it was necessary for his interests that he should be present.[1] An order made on a motion to dismiss, giving leave to go to examination, has the effect of opening publication.[2] Where it was considered conducive to the ends of justice, publication was opened and leave given to examine further witnesses, and to issue a foreign commission on payment of costs, and upon the terms of examining the witnesses in Canada at the next examination term, and the witnesses residing out of Canada at the same term, or by foreign Commission in the meantime; if the latter, the commission to be returned and depositions disclosed two weeks before the examination term, it appearing not to be owing to the negligence of the party applying that the evidence had not been taken before.[3] The Court refused to open publication in order to obtain evidence of an alleged conversation between a person mentioned in the pleadings, and one of the defendants.[4] The principle laid down by the Court in Waters v. Shade (2 Grant 218), in respect to opening publication, applies as well to suits for alimony as to other cases.[5] The fact that a defendant in a cause has since the filing of the bill temporarily left the jurisdiction of the Court, is no ground for postponing the examination of witnesses, and the hearing of the cause.[6] Where a cause was brought on to be heard at the suit of the Attorney General for the repeal of a grant of land alleged to have been issued by mistake, and the evidence adduced did not sufficiently establish the mistake; the Court directed the cause to stand over for the purpose of adducing further evidence.[7] A defendant having by his answer, set up several matters of defence which, through oversight, he had omitted to give evidence of, the Court, at the hearing, directed the cause to stand over, with liberty to both parties to give evidence upon those points.[8] The Court will not di-

1 *Howcutt* v. *Rees*, 2 Grant, 437.
2 *Weir* v. *Weir*, 1 Cham. R. 194.
3 *Blain* v. *Terryberry*, 1 Cham. R. 104.
4 *Malloch* v. *Pinhey*, 1 Cham. R. 105.
5 *McKay* v. *McKay*, 6 Grant, 279.
6 *Galbraith* v. *Gurney*, 1 Cham. R. 279.
7 *Attorney-General* v. *Garbutt*, 5 Grant, 181.
8 *Northey* v. *Moore*, 5 Grant, 609.

rect the examination of witnesses to take place before an Examiner in a county where no resident Master has been appointed, although consented to by the parties.[1] A cause was set down for the examination of witnesses, and when called on the plaintiff was not prepared to proceed. It was decided (overruling the decision in Wallace v. Mackay,[2]) that the defendant was entitled to have the cause struck out of the paper with the costs of the day.[3] After judgment had been given in a cause, an application was made to open publication on the ground that since the decree had been pronounced, it was discovered that a material witness in the cause was beneficially interested in the setting aside the will, which it was the object of the suit to have declared void, and had entered into an agreement to indemnify the plaintiff from the costs; but as the result would have been the same had that witnesses' testimony been out of the case, the Court refused the motion, but offered the defendant who applied, liberty to give evidence to establish the fact of interest in the witness, in order that, in the event of the cause going to appeal, his evidence would not appear there as that of an unbiassed witness.[4] Where the plaintiff examines several defendants before answer, the examination of the one cannot be read against the other defendants at the hearing of the cause.[5] Where a cause is withdrawn on account of the absence of a necessary witness for the plaintiff, and he shews that he has made diligent efforts to secure the attendance of such witness who is residing within the jurisdiction, but fails to secure it; the costs of putting off the examination will, as a general rule, be costs in the cause. In all other cases the costs will be disposed of according to circumstances, and in the discretion of the Judge.[6] Where a motion to postpone the hearing of a cause was made before the Secretary in the same day the cause was to be heard in another county, he refused the application.[7] Where the defendant's solicitors, through the neglect of their clerk, were not aware until after the hearing that the cause had been set down or notice of hearing served, and the question raised by the answer was as to the defendant's liability in a judgment recovered against him by his solicitor, the Court allowed a new hearing after the decree

1 *Phelan* v. *Phelan*, 6 Grant, 384.
2 1 Cham. R. 67.
3 *Cobourg & Peterboro' Railway Co.* v. *Covert*, 7 Grant, 411.
4 *Waterhouse* v. *Lee*, 10 Grant, 176.
5 *Douglass* v. *Ward*, 11 Grant, 39.
6 *Pattison* v. *McNab*, 12 Grant, 483.
7 *McEwan* v. *Orde*, 2 Cham. R. 280.

was drawn up and entered, on payment of costs. The application for such a purpose should be by petition to the Court, and not by motion in Chambers.[1] A motion was granted for postponing the hearing and examination of a cause, on the ground of the absence of a material witness after notice of hearing has been given, although the cause has been at issue for some months previous. The costs of such a motion are costs in the cause.[2] It is the practice to make the costs of postponing the hearing of a cause, where sufficient grounds are shewn for such postponement, cost in the cause. The engagements of a witness who was a Senator of the Dominion and a member of the Executive Council, at his duties at Ottawa, where the Senate was in session, were deemed sufficient excuse for not procuring his attendance, and good grounds for putting off the hearing.[3] Where a commission to take evidence abroad could not be executed in time, by reason of the illness of the Commissioner, the plaintiff was allowed further time to set the cause down for examination and hearing.[4]

CHAPTER XX.

HEARING CAUSES.

Our Order 164 provides, that "The clerk of Records and Writs, or the Deputy Registrar, is to prepare a list of all causes entered for hearing, and each cause is to be entered in such list in the order in which it has been set down, and causes are to be called on according to the list."

But, it frequently happens that the Court, upon a proper ground being stated, will order a cause which has been set down for hearing to be taken out of its turn: for the Court holds, that a defendant

1 *Donovan* v. *Denison*, 2 Cham. R. 284.
2 *Graham* v. *Machell*, 2 Cham. R. 376.
3 *Rees* v. *Attorney-General*, 2 Cham. R. 386.
4 *McIntyre* v. *Canada Company*, 2 Cham. R. 464.

has no right to object to a cause being heard, at any time, after it has been set down for hearing.[1] Thus, where, in a suit for the specific performance of an agreement to accept a lease for a term of years, the plaintiff applied to the Court to have his cause advanced, on the ground that the term of years would expire before the case could come on in its regular course, the order was made: on the plaintiff's undertaking to give due notice of the advancement to the defendant;[2] and if in such a suit the plaintiff does not apply to have the cause advanced, and by his delay allows the time to expire before the hearing of the cause, the Court will not direct an inquiry as to damages.[3] So, where an annuity, claimed by the bill, was all the subsistence the plaintiff had for herself and nine children, that was held a sufficient ground for having the cause advanced.[4]

It may be mentioned, with reference to the subject of consent causes, that a decree or order, made by consent of the counsel for the parties, cannot be set aside, either by rehearing or appeal,[5] unless, by clerical error, anything has been inserted in the order, as by consent, to which the party had not consented. If, however, the decree has been obtained by fraud, relief may be had against it by original bill.[6] The consent of counsel to a decree is to be given upon their own conception of their instructions.[7] It has been before stated, that although, where infants are concerned, the Court does not usually make a decree by consent, without first inquiring whether it will be for their benefit, yet, if such a decree is made, the infants will be bound by it.

Sometimes, a cause will be advanced to the head of the paper, *pro formâ*, to enable a witness attending from a public office in the country, to prove a document. Thus, where an application was made to the Court, that a cause, which was not in the paper for the day, might be immediately called on, for the purpose of proving a will, the proper officer having come up from York with the original for that purpose, and being detained in town at a considerable ex-

1 *Hoyle* v. *Livesey*, 1 Mer. 381; *Rawson* v. *Samuel*, C. & P. 181, 182.
2 *Hoyle* v. *Livesey*, *ubi sup.*
3 *DeBrassac* v. *Martyn*, 11 W. R. 1020, V. C. W.
4 *White* v. ——, cited 2 Mad. Pr. 588.
5 *Bradish* v. *Gee*, Amb. 229; *Harrison* v. *Rumsey*, 2 Ves. S. 488: Belt's Sup. 413; *Toder* v. *Sansam*, 1 Bro. P. C. ed. Toml. 463; Seton, 1120.
6 *Bradish* v. *Gee*, *ubi sub.*; *Davenport* v. *Stafford*, 8 Beav. 503, 523; 9 Jur. 801.
7 *Mole* v. *Smith*, 1 J. & W. 673; *Bradish* v. *Gee*, *ubi sup.*; *Re Hobler*, 8 Beav. 101: *Turner* v. *Turner*, 2 De G. M. & G. 28, 37; *Swinfen* v. *Swinfen*, 24 Beav. 549: 3 Jur. N. S. 1109; 2 De G. & J. 381: 4 Jur. N. S. 774; Seton, 1121.

pense, the application was granted; and the cause having been called on, the will was produced by the proper officer to the Registrar.[1]

Where original and cross causes are set down, and other causes intervene, the plaintiff in either cause may (if necessary), move for leave to bring forward his cause, or that his cause may stand adjourned, as the case may be, in order that both causes may be heard together.[2] Upon an application of this sort, it may be necessary to request that the evidence taken in the original cause may be read at the hearing of the cross cause, and the converse.[3]

Our Order 181 provides that "The solicitors for the several parties are to attend in Court when a cause is appointed to be heard, and during the hearing thereof." And Order 182 that "Where, upon the hearing of a cause, it appears that the same cannot conveniently proceed by reason of the solicitor for any party having neglected to attend personally, or by some person in his behalf, or having omitted to deliver any paper necessary for the use of the Court, and which, according to its practice, ought to have been delivered, such solicitor shall personally pay to the parties such costs as the Court thinks fit to award."[4] The solicitor is personally liable under this order.[5] The client will not be relieved of the consequences of the solicitor's neglect in ignorance of this rule without the consent of the other party.[6]

The causes in the list are called on in the order in which they there stand. If, upon a particular cause being called and the bill opened, the defendant does not appear, the plaintiff must prove service upon him of the notice of hearing; and the Court will then make such a decree as, upon the pleadings and evidence, the plaintiff is entitled to.[7]

Our Order 183 provides that "Where a defendant makes default at the hearing of a cause, the Court is to make such decree as it

1 *Anon.*, 4 Mad. 271.
2 Hinde, 415.
3 *Ante.* For form of order, see Seton, 1275, No. 2.
4 *Courtney* v. *Stock*, 2 Dr. & War. 251; and see *Gallemore* v. *Gill*, 2 Jur. N. S. 1178; 4 W. R. 773, as to the duty of solicitors to have original documents in Court.
5 *Cook* v. *Broomhead*, 16 Ves. 133.
6 *Walmesley* v. *Froude*, 1 R. & M. 334; and see *Harvey* v. *Renon*, 12 Jur. 445, *ante*; *Attorney-General* v. *Fellowes*, 6 Mad. 111.
7 *Hakewell* v. *Webber*, 9 Hare, 541; *Browne* v. *Smith*, 5 Jur. 1195, V. C. W.; *Hughes* v. *Jones*, 26 Beav. 24; Seton, 1121.

thinks fit. This decree is to be absolute in the first instance, without giving the defendant a day to show cause, and is to have the same force and effect as if the same had been a decree *nisi* in the first instance, and had been afterwards made absolute in default of cause shown by the defendant." Formerly, the last cause in the paper was privileged; but this is no longer the case.[1]

Where a decree was taken by default, in consequence of the negligence of the clerk of the defendant's solicitor, Sir John Romilly, M. R., refused to restore the cause to the paper;[2] but, in a subsequent case, the same Judge, on the motion of the defendant, allowed the case to be reheard, and modified the decree, upon the defendant paying all the costs subsequent to the original hearing, and reserving the costs up to and including the original hearing. The case, however, it should be mentioned, was a claim, and was heard on motion.[3]

The same course of proceeding, *mutatis mutandis*, as that adopted where the plaintiff has set the cause down and does not appear, may be taken where the cause has been set down at the request of the defendant, and the plaintiff does not appear. In such cases, the decree pronounced by the Court will be for a dismissal of the plaintiff's bill against the defendants, with costs, absoutely;[4] but the defendant can take no advantage of the plaintiff's non-appearance, unless the notice of hearing appears to have been properly served: for, otherwise, the plaintiff is in no default.[5]

Where the cause has been set down by the plaintiff, and the defendant's counsel is ready and appears, and no counsel appears for the plaintiff, the Court always calls upon the defendant to prove service upon him, such defendant, of the notice of hearing.[6] This must be done by affidavit, in the manner before pointed out; and if the Court is satisfied that the notice has been served, will make a peremptory decree dismissing the plaintiff's bill with costs;[7] and

1 *Flower* v. *Gedye*, 23 Beav. 449.
2 *Ibid.*
3 *Hughes* v. *Jones*, 26 Beav. 24; Seton, 29; see also *Hale* v. *Lewis*, 2 Keen, 318.
4 Hinde, 407, 418; *Clark* v. *Wilson*, 24 May, 1775. For form of decree in such case, see Seton, 1133, No. 4
5 Hinde, 418.
6 *Rigg* v. *Wall*, 3 M. & C. 505; 2 Jur. 1080.
7 Hinde, 419.

such dismissal, unless the Court otherwise directs, will be equivalent to a dismissal on the merits, and may be pleaded in bar to another suit for the same matter.[1]

Where the plaintiff, an executor, did not appear at the hearing, and the bill was dismissed with costs, the Court refused, with costs, an application by the plaintiff to have the cause restored to the paper, on the ground that he had, seven months previously, become bankrupt, and believed that his rights passed to his assignees: which (he suing as executor,) was not the fact.[2] Where, however, through the neglect of his solicitor, no one appeared for the plaintiff, the Court, thinking under the circumstances that the neglect was satisfactorily explained, ordered the cause to be set down again for hearing.[3]

It is to be observed that if the plaintiff sets down his cause, but does not serve the defendant with a notice of hearing, the defendant cannot have a decree to dismiss; but should, if he wishes to have the suit decided, himself set the cause down to be heard, and serve a notice of hearing on the plaintiff.[4]

It sometimes happens, that a person who has not been served with a notice of hearing, or who has not appeared in the cause, is willing to be bound by the decree: in such a case, the rule seems to be, that any party named as a defendant to a bill may, with the consent of the plaintiff alone, appear at the hearing of the cause, and be bound by the decree, although such party has not appeared in the suit; but a person, who has not been named as a defendant to the bill, cannot appear at the hearing, without the consent of all parties to the cause.[5]

The fact that the plaintiff is in contempt, is not a ground on which a defendant can object to the cause being heard: because the rules of Court make it imperative on the plaintiff to bring his cause to a hearing, at a certain time.[6]

1 Ord. I., 84; *ante*.
2 *Frost* v. *Hilton*, 15 Beav. 432.
3 *Hale* v. *Lewis*, 2 Keen, 318.
4 See *ante*.
5 *Dyson* v. *Morris*, 1 Hare, 413, 419; see the remarks on this case in the note to *Lewis* v. *Clowes*, 10 Hare, App. 62; and see *ante*.
6 *Ricketts* v. *Mornington*, 7 Sim. 200; *Footvoye* v. *Kennard*, 2 Giff. 110.

The formal mode of hearing a cause, where all the parties appear upon its being called on, is this: the leading counsel for the plaintiff opens the plaintiff's case, and in so doing states, first the bill, and then the answers, if any: pointing out the matters in issue, and the questions of Equity arising therefrom; after which the plaintiff's evidence is read, either by his leading or junior counsel, and their arguments in support of his case are adduced. The counsel for the defendant are then heard, in support of the defendant's case, and his evidence is read by them; and the plaintiff's senior counsel is then heard in reply. When all are heard, the Court pronounces the decree, either immediately or at a subsequent day.[1]

A plaintiff cannot be heard both in person and by counsel;[2] but where a barrister and his wife were co-plaintiffs, and he appeared for the plaintiffs, the Court allowed another counsel to be heard, on being informed that the plaintiff appeared as counsel.[3] A relator and a plaintiff, in a bill and information, cannot be heard in person: as the Court cannot separate the bill from the information, and cannot hear the relator on behalf of the Attorney-General.[4]

The Court of Chancery will not receive in evidence any document which ought to be stamped, without it has the proper stamp affixed to it; and the Court will itself raise the objection, whether it be taken by the other party or not. A Court of Equity cannot, any more than a Court of Law, receive parol evidence of the contents of a written agreement, requiring a stamp, which appears never to have been stamped, even where it is proved to have been fraudulently destroyed by the party against whom it is sought to be enforced.[5] If the instrument objected to is of such a nature that a stamp may be affixed to it on payment of a penalty, the Court will permit it to be so stamped, and will, for that purpose, permit the cause to stand over.[6]

The course of proceeding is much the same where the cause has been set down for hearing, upon bill and answer: in such case, the

1 The decree should be dated of the day on which judgment is actually delivered: *Attorney-General* v. *Stamford*, 7 Jur. 359, L. C. A decree is binding from the day it is pronounced; and not merely from the time when it is drawn up: *Re Risca Coal Company*, 8 Jur. N. S. 900: 10 W. R. 701, L. C.

2 *Parkinson* v. *Hanbury*, 4 De G. M. & G. 508.

3 *Newton* v. *Ricketts*, 2 Phil. 624; 12 Jur. 107, 238.

4 *Attorney-General* v. *Barker*, 4 M. & C. 262.

5 *Smith* v. *Henley*, 1 Phil. 391, 396; *Hart* v. *Hart*, 1 Hare, 1, 5.

6 *Coles* v. *Trecothick*, 9 Ves. 234, 239; *Carrington* v. *Pell*, 3 De G. & S. 512.

practice is that the answer is read, and must be admitted to be true in all points; and no other evidence is admitted, unless it be matter of record to which the answer refers, and which is provable by the record, or documents which may be proved by affidavit, or *viva voce* at the hearing.[1]

If the plaintiff goes to a hearing on bill and answer, and the Court does not see cause to make a decree thereupon, for want of sufficient matter confessed by the answer, the Court will, generally, permit him (if he desires it,) to reply, on payment of such costs as the Court shall think fit, within four days after such hearing. 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 plaintiff was satisfied his demands, whereupon the plaintiff replied against the other two, and brought the cause on by bill and answer against the third, it was insisted that the plaintiff could have no decree, on 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 prove it paid, and the plaintiff, 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 plaintiff was ordered to pay the costs, and left at liberty to reply to the answer of the other defendant.[2]

Where the bill is dismissed, on a hearing on bill and answer, the same order will, generally, be made as to costs as would be made, if the suit had been brought to a hearing, after filing replication.

It may here be mentioned that our Order 541 provides that "The Court may obtain the assistance of accountants, merchants, engineers, actuaries, or other scientific persons, in such way as it thinks fit, the better to enable it to determine any matter in evidence in any cause or proceeding, and may act on the certificate of such persons."

The allowance in respect of fees to such persons will be regulated by the Taxing Master.[3] The certificates, however, of such persons,

1 *Ante*; *Rowland* v. *Sturgis*, 2 Hare, 520; *Chalk* v. *Raine*, 7 Hare, 393: 13 Jur. 981; *Neville* v. *Fitzgerald*, 2 Dr. & War. 530; *contra*, *Jones* v. *Griffith*, 14 Sim. 262: 8 Jur. 733; and see *Wilkinson* v. *Fowkes*, 9 Hare, 592

2 *Barker* v. *Wyld*, 1 Vern. 140.

3 In general, the fees allowed accountants will be regulated by those allowed them in bankruptcy. *Meymott* v. *Meymott*, 10 Jur. N. S. 715: 12 W. R. 996, M. R.

although entitled to great weight, are not to be considered in any other light than as furnishing materials for the information and guidance of the Court; and affidavits may, therefore, be received in opposition to them.[1] The Court will not obtain the assistance of any scientific person, until an issue has been raised between the parties to the suit.[2]

Where, after a cause has come on to be heard, it has been discovered that, through inadvertence, although witnesses have been examined, no replication has been filed, the Court has permitted a replication to be filed *nunc pro tunc*.[3]

If a cause heard on bill and answer is dismissed, with liberty to the plaintiff to reply within a limited time after such hearing, on payment of costs, and the plaintiff does not pay the costs and reply within that period, the dismissal must stand; and, being signed and enrolled, may be pleaded in bar to a new bill for the same matter.[4]

It has been before stated, that the proper time for taking an objection at the hearing for want of parties is after the pleadings are opened, and before the merits are discussed: though the Court has frequently at a later period permitted the cause to stand over, for the purpose of adding parties.[5] With respect to the question of costs in such cases, it will be sufficient to refer to what has been before said upon the subject,[6] and to add that, 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.[7]

If a cause, instead of being ordered to stand over for want of parties, is struck out of the paper, so that it is necessary again to set it down, and to serve fresh notice of hearing, the defendant, if the cause is again set down, is, as we have seen, to be allowed the taxed costs occasioned by the first setting down, although he does not obtain the costs of the suit.[8]

1 Per L. J. Turner, in *Ford* v. *Tynte*. 10 Jur. N. S. 429, 430; and see *Hill* v. *King*, 9 Jur. N. S. 527, L. C.
2 *Stokes* v. *City Offices Company*, 13 W. R. 537, V. C. W.
3 *Rodney* v. *Hare*, Mos. 296; Wyatt's P. R 376.
4 1 Prax. Alm. 18.
5 *Ante*.
6 *Ibid*.
7 *Jones* v. *Jones*, 3 Atk. 217.
8 See *ante*.

In the matter of Lord Portsmouth,[1] 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 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 it has since been held, that a cause may be directed to be heard in private, although such course is not consented to.[2]

It is the practice in England to state the evidence in the decree, but our Order 185 provides that "The evidence read upon the hearing is not to be stated in the decree, but must be entered in the Registrar's book, at the time of the hearing."

CHAPTER XXI.

DECREES AND ORDERS.

SECTION I.—*General Nature of Decrees and Orders.*

A decree is a sentence or order of the Court, pronounced on hearing and understanding all the points in issue, and determining the right of all the parties to the suit, according to equity and good conscience.[3] It is either interlocutory or final.

An interlocutory decree is: when the consideration of the particular question to be determined, or the further consideration of the cause generally, is reserved till a future hearing. The further hearing is then termed a hearing upon further consideration, or upon the equity reserved.[4]

1 G. Coop. 106.
2 *Ogle* v. *Brandling*, 2 R. & M. 688.
3 See Wyatt's P. R. 154; Hinde, 429.
4 Seton, 2. In strictness, a decree is interlocutory until it is signed and enrolled: Gilb. For. Rom. 183; Wyatt's P. R. 154; but the term is more generally applied to decrees in which some inquiry as to matter, either of law or of fact, is directed, preparatory to a final decision: 1 Newl. 508.

It seldom happens that a first decree can be final, or conclude the cause. Thus, if any matter of fact is strongly controverted, the Court will, where necessary, direct such matter to be tried before itself, either with or without a jury; or, if it can be more conveniently so tried, before a Court of Common Law, or at the Assizes.[1] And where the Court awards damages,[2] they may be assessed in like manner. In such cases, no final decree can be pronounced until the issue has been tried. The Court, therefore, in such cases, in the first instance merely orders the issue to be tried;[3] and adjourns the further consideration of the other questions in the cause, until after the trial.

Sometimes, the object of the suit is a commission to settle the boundaries of lands. In such a case, also, the first decree is not generally final: the further consideration of the cause being reserved till after the commission has been returned.[4]

But the most usual ground for not making a perfect decree, in the first instance, is the necessity which frequently exists to make inquiries, or to take accounts, or sell estates, and adjust other matters: which must be disposed of, before a complete decision can be come to upon the subject-matter of the suit.

There are some cases, in which it is a rule of the Court not to make any decree whatever, till certain preliminary inquiries have been made. Thus, in suits for the specific performance of contracts, the Court will not, in general, 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.[6] The rule is not founded merely on practice, but upon principles which are clearly and accurately defined by Lord Eldon, in *Jenkins* v. *Hiles*:[6] "If," observes his Lordship, "instead of bringing an action of damages for breach of covenant, the plaintiff comes here for a specific performance, the defendant has a right, not only to have such a title as

1 S. 59 of the Chancery Act. And see 28 Vic. c. 17, s. 3.

2 Imp. Stat. 21 & 22 Vic., c. 27, s. 2.

3 The Court will not, except by consent, direct the issue to be tried, until the hearing of the cause: *George* v. *Whitmore*, 26 Beav. 557; *Morrison* v. *Barrow*, 1 De G. F. & J. 633, *per* L. J. Turner, 639; *Bradley* v. *Bevington*, 4 Drew. 511; 5 Jur. N. S. 562.

4 Seton, 588, No. 1. In suits for partition, further consideration may be adjourned, though such course is not usual; Seton, 571, 578.

5 *Jenkins* v. *Hiles*, 6 Ves. 646, 652. *Rose* v. *Calland*, 5 Ves 186, 188; *Omerod* v. *Hardman*, *ib.* 722, 731, are apparently at variance with this proposition; but see the observations of Lord Eldon upon these cases, in *Jenkins* v. *Hiles*, 6 Ves. 654; and see Seton, 593, *et seq.*

6 6 Ves. 653.

the plaintiff offers upon the abstract unauthenticated, but, in consideration of the relief sought here beyond the law, to have an assurance about the nature of his title, such as he cannot have elsewhere. Therefore, the Court never acts upon the fact, that a satisfactory abstract was delivered, unless the party has clearly bound himself to accept the title upon the abstract; but, though the abstract is in the hands of the party, who says, he cannot object to it, yet he may insist upon a reference: Why? because the decree compels the other party to produce all the deeds and papers, in his custody or power: from which reasonable and solid objections to the title may be furnished; which would never have fallen under the view of the purchaser, unless the Court wrung from the conscience of the vendor that sort of information which a purchaser could by no other means acquire. Inquiries and examinations also may be directed, by which the title may be sifted in a way in which it never could upon a mere abstract, authenticated as the vendor thought proper."

It is not to be inferred, from the opinion above expressed by Lord Eldon, that a purchaser may not preclude himself, by his manner of pleading, from his right to such an inquiry; for his Lordship goes on to say: "I have never understood, that the rule has gone this length: that the defendant, against whom a specific performance is sought, may not by an answer unequivocal, to which he was not drawn by surprise, the propriety of which is not rendered disputable by any subsequent discovery, waive the benefit of this principle; and come here, saying in effect, he trusts the representation of the plaintiff, without the obligation of an oath upon his conscience: offering, in the first instance, to the decision of the Court one neat dry point; upon which alone his objection rests. The rule has not been considered so absolute. But such instances, if they have occurred in practice, will not shake the rule; but, forming an exception, would confirm the general rule."[1] A purchaser may also preclude himself from his right to such a reference, by agreement,[2] or by acts *in pais:* such as taking possession of the estate, or exercising acts of ownership over it.[3] Such acts, how-

1 6 Ves. 654.
2 *Duke* v. *Barnett*, 2 Coll. 337; 10 Jur. 87.
3 *Fleetwood* v. *Green*, 15 Ves. 594; *Margravine of Anspach* v. *Noel*, 1 Mad. 310, 315: *Fordyce* v. *Ford*, 4 Bro. C. C. 494; *Simpson* v. *Sadd*, 4 De G. M. & G. 665, 673; 1 Jur. N. S. 457; *Bown* v. *Stenson*, 24 Beav. 631; and see Sugd. V. & P. 353.

ever, 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; and where such an inference could not be drawn from those facts, the Court refused to depart from its ordinary rules.[1]

It may be noticed here, that the terms in which the direction for an inquiry, as to the title of a purchaser, is framed, are not to inquire whether he could make a good title at the time of entering into the contract, but whether he can, that is, at the time of the inquiry, make a good title;[2] and it has been held, that if the vendor can show a good title, at any time before the result of the inquiry into the title by the officer of the Court has been certified, it will entitle him to a decree.[3] And even after the certificate, if the vendor can satisfy the Court that he can make a good title, by clearing up the objections, the Court will make a decree in his favour.[4]

The question, whether a vendor was or was not able to make a good title, at the time when the inquiry was directed, is a very material one with respect to costs, though not with reference to the decree for a specific performance:[5] the rule of the Court being, that a vendor is not entitled to costs, except from the time when his title is certified to be complete; and that, up to that time, he must pay costs himself.[6]

The time when a good title is shown is not, however, conclusive upon the question of costs: being subject to the general rule, that the costs must be paid by the person who caused the litigation.[7] In consequence of the above-mentioned rule, it is the practice, in directing an inquiry into the vendor's title, to direct also that, if it appears a good title can be made, an inquiry be made when it was first shown that such good title could be made;[8] but this further inquiry is not directed, where the contract for sale itself is not disputed.[9]

1 *Burroughs* v. *Oakley*, 3 Swanst. 159, 167; and where waiver is insisted on, it must be alleged by the bill: *Gaston* v. *Frankum*, 2 De G. & S 561: 16 Jur. 507; Sugd. V. & P. 342.
2 *Langford* v. *Pitt*, 2 P. Wms. 629; *Parr* v *Lovegrove*, 4 Drew 170; 4 Jur. N.S. 600; Seton, 593, No. 1.
3 *Mortlock* v. *Buller*, 10 Ves. 292, 315; Sugd. V. & P. 264.
4 *Paton* v. *Rogers*, 6 Mad. 256.
5 *Seton* v. *Slade*, 7 Ves, 265, 279.
6 *Harford* v. *Purrier*, 1 Mad. 532, 538; *Wynn* v. *Morgan*, 7 Ves. 202, 206; *Wilson* v. *Allen*, 1 J. & W. 623; *Wilkinson* v. *Hartley*, 15 Beav. 183; Seton, 616; and see Morgan & Davey, 177, *et seq.*
7 *Monro* v. *Taylor*, 8 Hare, 51, 70: 3 M'N. & G. 713, 725; *Scoones* v. *Morrell*, 1 Beav. 251, 258; *Abbott* v. *Sworder*, 4 DeG. & S. 448; *Lyle* v *Earl of Yarborough*, Johns. 70; *Carrodus* v *Sharp*, 20 Beav. 56; *Parr* v. *Lovegrove*, 4 Drew. 170; 4 Jur. N. S. 600; and see Sudg. V. & P. 651; Seton, 616, 617.
8 Seton, 593, No. 1; *ib.* 598.
9 *Gibbins* v. *North Eastern Metropolitan Asylum District*, 11 Beav. 1, 5: 12 Jur. 22; *Morris* v. *Wilson* Jur. N. S. 168, V. C. W.

It is to be recollected,[1] that it is a fundamental principle of Courts of Equity to make as complete a decision, upon all the points embraced in a cause, as the nature of the case will admit; so as to preclude, not only all further litigation between the same parties, but the possibility of the same parties being at any future period disturbed or harrassed by other parties claiming the same matter, as well as of any danger that may exist of injustice being done to other parties who are not before the Court in the present proceedings.

Acting upon this principle, the Court, in all cases relating to the distribution of the estate of an intestate, before it makes any decree distributing the estate, directs an inquiry who were the next of kin of the intestate, at the time of his decease, and whether any of them have since died, and, if so, who are their legal personal representatives.[2] An inquiry of this nature is always directed, in cases in which any part of the property in question in the cause devolves upon the next of kin: whether it be upon a total, or upon a partial or constructive intestacy. It is not now the practice, however, to make the inquiry preliminary to the taking of the accounts, as was formerly the case.[3]

In other cases, also, in which there is a fund distributable amongst persons constituting a particular class, consisting of numerous individuals, as in the case of a bequest to the cousins of a testator, the Court will, before it directs any steps to be taken towards a distribution, satisfy itself, if necessary, by an inquiry that all the individuals, constituting the class amongst whom the fund was distributable, are parties to the proceeding.[4] It also adopts the same course of proceeding, where the property is distributable between one or two or more classes of individuals.[5] A decree of this description is not properly a decree in the cause, but rather a preliminary interlocutory order, with a view to inquiry, before the Court can do anything determining the rights of the parties.[6]

In like manner, where the plaintiff, at the hearing, establishes a *prima facie* title to the character in which he sues, but not such as

1 See *ante*.
2 Seton, 149, No. 3; 180, No. 3; 182, Nos. 1, 3.
3 Seton, 185. Whether the inquiry shall be preliminary to taking the accounts, will be determined by the Judge in Chambers, in each case.
4 For forms of inquiry in these cases, see Seton, 182–184, Nos. 2—10.
5 *Ibid.*
6 See *Horwood* v. *Schemedes*, 12 Ves. 311, 315.

entitles him to a decree, the Court will direct an inquiry as to the facts on which his title depends.[1]

It is to be observed, that the reservation of further consideration is not confined to the first decree, but will be repeated in every decree in which it may be necessary to direct an inquiry.[2] 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 will require the cause to be set down for hearing.[3]

When a decree does not adjourn the consideration of the cause, it is said to be a "final decree;" and, when duly signed and enrolled, may be pleaded in bar to any new bill for the same matter. Of this nature is a decree dismissing the plaintiff's bill: which, as we have seen before, may be pleaded in bar to a new suit, unless accompanied with a direction that the dismissal is to be without prejudice to the plaintiff's right to file another bill. Directions of this sort are inserted, where the dismissal is occasioned by 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;[4] and so, where a bill was dismissed, in consequence of facts not having been properly put in issue;[5] or of the agreement, for the specific performance for which the bill was filed, turning out, upon the evidence, to be different from that actually proved.[6]

It is to be observed that, although a decree of dismissal of a bill, for the specific performance of an agreement, does not carry with it an implied injunction against a subsequent proceeding at Law, it has been the practice of the Court to insert in the decree of dismissal of such a bill, that it shall be without prejudice to a subsequent proceeding at Law;[7] but, whether it is introduced or not, the plaintiff, after his bill for a specific performance has been dismissed at the hearing, is still considered by the Court of Equity as at

1 *Miller* v. *Priddon*, 1 M'N. & G. 687; see also *John* v. *Jones*, and *Bent* v. *Birch*, cited Seton, 186: and *Cogan* v. *Stephens*, 13 June, 1831, MS.; and see *Skarf* v. *Soulby*, 1 M'N. & G. 364, 376: 13 Jur. 1109.

2 Setou, 57.

3 *Cooke* v. *Gwyn*, 3 Atk. 689

4 Seton, 1114, 1115, 1135 Now, however, a bill is seldom dismissed for want of parties; but see *Williams* v. *Page*, 28 Beav. 148.

5 *M'Neill* v. *Cahill*, 2 Bligh, 228.

6 *Woollam* v. *Hearn*, 7 Ves. 211, 222; *Lyndsay* v. *Lynch*, 2 Sch. & Lef. 1, 12; *Stevens* v. *Guppy*, 3 Russ. 171, 185; but see *Corporation of Rochester* v. *Lee*, 1 M'N. & G. 467, 470, as to the value of such reservations in a decree.

7 *Mortlock* v. *Buller*, 10 Ves. 292, 319; *M'Namara* v. *Arthur*, 2 Ball & B. 349: *Wedgwood* v. *Adams* 8 Beav. 103, 105.

liberty to bring his action at Law, upon the contract, unless the Court thinks proper specifically to restrain him, by injunction, from so doing.[1] The most usual course of preventing a plaintiff from proceeding at Law, after a dismissal in a case of this nature, is to dismiss the bill without costs: on the plaintiff's undertaking not to bring an action; this, however, is only by way of compromise.[2]

In general, where a bill is ordered to be dismissed upon a contingent event, the established rule is that such orders are not conclusive, unless the words "without further order" are annexed to the order; and that, where such words are omitted, the defendant must apply for and obtain an absolute order of dismissal. 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 plaintiff to add parties, and, in default thereof, that the bill stand dismissed with costs, 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, inasmuch as he is not the person to add the parties.[3]

Although the general rule of the Court is, to make a complete decree upon all the points connected with the case, it frequently happens that the parties are so circumstanced, that a decision upon all the points connected with their interests cannot be pronounced till a future period. Thus, for example, 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, are in general 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 general rule not to declare rights which are not immediately to be acted upon, lest events should occur, before the time of acting upon them, which may create an alteration in those rights. All that the Court, therefore, usually does, 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

1 *Ibid.*
2 *Mortlock* v. *Buller*, and *M'Namara* v. *Arthur*, *ubi sup.*
3 *Stevens* v. *Praed*, 2 Cox, 374, 376; Seton, 998; see also *ib.* 1270. As to enlarging the time, see *Farina* v. *Silverlock*, 1 De G. & J. 434; *Arnold* v. *Thomson*, 11 W. R. 52, V. C. W.

the fund are to be at liberty to apply to the Court as they may be advised. The same sort of liberty is also given in any other case in which it may seem requisite; 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 inrolled, may be pleaded in bar to another suit for the same matter. The effect of the reservation is to permit persons having an interest under it to apply to the Court touching such interest, in a summary way, without the necessity of again setting the cause down.[1]

This is the English practice, and it is stated here merely for the purpose of explaining the meaning of the expression "with liberty to apply." Our Order 186 does away with the necessity of inserting this clause. It provides that "It shall not be necessary in any Order,[2] to reserve liberty to apply, but any party may apply to the Court from time to time as he may be advised; and where any Order directs the payment of money out of Court, it shall not be necessary to direct that a cheque be drawn for the purpose."

There are some 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 a day is given to the infant to show cause against it, after he attains twenty-one;[3] and decrees where the bill is ordered to be taken *pro confesso* are also, sometimes of the same description.

The most ordinary case, in which a further order is necessary to complete the decree, is that of a decree for a foreclosure. Decrees of this nature, after directing an account to be taken of the principal and interest due to the plaintiff upon the mortgage, and the taxation of his costs, direct that, upon the defendant's paying to the plaintiff what shall be certified to be due to him for principal, interest, and costs, within six calendar months after the date of the Master's Report, at such time and place as shall be thereby appointed, the plaintiff shall reconvey the mortgaged premises, and deliver up upon oath all deeds and writings in his custody or power

1 See Seton, 56. The reservation of liberty to apply, does not extend to an application by the plaintiff to be allowed costs, as to which there is no express direction given by the decree: *Kendall* v. *Marsters*, 2 De G. F. & J. 200.

2 It will be recollected, that by Sec. 10 of Order 7, the word "Order" includes "Decree," and "Decretal Order"

3 Seton, 685.

relating thereto, to the defendant, or to whom he shall appoint; but that, in default of the defendant's paying to the plaintiff the principal, interest, and costs by the time aforesaid, the defendant shall, from thenceforth, stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the mortgaged premises.[1]

If the defendant does not pay the money at the time and place appointed, the plaintiff's right to the estate will become absolute. He must, however, in order to complete his title, procure a final order confirming it: otherwise the decree of foreclosure will not be pleadable.[2] If one of several mortgagees, to whom the amount is due on a joint account, die after the decree, and before the time appointed for payment, a new time for payment must be fixed, before the final order can be obtained.[3]

In the case also of a suit for the redemption of a mortgage, a final order is necessary. The decree, in such a suit, usually directs the plaintiff to pay the balance certified due from him within six months after the Master's Report: in default of which, the plaintiff's bill against the defendant is from thenceforth to stand dismissed out of Court, with costs;[4] and the final order is obtained on motion of course, supported by affidavits of the default.[5]

The practice of directing that, upon non-payment of money by the plaintiff, the bill shall be dismissed, is not confined to bills to foreclose or redeem mortgages. Thus, in *Lowther* v. *Andover*,[6] on a bill filed by a purchaser, for the specific performance of an agreement for the sale of an estate, it was ordered that a time and place for the payment of the principal money, interest and costs, should be appointed: and that in default of payment, the bill should stand dismissed with costs. In such cases, as well as in those above mentioned, a final order is necessary.

In cases of decrees of foreclosure, the Court will, upon application, enlarge the time for payment of the money, even though the

1 Seton, 364, No. 1.
2 Seton, 393; *Ford* v. *Wastell*, 2 Phil. 591; 12 Jur. 404. The release of the equity of redemption, after decree, is equivalent to a final order: *Reynoldson* v. *Perkins*, Amb. 564.
3 *Blackburn* v *Caine*, 22 Beav. 614; *Kingsford* v. *Poile*, 8 W. R. 110, M. R.
4 See decree in Seton, 461, No. 1.
5 Seton 467. A final dismissal of a bill to redeem is equivalent to a foreclosure; *Cholmley* v. *Countess of Oxford*, 2 Atk. 267; *Bishop of Winchester* v. *Paine*, 11 Ves. 199; but not a dismissal for want of prosecution: *Hansard* v. *Hardy*, 18 Ves. 460.
6 1 Bro. C. C. 396.

final order has been inrolled.[1] Formerly, it would do this without imposing any terms upon the defendant;[2] but it afterwards became the practice to do it, only upon the defendant consenting to a reference to compute interest upon the whole sum reported due for principal, interest and costs;[3] and the order will still be made in this form, under special circumstances.[4] The ordinary terms, however, upon which the Court enlarges the time are; payment of the sum found due for interest and costs, and carrying on the account of subsequent interest and costs: the defendant being ordered to pay the costs of the application at once.[5] On these terms, the time has been enlarged for six months, and again for three months;[6] and in *Edwards* v. *Cuncliffe*,[7] a fourth order was made for enlarging the time, though the third was directed to be peremptory.

Where the report of principal, interest and costs due on the mortgage is sought to be varied, and the time appointed for payment thereof is likely to arrive before the application to vary is heard, application should be made to have the time for payment enlarged until the application to vary the report has been disposed of; but, though this is omitted, the Court, in a proper case, will not make a peremptory order to foreclose, but will order subsequent interest to be computed, and appoint a new time for payment.[8] And so also, if a mortgagee receives rents after the report, and before the day appointed for foreclosure, the Court will not make the decree absolute without the further account being taken, and a new day fixed for payment;[9] but if the rents are received after the day appointed for foreclosure, no further account is necessary.[10]

In *Monkhouse* v. *the Corporation of Bedford*,[11] where a decree of foreclosure was appealed from, the Court refused a motion to suspend the execution of the decree till six months after the appeal should be heard, but directed that, on the defendants paying to the plaintiff the interest due from the time of filing his bill, and his costs (upon the plaintiff's undertaking to repay the same, if the

1 *Ford* v. *Wastell*, 2 Phil. 591: 12 Jur. 404: *Thornhill* v. *Manning*, 1 Sim. N. S. 451; Seton, 391.
2 *Ismoord* v. *Claypool*, 1 Cha. Rep. 263.
3 *Bickham* v. *Cross*, 2 Ves. S. 471; Belt's Sup. 409.
4 *Holford* v. *Yate*, 1 K. & J. 677; *Bruere* v. *Wharton*, 7 Sim 483: *Whitfield* v. *Roberts*, 7 Jur. N. S. 1268; 9 W. R. 844, M. R.
5 Seton, 391; *ib.* 390, No. 1; *Finch* v. *Shaw*, 20 Beav. 555; *Coombe* v. *Stewart*, 13 Beav. 111.
6 *Monkhouse* v. *Corporation of Bedford*, 17 Ves. 380, 382.
7 1 Mad. 287, 289.
8 See *Renvoize* v. *Cooper*, 1 S. & S. 364.
9 *Alden* v. *Foster*, 5 Beav. 592.
10 *Constable* v. *Howick*, 5 Jur. N. S. 331, V. C W.; Seton, 394.
11 *Ubi sup.*

decree should be reversed,) and consenting to the appointment of a receiver, the defendants might take six months from the time fixed by the report. And in *Finch* v. *Shaw*,[1] the time to redeem, pending an appeal to the House of Lords, was enlarged, on the defendant paying into Court the principal and interest found due, and paying the costs of the suit and the application at once; and the money to be paid into Court, was ordered to be invested at the defendants', the mortgagors', risk, and the dividends to be paid to the plaintiff, the mortgagee, he undertaking to refund.

Although the Court will, upon a bill for a foreclosure, allow the defendant, upon application, to enlarge the time appointed for payment of the principal, interest and costs, it will not do so upon a bill to redeem: for then the plaintiff comes into Court saying, "Here is the money: give me my estate;" but in a suit by a mortgagee to foreclose, the Court acts against a person unwilling to pay, and imposes upon him the terms that, if he does not pay, he shall lose his estate.[2]

Formerly, it was not the practice of the Court to make a declaratory decree, without granting consequential relief;[3] but now no suit is open to objection on the ground that a mere declaratory decree is sought thereby; and the Court may make binding declarations of right without granting consequential relief.[4] It seems, however, that the cases in which declarations of right may be made are not extended; and that the Court is merely enabled to declare rights, without following up the declarations by the directions which, according to the old practice, would have been necessarily consequent upon them.[5] Where some of the parties interested under a legal decree are infants, a declaratory decree, as to their rights and interests, cannot be made.[6]

Our Court has adopted this provision of the Imp. Sta. by Order 538, which provides that "No suit is to be open to objection on the

1 20 Beav. 555; Seton, 391.
2 *Novosielski* v. *Wakefield*, 17 Ves. 417; *Faulkner* v. *Bolton*, 7 Sim. 319.
3 See *Grove* v. *Bastard*, 2 Phil. 619, 621; 12 Jur. 385.
4 15 & 16 Vic. c. 86, s. 50.
5 Per L. J. Turner, in *Lady Langdale* v. *Briggs*, 8 De G. M. & G. 391, 428: 2 Jur. N. S. 982, 984; see *Garlick* v. *Lawson*, 10 Hare, App. 14; *Greenwood* v. *Sutherland*, *ib.* 12; *Jackson* v. *Turnley*, 1 Drew. 617: 17 Jur. 643; *Trustees of Birkenhead Docks* v. *Laird*, 4 De G. M. & G. 732, 738: 18 Jur. 883; *Rooke* v. *Lord Kensington*, 2 K. & J. 753; *Bristow* v. *Whitmore*, 4 K. & J. 743; *Gosling* v. *Gosling*, Johns, 265; *Bell* v. *Cade*, 2 J. & H. 122; *Saville* v *Bruce*, 29 Beav. 557; see also Seton, 23. The cases cited appear to overrule *Fletcher* v. *Rogers*, 10 Hare, App. 13.
6 *Webb* v. *Byng*, 8 De G. M. & G. 633: 2 Jur. N. S. 1242.

ground that a merely declaratory decree or order is sought thereby; and the Court may make a binding declaration of right without granting consequential relief."

It may be here mentioned that, if an order has been irregularly obtained, the party who has obtained it should take the earliest opportunity of discharging it: otherwise, any party affected by it may procure its discharge, at the costs of the person who obtained it;[1] and, moreover, no subsequent order to the same effect can be obtained, till that has been done.[2]

SECTION II.—*The Form of Decrees and Orders.*

Before we proceed to the consideration of the practice arising upon decrees when pronounced, it will not be out of place to make a few observations upon their form. Decrees, in general, consist of four parts:—1. The date and title; 2. The recitals; 3. The declaratory part (if any); and 4. The ordering or mandatory parts.[3]

1. The decree commences with a recital of the day, month and year when it was pronounced, and of the names of the several parties to the cause: who should have the same titles in the decree as they have in the bill;[4] thus, if the plaintiff is described in the bill as executor or administrator, the decree must be accordingly.

2. Formerly, decrees contained recitals of the pleadings in the cause;[5] and in like manner, a decree upon further directions, according to the old form, recited the ordering part of the original decree, and the report made in pursuance of it. But this is no longer the practice, and, unless the Court otherwise specifically directs, no recitals ought to be introduced in any decree or order of the Court; but the pleadings, petition, notice of motion, report,

1 See *Davis* v. *Franklin*, 2 Beav. 369, 375; *Tarbuck* v. *Tarbuck*, 4 Beav. 149, 153; *Lincoln* v. *Wright*, *ib.* 166, 172.
2 *Pearce* v. *Gray*, 4 Beav. 127, 129.
3 As to the frame and usual directions in decrees and orders, see Seton, x.—xi., 1—96. The reader is also referred to the excellent collection, contained in that work, of forms of decrees and orders, with practical notes.
4 Cnrs. Can. 359.
5 Seton, 4.

certificate, evidence, affidavits, exhibits or other matters or documents, on which such decree or order is founded, should be merely referred to.[1] In matters of contempt, however, or where the decree or order varies from some general rule, or the Registrar in his discretion sees fit,[2] he may make such short recitals as may be necessary, to show the grounds on which the decree or order is granted.[3]

3. 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.[4]

Sometimes, the Court has directed an insertion in the decree of the reasons for making the declaration, and of the grounds upon which it proceeds in making it.[5] This, however, is not frequently done: though the utility of the practice has been recognised.[6]

4. The ordering or mandatory part of the decree contains the specific directions of the Court, upon the matter before it. These directions must, it is obvious, depend upon the nature of the particular case which is the subject of the decree; and cannot, therefore, now be made the subject of discussion; they must, however, be framed in conformity with the rules contained in the General Orders of the Court; and the settled forms of decrees should be adhered to as much as possible.[7]

Our Order 187 provides that "Orders are to be divided into convenient paragraphs, and such paragraphs are to be numbered consecutively; and where accounts are directed to be taken, or enquiries to be made, the order may be in the form set forth in schedule J, hereunder written, with such variation as the circumstances of the case require." And Order 188 that "In all orders, sums are to be stated in dollars and cents."

1 3 & 4 Wil IV. c. 94, s. 10; Ord. XXIII. 3
2 See as to the practice, in drawing up a decree in the Registrars' Office, *Davenport* v. *Stafford*, 8 Beav. 503, 511, 513: 9 Jur. 801.
3 Ord. XXIII. 2. We have no order similar to this, but our practice is the same.
4 *Jenour* v. *Jenour*, 10 Ves 562, 568; Seton, 22; and see *Lambert* v. *Peyton*, 8 H. L Ca. 2.
5 *Gordon* v. *Gordon*, 3 Swanst. 400, 478; *Maynard* v. *Moseley*, *ib* 653; *Onions* v. *Tyrer*, 1 P. Wms. 344, n. (1); *Gibson* v. *Kinven*, 1 Vern. 67, n.; *Ex parte Earl of Ilchester*, 7 Ves 348, 373; *Attorney-General* v. *Clapham*, 4 De G. M. & G. 591, 607: 1 Jur. N. S. 505; 10 Hare, 617; and Seton, 22.
6 *Bax* v. *Whitbread*, 16 Ves. 15, 24; *Gordon* v. *Gordon*, *ubi sup.*
7 *Re Cant's Estate*, 1 De G. F. & J. 153, 158; *Stainton* v. *Carron Company*, 7 Jur. N. S. 645, 647, L. JJ.; Seton, 1.

Our Order 293 provides that "Every order requiring a party to do an act, other than the payment of money, shall state the time after service of the order within which the act is to be done; and upon the copy of the order served, there shall be endorsed a memorandum in the words, or to the effect set forth in schedule N."

Decrees and orders are frequently founded, either wholly or partially, upon admissions of facts, consents, submissions, undertakings, or waivers of claim: entered into or made by the parties or some of them, by their counsel at the bar, or by their solicitors in applications at Chambers. In such cases, the admissions, consents, submissions, undertakings, or waivers should be inserted in the decree or order: immediately before the ordering part, if they relate to the whole decree or order; and if not, immediately before the part to which they relate.[1]

SECTION III.—*Drawing up, Passing, and Entering Decrees and Orders.*

When a decree or order is pronounced by the Court, a note of it is taken down by the Registrar: from which minutes of the decree or order are afterwards prepared, and copies issued to the solicitors of the parties. The party entitled to the carriage of the decree or order should, immediately after it is pronounced, leave his papers with the Registrar, to enable him to draw up the decree or order; and should duly proceed therein; otherwise, the Registrar may draw it up at the instance of any other party, and deliver it to him.[2] The solicitors of the other parties should forthwith bespeak copies of the minutes, if they require them. A full draft of the decree or order is usually prepared for the party drawing it up; and copies of the minutes for the other parties.[3]

Our Order 10 provides that "Every order is to be bespoken, and the briefs and other documents required for preparing the same are

1 *Bartlett* v. *Wood*, 9 W. R. 817, L. C.; Seton, 21. For a form, see *ib.* 23.
2 Seton, 1137.
3 *Ibid.*

to be left with the Registrar, within seven days after the order is pronounced or finally disposed of by the Court." And Order 11, that "In case an order is not bespoken, or the briefs and other documents are not left, within the time prescribed by Order 10, the order is not to be drawn up without leave being obtained on an application in Chambers."

At the time of delivering out the draft of any decree or order which requires to be settled by the Registrar in the presence of the parties, the Registrar delivers out, to the party on whose application the draft has been prepared, an appointment in writing of a time for settling the same. A copy of such appointment must be served on the opposite parties one clear day at least before the time fixed thereby for settling the draft decree or order, by leaving such copy of such appointment at, or sending it by post to, the place for service of such party; and the party serving such copy, and the party so served, must attend such appointment, and produce to the Registrar their briefs, and such other documents as may be necessary, to enable him to settle the draft. The original appointment, with a memorandum endorsed thereon of the service of a copy thereof on the opposite party, signed by the person by whom such service was effected, must be delivered to the Registrar, in order that he may be satisfied that service has been duly effected; but he may require such service to be verified by affidavit.

This is the practice in England as established by Order I., 32, 23, 25, 24, 26—and although we have no similar order, the practice is the same. Our Order 12 provides that "No notice to settle minutes or pass an order is to be given unless by the direction of the Registrar," and Order 13 that "Where a notice is given to settle minutes, or to pass an order, and the party served attends thereon, but the party giving the notice does not attend, or is not prepared to proceed, the Registrar may proceed *ex parte* to settle the minutes, or pass the order, or may, in his discretion, order the party giving the notice to pay to the other the costs of his attendance: or if a party served asks for delay, the Registrar may grant the delay on such terms as he thinks reasonable as to payment of costs or otherwise."

Order 596, declares that "No notice of settling minutes or passing an order is to be given until the proposed minutes or order have, or

has been prepared by, or delivered to the Registrar: the notice (where the Registrar deems a notice proper) is to be by an appointment signed by him, a copy whereof is to be served: the proposed minutes or order shall remain in his office for inspection until settled or passed: and any party may take a copy thereof."

If, upon perusing the minutes, or draft of the decree or order, it appears that anything is doubtfully expressed, or contrary to the plain sense and meaning of the Court, or that anything has been omitted in them which ought to have been inserted, and the Registrar refuses to make an alteration in them,[1] an application must be made to the Court to vary the minutes. This application was formerly made by petition, stating the specific matter to be added or altered [2] but it is now usually made by motion: of which notice must be given.[3] The notice must specify the particular matter to be added or altered,[4] and the Registrar should be previously informed of the application.[5]

Motions of this nature will, in general, be permitted, provided the decree remains in minutes.[6] Strictly speaking, questions of importance ought not to be discussed on applications to vary minutes; but this rule is not always adhered to, and discussions of great moment have sometimes been permitted.[7]

Where a variation is made by the Court in the minutes or draft settled by the Registrar, the variation is embodied in the decree or order originally made, and, except when the costs of the application are ordered to be paid, no fresh order is drawn up.[8]

To avoid questions on the minutes, the Court sometimes requires the counsel on both sides to sign draft minutes, to be handed in to the Registrar: and when orders are taken by arrangement between the parties, the minutes should always be signed by the respective counsel.[9]

1 As to the power and duties of the Registrar, in drawing up decrees, see *Davenport* v. *Stafford*, 8 Beav. 503 511, 513: 9 Jur. 801.
2 *Grey* v. *Dickenson*, 4 Mad. 464; and see *Stewart* v. *Forbes*, 16 Sim. 433.
3 *Webber* v. *Hunt*, 1 Mad. 13; *Punderson* v. *Dixon*, 5 Mad. 121; Harr. by Newl. 321.
4 *Prince* v. *Howard*, 14 Beav. 208; *Hood* v. *Cooper*, 26 Beav. 373; Seton, 1142.
5 Seton, 1142.
6 1 Turn. & Ven. 319; Seton, 1142.
7 *Perry* v. *Philips*, 1 Ves. J. 251, 252: *Bootle* v. *Blundell*, 1 Mer. 193, 202 An application to vary the order cannot be made, on the mere ground that a decision which is in point was not prominently brought to the attention of the Court: *Re Vicar of St. Sepulchre*, 11 W. R. 456, V. C. K.
8 Seton, 1142. For form of order, see *ib.*
9 Seton, 1143.

The Registrar, upon consent of the parties, may allow such alterations to be made in the decree as his knowledge and experience teach him would be sanctioned by the Court if mentioned thereto.[1] After a decree or order has been settled by the Registrar, it cannot be altered in the absence of any of the parties interested.[2]

When the draft decree or order has been settled by the Registrar, he names a time in the presence of the several parties, or else delivers out an appointment in writing, of a time for passing the decree or order; and, in the latter case, such appointment must be served on the opposite party, in like manner as an appointment to settle a draft decree or order; and the original appointment, together with a memorandum endorsed thereon of the service of a copy thereof on the opposite party, and signed by the person by whom such service has been effected, must be delivered to the Registrar, in order that he may be satisfied that service has been duly effected; but the Registrar may require such service to be verified by affidavit.

The decree or order, having been prepared from the draft, is delivered, together with the draft, to the party bespeaking it: by whom it should be carefully compared with the draft. If the party, having thus received the original decree or order, neglects to return it to the Registrar, in order that it may be passed and entered, he will, on motion, of which notice must be given, be ordered to do so.[3]

A decree or order is said to be passed when the Registrar has inserted his initials in the margin, at the foot of the last page, as an authority to the Entering clerk to enter it in the Registrars' books.[4]

By the present practice of the Court, it is irregular to deliver a decree to any party not entitled to the carriage thereof, without an order to that effect; but where the plaintiff, who was *prima facie* so entitled, was guilty of great delay in proceeding under a decree pronounced, and a defendant beneficially interested applied for and

1 *Davenport* v. *Stafford*, 8 Beav. 503, 511: 9 Jur 801; Seton, 1142.
2 *Major* v. *Major*, 13 Jur. 1. L. C.
3 Seton, 1139; *Robison* v. *Manuelle*, 14 Jur. 583, Lds. Com.; *Clifford* v. *Turrill*, 2 De G. & S. 1; 12 Jur. 428. And see our Order 18.
4 Seton, 1139.

obtained the decree from the Registrar, which he carried into the Master's office—a motion to give the carriage thereof to the plaintiff, was refused with costs.[1]

The practice in all cases, except orders of course, and orders of a simple kind, in which the parties cannot be injured by the order as drawn up,[2] is as before stated.

Our Order 8 provides, that "All orders made in open Court, or to be issued on *precipe* for foreclosure, sale, or redemption, or for a sale instead of foreclosure on the application of an incumbrancer, are to be drawn up, settled and passed by the Registrar." And, Order 9, that "After an Order is passed and signed by the Registrar, the same is to be entered by the Entering Clerk, and issued by the Registrar to the party entitled thereto." And, Order 191 provides, that "A decree founded on a bill taken *pro confesso* is to be passed and entered as other decrees."

There are two Orders made under 29-30, Vic. c. 39, which may be conveniently noticed here. Order 192 provides that "Where a Queen's Counsel has held a sitting of the Court under the Statute in that behalf, he is to inclose to the Registrar, as soon thereafter as may be, a statement signed by him, of his decree in each case heard by him, and the date and place of hearing, and is to set forth the terms of his decree either at full length or otherwise, as the case may require. His judgment containing the reasons for his decree, if he thinks fit to state the same in writing, is also to be transmitted to the Registrar for the information of the Court and the parties." And Order 193, that "A decree made by a Queen's Counsel is to be expressed in the body thereof to be the decree of the Court, but the name of the Queen's Counsel is to be given in the margin."

Order 195 provides, that "No order of course, and no order obtained *ex parte*, and not being of a special nature, is to be entered, unless the entry thereof shall be directed by the Court or a Judge; but this provision is not to be construed as applying to decrees or decretal orders, or to final orders for sale or foreclosure."

1 *Steers* v. *Cayley*, 1 Cham. R. 165.
2 *Hart* v. *Tulk*, 6 Hare, 611, 616.

No proceedings can be taken upon a decree or order not entered; and if any are taken, they are irregular and voidable: even though the omission to enter the decree or order has been occasioned by the mistake of the entering clerk, and not through any neglect of the party.[1]

An order to enter a decree or order, *nunc pro tunc*, may be obtained, upon application by motion of course; and, when passed, must be left with the entering clerk, at the Registrars' Office, as his authority to enter the decree or order.

Orders to enter decrees, *nunc pro tunc*, will be made 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.[2]

In *Jessen* v. *Brewer*,[3] where the pleadings in the cause as well as the original decree, (which was pronounced seventy-nine 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 inrolled: it appearing from the minute-book of the Registrar that such a decree was pronounced at the time, and, from a Master's report, that it had been acted upon. And where an order which had been passed nine years before, but not entered, could not be found, the Court allowed it to be re-issued.[4]

It seems, that an order to enter a decree *nunc pro tunc* may be made, although the suit has abated.[5] And so, when the suit has abated between the hearing and judgment, the decree may still be drawn up.[6]

In January 1841 an original decree of foreclosure had been made; in pursuance thereof, the Master made his report, and in May of the same year the cause was set down for hearing on further directions,

1 *Tolson* v. *Jervis*, 8 Beav. 364. 366. It is essentially requisite to the perfect completion of a decree, that it be passed and entered: *Drummond* v. *Anderson*, 3 Grant, 150.
2 *Lawrence* v. *Richmond*, 1 J. & W. 241; *Donne* v. *Lewis*, 11 Ves. 601.
3 1 Dick. 370.
4 *Russell* v. *Tapping*, 3 W. R. 379, V. C. K.
5 Seton, 1139; and see *Willimott* v. *Ogilby*, there cited; *contra*, *Bertie* v. *Lord Falkland*, 1 Dick. 25; but see, as to the latter case, 2 C. P. Coop. t. Cott. 37.
6 *Davies* v. *Davies*, 9 Ves. 461: *Belsham* v. *Percival*, 8 Hare, 157; 2 C. P. Coop. t. Cott. 176; *Collinson* v. *Lister*, 20 Beav. 355: 1 Jur. N. S. 835; Seton, 1139; and see *Boucicault* v. *Delafield*, 9 Jur. N. S. 1282; 12 W. R. 101, V. C. W.; *Rucker* v. *Scholefield*, 1 N. R. 180, V. C. W.

but the decree then pronounced was not drawn up, or any entry made thereof. A motion made to allow the plaintiff to draw up and enter *nunc pro tunc* the decree on further directions from minutes alleged to have been prepared by the Registrar was refused.[1]

SECTION IV.—*Enrolment of Decrees and Orders.*

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 passed 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 record of other Courts of the same nature.

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; whilst a decree, which has been enrolled, is not susceptible of alteration, except in England by the House of Lords 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 merely as interlocutory, and cannot be pleaded in bar to another suit for the same matter.[2] The advantage, therefore, to be obtained by the enrolment of a decree is: to prevent its being the subject of a rehearing, and to enable the party benefited 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. No appeal to the House of Lords can take place, unless the decree appealed against has been enrolled.[3]

This is the English practice, but our Order 322 provides that "A re-hearing may be had as well after as before enrolment; but no second rehearing is to be had, without leave of the Court granted upon special motion for the purpose." Our Order 189 that "Decrees or decretal orders are not to be enrolled until the final decree or order in the cause has been pronounced."

1 *Drummond* v. *Anderson*, 3 Grant, 150.
2 *Ante*.
3 *Andrews* v. *Walton*, 8 Cl. & F. 457; 6 Jur. 519; *Broadhurst* v. *Tunnicliff*, 9 Cl. & F. 71; see *Wellesley* v. *Wellesley*, 3 De G. & J. 164; and S. C. *nom. Beavan* v. *Mornington*, 8 H. L. Ca. 525; 6 Jur. N S. 1123; *Monypenny* v. *Dering*, 4 De G. & J. 175; 5 Jur. N. S. 661.

Order 190 provides that "If no petition for rehearing is filed, within thirty days after the entry of the final decree or order, the Clerk of Records and Writs, at the instance of any party to the cause is to attach together the bill, pleadings and other proceedings, and is to annex thereto a fair copy of the decree or decretal order signed by a Judge, and counter-signed by the Clerk of Records and Writs, and the papers and proceedings so annexed and signed are to remain on record in his office, and such filing is to be deemed and taken to be an enrolment of the decree for all purposes." And Order 194 provides that "Interlocutory orders are not to be enrolled."

If any irregularity has occurred in the enrolment of a decree or order, or in the proceedings to accomplish that object, the Court will, upon application by motion, order it to be vacated.[1] Thus, the enrolment was vacated where due notice of passing and entering the decree had not been given, under circumstances which amounted to surprise;[2] and where the notice from the Record and Writ Clerk's Office stated that the docket would be presented for signature, unless an appeal was lodged, and the order to set it down was served, within twenty-eight days, although it was held that the appeal ought to have been actually set down to constitute a prosecution of the *caveat* with effect, yet the Court considered the party had been misled, and was entitled, as an indulgence, to have the enrolment vacated.[3]

It seems that, if the party enrolling the decree has said or done something which would induce his opponent to believe the decree would not be enrolled, approaching deception or *mala fides*, it is a ground for vacating the enrolment, but not otherwise.[4] It was, therefore, held, by Lord Brougham, in *Balguy* v. *Chorley*,[5] that the mere circumstance of its having been intimated, on the part of the defendant, to the plaintiff's solicitor, that it was the intention of the defendant to appeal forthwith, and of the plaintiff's solicitor saying in answer, that he was open to any fair offer of arrangement to

1 *Parker* v. *Downing*, 1 M. & K. 634, 637; *Robinson* v. *Newdick*, 3 Mer. 13; *Woods* v. *Woods*, 12 Jur. 662, L. C.; *Barnes* v. *Wilson*, *ubi sup.* For form of order to vacate enrolment, see Seton, 1149.

2 *Hargrave* v. *Hargrave*, 3 M'N. & G. 348, 351; see also *Anon.*, 1 Ves. S. 326; Belt's Sup. 158.

3 *Pearce* v. *Lindsay*, 4 De G. & J. 211; 5 Jur. N. S. 661; and see S. C. *supra*; but see *Attorney-General* v. *Conservators of the River Thames* 9 Jur. N. S. 588: 11 W. R. 408, L. C.

4 *Wardle* v. *Carter*, 1 M. & C. 283, 285; *Lewis* v. *Hinton*, 11 Jur. 955, L. C. *Wickenden* v. *Rayson*, 1 Jur. N. S. 945, L. C.: *Williams* v. *Page*, 1 De G. & J. 561; *Backhouse* v. *Wylde*, 3 Jur. N. S. 398, L. C. *Wildman* v. *Lade*, 4 De G. & J. 401, 405: *Hill* v. *South Staffordshire Railway Company*, *ubi sup.*; and see *Whitaker* v. *Leach*, and *Richards* v. *Woods*, cited 1 Smith's Pr. 707.

5 M. & K. 640.

prevent the necessity of an appeal, did not amount to such a surprise as would induce the Court to vacate the enrolment. This is in accordance with what was laid down by Lord Lyndhurst, in *Barnes* v. *Wilson*,[1] where his Lordship held, that a party was not bound to communicate his intention to enrol a decree to his adversary, because the latter informs him of his intention to appeal against it.

The enrolment of an order absolute of foreclosure does not, any more than the enrolment of the decree of foreclosure, preclude the Court from again enlarging the time in a proper case, and upon the usual terms.[2]

The costs of enrolling a decree or order will not be allowed, on taxations as between party and party.

Section V.—*Rectifying Decrees and Orders.*

We have seen before that, as long as the decree or order remains in the shape of minutes, that is, till it has been passed by the Registrar and entered, it may be rectified, upon application to the Court, or by having it put into the cause paper, "to be spoken to;" but that, after a decree or order has been passed and entered, the Court will not entertain any application to vary it, unless in respect of matters which are quite of course. The proper method of having a decree or order rectified, in other matters, is by applying to have the cause reheard.[3]

Clerical mistakes in decrees or orders, or errors arising from any accidental slip[4] or omission, may, at any time before enrolment, be corrected, upon motion or petition, without the form and expense of a rehearing. Thus, the omission of a direction to settle the conveyance,[5] or of a reference as to title, in a decree for specific per-

1 1 R. & M. 486, 493.
2 *Ford* v. *Wastell*, 2 Phil. 591, 593; *Thornhill* v. *Manning*, 1 Sim N S. 451.
3 Harr. by Newl. 322; and see on this subject, Seton, 1143.
4 *Turner* v. *Hodgson*, 9 Beav. 265.
Trevelyan v. *Charter*, 9 Beav. 140, 142.

formance,[1] or of a direction to take the accounts of the personal estate, in a creditors' suit,[2] may be thus supplied.[3]

Our Order 335 provides that "An application to amend an order which has not been drawn up in conformity with the judgment pronounced, so as to make the same conformable thereto; and an application to correct any other clerical mistake in an order arising from an accidental slip or omission, may be made in Chambers on petition, and the Court may grant the same, if, under all the circumstances, the Court sees fit;" and Order 336, that "Where an order as drawn up requires amendment in any other particular on which the Court did not adjudicate, the same may be amended in open Court, on petition, without a rehearing, if, under all the circumstances, the Court sees fit." Where a necessary direction is omitted in a decree, the Court will amend it, although the decree has been passed and entered. In such a case, the proper mode of proceeding is by petition.[4] The Court will not set aside a decree which has been regularly obtained upon *præcipe* under the orders of this Court, except upon an affidavit shewing that the defendant will be damnified by the decree being permitted to stand against him.[5] An application by petition to correct a clerical error in a decree or order must, as a general rule, be made on notice.[6] Where an order for sale had been taken out *ex parte* by mistake, in lieu of an order for foreclosure, the Court will vacate the order for sale, and grant an order for foreclosure *ex parte*.[7] Where an order to do a certain act does not limit the time thereof, an order limiting the time within which the act is to be done will be granted *ex parte*.[8] After a decree in a foreclosure suit referring it to the Master to take an account of what was due, the defendant applied to set aside the order *pro confesso*, and subsequent proceedings, and permit an answer to be filed, which was ordered to be done upon the defendant paying the costs of the application, and putting in his answer within two weeks, in default the decree already drawn up to remain in force. No action having been taken by the

1 *Hughes* v. *Jones*, 26 Beav. 24.
2 *Pickard* v. *Mattheson*, 7 Ves. 293.
3 For other cases, see *Wallis* v. *Thomas*, 7 Ves. 292; *Newhouse* v. *Mitford*, 12 Ves. 456; *Lane* v. *Hobbs*, *ib.* 458; *Skrymsher* v. *Northcote*, 1 Swanst. 573, n.; *Tomlins* v. *Palk*, 1 Russ. 475; *Hawker* v. *Buncombe*, 2 Mad. 391; *Windsor* v. *Cross*, 9 Hare, App. 44; *Cradock* v. *Owen*, 2 Sm. & G. 241.
4 *Moffat* v. *Hyde*, 6 U. C. L. J. 94.
5 *Mitchell* v. *Crooks*, 2 Grant, 123.
6 *Radenhurst* v. *Reynolds*, 11 Grant, 521.
7 *M'Gillivray* v. *Cameron*, 1 Cham. R. 197.
8 *M'Kay* v. *Reed*, 1 Cham. R. 196.

defendant under this order for several weeks, an application on the part of the plaintiff was made upon notice to discharge that order with costs. The Chancellor made the order as asked, although at first doubting any necessity therefor, as the order already drawn up declared that, under the circumstances which had occurred, the decree should remain in force.[1] Where a decree which had been taken out by the plaintiff in an administration suit, erroneously made provision for payment of certain annuities and legacies in priority to the provision made by the will for the widow of the testator, the Court, upon the petition of the widow, directed the decree to be amended, but refused costs to either party.[2] A final decree of foreclosure had been obtained in a suit where the true position of parties was not disclosed, or material facts had been misrepresented, and a bill was subsequently filed to enforce a claim against the party beneficially interested as plaintiff in that suit. The Court refused to make a decree other than would have been proper had the true position of the parties to that suit been stated.[3] An incumbrancer, made a party in the Master's office under the General Orders of 6th February, 1865, cannot, after the lapse of fourteen days from the service of the decree, file a petition to vary the decree without first obtaining leave by an application in Chambers.[4] A decree can only be amended on application in Chambers, when it is not drawn up in accordance with the judgment, or some necessary consequential direction has been omitted. The plaintiff has, in the absence of any expression of the Court, a right to take the reference to the place where the bill was filed.[5] A consent decree may be amended on petition, if it is shewn that it contains terms which were not consented to.[6] A motion to set aside a decree obtained by default, and not on the merits, was held to be properly made in Chambers.[7] The Secretary in Chambers will not grant an order to amend a decree, except to correct a clerical error, or to make the decree conform with the judgment. Where the decree omitted to direct that costs should be paid forthwith, an application to amend was refused.[8] On a bill to enforce a vendor's lien, the decree, which, through oversight, directed that in default of payment of

1 *Williams* v. *Atkinson*, 1 Cham. R. 34.
2 *Eadie* v. *M'Ewen—Re Eadie*—14 Grant, 404.
3 *Wilson* v. *Hodgson*, 14 Grant, 543.
4 *Roe* v. *Stanton*, 15 Grant. 137.
5 *Watson* v. *Henderson*, 2 Cham R. 370.
6 *Merchants' Bank* v *Grant*, 3 Cham. R. 64.
7 *Kline* v. *Kline*, 3 Cham R. 79.
8 *Wilson* v. *Robertson*, 3 Cham. R. 100.

the amount to be found due by the Master, an execution against the goods, &c., of the original purchaser should issue, without first selling the land, was set aside, at the instance of the purchaser after the execution had been issued and placed in the hands of the sheriff, the defendant, though served with the bill, having taken no proceedings in the case.[1] The plaintiff claimed dower; a decree was made less extensive than she claimed; the Master made his report in pursuance of the decree; the solicitor on the same day signed a consent to a decree on further directions being made in certain terms stated in the consent; these terms were in accordance with the decree and report; they provided, also, that, in lieu of dower, plaintiff should be paid a certain annual sum named; the decree was not drawn up, but the agreement which it embodied was acted on for eight years. *Held*, that the plaintiff was bound by it, and that she could obtain no relief on the ground that the original decree should have been more favorable to her.[2]

It is, nevertheless, 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 of form, or where the matter to be inserted is clearly consequential on the directions already given.[3] Upon this ground, where the decree directed a commission to ascertain the boundaries of prebendal lands, a motion, that the decree might be extended to copyhold as well as to freehold lands, which was opposed, was refused.[4] 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.[5] In *Colman* v. *Sarell*,[6] 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*,[7] Sir John Leach, V.C., declined to correct a decree, in which the error was apparent, because the alteration proposed would require new directions upon the corrected part. Where the decree expressed that the parties had consented that the matters in question should be

1 *Switzer* v. *Ingham*, 14 Grant, 287.
2 *Sills* v. *Lang*, 17 Grant, 691.
3 *King* v. *Savery*, 8 De G. M. & G. 311: 2 Jur. N. S. 431.
4 *Willis* v. *Parkinson*, 3 Swanst. 233.
5 *Brackenbury* v. *Brackenbury*, 2 J. & W. 391, 393, 396.
6 2 Cox, 206.
7 2 S. & S. 64.

decided by the Court, without directing an issue, the Court refused to vary it, by expressing that the parties had not asked for an issue.[1]

It seems that the Court will, in this manner, supply what may be necessary to make an existing direction complete; but will not make a new direction; and, therefore, where a decree directed an account of the real estate of a testator, sold since his death, but omitted to direct an account of the moneys received from the sale of such as had been sold, the Court refused to rectify the decree, by directing such account to be taken.[2]

Where the title of an order was erroneous, leave was given to amend it: although the effect of the alteration was to charge a surety, who had been sued at law under the order, and, relying upon the mistake in the title, had pleaded that there was no such order.[3]

The rectification of a decree or order is usually made by an alteration of the decree or order itself;[4] but where this cannot be conveniently done, a supplemental order will be made.[5]

A decree may be varied in this manner, at any time, until enrolment; thus, a decree has been altered, although it had been pronounced seven years before, and the cause had been heard on further directions.[6]

The Court will, in some cases, extend the indulgence of rectifying decrees in which there have been clerical mistakes, to decrees which have been actually enrolled. Thus, 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; so, likewise, if some part of the decree be omitted in the enrolment, it may be inserted upon motion to the Court. It is to be observed, that, under the denomination of miscasting, is not to be included any pretended miscasting or misvaluing, but only error in auditing

1 *Stewart* v. *Forbes*, 16 Sim. 433; 13 Jur. 5.
2 *Whitehead* v. *North*, C. & P. 78; see also *Bird* v. *Heath*, 6 Hare, 236; 12 Jur. 861; *Fyler* v. *Fyler*, 1 Coll. 93; 8 Jur. 211.
3 *Spearing* v. *Lynn*, 2 Vern. 376: Prec. in Ch. 115: 1 Eq. Ca. Ab. 30 pl. 6.
4 Seton, 1143: *Hawker* v. *Buncombe*, 2 Mad. 391; *Skrymsher* v. *Northcote*, 1 Swanst. 573, n.: *Tomlin* v. *Falk*, 1 Russ. 47 *Hughes* v. *Jones*, 26 Beav. 24: *Bird* v. *Heath*, *ubi sup.*
5 *Wallis* v. *Thomas*, 7 Ves. 292; *Lane* v. *Hobbs*, 12 Ves. 458; *Needham* v. *Needham*, 1 Hare, 633: 7 Jur. 336; *Anon.*, 1 Jur. N. S. 973, V. C. W.
6 *Askew* v. *Peddle*, 14 Sim. 301.

and numbering.[1] In *Weston* v. *Haggerston*,[2] 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.

Our Order 330 makes a material alteration in the former practice: an alteration which the English Court has not made; and, in order to understand the effect of this Order, it will be necessary to enquire what the old practice was, which will be done in a subsequent part of this work. This order provides that "Any party entitled by the former practice to file a bill of review, praying the variation or reversal of an order upon the ground of matter arising subsequent to the order, or subsequently discovered, or a bill in the nature of a bill of review, or a bill to impeach a decree on the ground of fraud, or a bill to suspend the operation of a decree, or a bill to carry a decree into operation, is to proceed by petition in the cause, praying the relief which is sought, and stating the grounds upon which it is claimed."

Where the plaintiff's costs of two motions were reserved to the hearing, and were then, by mistake, omitted to be provided for by the decree, which had been enrolled, the Court, on petition, made a separate order for their payment.[3]

It is an established principle of the Court, that every order and decree, however erroneous, is good until it is discharged.[4]

SECTION VI.—*Of Enforcing the Execution of Decrees and Orders.*

ALL decrees and orders may, as we have seen, be enforced by process of contempt. Such as direct payment of a sum of money or costs may also be enforced by writs of *fieri facias*.

No decree or order made in any suit or matter, requiring any person to do an act thereby ordered, can be enforced by attach-

1 See Seton, 1144.
2 G. Coop. 134; see also *Yow* v. *Townsend*, 1 Dick. 59; *Fearson* v. *Desbrisay*, 21 L. J. Ch. 511, M.R.
3 *Viney* v. *Chaplin*, 3 De G. & J. 282.
4 *Chuck* v. *Cremer*, 2 Phil. 113, 115; 1 C. P. Coop. t. Cott. 338, 312.

ment: unless such decree or order states the time after service[1] of the decree or order, within which the act is to be done: and unless, upon the copy of the decree or order served upon the person required to obey the same, there is indorsed a memorandum in the words or to the effect following, *viz.*:—"If you, the within-named *A. B.*, neglect to obey this order, by the time therein limited, you will be liable to be arrested by the Sheriff; and also be liable to have your estate sequestered, for the purpose of compelling you to obey this order," &c.[2]

If, however, the decree or order omits to fix a time, it is not thereby rendered ineffectual, but the Court will, upon motion for that purpose, of which notice must be given, make a supplemental order, fixing a time for the performance of the act.[3] When the decree or order names a specific day for doing the act, and does not merely limit a time after service for that purpose, it must be served before the day named;[4] or if the service cannot be effected before that day, an application must be made, by special motion, for an order enlarging the time,[5] or fixing a new period, where the time appointed has expired. A copy of such supplemental or further order must be indorsed and served, in like manner as in the case of the original order.[6]

In the case of a corporation aggregate, the indorsement to be made on the copy to be served of a decree or order must be varied, by omitting the words "you will be liable to be arrested," and substituting for them the words "you will be liable to have your lands and tenements, goods and chattels, distrained upon, and to have your estate sequestered."[7]

The service of the decree or order must (unless otherwise authorized by the Court) be personal;[8] and is effected, by deliver-

1 The time is frequently limited thus: "On or before the — day of —, or within — days after service;" or, "on or before the — day of —, or thereafter, within — days after service." The latter form is preferable.

2 Ord. 337. Where there was a mistake in the indorsement, an attachment founded on service thereof was discharged: *Hinde* v. *Blake*, 5 Beav. 431; and see *Re Bowen*, 9 Jur. N. S. 612: 11 W. R. 607. M. R. The indorsement is not required, where the service is made to ground a writ of assistance: see *post*.

3 *Needham* v. *Needham*, 1 Hare, 633: 7 Jur. 336; and see S. C. 1 Phil. 640; *Morley* v. *Clavering*, 30 Beav. 108; *Urmston* v. *Singleton*, Seton, 615.

4 *Adkins* v. *Cook*, 2 De G. & J. 286; 4 Jur. N. S. 1162.

5 *Duffield* v. *Elwes*, 2 Beav 268; Braithwaite's Pr. 166;

6 Braithwaite's Pr. 135, 167; and see *Adkins* v. *Bliss*, *ubi sup.*

7 Braithwaite's Pr. 358, n. (e); Braithwaite's Manual, 53.

8 *Re Lloyd*, 10 Beav. 451, and cases in reporter's notes; *Whistler* v. *Aylward*, Drn. 1; *Re Wisewold*, 16 Beav. 357; *Gooch* v. *Marshall*, 8 W. R. 410, V. C. W.; *Re Paragon and Spero Mining Company*, 8 Jur. N. S. 11: 10 W. R. 76, V. C. W.; *Pycroft* v. *Williams*, 5 W. R. 464, V. C. W.

ing to, and leaving with the person required to do the act, a true copy of the order, indorsed in the manner before mentioned, and at the same time producing and showing to the person served the original order, as duly passed and entered; or an office-copy thereof.[1] The Court has jurisdiction, in a proper case, to entertain an application by a party served with an office-copy of the decree, under the General Orders of June, 1853, (No. 6, Rule 6) after the expiration of the fourteen days thereby limited.[2] When the parties who would become interested under a decree, as kin of a testator, are very numerous, and difficult to serve, the Court will, in its discretion, dispense with service on them, or some of them, and direct one of a family or class to be served.[3]

Although personal service is, in general, requisite, yet the Court will sometimes, under the particular circumstances of the case, allow substituted service to be effected.[4] Thus, where the party absconded to avoid service,[5] or was not to be found,[6] or kept his door locked,[7] the Court has ordered substituted service upon his solicitor to be good service. The reason for requiring personal service, previously to the issuing of process of contempt, is chiefly to prevent surprise; and, therefore, wherever it can be shown that the party is not likely to be taken by surprise, the Court will order substituted service to be good service. Thus, where a defendant was present in Court when the decree was pronounced, and afterwards kept out of the way, the Court ordered substituted service of the decree upon her solicitor;[8] and so, in *De Manneville* v. *De Manneville*,[9] where the party had declared that he would not obey the order.

Where the person required to do the act resided permanently abroad, on her Majesty's service, substituted service on his solicitor was ordered, without proof of any attempt to serve him personally.[10]

1 Braithwaite's Pr. 166, 167; Braithwaite's Manual, 175 *n.* (73).
2 *Stewart* v. *Hunter*, 2 Cham. R. 265.
3 *Anderson* v. *Kilborn*, 2 Cham R. 408.
4 As to substituted service generally, see *ante*.
5 *Edwards* v. *Poole*, cited 12 Ves. 205; *Skegg* v. *Simpson*, 2 De G. & S. 454; *Burlton* v. *Carpenter*, 11 Beav. 33; *Re Mourilyan*, 13 Beav. 84; and see *Re Dufaur*, 16 Beav. 113.
6 Wyatt's P. R. 207, 250; *Hunter* v. ——, 6 Sim. 429.
7 *Henley* v. *Brooke*, cited 12 Ves. 204.
8 *Rider* v. *Kidder*, 12 Ves. 202.
9 *Ibid*, 203, 205.
10 *Griffiths* v. *Cowper*, 2 De G. F. & J. 208: 6 Jur. N. S. 718; 9 Giff. 230.

The order for substituted service is obtained on an *ex parte* application :[1] which is made by summons in causes and matters originating in Chambers, or for the purpose of proceedings pending there; in other cases by motion in Court.[2] The application must be supported by affidavit showing why personal service cannot be effected, and upon whom the substituted service is proposed to be made.[3]

If substituted service is permitted, the service must be effected strictly in accordance with the terms of the order directing such service, and a copy of such order must also be, at the same time, served in the same manner.[4]

Our Order 288 provides that "If a party who is ordered, otherwise than by an order of course, to do any act, other than to pay money, in a limited time, refuses or neglects to obey the order according to the exigency thereof, the party prosecuting the order shall, at the expiration of the time limited, upon filing (*with the Registrar*)[5] an affidavit of the service of the order, and of the non-performance thereof, be entitled, upon *præcipe*, to a writ or writs of attachment against the disobedient party."

It will be observed that this order is confined to cases where a party is ordered to do an act by a special order or decree of the Court. In such cases an attachment may be obtained if the order be disobeyed: but there is a variety of orders issued *on præcipe*, or, as they are styled, "orders of course," such as an order to produce; and where such an order is disobeyed, an attachment could formerly be obtained only by first obtaining an order from the Court directing the performance of the act required, called an order *nisi*, and, on this being disobeyed, a further order was obtained called an order *absolute*. This order *nisi* has been abolished, and Order 295 provides that "in lieu of an order *nisi*, notice is to be given of the motion for an order absolute," and Order 296 that "Where the application for such an order is made, by reason of default in the production of books and papers in the Master's office, or in the office of the Clerks of Records and Writs, or in

1 *Danford* v. *Cameron*, 8 Hare, 329; *Reed* v. *Barton*, 4 W. R 793, V C. W.
2 Seton, 1212.
3 Seton, 1212.
4 Braithwaite's Pr. 167.
5 The words "with the Registrar" are struck out by Order 550

carrying in accounts, service of the notice of motion upon the solicitor of the party required to obey the same is to be sufficient service."

Under Order 295 a notice of motion for an order absolute must be served four clear days before its return by analogy to the former practice by order *nisi*.[1] It is not necessary to state in the notice of motion that a certificate of an officer of the Court will be read in support of the application, as such a certificate can be read though no such notice be given.[2] It was also held in this case that where an order is complied with after service of notice of motion to commit for disobedience of it, and before the motion comes on, an order to commit will not be granted, but the party will be required to pay to the applicant the costs of the motion within twenty-four hours after their amount has been settled. In moving under this order for non-production in the Master's office, the Master's certificate as to non-production must bear the latest possible date.[3] A party neglecting to produce accounts before the Master when so required, will be ordered to pay the costs occasioned by his contempt, although no commitment has taken place. Where an order to commit is sought for the non-execution of a conveyance, which has been directed to be kept at a solicitor's office for execution, it must be shown that the conveyance was accessible for execution in such office.[4] The Court will not order a commitment for disobeying a decree where the disobedience is, in effect, the non-payment of money.[5] Service of motion to commit on the solicitor of the party charged with contempt for non-production of documents in the Master's office is good service.[6] An application to commit a witness for contempt in refusing to sign depositions made by him will not be granted *ex parte*. Notice should be served on the witness.[7] Four days notice must be given of a motion to commit.[8] The notice of motion to take an affidavit on production off the files, and to commit for contempt, should be served on the defendant's solicitor, and not on the defendant

1 *Kelly* v. *Smith*; *Gamble* v. *Ellis*,; *Connor* v. *Spragge*; 1 Cham. R. 364; and *Gray* v. *Hatch*, 2 Cham. R. 12.
2 *Malloch* v. *Plunkett*, 1 Cham. R. 381.
3 *Somerville* v. *Joyce*, 1 Cham. R. 202.
4 *Bell* v. *Miller*, 1 Cham. R. 370.
5 *Male* v. *Bouchier*, 1 Cham. R. 359; S. C. 2 Cham. R. 254.
6 *Gourlay* v. *Riddell*, 2 Cham. R. 158.
7 *Blain* v. *Terryberry*, 1 Cham. R 255.
8 *Gray* v. *Hatch*, 2 Cham. R. 12.

personally. Motions for orders to commit for non-production are properly made in Chambers. A party parting with papers after service on him of an order to produce, was ordered to produce them, to file a better affidavit, and to pay costs.[1] The Court will not detain a person in gaol merely for the non-payment of money; but in order to punish any one who has been guilty of a contempt of Court, it may imprison him for a stated period, allowing him to be discharged if he pay the costs of his contempt before the expiration of such period. The Court will entertain applications affecting the liberty of the subject during vacation. Poverty is no excuse for delay in making an application to the Court, as in such case the party can apply *in forma pauperis*.[2] A party who was in contempt to an attachment for not bringing accounts into the Master's office for the purpose of a reference, afterwards filed the same with the Master, but neglected to pay the opposite party the costs of the proceedings to put him into contempt, and a motion was now made *ex parte* for an order to remove the accounts so brought in from the files in the Master's office, in order that the party might be proceeded against for the contempt,—the order was granted.[4] In proceedings against a corporation to enforce obedience to a decree or order, it is not necessary to sue out a writ of *distringas;* the proper mode of proceeding is by Orders *nisi* and absolute for a sequestration.[5] This decision was made before Orders *nisi* were abolished. Notice would now be given under Order 295. A party neglecting to produce accounts before the Master when so required, will be ordered to pay the costs occasioned by his contempt, although no commitment has taken place.[6] The Court will not grant an Order *nisi* against a person not a party to the suit; where an Order against such person is required, the proper practice to obtain it is by notice of motion or petition.[7] It is improper to have recourse to an attachment when the object sought can be obtained without such process. Where, therefore, a party directed to execute a conveyance had come into town for the purpose of executing it, although after the period in which strictly it should have been done, and the plaintiff's solici-

1 *Ross* v. *Robertson*, 2 Cham. R. 66.
2 *Harris* v, *Myers*, 1 Cham. R. 229.
3 *Corbett* v. *Meyers*, 1 Cham. R. 26.
4 *Attorney-General* v. *Brantford*, 1 Cham. R. 26.
5 *Berrie* v. *Moore*, 1 Cham. R. 107.
6 *Harris* v. *Meyers*, 1 Cham. R. 262.
7 *Mason* v. *Seeney*, 2 Cham. R. 220.

tor, with a knowledge of these facts, issued an attachment, it was set aside with costs.[1] Where a party is in contempt for not bringing in accounts into the Master's office, it is a sufficient clearing of his contempt to bring in such accounts, and the sufficiency of them will not be looked into.[2] On moving to make an Order *nisi* for not delivering an abstract of title, absolute, it is necessary to show that it has not been delivered to either party named in the Order.[3] A motion was made *ex parte* for an attachment, where a receiver had been appointed to make certain affidavits within a limited time and had failed to do so. It was considered that notice must be given.[4] A married woman defendant living with her husband was ordered to bring certain accounts, as administratrix, into the Master's office, and having disobeyed the Order, an application to commit her for contempt was refused, the general rule being that the husband must answer for the wife's default, unless he shows some ground of exemption.[5] Where, on an application against parties who had been ordered to bring in accounts into a Master's office, for an Order *nisi*, on the ground that the accounts brought in were insufficient, it appeared that the insufficiency consisted in the items of the accounts being undated, the Order *nisi* was refused. In such a case, before applying for an Order *nisi*, a warrant should be obtained from the Master calling upon the parties to bring in better accounts.[6] Where an Order *nisi*[7] has been duly served to enforce the filing of accounts in the Master's office; and accounts are filed, but the Master certifies that they are insufficient; it is the practice to grant an order absolute *ex parte*. The practice is a harsh one, however, and, if asked, an opportunity will be given to show the sufficiency of the accounts.[7] A notice of motion for an order absolute for non-production in the Registrar's office, under Order 31, of 6th February, 1865, requires personal service by analogy to the former practice by Order *nisi*.[8] Four days' notice must be given of a motion to commit.[9] A motion to commit must be made on four days' notice. Where, therefore, an application for an order to put in a better

1 *Clancy* v. *Patterson*, 2 Cham. R. 217.
2 *Dick* v. *McNab*, 1 Cham R. 31.
3 *Morphy* v. *Feehan*, 2 Cham. R. 53
4 *Maughan* v. *Wilkes*, 1 Cham. R. 91.
5 *Merkley* v. *Casselman*, 1 Cham. R. 292.
6 In lieu of an order *nisi*, notice is now to be given for an Order absolute. See Order 295.
7 *Spencer* v. *Seeming*, 1 Cham. R. 186.
8 *Dickson* v. *Dickson*, 1 Cham. R. 366
9 *Gray* v, *Hatch*, 2 Cham. R. 12.

affidavit on production, or be committed, was made on two days' notice, the Secretary refused the motion.[1] A direction to do an act "forthwith" is a sufficient compliance with Orders 288 and 293. Where, under an order so endorsed, a party was attached for disobedience, the attachment was held to be regular and the parties only entitled to their discharge on compliance with it. Where the attorney of the parties directed to confess judgment at law had been arrested for disobedience of the order as well as the parties themselves, his arrest was held to be irregular and his discharge ordered.[2] When a party has been committed for not bringing in accounts, and it is shewn by certificate that the accounts have since been brought in, it cannot be urged on a motion for his discharge that the accounts are insufficient. Nor will the payment of costs be made a condition precedent to his discharge.[3] The practice as to motions to commit for non-production will be further considered in the chapter on "Production of Documents" in a subsequent part of this treatise.

The form of the writ of attachment is the same as that on *mesne process*; but the indorsement (which should strictly follow the language of the decree or order) recites so much of the mandatory part of the decree or order as directs performance of the act, and explains the purpose for which it is issued.[4]

The writ will be issued by the Record and Writ Clerk, upon his being satisfied by affidavit of the due service of the decree or order, and that it has not been obeyed. The writ is prepared, directed, made returnable, delivered, executed and returned, and the return enforced in the same manner as an attachment in *mesne process*.[5]

An attachment for non-performance of a decree or order is not a bailable process; and the person, if taken upon it, must be committed to, or detained in, prison, and not suffered to go at large. It seems that, formerly, where the sheriff, after arresting any person upon an attachment for not obeying a decree or order for payment of money, suffered him to go at large, the sheriff himself was ordered, upon motion, to pay the money;[6] and in *Solly* v.

1 *Broughal* v. *Hector*, 2 Cham. R. 434.
2 *Wallace* v. *Acre*; *Livingston* v. *Acre*, 2 Cham. R 392.
3 *Clark* v. *Clark*, 3 Cham. R. 67.
4 Braithwaite's Pr. 167.
5 *Ante*.
6 *Levett* v. *Letteney*, Beames on Costs, App. 235; cited 11 Ves. 170; see, however, *Thomas* v. *Hall*, 2 De G. & S. 264.

Greathead,[1] a similar order was made by Lord Eldon: who ordered the sheriff not only to pay the money for which the attachment was issued, but the costs of the contempt incurred by the party, and of the application. Under the present practice, the sheriff is only liable to the extent of the loss actually suffered by his neglect; and this loss is ascertained by the Court of Chancery, and not by a common law Court.[2] Where the sheriff improperly takes bail, the remedy against the disobedient person is an order of the Court for a messenger to arrest him, and bring him to the bar of the Court; the order is obtained on an *ex parte* motion.[3]

If there is any irregularity in the order, or the affidavit on which the attachment is issued, it will be set aside.[4]

If the sheriff finds the disobedient person, he must either send him to prison, or, if already in prison, lodge a detainer against him, and make his return to that effect; and the person prosecuting the decree or order may leave him there until he has cleared his contempt, by performing the act required of him, and paying the costs of the contempt.[5] In addition to this, the person prosecuting the decree or order, is, upon the sheriff's return that the disobedient person has been so taken or detained, entitled to a commission of sequestration against his estate and effects.[6] The writ of sequestration will be ordered to issue on motion[7] of course, supported by the production of the sheriff's return to the attachment.[8]

This Order, 289, provides that "In case the party shall be taken or detained in custody under the writ of attachment, without obeying the order, then upon the sheriff's return that the party has been so taken or detained, the party prosecuting the Order shall be entitled upon *præcipe*, to a commission of sequestration against the estate and effects of the disobedient party." And Order 290 that "If an attachment cannot be executed against the party refusing or neglecting to obey the Order by reason of his

1 Beames on Costs, App. 235; S. C. as *Anon.* 11 Ves. 170.
2 5 & 6 Vic. c 98, s. 31: but we have no Act similar: *Moore* v. *Moore*, 25 Beav. 8: 4 Jur. N. S. 250; *Sudgen* v. *Hull*, 28 Beav. 263; *ante*, p. 426; and see Chitty's Arch. 693, 795.
3 *Anon.*, Prec. in Cha. 331; *Cowdray* v. *Cross*, 24 Beav 445; *ante*, p. 426.
4 *Mackenzie* v. *Mackenzie*, 5 De G. & S. 338; *Re Reynolds*, 10 W. R. 709, V. C. S.
5 Braithwaite's Pr. 284.
6 Ord. 289.
7 Harr. by Newl. 138.
8 Braithwaite's Pr. 285. For form of order, see Seton, 1214.

being out of the jurisdiction of the Court, or of his having absconded, or that with due diligence he cannot be found, and the Court is satisfied by affidavit that such is the case, the party prosecuting the Order shall be entitled to an Order for a Commission of sequestration against the estate and effects of the disobedient party; and it shall not be necessary for that purpose to sue out an attachment." Order 291 provides that "If a party who is ordered to pay money, neglects to obey the Order according to the exigency thereof, the party prosecuting the Order may, at the expiration of the time limited for the performance thereof, apply in Chambers for a writ of sequestration against the defaulting party, and upon proof of due service of a notice of the motion, unless the Court thinks proper to dispense with such service, and upon proof, by affidavit, of such other matters, if any, as the Court requires, the Court may order a writ of sequestration to issue."

As a general rule, a sequestratisn will not be ordered if there has been any irregularity in the attachment; but where the attachment had been issued into a wrong county, and the defendant was abroad, the Court ordered the writ of sequestration to issue, without a fresh attachment.

The person against whom a sequestration has issued may, by his conduct, waive his right to object to it, on the ground of irregularity.[1]

The process of sequestration on final process is a writ or commission directed to certain persons nominated by the person prosecuting the decree or order, empowering them to enter upon the real estate of the disobedient person, and to receive, sequestrate, and take the rents and profits thereof, and also his personal estate, and keep the same under sequestration in their hands until he shall have performed the act required, and cleared his contempt.[2]

Sequestrations are stated to have been first introduced in Sir Nicholas Bacon's time, and were then but sparingly used in process, and after a decree to sequester the thing in demand only.[3] It is said that the first instance of a sequestration after a decree

1 *Const* v. *Barr*, 2 Russ. 161, 168.
2 See Hinde, 138.
3 *Earl of Kildare* v. *Eustace*, 1 Vern. 421; 3 Bla. Com. 444.

was in *Sir Thomas Read's* case, in Lord Coventry's time;[1] another was issued in *Lake* v. *Meares*,[2] 11 Jac., and in the case of *Hide* v. *Petit*, in 1666:[3] which was affirmed in part;[4] the same process seems to have been adopted by the Court of Exchequer in *Guavus* v. *Fontaine*, 1687,[5] and in a case of *Witham* v. *Bland*,[6] in Lord Shaftesbury's time.[7]

There appear, however, to have been great struggles between the Courts of Common Law and Courts of Equity before this process was established: the former holding that a Court of Conscience could only give remedy *in personam* and not *in rem*, and that sequestrators were trespassers, against whom an action at Law would lie;[8] and to such extent does the objection of the Courts of Law to this process appear to have been carried, that, according to a case cited by Lord Nottingham, in *Colston* v. *Gardiner*,[9] a question was entertained upon an indictment for murder, where one was killed for laying on a sequestration, whether the homicide was justifiable or not.[10] But the process has become, by long use and acquiescence, the legal and ordinary process of the Court.[11]

A sequestration is usually directed to four sequestrators; and care ought to be taken that the persons named are able to answer for what shall come to their hands, in case they should be called upon to account.[12] The writ is to a great extent a recital of the order for the sequestration; the form must, therefore, be varied to meet the circumstances of each particular case.[13]

This is the English practice, but ours is different. Our Order, 292, provides that "Commissions of sequestration are to be directed to the sheriff, unless otherwise ordered."

A writ of sequestration cannot properly be issued on *præcipe*. Before such writs can be regularly issued, the order for the pay-

1 North's life of L. K. Guilford, vol. 2, p. 73.
2 Tothill, 175.
3 1 Cha. Ca. 91, 93: Freeman, 125, 168; *Beddingfield* v. *Zouch*, *ib.* 168.
4 See 3 Swanst. 295, n. (*c.*)
5 See *Ibid.* 296, n.; 297, n. (*a.*)
6 Cited 2 Ch. Ca 46.
7 Hinde, 128
8 *Brograve* v. *Watts*, Cro. Eliz 651.
9 2 Ch. Ca 44; 3 Swanst. 279, n.
10 Gilb. For. Rom. 78; Hinde, 128.
11 Hinde, 128.
12 Harr. by Newl. 143. It is not essential that the commissioners should be professional persons; Braithwaite's Pr. 240.
13 Braithwaite's Pr 240.

ment of the money must be served, and an affidavit of such service, and of the non-payment filed. A writ so issued on *præcipe* was set aside, but without costs.[1]

A commission of sequestration is prepared by the solicitor of the party prosecuting the contempt; it must be indorsed with the name and usual place of business of such solicitor and of his agent, if any, or with the name and place of residence of the party prosecuting the contempt, where he acts in person, and, in either case, with the address for service, if any.[2]

The return to a writ of sequestration is indorsed on the commission; but it is not the practice to file it.[3]

The person prosecuting the decree or order must, if he wishes to have another sequestration, or any further remedy, after the return of *nulla bona* apply specially to the Court.[4]

When a sequestration is to be executed, it should be delivered to the sequestrators, or sheriff, by the solicitor, with proper instructions for carrying it into effect.[5]

The sequestrators, under a sequestration, may take all the goods and chattels in the possession of the disobedient person, or which they can come at without suit or action. With respect to *choses in action* in the hands of a third person, it seems doubtful whether they can be taken under a sequestration, without the consent of the party in whose hands they are.[6] The result of the cases appears to be, that where a *chose in action* is in the hands of a third person, who is willing to abide by the order of the Court, or who admits it to belong to the party against whom the sequestration has issued, the Court will consider it liable to the sequestration, and will order it to be paid into Court. The difficulty with regard to the effect of a sequestration upon a *chose in action* arises, where the individual, in whose hands it is, disputes either the amount, or the title of the party whose property is sequestered, as to the manner in which the sequestration is to be made available

1 *Fisken* v. *Wride*, 2 Cham. R. 212.
2 Ord. 40.
3 *Goldsmith* v. *Goldsmith*, 5 Hare, 123, 129: 10 Jur 561: Braithwaite's Pr. 291.
4 Braithwaite's Pr. 291; and see *Wright* v. *Wellesley*, 1 Smith's Pr. 201; *Knott* v. *Coitee*, 19 Beav. 470.
5 1 Turn. & Ven. 122.
6 *Wilson* v. *Metcalf*, 1 Beav. 263, 270; *Francklyn* v. *Calhoun*, 3 Swanst. 276, 311: *Lord Pelham* v. *Duchess of Newcastle*, *ib.* 290, n.: *Johnson* v. *Chippendall*, 2 Sim. 55, 64.

to reach such property. That the Court cannot, in such a case, make an order upon an unwilling party, is clear from the cases above referred to.[1]

In a case in our own Court the following points were decided: 1st, that a chose in action is not a subject of sequestration unless a third party, the debtor, consents to it; 2nd, that a creditor has a right, under a writ of sequestration, to compel payment by a third party of a debt which he owes to the defendant against whose estate the writ issues; 3rd, that a chose in action is not so bound, either by the issue of a sequestration, or by its delivery to the sheriff, as to prevent the third party paying his creditor in good faith, and so discharging himself or preventing the creditor in good faith transferring the security, and so avoiding the effect of the sequestration; 4th, that writs of execution only bind moneys, choses in action, or securities for money, from the time of seizure by the sheriff, and not from the time either of the issue of the writ or the delivery thereof to the sheriff.[2] Rent to accrue due is not a chose in action, and a tenant in respect to it, may attorn; but where the tenant, having been notified by the sequestrator, promised to pay him the rent in future, and afterwards, on being indemnified, paid it to a party claiming it as assignee, he was ordered to pay it over again to the sequestrator.[3] Where a writ of *fi. fa.*, or sequestration is placed in the sheriff's hands, it forms a lien on the defendant's equitable estate from the date of such delivery, and not merely from the date of the plaintiff's filing a bill to enforce the same.[4] The claim of a debtor to compensation for misrepresentations of parties in obtaining a patent of land, is not liable to be seized, attached or sequestered, before the amount is determined by, decree or otherwise.[5]

A pension from the Crown may be sequestered;[6] but the salary of an equerry,[7] or a pension for past services,[8] or the half-pay of an officer in the army or navy,[9] cannot be either assigned or

1 See Seton, 1216; *Simmonds* v. *Lord Kinnaird*, 4 Ves. 735.
2 *McDowell* v. *McDowell*, 10 U. C. L. J. 48; 1 Cham. R. 140, S. C.
3 *Harris* v. *Meyers*, 2 Cham. R. 121.
4 *Moore* v. *Clark*, 11 Grant, 497.
5 *Roberts* v. *Corporation of Toronto*, 16 Grant, 236.
6 *M'Carthy* v. *Goold*, 1 Ball & B. 387.
7 *Fenton* v. *Lowther*, 1 Cox, 315.
8 *Lloyd* v. *Cheetham*, 3 Giff. 171; 7 Jur. N. S. 1272; but see *Carew* v. *Cooper*, 10 Jur. N. S. 11; 12 W. R. 198, V. C. S.; 10 Jur. N. S. 429; 12 W. R. 586, 767, L. C.
9 *M'Carthy* v. *Goold*, *ubi sup.*; *Stone* v. *Lidderdale*, 2 Anst. 533, 539; *Collyer* v. *Fallon*, T. & R. 459, 467.

attached. This distinction arises from principles of public policy: which consider half-pay as intended to provide decent maintenance for experienced officers, both as a reward for their past services, and to enable them to preserve such a situation that they may be always ready to return into actual service.[1]

The question, whether the commissioners, under a writ of sequestration upon *mesne process*, can seize the books and papers of a corporation, was discussed in *Lowten* v. *The Mayor of Colchester*;[2] but was not decided: although Lord Eldon expressed strong doubts as to the existence of such a power.

It appears that Lord Eldon was of opinion that sequestrators have the power of breaking open doors in the execution of their duty;[3] and in *Lord Pelham* v. *The Duchess of Newcastle*,[4] the sequestrators were allowed to open boxes and rooms that were locked, if the keys were denied them, and to schedule the goods in them; but to remove nothing from the house without the special order of the Court.

The latter part of the order in the above case, which prohibits the sequestrators from removing anything from the house, is consistent with the ordinary practice of the Court: which, considering goods taken upon sequestrations on *mesne process* as in the nature of a pledge to answer the contempt, merely gives the sequestrators power to take the property from the defendant, and to prevent his enjoyment of it till he has cleared his contempt. And it seems that, if the sequestrators take upon themselves to remove the defendant's property, they will be liable to an attachment.[5]

If, under a sequestration, a sale is wanted, application should be made to the Court for permission to sell; but an order for the sale of goods taken upon *mesne proceess*, will not be made: except for the purpose of raising money to pay the expenses.[6] In the case, however, of sequestrations to enforce decrees or orders, the Court will order the sale of goods: such as rents paid in kind, or the

1 Per L. C. B. Macdonald, 2 Anst. 541; and see *Spooner* v. *Payne*, 1 De G. M. & G. 388, 388; 16 Jur. 367.
2 2 Mer. 395, 397.
3 See 2 Mer. 397.
4 3 Swanst. 290, n.
5 *Desbrow* v. *Crommie*, Bunb. 272; *Hales* v. *Shaftoe*, 1 Ves. J. 86.
6 *Goldsmith* v. *Goldsmith*, 5 Hare, 123, 129; 10 Jur. 561; *Wilcocks* v. *Wilcocks*, Amb. 421; see however, *Shaw* v. *Wright*, 3 Ves. 22, 24.

natural produce of a farm,[1] or household goods and furniture,[2] or the reversionary interest in a fund in Court, standing to the credit of another cause.[3]

It should be here explained that in England a defendant refusing to answer a bill may be attached, and is also liable to have his property sequestered. When a writ of sequestration issues in such a case, it is called *mesne* process: but we have no such practice, and with us a sequestration is resorted to only in the case of disobedience to an order of the Court. Where a receiver of partnership property has been appointed, and certain chattels have been seized under a sequestration against the defendants for contempt of the injunction, and the chattels so seized were alleged to be the property of the defendant and his co-partner, but it appeared that third persons claimed an interest therein, the plaintiff having moved to sell this property, a reference was directed in such motion (on which the claimant had appeared) to inquire as to their interest, and any further order on the motion was reserved, the parties to the motion electing to have a reference instead of issues to try the questions in dispute.[4] Where it is necessary to proceed to a sale of property seized by sequestrators, notice of application for an order for the purpose must be given.[5]

The Court will not sell terms of years, or leasehold estates, or any property which passes by title and not by delivery, although it will direct the profits to be applied: because sequestrators can give no warranty for title, the property not being vested in them.[6]

The application for a sale may be made by motion, upon notice.[7]

Besides the effect which a sequestration has upon the goods and chattels of the disobedient person, the writ authorises the sequestrators to enter upon all his messuages, lands, tenements, and real estate, and to collect, take and get into their hands the rents and

1 *Shaw* v. *Wright*, *ubi sup.*
2 *Wharam* v. *Broughton*, 1 Ves. S. 180. 184; Belt's Sup. 108; *Mitchell* v. *Draper*, 9 Ves. 208; *Cavil* v. *Smith*, 3 Bro. C. C. 362.
3 *Cowper* v. *Taylor*, 16 Sim. 314; *Knight* v. *Knight*, 4 W. R. 771, V. C. K. For form of order for sale, see Seton, 1218.
4 *Prentiss* v. *Brennan*, *Re Brennan*, 2 Grant, 274.
5 *Forbes* v. *Conolly*, 1 Cham. R. 6.
6 *Sutton* v. *Stone*, 1 Dick. 107: *Shaw* v. *Wright*, *ubi sup.* *Mitchell* v. *Draper*, *ubi sup.*

profits thereof. Under this authority, the sequestrators may enter into the possession of such parts of the real estate as are in the occupation of the disobedient person, whether freehold or copyhold;[1] and may also enter into the receipt of the rents and profits of such estates as are in the occupation of tenants.

The sequestrators, upon entering upon the real estate of the disobedient person, should serve the tenants in possession with a notice in writing to attorn and pay their arrears and growing rents to them: which may be done, either by serving the tenant personally 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 of his family, together with a copy of the sequestration, and showing the original writ to the person served.[2]

If the tenants refuse to attorn, the proper course appears to be to obtain from the sequestrators a return of the names of the tenants, and of their refusal to attorn,[3] and then to move, upon notice to the tenants, that they may be ordered to attorn and pay their rents to the sequestrators.[4] This order should be made upon the tenants by name, and not upon the tenants generally.[5]

The tenant of a party against whom a writ of sequestration has issued will be ordered to pay the Commissioner rent shewn to be due, and also to attorn and pay the accruing rent.[6] Sequestrators can lease for any period during which the rents will be less in the aggregate than the amount for which sequestration issued.[7] Where a sequestration has issued to compel payment under a decree, and there appeared to have been considerable delay in enforcing the payment of rents, during which period the defendant had died, and one of his heirs had received sundry sums for rent, a motion that such rents be paid over again to the sequestrators by the tenants was refused, and the tenants ordered to attorn as to future rents only.[8]

1 *Colston* v *Gardner*,, 2 Ch. Ca. 43, 46; 3 Swanst. 279, n. In *The Marquis of Cœrmarthen* v. *Hawson*, the Court of Exchequer appears to have doubted whether they could revive a sequestration against the heir to copyhold lands, on account of the difficulty of compelling the lord to admit the sequestrators, and also by reason of the lord's right to the fine; 3 Swanst. 294, n.; see *ib.* 298.

2 See *Shaw* v. *Wright*, Reg. Lib. 1795, B 652; 3 Ves. 22, 24.

3 The return need not be filed: Seton, 1219.

4 *Rowley* v. *Ridley*, 2 Dick. 622, 631, cited 4 Ves. 738; 3 Swanst 306. n. (*b*); *Anon.*, 2 Ch. Ca. 163; *Goldsmith* v. *Goldsmith*, 5 Hare, 123, 127, 129: 10 Jur. 561. For form of order, see Seton, 1219.

5 *Anon.*, 2 Cha. Ca 163.

6 *Jackson* v. *Jackson*, 1 Cham. R. 115.

7 *Harris* v. *Meyers*, 3 Cham. R. 89.

8 *Harris* v. *Meyers*, 3 Cham. R. 107.

We have seen before, that sequestrators may take possession of lands in the disobedient person's own occupation. It seems, also, that where the sequestration is for the non-performance of a decree, the Court will, upon motion with notice, give them authority to set and let the property;[1] but no such authority will be given where the sequestration is upon *mesne process*.[2]

A fraudulent alienation of property will not prevent the effect of a sequestration;[3] and where, upon a motion for a writ of assistance to enforce an injunction to put sequestrators into possession of the house and goods of the defendant, the defendant alleged that he had assigned the house and goods to *A. B.* for a valuable consideration, it was ordered that *A. B.* should be examined *pro interesse suo*, unless he showed cause to the contrary at the next seal.[4]

Sequestrators are accountable for all that they receive, and are bound from time to time to make returns to the Court of what comes to their hands under the sequestration;[5] and they may be ordered, on motion with notice, to pass their accounts and pay over their balances.[6] Where the sequestration is for non-performance of a decree for payment of money, the proceeds are applicable to the payment of the demand;[7] but the sequestrators ought not so to apply them of their own authority. They ought to bring the money arising from the rents or otherwise into Court: which they may obtain leave to do by petition or motion; and the person who is desirous of having the sequestered property applied under the decree, in satisfaction of his demand, must apply to the Court for that purpose.[8]

It appears that the Court will direct a writ of assistance to issue, for the purpose of putting sequestrators into possession.[9]

It is a contempt of the Court to disturb sequestrators, in their possession of property taken under the sequestration;[10] and where

1 *Neale* v. *Bealing*, 3 Swanst. 304, n. (*c*), *Harvey* v. *Harvey*, 3 Cha. Rep. 87; *Dunkley* v. *Scribnor*, 2 Mad. 443, 446.
2 *Ray* v. ——, 3 Swanst 306, n.
3 *Colston* v. *Gardner*, 2 Cha. Ca. 43, 46: S. C. *nom. Coulston* v. *Gardiner*, 3 Swanst. 279, n.; *Witham* v. *Bland*, *ib.* 277, n.: *Bird* v. *Littlehales*, *ib.* 299, n.; *Hamblyn* v. *Ley*, *ib.* 301, n.; *Blenkinsopp* v. *Blenkinsopp*, 12 Beav. 568, 583; 14 Jur. 777: 1 De G. M. & G. 495, 499: 16 Jur. 787.
4 *Bird* v. *Littlehales*, *ubi sup.*
5 *Desbrow* v. *Crommie*, Bunb. 272, *Howell* v. *Lord Coningsby*, 1 Fowl. Ex. Pr. 161.
6 Hinde, 138. For forms of order, see Seton, 1219.
7 *Davis* v. *Davis*, 2 Atk. 24.
8 1 Newl. 689.
9 See Seton, 1216; and for form of order, see *ib.* 1229, No. 2.
10 *Angel* v. *Smith*, 9 Ves. 336; *Lord Pelham* v. *Duchess of Newcastle*, 3 Swanst. 289, n.

sequestrators have been forcibly dispossessed, the Court will compel restitution to them of the property of which they were so dispossessed.[1]

Where lands or the profits of lands are the subject of a suit, and the suit has been duly registered as a *lis pendens*, the title is bound from the filing of the bill, and every purchaser *pendente lite* comes in at his peril: even though he has paid a *bona fide* consideration;[2] but in other cases, unless the decree or order operates as a judgment, the land is not liable till sequestration;[3] and so, where an account of profits is decreed against a trustee of land, by way of execution of a trust, there, the person only is charged for breach of trust in not applying the profits, and the land is not charged but while in the hands of the trustee, nor then, neither, till sequestration issued: so that purchasers before sequestration are free.[4] It is to be observed, however, that even where lands are collaterally charged by a sequestration, a voluntary conveyance, executed before the sequestration issued for the purpose of defeating it, will not have that effect;[5] and that, in *Witham* v. *Bland*,[6] where a personal decree had been made against the father, upon which a sequestration issued, Lord Nottingham revived the sequestration against the son, who was also the heir: because he did not claim as heir, but under a voluntary conveyance, executed before the sequestration, to defeat the decree.[7] A sequestration binds from the time of awarding it, and not from the time of executing it, or of its being laid on by the Commissioners.[8]

When any person claims to be entitled to an estate or other property sequestered, whether by mortgage or judgment, lease or otherwise, or has a title paramount to the sequestration, he should apply to the Court to direct an inquiry whether the applicant has any and what interest in the property sequestered.[9] This inquiry is called an examination *pro interesse suo;* and an order for such an

1 *Lord Pelham* v. *Duchess of Newcastle*, *ubi sup.*
2 *Crofts* v. *Oldfield*, 3 Swanst. 278, n.; *Bird* v. *Littlehales*, *ib.* 299, n.; *Self* v. *Madox*, 1 Vern. 459.
3 *Bird* v. *Littlehales*, *ubi sup.*; *Hamblyn* v. *Ley*, 3 Swanst. 301, n.: 1 Dick. 94; *Coulston* v. *Gardiner*, 3 Swanst. 279, n.
4 *Crofts* v. *Oldfield*, 3 Swanst. 278, n.
5 *Coulston* v. *Gardiner*, 3 Swanst. 279, n.; *Bird* v. *Littlehales*, *ib.* 299, n.; *Hamblyn* v. *Ley*, *ib.* 301, n: and see *Langley* v. *Bredon*, cited *ib.* 284, n.
6 3 Swanst. 276, n.
7 See *Johnson* v. *Chippendale* 2 Sim. 55, 64, where a release by a grantee of an annuity to the grantor, after sequestration, was held to be good.
8 *Burdett* v. *Rockley*, 1 Vern. 58.
9 The mode of proceeding is the same, where the property is in the possession of a receiver: *Anon.* 6 Ves. 287; *Angel* v. *Smith*, 9 Ves. 336; *Brooks* v. *Greathead*, 1 J. & W. 178; *Russell* v. *The East Anglian Railway Company*, 3 M'N. & G. 104, 113, 117, 125.

examination may be obtained by a party interested, as well where the property consists of goods and chattels or personalty, as where it is real estate.[1] Thus, in *Martin* v. *Willis*,[2] a person claiming title to goods seized under a sequestration, obtained an order for an examination *pro interesse suo*, and in the meantime that the goods might be restored to him on his giving security.

An order for the inquiry will not be granted till after the sequestrators have made a return: because, till then, it cannot appear to the Court what is sequestered.[3] The application for the order is usually made by motion, supported by affidavit showing the facts under which the claim arises.[4]

It has been doubted whether a plaintiff can compel a claimant to be examined *pro interesse suo*;[5] but in *Bird* v. *Littlehales*,[6] an order was made for a person to be examined *pro interesse suo*, on the application of the plaintiff; and similar orders were pronounced in *Hamblyn* v. *Lee*[7] and in *Johnes* v. *Claughton*.[8] In *Bird* v. *Littlehales* the order was made in consequence of the defendant's counsel having stated, in answer to an application for a writ of assistance, that the defendant had assigned the property for a valuable consideration to *A. B.*; whereupon the Court directed that *A. B.* should be examined *pro interesse suo*, unless he showed cause to the contrary.[9]

It will be convenient here to notice our orders and decisions on the practice of examinations *pro interesse suo*. Our Order 6 abolishes "applications to be examined *pro interesse suo*;" and Order 398 provides that "Any party who might, under the former practice, have moved to be examined *pro interesse suo*, may apply to the Court, upon motion, for such relief as he may think himself entitled to." Order 399, that "Notice of motion is to be served upon the defendant or defendants at least three weeks before the

1 *Lord Pelham* v. *The Duchess of Newcastle*, 3 Swanst. 290, n. See our Orders 398 to 401, and Order 6, as to examinations *pro interesse suo*.
2 In Scacc. 10 May, 1745: 1 Fowl. Ex. Pr. 160, where it is stated that this order was directed by the Court to be made, similar to that in *Mackenzie* v *The Marquis of Powis*, 6 July, 1739, which was settled by the Court.
3 *Lord Pelham* v *The Duchess of Newcastle*, 3 Swanst. 289, n.
4 *Hunt* v *Priest*, 2 Dick. 540. The order is sometimes made at Chambers, on summons. For form of order, see Seton, 1220, No. 1.
5 *Kaye* v. *Cunningham*, 5 Mad. 406.
6 3 Swanst. 299, 300, n.
7 Seton, 1220; 1 Dick. 94; 3 Swanst. 302, n.
7 Jac. 573.
9 *Bird* v. *Littlehales*, Reg. Lib. 1742, A. 187.

day fixed for the application;" Order 400 provides that "Within ten days from the service of the notice the affidavits in answer must be filed; within six days after the expiration of such ten days, the affidavits in reply are to be filed, and, except so far as these affidavits are in reply, they are not to be regarded by the Court, unless upon the hearing of the motion the Court gives leave to answer them, and in that case the costs of such affidavits, and of the further affidavits consequent upon them, are to be paid by the party moving, unless the Court orders otherwise. No further evidence on either side is to be used upon the hearing of the motion, without the leave of the Court;" and Order 401, that "On hearing the motion, the Court may, instead of either granting or refusing the motion, give such directions for the examination of parties or witnesses, or for the making of further enquiries, or for the institution of any suit or action, as the circumstances of the case may require."

The right to be examined *pro interesse suo* is not intended for the claimant's benefit exclusively, but rather perhaps for the benefit of the party in whose interest the goods claimed are seized. It is a right, however, which will be granted at the instance of the claimant.[1] Under a sequestration against the defendant, property on his land had been seized, to which a third party laid claim, and which the bailiff released to the claimant upon his own undertaking. Upon enquiry by the plaintiff into the circumstances, he released the property, but not until after notice given by the claimant of a motion in the nature of one for an examination *pro interesse suo.* It was held that the claimant, by leaving his property in the custody of the defendant, had brought the difficulty on himself, and was therefore not entitled to the costs of the application.[2]

When sequestrators or a receiver are in possession of property belonging to a party, and a person claiming that property adversely to the party brings an action at Law against the sequestrators or receiver, for the purpose of enforcing his claim, the Court will interfere by injunction to prevent the person claiming from proceeding with the action; for, although the Court will sometimes permit a person to proceed at Law against the sequestrators or receiver,

1 *Prentiss* v. *Brennan*, 2 Grant, 582.
2 *Harvey* v. *Taylor*, 1 Cham. R. 353.

where a matter is in fit state for the right to be ascertained by a trial at Law,[1] such a proceeding cannot be adopted, unless the permission of the Court has been first obtained. This was settled in *Angel* v. *Smith*,[2] where the rule was laid down, both with respect to receivers and sequestrators, that their possession is not to be disturbed without leave.[3]

Sometimes, where a person claiming a legal right to property sequestered has made an application for an inquiry as to his interest, the Court, finding his right to be clear and undisputed, has at once made an order in his favour, without an inquiry.[4] The Court has, also, ordered the possession of the property claimed to be delivered up to the claimant, upon his entering into good and sufficient security to restore it, in case the decision upon his claim should be against him.[5] In the case of *Empringham* v. *Short*,[6] where the sequestrator took possession of property which was claimed by a third person, Sir James Wigram, V. C., had occasion to investigate the practice of the Court in trying the rights of parties under sequestrations; and he came to the conclusion, that it is perfectly clear that, in such cases the Court exercises a discretion: observing, that "where the case has been considered to admit of no doubt, the Court has determined it without further inquiry. In some cases, the Court has ordered the parties to bring an ejectment; in other cases, where the sequestrator has found a person in possession of the property, the Court has ordered a writ of assistance to issue, unless the party submitted to come in and be examined *pro interesse suo*. The Court sees what is necessary to be done, in order to try a question of right, and it then puts it in the way of trial."[7]

An infant applies for the inquiry by his guardian.[8]

If it appears that the claimant has a plain title to the property, the sequestration will be discharged against him: with or without costs, as the Court may determine upon the circumstances of the case.[9]

1 *Attorney-General* v. *Mayor of Coventry*, 1 P. Wms. 308; *Anon.* 6 Ves. 288; *Angel* v. *Smith*, 9 Ves. 335.
2 *Ubi sup.*
3 *Johnes* v. *Claughton*, Jac. 573; *Brooks* v. *Greathead*, 1 J. & W. 178; *Russell* v. *East Anglian Railway Company*, 3 M'N. & G. 104, 117; *Crow* v. *Wood*, 13 Beav. 271.
4 *Dixon* v. *Smith*, 1 Swanst. 457, 459.
5 *Wharam* v. *Broughton*, 1 Ves. S. 180, 181.
6 3 Hare, 461.
7 3 Hare, 470.
8 *Lord Pelham* v. *Duchess of Newcastle*, 3 Swanst. 290, n.
9 Gilb. For. Rom. 81; *Tatham* v. *Parker*, 1 Sm. & G. 506: 1 Jur. N. S. 992.

Where sequestrators are in the possession of lands or tenements in question in the cause, the appointment of a receiver of the rents and profits of those lands will have the effect of discharging the sequestration.[1]

Where the person against whom sequestration on *mesne process* has issued dies, the process, being personal, not only abates but falls altogether, and cannot be revived; but it is otherwise where it has issued for non-performance of a decree:[2] for there, the sequestration is merely abated with the suit, and, being in the nature of an execution, it may be revived against the personal representative of the person.[3] If the decree, in such case, is for a mere personal demand, the sequestration can only be revived against the personal representative, and not against the heir:[4] unless the decree is for the performance of a covenant in which the heir is bound, or for the land itself. Where, however, the land descends to an heir in tail,[5] or to a purchaser; the land, of course, ceases to be bound, unless it has been entailed or conveyed away, subsequently to the decree, or with the view of avoiding the effect of the sequestration.

A sequestration against the lands of a married man will not bind his wife's dower after his death, even though the marriage took place after the sequestration issued;[6] and where a sequestration was awarded to sequester a manor and other real estate belonging to a defendant, to satisfy a decree, out of which manor an annuity was secured to the defendant's wife, which, together with the manor, had been sequestered during the husband's life: upon the application of the wife, after the defendant's death, the sequestration was discharged, as far as respected the annuity.[7]

A sequestration will not go or be revived against an heir on the death of the ancestor, unless the suit be revived;[8] and it is to be noticed that, in such case, the suit must be revived against the heir; and that a revivor against the personal representative alone, will

1 *Shaw* v. *Wright*, 3 Ves. 22, 24.
2 *Hawkins* v. *Crook*, 3 Atk. 594: *University College* v. *Foxcroft*, 1 Vern. 166; *Ramshaw* v. *Greenhill*, cited 1 Ves. S. 183.
3 *Burdett* v. *Rockley*, 1 Vern. 58; *Wharam* v. *Broughton*, 1 Ves. S. 180, 182, 183; *White* v. *Hayward*, 2 Ves. S. 461, 464; *Hyde* v. *Greenhill*, 1 Dick. 106: and see *Tatham* v. *Parker*, 1 Sm. & G. 506; 1 Jnr. N. S. 992.
4 *Burdett* v. *Rockley*, 1 Vern. 58; *University College* v. *Foxcroft*. *ib.* 166; *Wharam* v. *Broughton*, 1 Ves. S 180: *Hyde* v. *Greenhill*, *ubi sup.*; *Marquis of Caermarthen* v. *Hawson*, 3 Swanst. 294, 298, n.
5 *Earl of Athol* v. *Earl of Derby*, 1 Cha. Ca. 220.
6 *Burdett* v. *Rockley*, 1 Vern. 118.
7 *Proctor* v. *Reynol*, 1 Cha. Rep. 247; *Langley* v. *Breydon*, cited 2 Cha. Ca. 46.
8 *Derby* v. *Ancram*, cited 2 Cha. Ca. 46.

not warrant the revivor of the sequestration against the heir.[1] Where a sequestration to compel the performance of a decree had been issued against a person who subsequently died, it was held that the writ could be revived against his heirs. *Semble*, that sequestration issued on *mesne* process cannot be revived.[2]

The proper course, where there is an abatement of the suit by the death of the plaintiff, appears to be, for the person whose property is sequestered, to move that the representative of the plaintiff may revive the suit within a given time, or else that the sequestration may be removed.[3] It seems, however, that where sequestration is upon real estate, and the person in default dies, but the plaintiff does not revive the suit against the real representative, the person claiming the land may proceed by ejectment to recover possession of it, and that the Court will not restrain him.[4] Where, however, a sequestration is in force, or has been revived, a party claiming an interest in the property sequestered ought not to proceed by ejectment or other action to recover it, but should apply to the Court for an inquiry as to his interest.

Where a sequestrator abuses his power, the Court will, upon representation of the facts, make an order that he show cause why he should not be committed and pay the costs to the party complaining.[5]

The costs of a sequestration are not liquidated, but are costs to be taxed. The fees payable to the commissioners are regulated by the nature and value of the property.[6] Sometimes the sequestrators have been allowed a poundage, and sometimes, under circumstances of trouble and expense, a specific sum *in solido*.[7]

Our Order 297 provides that "Every person, not being a party in a cause, who has obtained an Order, or in whose favor an Order has been made, shall be entitled to enforce obedience to such Order by the same process as if he were a party to the cause; and every person not being a party in a cause, against whom obedience to an

1 See *Burdett* v. *Rockley*, 1 Vern. ed. Raithby, 58, n.
2 *Turley* v. *Meyers*, 3 Cham. R. 102.
3 See *White* v. *Hayward*, 2 Ves. S. 462, 464.
4 *Burdett* v. *Rockley*, *ubi sup.*; Reg. Lib. 1681, A. 671; 1682, A. 184.
5 *Lord Pelhem* v. *Lord Harley*, 3 Swanst. 291, n.
6 Braithwaite's Pr. 241.
7 1 Turn. & Ven. 125; *Wood* v. *Freeman*, 2 Atk. 542; and see *Hawkins* v. *Crook*, 3 Atk. 594.

Order of the Court may be enforced, shall be liable to the same process for enforcing obedience to the Order as if he were a party to the cause." And Order 294, that "It shall not be necessary to issue a writ of attachment or injunction upon an Order for delivery of possession, but the party prosecuting the Order, upon filing with the Clerk of Records and Writs an affidavit of service of the same, and of non-compliance therewith, shall be entitled without further Order to a *writ of assistance.*

It may here be mentioned that Order 464 provides that "In a suit for foreclosure or for redemption, the mortgagor or other person entitled to the Equity of redemption, being in possession of the premises foreclosed, may be ordered to deliver up possession of the same upon or after final Order of foreclosure, or for the dismissal of the bill, as the case may be."

The affidavit need only show that the order was not complied with within the time limited: it need not show an existing non-compliance at the time the application for the writ is made.[1] The copy of the decree or order served need not be endorsed with the notice required previously to the issue of an attachment; but the writ will be issued notwithstanding the copy of the decree or order was so endorsed.[2]

In preparing the writ, the language of the decree or order should be followed.[3]

The writ is lodged with the sheriff of the county, and is executed in the name of the sheriff. The Court will enjoin an action brought against a sheriff's officer, in respect of his acts under the writ: although damages are claimed against him for taking chattels not included in the order.[4]

Process of contempt for non-performance of a decree or order, has the same effect in preventing the party from being heard, as the like process for not appearing or answering; and the contempt may be cleared, waived, or discharged, in nearly the same manner.

1 *Webster* v. *Taylor*, 18 Jur. 869, V. C. W.
2 *Bower* v. *Cooper*, 2 Hare, 412; Braithwaite's Pr. 158; Seton, 1229.
3 Braithwaite's Pr. 158.
4 *Walker* v. *Micklethwaite*, 1 Dr. & S. 49.

In addition to the processes already mentioned of receiving moneys directed to be paid by an order of the Court, it is provided by the Arrest and Imprisonment Act (Con. Sta. U. C. C. 24, S. 19) that "For the purpose of enforcing payment of any money, or of any costs, charges or expenses payable by any decree or order of the Court of Chancery; or any rule or order of the Court of Queen's Bench, or Common Pleas, or any decree, order or rule of a County Court, the person to receive payment shall be entitled to Writs of *Fieri Facias*, and *Venditioni Exponas* respectively against the property of the person to pay, and shall also be entitled to attach and enforce payment of the debts of or accruing to the person to pay, in the same manner respectively and subject to the same rules, as nearly as may be, as in the case of a judgment at law in a civil action: and such Writs shall have the like effect as nearly as may be, and the Courts and Judges shall have the same powers and duties in respect to the same, and in respect to the proceedings under the same, and the parties and Sheriff respectively shall have the same rights and remedies in respect thereof, and the Writs shall be executed in the same manner and subject to the same conditions as nearly as may be, as in the case of like Writs in other cases; but, subject to such general orders and rules varying or otherwise affecting the practice in regard to the said matters, as the Courts respectively may from time to time make under their authority in that behalf."

It is irregular to take out a *fi. fa.* the instant costs have been taxed without allowing a reasonable time to the Solicitor whose client has to pay them, to communicate the result of the taxation. A retaining fee of $20 is not taxable.[1] A Sheriff, in his advertisement of sale of lands seized under a *fi. fa.* from this Court, had described them as the lands of the defendant, when they were those of the plaintiff, on an application or notice the return was allowed to be amended on payment of costs of the motion.[2] The Court will grant an order for the examination of the defendant for the purpose of ascertaining what debts are due the defendant under the Statute, with a view of garnishing such debts.[3] Where an application is made to compel a garnishee to pay over to the creditor debts due by

1 *Cullen* v. *Cullen*, 2 Cham. R. 94, citing *Perkins* v. *The National Assurance and Investment Association*, 2 H. & N. 71; *Cruickshank* v. *Moss*, 8 L. J. N. S. 439; *Henry* v. *Com. Bank*, 17 U. C. Q. B. 104; *Jones* v. *B. U. C.*, V. C. Mowat, 8 October, 1867.
2 *M'Cann* v. *Eastwood*, 2 Cham. R. 182.
3 *Bostwick* v. *Shortis*, 1 Cham. R. 69.

him to the debtor, which have been garnished, notice must be served on such garnishee.[1] An award for an amount together with costs having been made in favor of a party, the costs were taxed by consent, and the amount promised to be paid to the solicitor of the party ordered to receive such costs. A garnishee order was subsequently obtained by a third party, under which the amount awarded and the costs were paid over to such third party with notice, however, of the solicitors' lien for the costs; under these circumstances a motion made to stay proceedings to enforce payment of the costs under the award at the instance of the solicitor to whom they were payable was refused with costs.[2] A debt due to an administrator in his representative character cannot be attached to answer a debt due by the administrator in his private capacity.[3] A creditor applying for a garnishee order is not entitled to the costs of the application.[4]

It may be observed generally, that the object of the Statute just referred to was to render the practice in Chancery as to Writs of fi. fa. goods, fi. fa. lands, Venditioni Exponas in both cases, and as to garnishment as similar to that established in the Common Law Courts as possible. The Court has abstained from making any orders on these subjects, and the practitioner, therefore, will be guided by the Common Law practice, applying it, as near as may be, to the principles of this Court.

The Sheriff levying under a Writ of *fi. fa.* issued by the Court of Chancery, is not entitled to an injunction to restrain proceedings against him by strangers to the suit.[5] The Court will not hold a party who has been in contempt for not obeying an order, in gaol for non-payment of the costs occasioned by his contempt.[6]

Where part only of a debt directed to be paid by an order had been levied under a *fieri facias*, the Court refused to make an order for the payment of the balance; but directed an inquiry as to the amount due, and ordered payment thereof within ten days after the date of the Chief Clerk's certificate.[7]

1 *Re English*, 1 Cham. R. 197.
2 *M'Lean* v. *Beatty*, 1 Cham. R. 138.
3 *Bowman* v. *Bowman*, 1 Cham. R. 172.
4 *Evans* v. *Evans*, 1 Cham. R. 248.
5 *Rock* v. *Cook*, 2 De G. & Sma. 493; 12 Jur. 957, 2 Phil. 691
6 *Pherrill* v. *Pherrill*, 2 Cham. R. 444.
7 *Hipkins* v. *Hipkins*, 26 L. J. Ch. 512, V. C. S.

Officers and attendants upon the Court, suitors and witnesses, are to have privilege *eundo, redeundo, et morando,* for their necessary attendance; but not otherwise; and where any of them are arrested at such times of necessary attendance, it is a contempt of Court.[1] A solicitor who is proceeding to the Court, to attend to his professional business there pending, is privileged from arrest; and the question in such cases is, whether, at the time of his arrest, he was *bona fide* proceeding in a direct line to or from the Court[2] The solicitor is also privileged if he is on his way to attend an appointment at the offices of the Court.[3] If the first arrest is bad, all the detainers lodged under it are so.[4] The application to discharge must be made to that Court of which the proceeding is a contempt.[5]

Any one who uses violence or abusive language to a person serving the process or orders of the Court, or uses scandalous or contemptuous words against the Court or the process thereof, is liable to be committed upon motion, on notice to the person so offending.[6] It seems, that where the contempt is established by one witness only, an *ex parte* motion for an order *nisi* should be made in the first instance: in other cases, notice of motion should be given.[7]

1 Ord. of 1618, No. 86. See, as to barristers: *Anon.* 1 Y. & C. Ex. 331; as to solicitors: *Ex parte Ledwich*, 8 Ves. 598; *Gascoygne's Case*, 14 Ves. 183; *Castle's Case*, 16 Ves. 412; *Attorney-General* v. *Leathersellers' Company*, 7 Beav. 157; *Jones* v. *Rose*, 11 Jur. 379, L. C.: *Eyre* v. *Barrow*, 4 Jur. N. S. 652; 6 W. R. 767, V. C. S.; *Re Jewitt*, 10 Jur. N. S 814: 12 W. R. 945, M. R; as to suitors and witnesses: *Moore* v *Booth*, 3 Ves. 350; *Ex parte Byne*, 1 V. & B 316; *List's Case*, 2 V. & B. 374; *Orchard's Case*, 5 Russ. 159; *Gibbs* v. *Phillipson*, 1 R. & M. 19, 21; *Attorney-General* v. *Skinners' Company*, 8 Sim. 377; C. P. Coop. 1; *Plomer* v. *Macdonough*, 1 De G. & S. 232: S. C. *nom Plumer* v. *Macdonald*, 11 Jur. 899; *Newton* v. *Askew*, 6 Hare, 319; 13 Jur. 186; *Andrewes* v. *Walton*, 1 M'N. & G. 380, 389; 14 Jur. 260; and see Seton, 1238. As to the privilege and practice at law, see Chitty's Arch. 768.

2 Per Lord Langdale, in *Attorney-General* v. *Leathersellers' Company, ubi sup.*; and see *Jones* v. *Rose*, and *Eyre* v. *Barrow, ubi sup.*

3 *Eyre* v. *Barrow*, and *Re Jewitt, ubi sup.*; and see *Moore* v. *Booth, ubi sup.*

4 *Ex parte Ledwich, ubi sup.*; and see *Hooper* v. *Lane*, 6 H. L. Ca. 443; 3 Jur. N. S. 1026.

5 *List's Case*, and *Newton* v. *Askew, ubi sup.*; and see *Eyre* v. *Barrow, ubi sup.*

6 Order of May, 1661. See *Anon.* 2 Atk. 471; *Anon.* 2 Ves. S. 520; *Van* v. *Price*, 1 Dick. 91; *Williams* v. *Johns*, 2 Dick. 477; 1 Mer. 303, n. *(d)*; *Elliot* v. *Halmarack*, 1 Mer. 302; *Wellesley's Case*, 2 R. & M. 639: *Lechmere Charlton's Case*, 2 M. & C. 316; *Ex parte VanSandau*, 1 Phil. 445, 605; *Re Keane*, cited Seton, 865; and see *Smith* v. *Lakeman*, 2 Jur. N. S. 1202, V. C. S.; *Coleman* v. *West Hartlepool Railway Company*, 8 W. R. 734, V C. W.; *Felkin* v. *Lord Herbert*, 10 Jur. N. S. 62; 12 W. R. 241, V. C. K. Privilege of Parliament is no protection; *Wellesley's Case*, and *Lechmere Charlton's Case, ubi sup.*

7 See Seton, 1239. For forms of order discharging a special contempt, see Seton, 1237.

CHAPTER XXII.

TRIALS OF QUESTIONS OF FACT, AND ASSESSMENTS OF DAMAGES.

SECTION I.—*In what cases directed.*

It was formerly the practice of the Court, in certain cases where legal rights were involved, or where there was great difficulty in deciding upon facts, to give the parties leave to bring an action, or to direct an issue to be tried by a jury, in a Court of Common Law. But now it is provided by the Chancery Act (C. 12. Con. Sta. U. C., S. 69) that "In any case in which the Court requires an issue to be tried by a jury, it shall not be necessary to commence any feigned action in a Court of Law, but upon an office copy of the decree or Order directing the trial of the issue, being entered for trial in the same manner as a *Nisi Prius* record is entered, the issue shall be tried at the Assizes, or at the Sittings of a County Court in Upper Canada, in the same manner as issues are tried in actions brought in the Superior Courts of Law, or in the County Courts, and the finding of the Jury shall be endorsed upon such office copy and signed by the presiding Judge, and the office copy shall be transmitted to the Registrar of the Court of Chancery, or instead of directing an issue to be tried at Law, the Court may try the same by a jury without the intervention of a Court of Common Law, and may issue a precept or order directed to the Sheriff of any county the Court sees fit, requiring him to strike and summon a jury for that purpose, and at the trial one Judge or more of the Court of Chancery may sit or preside." This clause is similar in effect to the Imperial Statute 25 and 26 Vic. C. 42, S. 1, 2, and the English decisions on it will be found applicable in this Province.[1]

[1] *Baylis* v. *Watkins*, 8 Jur. N. S. 1165, L. JJ.; *Egmont* v. *Darell*, 1 H. & M. 563; *Eaden* v. *Firth*, *ib.* 573; *Young* v. *Fernie*, 1 De G. J. & S. 353; 10 Jur. N. S. 58: *Re Catholic Publishing and Bookselling Company*, 10 Jur. N. S. 192: 12 W. R. 455, M. R.; 2 De G. J. & S. 116; 10 Jur. N. S. 301, L. JJ.; *Williams* v. *Williams*, 33 Beav. 306; *Cowgill* v. *Rhodes*, *ib.* 310; *Freeman* v. *Tottenham and Hampstead Railway Company*, 11 Jur. N. S. 107, V. C. S.; *ib.* 256, L. JJ.; and see *Curlewis* v. *Carter*, 9 Jur. N. S. 1148; 12 W. R. 97, V. C. S.; *Copeland* v. *Webb*, 1 N. R. 119, V. C. K.; *Davenport* v. *Jepson*, *ib.* 173, L. JJ.; *Johnson* v. *Wyatt*, 2 De G. J. & S. 18: 9 Jur. N. S. 1333; *Davenport* v. *Goldberg*, 2 H. & M. 282.

It seems that the Court will now direct a question of fact to be tried before itself, or a Court of Common Law, only in those cases in which it would formerly have given the parties leave to bring an action at law, or would have directed an issue.[1] It is necessary, therefore, to consider the rules which regulated the practice of the Court in this respect.

Whenever the equitable title of the plaintiff depended upon his legal title, and the latter was disputed, it was formerly the practice to require him to establish his legal title by an action, before granting any equitable relief. Cases of this kind occur most frequently where the Court is asked to restrain the commission of acts which are injurious to the legal title; and will, therefore, be more appropriately discussed in the Chapter on Injunctions.

Our Order 539 provides that "Where, according to the former practice, the Court was in the habit of refusing equitable relief until the party seeking such relief had established his legal title or right in a proceeding at Law, the Court will itself determine such title or right, without requiring the party seeking relief to proceed at Law to establish the same; but the Court may require the right or title to be established at law whenever it considers that course expedient."

Where there was contradictory evidence between persons of equal credit, who had equal opportunities of information, and the evidence was so equally balanced on both sides that it became doubtful which scale preponderated, an issue was in general directed, in order that the Court might be satisfied, by the verdict of a jury, of the truth or falsehood of the facts controverted;[2] but if the Court was able to come to a conclusion satisfactory to its own mind, an issue was not directed, however conflicting the evidence might be.[3]

There were cases, also, where the Court directed issues, although there was no contradictory evidence, or any matter to embarrass the Court, or to prevent its coming to an immediate decision upon

1 See *George* v. *Whitmore*, 26 Beav. 557; *Bradley* v. *Bevington*, 4 Drew. 511; 5 Jur. N. S. 562; *Morrison* v. *Barrow*, 1 De G F. & J, 633, 639; *Peters* v. *Rule*, 5 Jur. N. S. 61; 7 W. R. 171, V. C. W.; *Egmont* v. *Darell*, 1 H. & M. 563; *Eaden* v. *Firth*, *ib* 573; and see *Davenport* v. *Goldberg*, 2 H. & M. 282.

2 2 Mad. Pr. 476, 2nd ed.; 621 3rd ed.: *Stokes* v. *Edmeades*, 1 M'Cl. & Y. 436.

3 *Robinson* v. *Anderson*, 7 De G. M. & G. 239; see, however, *Collins* v. *Saurey*, 4 Bro. P. C. Ed. Toml. 692; *Mason* v. *Mason*, 1 Mer. 308, 313.

the evidence before it. Such cases, however, were principally confined to those in which the common law invested a party filling a particular situation with certain rights, of which it was the object of the suit to divest him. Thus, an heir at law was so far regarded by the Courts, that it was considered that all freehold estates of which his ancestors died seised, or to which he was entitled at the time of his death, were vested in him, unless it was shown that the ordinary course of descent had been interrupted by the ancestor having executed a will; and so strongly did Courts of Equity consider the claim, that they would not, if the heir objected to it, even where the evidence before them was such as to leave no ground for doubt upon the subject, take upon themselves to establish a will affecting real estate, without previously having the opinion of a jury upon an issue *devisavit vel non*.[1]

In the case also of a rector, his common law right to all the tithes of his parish was considered so strong that the Court would not take upon itself the responsibility of deciding against it, even upon the most indubitable testimony, if the rector thought proper to insist upon having it tried by a jury.[2] Thus, in all cases, the right of a rector to an issue to try the validity of a *modus* or composition in lieu of tithes was considered indisputable; and the same rule was extended to a vicar, who had established his general right to the tithes in question under his endowment.[3] But the rule only applied where the title to the tithes was undisputed: for if the occupiers set up and proved a different title, such as a distinct grant of tithes to the persons under whom they claimed, supported by evidence of constant non-payment to the rector, to rebut which there was no evidence on the part of the rector, he was not considered entitled to an issue.[4]

Even an heir at law might, by his conduct, deprive himself of his right to an issue to try the validity of a will: as where, if the administration under the will would affect the real estate, which was subjected to the payment of debts, he at first opposed the pro-

1 *Lord Fingal* v. *Blake*, 1 Moll. 113; *Tucker* v. *Sanger*, 1 M'Cl. & Y. 425; *Cooke* v. *Cholmondely*, 2 M'N. & G. 18, 26, 11 Jur. 702, V. C. E.; S. C *nom Cooke* v. *Turner*, 15 Sim. 611, 623; *Boyse* v. *Rossborough*, Kay, 71; 18 Jur. 205: 3 De G. M. & G. 817; 3 Jur. N. S. 373; 1 K. & J. 124, 502; *Taylor* v. *Brown*, 10 W. R. 361, M. R.; *Egmont* v. *Darell*, 1 H. & M. 563.

2 *Williams* v. *Price*, 4 Pri. 156.

3 *Adams* v. *Evans*, *ib.* 14.

4 See *Wilmot* v. *Kellaby*, Daniell, 116; S. C. *nom.* *Wilmot* v. *Hellaby*, 5 Pri. 355, and cases there cited; see also, *Barker* v. *Baker*, Wightw. 397.

bate, and then withdrew his opposition, and stood by and allowed the executors and devisees to pay away large sums of money under the will;[1] or where, upon a bill to perpetuate the testimony of the witnesses to the will, he did not cross-examine the witnesses, but took his costs as a disinherited heir;[2] or where he acquiesced in the will, in such a manner as would bar his possessory rights at Law, (namely, for twenty years,) and put the party claiming under it in a worse situation than he wonld otherwise have been in had he disputed the will originally;[3] or where the will in question in the suit had been traced into his possession, but he did not produce it;[4] or where he admitted the will in issue in the suit, but alleged that it had been revoked by a subsequent will in his favour, and did not produce any evidence of the revocation.[5]

Where, however, the heir at law had been a party (but not in that character,) to proceedings in the Ecclesiastical Court, and before the Judicial Committee of the Privy Council, by which the validity of the will, as to personalty, was established, he was held not to have thereby waived his right to an issue *devisavit vel non*.[6]

In a creditors' suit, the Court would not grant an issue *devisavit vel non:* because the right of the creditors was paramount to the rights of those claiming under the will, or of the heir.[7]

The right of an heir at law to an issue was one which he might waive; and, even in the case of an infant, if his counsel thought it clear that there was no ground to dispute the will, he was justified in declining an issue.[8]

If an adult heir at law refused an issue, on the hearing of the cause, the Court would establish the will against him; though he did not admit the will by his answer.[9]

1 *Pike* v. *Hoare*, Amb. 428; 2 Eden. 182.
2 *Ibid.*
3 *Tucker* v. *Sanger*, M'Cl 424; 1 M'Cl. & Y. 425; 13 Pri. 119; *Man* v. *Ricketts*, 7 Beav. 93, 101: 8 Jur. 159; Affd. 1 H. L. Ca. 472, *nom. Ricketts* v. *Turquand*,
4 *Hampden* v. *Hampden*, 3 Bro. P. C. Ed. Toml. 550; *Dalston* v *Coatsworth*, 1 P. Wms. 730; *Hayne* v. *Hayne*, 1 Dick. 18; *Woodroffe* v. *Wood*, *ib.* 32; *Williams* v. *Williams*, 33 Beav. 306, and see *Cowgill* v. *Rhodes*, *ib.* 310.
5 *Whitaker* v. *Newman*, 2 Hare, 299, 303: 7 Jur. 231.
6 *Stacey* v. *Spratley*, 2 De G. & J. 94: 5 Jur. N. S. 28.
7 *Spikernell* v. *Hotham*, 9 Hare, 73.
8 *Levy* v. *Levy*, 3 Mad. 245
9 *Jackson* v. *Barry*, 2 Cox, 225.

Except in the cases of an heir at law, or of a rector or vicar, who were entitled to issue as a matter of right, the granting of an issue by a Court of Equity was entirely a matter of discretion in the Court: which it would not, however, exercise without due deliberation,[1] and a mistake in the exercise of which was a just ground of appeal; and, therefore, if the Court refused an issue, and the Court of Appeal thought that the contrary decision would have been a sounder exercise of discretion, it would rectify the order of the Court below accordingly;[2] and so, where the House of Lords thought that the Court below had directed issues improperly, it reversed the order directing the issues, and remitted the cause, with directions to the Judge to decide upon the matter himself.[3]

The Court refused an issue, where, though the facts were controverted, it saw clearly that, even if found to be as the party asking for the issue alleged them to be, the party would not in law be entitled to relief. Thus, where a *modus* was clearly invalid as laid, the Court refused to grant an issue, but decided upon the point of law;[4] and so, where the defence to a bill for tithes was a mere prescription *in non decimando*, without any colour of title, the Court would not send it to a jury: because such a prescription was no defence, even where the bill was brought by a lay impropriator.[5]

Where, also, it was obvious that the finding of a jury could be in no other way but one, an issue was refused. Thus where, in a suit for tithes, a legal exemption was set up, which was supported by proof of non-payment to the rector, for a very long period of time, but no satisfactory evidence was given of the legal origin of the claim for exemption, and the Court was satisfied that it was impossible to throw any further light upon the subject than was afforded by the evidence already before it, an issue was refused: because the Court was of opinion that, if the evidence was presented to a jury, they would not be justified in finding that such an exemption ever existed.[6] So in tithe cases, where the Court was of opinion that a *modus*, as set up by the answer, even if proved,

1 *Short* v. *Lee*, 2 J. & W. 464, 497; *O'Connor* v. *Cook*, 6 Ves. 665, 671, *Boyse* v. *Rossborough*, 1 K. & J. 124, 139; *Hopwood* v *Earl of Derby*, 1 K. & J 255, 262; *Davenport* v. *Goldberg*, 2 H. & M. 282. For cases in which issues have been directed, see Seton, 983, *et seq.*

2 See *Hampson* v. *Hampson*, 3 V. & B. 41.

3 *Nicol* v. *Vaughan*, 2 Dow. & C. 420; 5 Bligh. N. S. 505: see also S. C. *nom Earl of Winchilsea* v. *Garetty*, 1 M. & K. 253.

4 *Blackburn* v. *Jepson*, 3 Swanst. 132.

5 *Berney* v. *Harvey*, 17 Ves. 119, 127.

6 *Ross* v. *Aglionby*, 4 Russ. 489, 494, 498.

would be bad in law, it would decree an account against the defendants, without directing an issue to try the validity of the *modus*.[1] Upon the same principle, although there was evidence of a continued adulterous intercourse between a married woman and her paramour, the Court refused to grant an issue to try the legitimacy of her child: because there was also evidence of such access between the husband and his wife as was consistent with the presumption of the child's legitimacy.[2]

In *The Bishop of Winchester* v. *Fournier*,[3] a case of *Bridge* v. *Eddows* is mentioned, where the bill sought to have a forged bond delivered up; and Lord Hardwicke directed an issue, though it is stated to have been proved plainly, that, at the time of the alleged execution of the bond, the pretended obligor was not at the place where he was supposed to have executed it; and his Lordship is represented to have said: "that he could not try the question; that it was a fact of forgery which he could not enter into; and that must be tried." In *Peake* v. *Highfield*,[4] however, Lord Gifford, M. R., said that he did not apprehend that Lord Hardwicke meant to go to the full extent of the words there imputed to him; and that in some of the cases which he had referred to, the Court did try the fact of forgery, and, at the hearing, ordered the forged instrument to be given up.[5]

In the case last cited, although Lord Gifford was of opinion that the Court had jurisdiction, without directing any trial at Law, to declare an instrument forged, and to order it to be delivered up, yet as both the defendant and a witness had sworn to the due execution of the instrument, he considered it would be too much for him to make, at once, a decree in favour of the plaintiff; and, therefore, he directed an issue to try whether the deed in question was the deed of the party by whom it purported to be executed.[6]

It is to be observed, that it was generally in those cases only where there was contradictory evidence that the Court granted an issue to try a controverted fact: a mere suggestion upon the record,

1 *Goodenough* v. *Powell*, 2 Russ. 219, 229.
2 *Bury* v. *Phillpot*, 2 M. & K. 349, 352.
3 2 Ves. S. 446, 448.
4 1 Russ. 559, 563.
5 See *Masters* v. *Braban*, 1 Russ. 560, n.; *Secombe* v. *Fitzgerald*, *ib.* 561, n.; *White* v. *Hussy*, Prec. in Ch. 14.
6 *Peake* v. *Highfield*, 1 Russ. 559.

unsupported by evidence, in opposition to evidence on the other side, was not sufficient. Thus, where Sir John Leach, M. R., had directed issues to try the validity of a bond, merely upon the surmise and suggestion of a party: the bond being unobjectionable on the face of it, and all the evidence, as to the circumstances under which it was obtained, was before the Court upon the report of a Master, the House of Lords reversed the order directing the issues, and remitted the cause to the Master of the Rolls, with directions to him to decide upon the matter himself.[1]

It must not, however, be understood that, unless there was contradictory evidence, the Court was precluded from sending a matter to be investigated before a jury: for where the evidence was all on one side, but not sufficient to satisfy the conscience of the Court that the fact was as it was represented to be, the Court was in the habit of directing an issue to try the fact, although the evidence in support of it was not opposed by any adverse claim on the other side. Thus, where the defendants had not disputed the plaintiff's title, but had put him to the proof of it by their answer, and the plaintiffs had gone into long evidence in support of their title, which the Master of the Rolls did not deem satisfactory, issues were directed to try it.[2] Although it sometimes happened, that where, upon the hearing of a cause, a matter not in issue having started up, which appeared to the Court material to the question, the Court directed an issue to try it,[3] the Court would not permit a party to take an issue, upon a point in question, in a different form from that which he had stated in his pleadings. Thus, the Court refused to permit defendants to have an issue to prove matters which were not stated in their answers, but which appeared by the answer of the plaintiffs to their cross bill.[4] So, where the plaintiff, in a bill for specific performance, failed in proving the terms of the agreement he relied upon, the Court would not assist him by directing an issue to ascertain the terms;[5] and a party was held not entitled to an issue, or an inquiry, to establish a case relied upon by his pleading, but omitted in proof.[6]

1 *Nichol* v. *Vaughan*, 2 Dow. & C. 420; 5 Bligh, N. S. 505; see also S. C. *nom. Earl of Winchilsea* v. *Garetty*, 1 M. & K. 253; *Harrod* v. *Harrod*, 1 K. & J. 4; 18 Jur. 853.
2 *Moons* v. *De Bernales*, 1 Russ. 301; see also, *Burkett* v. *Randall*, 3 Mer. 466.
3 *Balch* v. *Tucker*, 2 Ch. Ca. 40.
4 *Warden and Minor Canons of St Paul's* v. *Kettle*, 2 V. & B. 1, 16; and see *Bennett* v. *Neale*, Wightw. 324.
5 *Savage* v. *Carroll*, 2 B. & B. 451.
6 *Ibid.* 1 B. & B. 548; *Price* v. *Berrington*, 3 M'N. & G. 488, 498; 15 Jur. 999, 1002.

An issue might be directed to ascertain the facts upon any question in the suit; thus, it seems an issue would be directed upon a motion to commit a party for the breach of an injunction, where the fact of the breach was strongly controverted;[1] and an issue has been directed upon an application for an injunction;[2] and upon a motion for a receiver.[3]

An order for the trial of a question of fact before the Court itself, or a Court of Common Law, will not, in general, except by consent, be made before the question as to which an issue is sought comes before the Court for adjudication.[4]

It seems, however, that an order for the trial of a question *devisavit vel non* will be made on an interlocutory application by an heir at law;[5] and that where the equitable title depends on the legal title, and the latter is disputed, the Court will, on a motion for an injunction, direct a trial of the question of the legal title.[6]

Where the question is directed to be tried before the Court of Chancery, it is discretionary in the Court whether a jury shall be summoned or not; but it seems that, in general, the question will be submitted to a jury, wherever, under the former practice, leave would have been given to bring an action at law, in order to establish the legal right.[7]

Formerly, the Court of Chancery had, in no case, power to award damages;[8] but now it is provided by our Statutes 28 Vic. c. 17, S. 3, that "In all cases in which the Court has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any

1 See *Agar* v. *Regent's Canal Company*, G. Coop. 77, 79.
2 *De Tastet* v. *Bordenave*, Jac. 516.
3 *Gardiner* v. *Rowe*, 4 Mad. 236.
4 *Bradley* v. *Bevington*, 4 Drew. 511; 5 Jur. N. S. 562; *George* v. *Whitmore*, 26 Beav. 557; *Morrison* v. *Barrow*, 1 De G. F. & J. 633, 639, *Davenport* v. *Goldberg*, 2 H. & M. 282; see also *Fullagar* v. *Clark*, 18 Ves. 481: *Ridgway* v. *Roberts*, 4 Hare, 106, 119. For cases where, under former practice, an issue was directed on an interlocutory application, see *Bacon* v. *Jones*, 4 M. & C. 433; 3 Jur. 994; *Ansdell* v. *Ansdell*, 4 M. & C. 449; *Townley* v. *Deare*, 3 Beav. 213; *Middleton* v. *Sherburne*, 4 Y. & C. Ex. 358, 377, 393; *Lewis* v. *Thomas*, 3 Hare, 26, 29; *Bonser* v. *Bradshaw*, 4 Jur. N. S. 1011; 6 W. R. 427, V. C. S.; and see *Kent* v. *Burgess*, 11 Sim, 361, 377; 5 Jur. 166; *Lancashire* v. *Lancashire*, 9 Beav. 259.
5 *Middleton* v. *Sherburne*, *ubi sup.*; *Hopwood* v. *Earl of Derby*, 1 K. & J. 255; *Bonser* v. *Bradshaw*, *ubi sup.*, and the cases there cited.
6 *Eaden* v. *Firth*, 1 H. & M. 573; and see *post*, Chap. XXXVI., *Injunctions*.
7 *Peters* v. *Rule*, 5 Jur. N. S. 61: 7 W. R. 171, V. C. W.; *Eaden* v. *Firth*, 1 H. & M. 573; and see *Freeman* v. *Tottenham and Hampstead Railway Company*, 11 Jur. N. S. 254, L.JJ.: *Davenport* v. *Goldberg*, 2 H. & M. 282.
8 See *Soames* v. *Edge*, Johns. 669 For a case where damages were given, instead of specific performance, see *Kay* v. *Johnson*, 2 H. & M. 118, 124.

covenant, contract or agreement, the Court, if it thinks fit, may award damages to the party injured, either in addition to, or in substitution for such injunction or specific performance, and such damages may be ascertained in such manner as the Court may direct, or the Court may grant such other relief as it may deem just."

This is similar to Sec. 2 of the Imp. Sta. 21 & 22 Vic. c. 27, and the English decisions on it are applicable here.

Where a plaintiff filed a bill for an injunction and payment of damages; and it appeared that the wrongful act complained of had, without his knowledge, been discontinued before the suit was commenced: *Held*, that the Court had not jurisdiction to make a decree for the damages. The defendant having neglected to inform the plaintiff of the discontinuance, though applied to respecting it, before suit, the bill was dismissed without costs.[1]

These provisions do not, however, extend the jurisdiction of the Court, and damages will not, therefore, be given in cases where, previously to the Act, the Court would not have ordered an injunction, or decreed specific performance.[2] Where the Court is of opinion that the plaintiff should have proceeded at law, no assessment of damages will be directed in equity; but the bill will be dismissed, without prejudice to the plaintiff's right to proceed at law.[3] The plaintiff may, by his conduct, forfeit his right to damages,[4] and the damages may be awarded, although not specifically prayed by the bill.[5] Where there will be extreme difficulty in the Court seeing its way to assess the damages, leave will, it seems, be given to the plaintiff to proceed at law for the purpose of recovering damages.[6]

Unless special damage can be shown to have been caused by the delay, the Court will not, in addition to decreeing the specific performance of a contract, award damages on account of its non-performance.[7]

1 *Brockington* v. *Palmer*, 18 Grant. 488.
2 *Rogers* v. *Challis*, 27 Beav. 175; 6 Jur. N. S. 334; *Chinnock* v. *Sainsbury*, 6 Jur. N. S. 1318; 9 W. R. 7, M. R.; *Norris* v. *Jackson*, 1 J. & H. 319: *Wicks* v. *Hunt*, Johns. 372; *Howe* v. *Hunt*, 31 Beav. 420: 8 Jur. N. S. 834; *Johnson* v. *Wyatt*, 2 De G. J. & S. 18; 9 Jur. N. S. 1333; *Middleton* v. *Magnay*, 2 H. & M. 233, 236.
3 *Clarkson* v. *Edge*, 10 Jur. N. S. 871: 12 W. R. 518, M. R.
4 *Collins* v. *Stuteley*, 7 W. R. 710, M. R.; *Lancaster* v. *DeTrafford*, 8 Jur. N. S. 873: 10 W. R. 474, M. R.
5 *Wedmore* v. *Mayor of Bristol*, 11 W. R. 136, V. C. S.; *Catton* v. *Wyld*, 32 Beav. 266; *Curriers Company* v. *Corbett*, 2 Dr. & S. 355.
6 *Betts* v. *DeVitre*, 11 Jur. N. S. 9 V. C. W.; and see *Hills* v. *Evans*, 8 Jur. N. S. 525, 531, L. C.
7 *Chinnock* v. *Marchioness of Ely*, 2 H. & M. 220: 11 Jur. N. S. 32; the decree was subsequently reversed on the merits, S. C 11 Jur. N. S. 329; 13 W. R. 597, L.C.; see also *Middleton* v, *Magnay*, 2 H. & M. 233.

The amount of damages may be assessed before the Court itself, either with or without a jury, or before a Court of Common Law at *Nisi Prius*, or at the Assizes, or in a County Court, or by an inquiry in Chambers;[1] or, it is presumed, before a Master.

In general, the Court will not authorise an advance to the parties out of a fund in Court, in order to enable them to proceed to the trial of the issue.[2] It has, however, been permitted under special circumstances.[3]

An order directing the trial of a question of fact or the assessment of damages may be appealed from, in the usual manner;[4] and neither party is, by going to trial, precluded from appealing against the order by which the trial was directed.[5]

Section III.—*New Trials.*

If any party is dissatisfied with the verdict of the jury, or of the judge, he must apply for a new trial.

The Court of Chancery 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. Hence, upon any material and weighty reason, if 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.[6] Acting upon this principle, the Court will grant a new trial, not only in cases where the

1 *Mold* v. *Wheatcroft*, 27 Beav. 510; *Middleton* v. *Greenwood*, 2 De G. J. & S. 142; 10 Jur. N. S. 350, V.C.W., and L.JJ.: *Currie's Company* v. *Corbett*, *ubi sup.* As to the form of the inquiry, see *ib.*; Seton, 928. No. 3; and as to the evidence on the inquiry, see *Mold* v. *Wheatcroft*, 30 L. J. Ch. 598, M.R.

2 *Johnson* v. *Todd*, 3 Beav. 218, 221; *Nye* v. *Maule*, 4 M. & C. 342, 345.

3 *Coombs* v. *Brooks*, 3 De G. & S. 452: 13 Jur. 784; and see *Gregg* v. *Taylor*, 4 Russ. 279, 281.

4 *Hampson* v. *Hampson*, 3 V. & B. 41; *Nicol* v. *Vaughan*, 2 Dow. & C. 420; 5 Bligh. N. S. 505; see also, S. C. *nom. Earl of Winchilsea* v. *Garetty*, 1 M. & K. 253, 257.

5 *Butlin* v. *Masters*, 2 Phil. 290; *Parker* v. *Morrell*, *ib.* 453; *White* v. *Lisle*, 3 Swanst. 351, n.; 1 C. P. Coop. t. Cott. 361; but see *DeTastet* v. *Bordenave*, Jac. 516, 521; 1 C. P. Coop. t. Cott. 361

6 Per Lord Hardwicke, in *Stace* v. *Mabbott*, 2 Ves. S. 553.

verdict is against the 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.[1] And the practice has always been, not to consider merely whether there was evidence which would support the finding of the jury, and, in that case, refuse a new trial, but to consider whether having regard to the entire subject matter and to the whole of the evidence given at or before the trial, and what has since become known, the Court is satisfied that full and complete justice has been done between the parties, and that no further investigation is necessary for the purpose of attaining that end; and unless it is so satisfied, the Court requires that the matter shall be again tested by an examination before a jury, with such directions and modifications as it may consider desirable for the fair, thorough, and impartial sifting of the whole matter.[2] Generally, however, where the application rests solely on the ground that the verdict was against the evidence, and the judge certifies that he is not dissatisfied with the verdict, the Court will not direct a new trial.[3]

The Court will, however, grant a new trial upon the production of new evidence, which was not before the jury upon the original trial;[4] or where the Court is satisfied that evidence which was discredited for want of corroboration may be corroborated;[5] or it appears probable that more evidence can be adduced as to a custom;[6] and so, where, after a trial, a witness is convicted of perjury, or a party of forgery.[7] But the Court will not set aside a trial at Law for any matter which might have been made use of at the trial;[8] or where it is of opinion that the evidence, though newly discovered, will not afford a foundation for a different verdict.[9]

Where it can be shown that a party has been taken by surprise, and evidence produced at the trial which he could have no reason to expect would be produced, the Court has directed a new trial.[10]

1 *Lord Faulconberg* v. *Peirce*, 1 Amb. 210; *Cleeve* v. *Gascoigne*, *ib.* 323; and see *Locke* v. *Colman*, 2 M. & C. 42, 46.
2 Per Sir J. Romilly, M.R., in *Swinfen* v. *Swinfen*. 27 Beav. 148, 152; see also *Waters* v. *Waters*, 2 De G. & S. 591; *Ex parte, The Freemen, &c., of Sunderland*, 1 Drew. 184.
3 *Lord Faulconberg* v. *Peirce*, *ubi sup.*; *Gibbs* v. *Hooper*, 2 M. & K. 353; *Swinfen* v. *Swinfen*, 27 Beav. 148. *Watson* v. *Munro*, 6 Grant, 385; S. C. on appeal, 8 Grant, 60.
4 *Gibbs* v. *Hooper*, 2 M. & K. 353, 356; and see *Ansdell* v. *Ansdell*, 4 M. & C. 449; *Sewel* v. *Frecston*, 1 Cha. Ca. 65.
5 *Shields* v. *Boucher*, 1 De G. & S. 40.
6 *Locke* v. *Colman*, *ubi sup.*
7 *Tilly* v *Wharton*, 2 Vern. 378; see also, *Coddrington* v. *Webb*, *ib.* 240.
8 *Curtess* v. *Smalridge*, 1 Ch. Ca. 43: Freem. 178: *Montgomery* v. *Attorney-General*, 9 Mod. 388.
9 *Colgrave* v. *Juson*, 3 Atk 197.
10 *Exton* v. *Turner*, 2 Ch. Ca. 80; see also, *Willis* v. *Farrer*, 3 Y. & J. 264; *M'Gregor* v. *Bainbrigge*, 7 Hare, 106, n.

Thus, where, at the trial of a question of legitimacy, a witness was called to prove a fact (showing that there might have been access between a husband and wife at a particular time and place): which witness had not been examined in a suit in the Ecclesiastical Court, to which the mother of the child whose legitimacy was disputed was a party, and in which his evidence would have been material to her, nor was any attempt made by her in that suit to establish the case of access which his testimony went to make out: Lord Lyndhurst held that the testimony of this witness was a surprise upon the party against whom it was produced; and its accuracy being impeached by affidavit, he directed a new trial of the issue.[1]

The Court will also grant a new trial, in cases in which a fraud has been practiced upon the party applying.

Although surprise and fraud is in general considered a sufficient ground for directing a new trial, the Court has refused to grant a new trial, upon a mere suggestion that the plaintiff was not apprised of some particular evidence which was made use of at the trial, and, therefore, was not prepared to answer it: because it appeared that the evidence by which the plaintiff was surprised was that of a witness who was brought to swear that one of the most material witnesses for the plaintiff was not in England at the time when the transaction to which he deposed was alleged to have taken place, and it was proved, by affidavit, that, a fortnight before the trial took place, notice was given to the plaintiff of the intention of the defendant to prove that the witness was abroad; which, though it was not so particular as to point out the very place where he would be shown to be, was held, by Lord Hardwicke, to be sufficient notice to prepare the plaintiff to encounter the evidence.[2] A new trial will not be granted, where a party is in possession of evidence which, either in the exercise of discretion or from neglect, he does not produce at the trial;[3] nor 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 side to produce it. Upon this ground, the circumstance of evidence, which was discovered after the answer of the defendant was put in, having been made use of at the trial, was held not a sufficient reason for directing a new trial: there having been no surprise upon the party applying, who, before the trial,

1 *Gibbs* v. *Hooper*, 2 M. & K. 353, 356.
2 *Richards* v. *Symes*, 2 Atk. 319.
3 *Standen* v. *Edwards*, 1 Ves. J. 133.

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.[1] Where the plaintiff in the issue was dead at the time of trial, but the fact was not known to the parties, the Court refused to grant a new trial.[2]

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.[3]

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.[4]

A new trial may also be directed on the ground of a misdirection of the jury by the judge who tried the issue;[5] and 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.[6]

The Court will also order a new trial of an issue, where it sees reason to be dissatisfied with the conduct of the jury,[7] or where there has been an irregularity in the trial. It has been said, that to induce the Court to set aside a former trial for irregularity, and for that cause to grant a new one, there must be ordinarily a certificate in writing, from the judge or Court before whom it was tried, of a verdict against evidence, or other misbehaviour of the jury, or such like.[8] This, however, does not appear to be the present prac-

1 *Legard* v. *Daly*, 1 Ves. S. 192
2 *Bird* v. *Kerr*, 4 K. & J 270.
3 *Kemp* v. *Mackrell*, 2 Ves. S. 580
4 *Cleeve* v. *Gascoigne*, Amb. 323.
5 *Ibid.*; *Bearblock* v. *Tyler*, Jac. 571.
6 *O'Connor* v. *Cook*, 8 Ves. 535.
7 *East India Company* v. *Bazett*, Jac. 91, 93.
8 Wyatt's P. R 263.

tice; and the Court has set aside the verdict in such cases, without any such certificate by the judge.[1]

A new trial may also be granted, because evidence which was tendered was improperly rejected: though it seems that the Court will not direct a new trial upon the latter ground only, if it is satisfied that the verdict is right, upon considering all the evidence, including that which was rejected.[2] Where, also, an application is made to the Court to grant 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, if the case had been properly summed up, have given a different verdict.[3]

Where the matter related to the right to land, the Court frequently directed new trials of issues, even in cases in which the issue had been properly tried, and the verdict was satisfactory upon the evidence: the Court formerly being unwilling to make a decree binding the inheritance, where there had been but one trial at Law.[4] It must not, however, be supposed that a second trial of an issue can be demanded as a right: for even where the object is to establish a will against an heir at law, who, but for the interference of the Court, would be entitled to take the successive opinions of juries by new ejectments, the Court, if it sees no reason to be dissatisfied with the first verdict, will refuse him a second trial.[5] When a new trial is granted, and it happens that one verdict goes one way, and the other another way, then the Court will ordinarily, on motion, order a third trial: which is commonly conclusive.[6] But in the case of a will, even after two trials, in both of which the verdict has been in favour 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.[7]

1 See *East India Company* v. *Bazett*, *ubi sup.*; *Stace* v. *Mabott*, 2 Ves S. 553.
2 *Hampson* v. *Hampson*, 3 V. & B. 41; *Warden & Minor Canons of St Paul's* v. *Morris*, 9 Ves. 155, 167; *Bootle* v. *Blundell*, 19 Ves. 500, 503; *Barker* v. *Ray*, 2 Russ 63, 75; *Pemberton* v. *Pemberton*, 11 Ves. 50, 52; and see, *Kidney* v. *Cockburn* 2 R. & M. 167.
3 *Tatham* v. *Wright*, 2 R. & M. 31; and see *Ringrose* v. *Todd*, 12 Pri. 650; *Barker* v. *Ray*, *ubi sup.*; *Slaney* v. *Wade*, 7 Sim. 595, 610.
4 *Earl Darlington* v. *Bowes*, 1 Eden, 270; *Stace* v *Mabbot*, 2 Ves. S. 553; and see, *Edwin* v. *Thomas* 2 Vern. 75, in which it was thought to be a sufficient ground for a new trial, that the result concerned all the copyholders of a manor: see also, *Locke* v. *Colman*, 2 M. & C. 42. 46.
5 *Wilson* v. *Beddard*, 12 Sim. 28 32; *Winchelsea* v. *Wauchope*, 3 Russ. 441, 445; *White* v. *Wilson*, 13 Ves 88; *Johnston* v. *Todd*, 5 Beav. 597, 606; *Hitch* v. *Walls*, 10 Beav. 84, 89: *Swinfen* v. *Swinfen*, 27 Beav. 148; *M'Gregor* v. *Topham*, 3 Hare, 488, 496; 3 H. L. Ca. 132; *Waters* v. *Waters*, 2 De G. & S. 591.
6 Wyatt's P. R. 263.
7 *Pemberton* v. *Pemberton*, 13 Ves. 290.

It seems, also, that even after three trials, the Court has power, if it sees reason to be dissatisfied with the verdict, to grant a fourth. An application for this purpose was made to the Court in *Pemberton* v. *Pemberton*,[1] and no objection was raised to the power of the Court to direct a fourth trial: though the result of the case was, that Lord Erskine, being satisfied with the verdict, refused the motion. The Court will not, however, direct a new trial after a third, unless upon some special ground; and in *Attorney-General* v. *Montgomery*,[2] Lord Hardwicke said, that where there had been two trials, the last of which was at Bar, the Court has suffered the last to prevail; and that to lay down a rule that there must be three would be attended with great expense. In *The Warden and Minor Canons of St. Paul's* v. *Morris*,[3] after two trials, at Bar, a third trial was refused: although evidence had been rejected at the last, which the Court thought ought to have been received; and in *Bates* v. *Graves*,[4] the Court refused a third trial of an issue as to the validity of a will of real estate: although neither of the former trials had been at Bar.

The rules which regulate the Court of Chancery in granting new trials of issues directed to Courts of Common Law having been considered, it is now proposed to state those upon which the Courts of Common Law act in granting new trials at law.

For certain mistakes made by the judge during the course of the trial, a new trial may be granted. Thus, if a judge at the trial, admit improper evidence,[5] or reject evidence which ought to be admitted,[6] by which means the result of the trial might have been different, the Court will, in general, grant a new trial.[7] In some cases, however, the Court may refuse a new trial, though evidence has been improperly rejected: as where the fact which such evidence was offered to establish was proved by other means, or was not disputed,[8] or was admitted by the opposite counsel;[9] or where,

1 13 Ves. 290, 302, 313.
2 2 Atk. 378.
3 9 Ves. 155, 171.
4 2 Ves. J. 287, 293.
5 *Tutton* v. *Andrews*, Barnes, 448; *Baron de Rutzen* v. *Farr*, 4 A. & E. 53: 5 N. & M. 617; *Doe Tatham* v. *Wright*, 1 H. & W. 729; 7 A. & E. 313.
6 *Smedley* v. *Hill*, 2 W. Bl. 1105; *Boyle* v. *Wiseman*, 10 Ex. 647; 1 Jur. N. S. 115.
7 See *Robinson* v *Williamson*, 9 Pri. 136; *Freeman* v. *Arkell*. 2 B. & B. 494; *Gravenor* v. *Woodhouse*, 1 Bing. 31; *Crease* v. *Barrett*, 1 C. M. & R 919; *Baily* v. *Haines*, 14 Jur. 80, 81, Q. B., where it was held to be immaterial that the jury professed to have given their verdict independently of the evidence improperly received.
8 *Edwards* v *Evans*, 3 East, 451; *Rex* v. *Teal*, 11 East, 311; *Alexander* v. *Barker*, 2 C. & J. 133; *Strudt* v. *Roberts*, 5 D. & L. 460, B. C.: *Doe Walsh* v. *Langfield*, 16 M. & W. 497.
9 *Mortimer* v. *M'Callan*, 6 M. & W. 58; see *Stracey* v. *Blake*, 1 M. & W. 168.

assuming the rejected evidence to have been received, a verdict in favour of the party offering it would have been clearly and manifestly against the weight of evidence, and certainly set aside, on application to the Court, as an improper verdict;[1] and the Court has refused a new trial on the ground of the improper admission of evidence, where there clearly appeared to be sufficient evidence to support the verdict, independently of the evidence so admitted.[2] It may here be stated, that no new trial will be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp.[3]

If the judge misdirect the jury,[4] a new trial may be granted. Where there is a misdirection on a point immediately in issue, and for which a bill of exceptions will lie, a new trial is a matter of right, but this is not so where the judge makes a mistake on some collateral point. In the latter case, a new trial will only be granted if the Court is satisfied that injustice has been done by the misdirection.[5] Where the judge's direction was correct, but the Court thought the jury might have misunderstood it, a new trial was granted: the costs to abide the event.[6] An incorrect direction to the jury upon a point which could not have influenced their verdict, is not a ground for a new trial;[7] nor is a wrong observation on a matter of fact, which is left to the jury;[8] and the Court refused a new trial where there had been misdirection with respect to one item only of the plaintiff's demand: the plaintiff consenting to reduce the damages by the whole sum, in respect of which the misdirection took place.[9] Where the defendant obtained a verdict in a case in which the plaintiff ought to have been non-suited, there being no evidence in support of his case, the Court refused a rule *nisi* for a new trial, on the ground of misdi-

1 Per Parke, B., 1 C. M. & R. 933; *Baron de Rutzen* v. *Farr*, 4 A. & E. 53: 5. N. & M. 617; *Doe Tatham* v. *Wright*, 1 H. & W. 729: 7 A. & E. 313; *Bosanquet* v. *Shortridge*, 14 Jur. 71, Ex.; *Darch* v. *Tozer*, 13 Jur. 959, Q. B.; *Ferrand* v. *Milligan*, 10 Jur. 6 Q. B.

2 *Horford* v. *Wilson*, 1 Taunt. 12; and see *Doe Tynham* v. *Tyler*, 6 Bing. 561: 4 M. & P. 377.

3 17 and 18 Vic. c. 125, s. 31; and see *Eames* v. *Smith*, 1 Jur. N. S. 1025, Ex., where the judge reserved for the opinion of the Court, the question whether a stamp was sufficient.

4 *Anon.* 2 Salk. 649; *How* v. *Strode*, 2 Wills, 269, 273.

5 *Black* v. *Jones*, 6 Ex. 213. See *Edmondson* v. *Machell*, 2 T. R. 4; and per Tindal, C. J., in *Moore* v. *Tuckwell*, 15 L. J. C. P. 153; 1 C. B. 607; *Cox* v. *Kitchin*, 1 B. & P. 338 *Calcraft* v. *Gibbs*, 5 T. R. 20; *Robinson* v. *Cook*, 6 Taunt, 636; *Wicks* v. *Clutterbuck*, 2 Bing. 483; 10 Moore, 63; *Twigg* v. *Potts*, 1 C. M & R. 89; *Duke of Newcastle* v. *Inhabitants of Broxstowe*, 1 N. & M. 598.

6 *Toulmin* v. *Hedley*, 2 C. & K. 157; see *Lord* v. *Wardle*, 4 Sc. 402.

7 *Bessey* v. *Windham*, 6 Q. B. 166.

8 *Taylor* v. *Ashton*, 12 L. J. N. S., Ex. 363: 11 M. & W. 401.

9 *Moore* v. *Tuckwell*, *ubi sup.*; see *Mayfield* v. *Wadsley*, 3 B. & C. 357.

rection, but granted a rule *nisi* to enter a nonsuit.[1] If the judge does not give the jury a sufficient direction, a new trial may sometimes be granted.[2]

If the judge leaves a question to the jury which he ought to decide himself as a point of law, and the jury decide the question correctly, the Court will not grant a new trial.[3]

The Court will not grant a new trial for an objection, either to the direction of the judge at the trial,[4] or to the admission[5] or rejection[6] of evidence, unless such objection was distinctly raised at the trial. Where evidence is tendered for a purpose for which it is not admissible, and rejected, a new trial will not be granted merely because such evidence was admissible for another purpose not stated at the trial.[7] An objection to the admissibility of evidence must be made before the summing up.[8] The Court will not grant a new trial upon an objection which has been waived at *nisi prius*;[9] nor on the ground that the judge has refused to recall a witness, unless it is very clear that he was wrong.[10]

If the judge improperly discharges the jury from giving a verdict on one or more of the issues, the Court may grant a new trial.[11] Where, however, there were two issues, and the jury found upon both, but the judge, under a misapprehension that the finding upon the first issue rendered the second useless, discharged the jury upon the second issue, it was held, that the proper course was to apply to the judge to have the verdict entered according to his notes, and not to move for a new trial.[12]

It seems that a new trial may be granted, if the judge improperly refuses to postpone the trial.[13]

1 *Vane* v. *Cobbold*, 1 Ex. 798.
2 *Elliot* v. *The South Devon Railway Company*, 17 L. J. Ex. 262; *Hadley* v. *Baxendale*, 18 Jur. 358, Ex., where the judge omitted to give a sufficient direction as to the mode of measuring the damages. As to the effect of nondirection, see *Ford* v. *Lacy*, 7 Jur. N. S. 684, Ex.
3 *Doe Strickland* v. *Strickland*, 19 L. J. C. P. 89.
4 *Robinson* v. *Cook*, 6 Taunt. 336; *Morrish* v. *Murray*, 13 M. & W. 52: 2 D. & L. 199; *Wardman* v. *Bellhouse*, 9 M. & W. 596; *Hazeldine* v. *Grove*, 3 Q. B. 997; *Watson* v. *Whitmore*, 8 Jur. 964, Ex.; *Hearne* v. *Stowell*, 6 Jur. 458, Q. B; *Brown* v. *Storey*, 1 Sc. N. R. 9; *Doe Strickland* v. *Strickland*, 8 C. B. 725; *Horton* v. *Carpenter*, 27 L. J. C. P. 1.
5 *Malin* v. *Taylor*, 2 Hodg. 3; *Williams* v. *Wilcox*, 8 A. & E. 314; *Walker* v. *Needham*, 1 Dowl. N. S. 220; *Doe Gilbert* v. *Ross*, 7 M. & W. 102; *Doe Phillips* v. *Benjamin*, 9 A. & E. 649; *Foss* v. *Wagner*, 7 A & E. 116 n.; *Kenn* v. *Neck*, 3 Dowl. 163.
6 *Gibbs* v. *Pike*, 9 M. & W. 351: 1 Dowl. N. S. 409; *Goslin* v. *Corry*, 8 Sc. N. R. 24; *Sorden* v. *Conton*, 3 Jur. 1027, Q. B.; *Whitehouse* v. *Hemmant*, 27 L. J. Ex. 295.
7 *Rex* v. *Grant*, 3 N. & M. 106; *Doe Kinglake* v. *Bevis*, 18 L. J. C. P. 628.
8 *Abbott* v. *Parsons*, 7 Bing. 563.
9 *Shirley* v. *Matthews*, 1 Jur. 57, Ex.; *Melin* v. *Taylor*, 2 Hodg. 3; *Morrish* v. *Murray*, *ubi sup.*
10 *Middleton* v. *Barned*, 18 L. J. Ex. 433.
11 *Tinkler* v. *Rowland*, 4 A. & E. 868.
12 *Iles* v. *Turner*, 3 Dowl. 211.
13 *Goldient* v. *Beagin*, 11 Jur. 544, Ex., where it was contended that certain observations made by the judge before the trial, were calculated to prejudice the case.

A new trial will not be granted because the judge has improperly allowed a party to begin: unless clear and manifest injustice was occasioned thereby.[1]

In some cases, where there has been a mistake in the taking or entry of the verdict, a new trial will be granted.[2] On a motion for a new trial upon the ground that the verdict was entered by mistake, the Court will receive the affidavit of a juryman as to what occurred in open Court upon the delivery of the verdict.[3]

If a juror has been sworn on the jury by a wrong surname (particularly if he is not the person summoned or intended to be sworn), a new trial may be granted;[4] but otherwise if sworn by a wrong Christian name.[5] It is discretionary, however, with the Court to grant a new trial in such a case or not; and it will not do so, unless the mistake as to the juror has been productive of some injustice.[6]

In an action against a provisional committeeman of a proposed railway company, for goods supplied in the course of its formation, in which there was a verdict for the defendant, the Court granted a new trial upon the ground that the foreman of the jury was a provisional committeeman of the same company, but only on payment of costs: as it appeared that the plaintiff's attorney was aware of the foreman's interest.[7] The Court refused to set aside a trial upon the ground that one of the jurors had served the defendant with process in the action.[8]

1 *Brandford* v. *Freeman*, 5 Ex. 734 : 20 L. J. Ex. 36 ; *Leeke* v. *Gresham Life Insurance Society*, 15 Jur. 1161, Ex.; *Doe Bather* v. *Brayne*, 5 C. B. 655 : 17 L. J. C. P. 127 ; *Edwards* v. *Matthews*, 4 D. & L. 721 : 11 Jur. 398 ; *Geach* v. *Ingall*, 14 M. & W. 95 ; *Haikman* v. *Fernie*, 3 M. & W. 505.

2 See *Bentley* v. *Flemming*, 9 Jur. 402 : 1 C. B. 479, where the associate received the verdict in the absence of the judge.

3 *Roberts* v. *Hughes*, 7 M. & W. 399 : 1 Dowl. N. S. 82 ; *Dauntley* v. *Hyde*, 6 Jur. 133, Ex. ; and see *Davis* v. *Taylor*, 2 Chit. Rep. 268. The affidavit of a juryman to the effect that he would not have agreed to the answers given by the foreman of the jury to the Court, if he had known they would have entitled the plaintiff to a verdict, held, if admissible, no ground for disturbing the verdict : *Raphael* v. *The Bank of England*, 25 L. J. C. P. 33. As to when the affidavit of a juryman is inadmissible.

4 *Norman* v. *Beaumont*, Willes, 484 : Barnes, 453 ; *Wray* v. *Thorn*, *ib.* 454 ; *Parker* v. *Thornton*, 1 Str. 640 : 2 Ld. Raym. 1410 ; and see *Dovey* v. *Hobson*, 6 Taunt. 460 ; *Gee* v. *Swan*, 9 M. & W. 686, per Parke, B.

5 *Hill* v. *Yates*, 12 East, 231, n. ; and see *Wray* v. *Thorn*, Willes, 488.

6 *Hill* v. *Yates*, 12 East, 229 ; see *Dickenson* v. *Blake*, 7 Bro. P. C. 177 ; *Torbock* v. *Lainy*, 5 Jur. 318, Q. B., where the objection was taken before the verdict was recorded ; *Earl of Falmouth* v. *Roberts*, 1 Dowl. N. S. 663 : 9 M. & W. 469. As to granting a new trial upon the ground that a person who appeared on the jury was not on the panel, see *Carne* v. *Nicholl*, 3 Dowl. 115 ; *Hill* v. *Yates*, and *Dovey* v. *Hobson*, *ubi sup.*

7 *Baily* v. *Macauley*, 14 Jur. 80 Q. B. The Court refused to receive affidavits from the jurymen that the foreman did not influence the verdict : see *Williams* v. *The Great Western Railway Company*, 28 L. J. Ex. 2.

8 *Prime* v. *Titmarsh*, 7 Jur. 202, Ex.

If the jury return a perverse verdict, the Court will grant a new trial, and, in general, without payment of costs.[1]

If the jury find a verdict contrary to evidence, the Court will, in general, grant a new trial,[2] even in the case of a trial at bar;[3] but not if the verdict was such as the justice of the case required;[4] and it was refused where the credibility of a witness was left to the jury, and they found a verdict against his evidence: although there was no evidence to impeach his credit.[5] Where the evidence is conflicting, a new trial will seldom be granted, unless the evidence against the verdict very strongly preponderates.[6] In a question, however, relating to real property, where the inheritance would have been for ever bound by the verdict, the Court granted a new trial: although the case had been left to the jury upon conflicting evidence.[7] In granting a new trial upon the ground that the verdict is against the evidence, the Court is, in a great measure, guided by the opinion of the judge who tried the case whether the verdict is satisfactory or not.[8]

For excessive damages, the Court will grant a new trial as of course, or set aside the execution of a writ of inquiry in all cases where the damages may be ascertained by mere calculation;[9] and in other cases of actions *ex contractu*, if it appears clearly that the damages are excessive;[10] but a new trial has been refused in an action on a bill or note, where the jury found for no greater amount than the bill or note, though it was alleged that less was due;[11] and where the value on which the damages were calculated was assented to by both sides at the trial, the Court refused to reduce the damages on the ground that the basis of the calculation was erroneous.[12] In actions *ex delicto*, such as action for trespass,[13]

1 See *Harrison* v. *Fane*, 1 Sc. N. R. 287; *Gibson* v. *Muskett*, 3 Sc. N. R. 427; *Mould* v. *Griffiths*, 8 Jur. 1010, Ex.; *Parker* v. *Great Western Railway Company*, 3 Railw. Ca. 17, C. P.

2 *Bright* v. *Eynon*, 1 Burr. 390; *Miller* v. *Taylor*, 4 Sc. 513; *Levy* v. *Milne*, 12 Moore, 418; *Morris* v. *Cleasby*, 1 M. & Sel. 576; see *Glynn* v. *Houston*, 2 Sc. N. R. 548.

3 *Musgrave* v. *Nevinson*, 2 Ld. Raym. 1358.

4 *Wilkinson* v. *Payne*, 4 T. R. 468; *Sampson* v. *Appleyard*, 3 Wils. 273; *Goslin* v. *Wilcock*, 2 *ib.* 302; *Aylett* v. *Lowe*, 2 W. Bl. 1221; *Foxcroft* v. *Devonshire*, 2 Burr. 936; *Denn* v. *Barnard*, Cowp. 597; *Bolton* v. *Pritchard*, 4 D. & L. 117, B. C.; but see 3 B. & Ald. 692.

5 *Lacey* v. *Forrester*, 3 Dowl. 688; but see the observations of Tenterden, C. J. & Bagley, J., in *Davis* v. *Hardy*, 6 B. & C. 231.

6 *Ashley* v. *Ashley*, 2 Str. 1142; *Doe Mason* v. *Mason*, 3 Wils. 63; *Swain* v. *Hall*, *ib.*; *Anon.*, 1 *ib.* 22; see *Norris* v. *Freeman*, 3 *ib.* 38; *Melin* v. *Taylor*, 3 Bing. N. C. 109.

7 *Swinnerton* v. *Marquis of Stafford*, 3 Taunt. 91; see *ib.* 232; *Lee* v. *Shore*, 2 D. & R. 198: 1 B. & C. 94; *Hodgson* v. *Forster*, 2 D. & R. 221: 1 B. & C. 110; *Lowdon* v. *Hierons*, 2 Moore, 102.

8 See *Lake* v. *Deer*, 1 Jur. 983, Q. B.

9 See *Day* v. *Edwards*, 1 Taunt. 491; *Sowerby* v. *Lockerby*, 1 Jur. 796, Q. B.

10 See *Wood* v. *Hurd*, 2 Bing. N. C. 166; *Harrison* v. *Cage*, Carth. 467.

11 *Selly* v. *Powis*, 1 H. & W. 2.

12 *Hilton* v. *Fowler*, 5 Dowl. 312.

13 *Benson* v. *Frederick*, 3 Burr. 1845; *Ducker* v. *Wood*, 1 T. R. 277; *Merest* v. *Harvey*, 5 Taunt. 442: 1 Marsh. 139; *Lockley* v. *Pye*, 8 M. & W. 133.

for diverting a watercourse,[1] or the like, where there is no certain measure of damages,[2] a new trial is seldom granted on this account: unless the damages were outrageous;[3] or the Court is satisfied that the jury acted under the influence of undue motives, or of gross error or misconception;[4] and the same as to the execution of writs of inquiry.[5] A very clear case of excess must be made out;[6] and it may be here mentioned that, for this purpose, the Court will not receive affidavits of the defendant's witnesses, to explain or add to evidence given by them at the trial.[7] It is very usual, where an excessive verdict has been given, for the judge to suggest to the counsel to agree on a sum, to prevent the necessity of a new trial.[8]

A new trial will sometimes also be granted, or the execution of a writ of inquiry set aside, and a fresh inquiry granted, if it appears clear to the Court, that the damages are too small;[9] or if the smallness of the damage has arisen from some mistake on the part either of the Court,[10] or the jury,[11] or from some unfair practice upon the part of the defendant.[12] Where, in an undefended action on a mortgage deed, a verdict was taken for the plaintiff by mistake for the principal only, the Court refused to increase the damages by adding the interest, but offered to grant a new trial.[13] But, as a general rule, the Court will not grant a new trial, in an action for a tort, on account of the smallness of the damages.[14]

For the misconduct of the jury, also, the Court will, in general, grant a new trial, if the misconduct be such as to satisfy the Court that the verdict has been determined on without that grave and serious deliberation, that right exercise of judgment, and that total absence of all partiality, so necessary to the proper execution

1 *Pleydell* v. *Earl of Dorchester*, 7 T. R. 529 : 1 Chit. Rep. 729, n. (*a*).
2 See *Bennett* v. *Allcott*, 2 T. R. 166; *Day* v. *Holloway*, 1 Jur. 794, Q. B.
3 *Price* v. *Severne*, 7 Bing. 316 : 5 M. & P. 125; *Sharp* v. *Brice*, 2 W. B. 942; *Leith* v. *Pope*, *ib.* 1327; *Pleydell* v. *Earl of Dorchester*, 7 T. R. 529; *Bruce* v. *Rawlins*, 3 Wils. 61; *Williams* v. *Currie*, 1 C. B. 841; *Britton* v. *South Wales Railway Company*, 27 L. J. Ex. 355.
4 *Chambers* v. *Caulfield*, 6 East, 244; *Edgell* v. *Francis*, 1 Sc. N. R. 118; *Creed* v. *Fisher*, 18 Jur. 228, Ex.
5 *Benson* v. *Frederick*, and *Bruce* v. *Rawlins*, *ubi sup.*; *Irwin* v. *Dearman*, 11 East, 23.
6 *Lathbury* v. *Brown*, 10 Moore, 106.
7 *Phillips* v. *Hatfield*, 8 Dowl. 882.
8 Per Alderson, J., 7 Bing. 320; see *Leeson* v. *Smith*, 4 N. & M. 301.
9 *Armytage* v. *Haley*, 4 Q. B. 917 : 7 Jur. N. S. 671; *Wilson* v. *Hicks*, 26 L. J. Ex. 242; *Nichols* v. *Bestwick*, 28 L. J. Ex. 4.
10 *Markham* v. *Middleton*, 2 Str. 1259; *Noble* v. *Kennoway*, 2 Doug. 510.
11 *Woodford* v. *Eades*, 1 Str. 425; *Levy* v. *Baillie*, 7 Bing. 349 : 6 M. & P. 208.
12 *Wits* v. *Polehampton*, 2 Salk. 647; see *Hall* v. *Stone*, 1 Str. 515.
13 *Baker* v. *Brown*, 2 M. & W. 199 : 5 Dowl. 313.
14 *Manton* v. *Bates*, 1 C. B. 444; *Gibbs* v. *Turmaley*, *ib.* 640 : *Mauricet* v. *Brecknock*, 2 Doug. 509; *Richards* v. *Rose*, 9 Ex. 218; 23 L. J. Ex. 3 : *Apps* v. *Day*, 14 C. B. 112.

of the important duties of jurymen. Thus, if the jurors eat or drink, after the summing up, at the expense of the party for whom they afterwards find a verdict; or if they determine their verdict by lots; or if they or any of them have previously declared that the plaintiff should never have a verdict;[1] or the like: the Court may set aside the verdict, and grant a new trial.[2] Where two of the jury, during the progress of a trial, which lasted two days, dined and slept at the house of the defendant on the evening of the first day, and, consequently before the summing up, the Court held that it was discretionary whether the verdict should be set aside and a new trial granted; and as the party making the application did not entertain any belief that the jurors, in giving their verdict, were influenced by their visits, and there were no grounds for suspicion of unfairness, the Court refused to do so.[3] The Court will not receive affidavits made by any of the jurymen,[4] or affidavits of what any of the jurors have said, respecting such misconduct:[5] it must be proved in some other way;[6] and this is the case, though the misconduct is, in some degree, confirmed *aliunde*.[7] though it seems that where, in moving for a new trial, affidavits imputing personal misconduct to a jury are used, affidavits of any of the jury, rebutting such imputation, may be used in answer.[8]

If the cause be tried in the order in which it is inserted in the cause list, in the absence of the opposite party,[9] or his counsel, the Court will not grant a new trial, unless under very special circumstances; and then, as a general rule, only on an affidavit of merits, and on payment of costs.[10]

1 *Dent* v. *Hundred of Hertford*, 2 Salk. 645; 2 Comyn, 601; see *Gainsford* v. *Blachford*, 6 Pri. 36.

2 See *Hughes* v. *Budd*, 8 Dowl. 315; *Cooksey* v. *Haynes*, 27 L. J. Ex. 371. For a case where all the jury were not present when the verdict was given, see *Rex* v. *Wooler*, 2 Stark. 111; 6 M. & S. 366.

3 *Morris* v. *Vivian*, 10 M & W. 137: 2 Dowl. N. S. 235; see *R.* v. *Kinnear*, 2 B. & A. 468; 1 Chit. Rep. 401.

4 *Harvey* v. *Hewitt*, 8 Dowl. 598; *Roberts* v. *Hughes*, 7 M. & W. 399; *Vaise* v. *Delaval*, 1 T. R. 11; *Onions* v *Naish*, 7 Pri. 203; *Hartwright* v. *Badham*, 11 Pri. 383; *R.* v. *Wooler*, 6 M. & S. 366; *Bridgwood* v. *Wynn*, 1 H. & W. 574; *Baily* v. *Macauley*, 14 Jn 80, Q. B.

5 *Harvey* v. *Hewitt*, *ubi sup.*; *Straker* v. *Graham*, 7 Dowl. 223; 4 M & W. 721; *Burgess* v. *Langley*, 6 Sc. N. R. 518; 1 D. & L. 21; 12 L. J. N. S. C. P. 257; *Addison* v. *Williamson*, 5 Jnr. 466, Ex.; *Davis* v. *Taylor*, 2 Chit. Rep. 268.

6 See *Harvey* v. *Hewitt*, *ubi sup.*; where affidavits where made by persons who witnessed the jury drawing lots for their verdict.

7 *Owen* v. *Wharbuton*, 1 B. & P. N. R. 326; see *Hindle* v *Birch*, 8 Taunt. 26: 1 Moore, 455.

8 *Standewicke* v. *Watkins*, 2 D. & L. 502; see *Taylor* v. *Webb*, Trials per Pais, 24.

9 See *Cook* v. *Beardsall*, 29 L J. Ex. 35, where the defendant intended to conduct his own cause in person, and there were two Courts sitting.

10 See *Anon.*, 2 Salk. 645; *Third* v. *Goodier*, 1 Pri. R. 717, Ex.; *Bland* v. *Warren*, 7 A. & E. 13; *Watson* v. *Reeve*, 5 Bing. N. C. 112: 7 Dowl. 127; *Breach* v. *Casterton*, 7 Bing. 224; 4 M. & P. 867; *Masters* v. *Barnwell*, *ib.* n.; *Gwilt* v. *Crawley*, 8 Bing. 144; 1 M. & Sc. 229; *R.* v. *Richardson* 8 Dowl. 511; *Nash* v. *Swinburn*, 4 Sc. N. R. 326; 3 M. & G. 650; 1 Dowl. N. S. 190, where the defendant's attorney's clerk misread the notice of trial; *Curtis* v. *March*, 4 Jur. N. S. 1112, Ex., where the clocks differed.

If the party for whom a verdict is afterwards given, deliver to the jury, after they have left the box, evidence which has not been shown to the Court,[1] or if he has used improper influence with the jury, to induce them to give a verdict in his favour, a new trial will be granted. Where handbills reflecting on the plaintiff 's character were distributed in Court, and shown to the jury on the day of the trial, a verdict against him was set aside, and a new trial granted, although the defendant, by his affidavit, denied all knowledge of the handbills.[2] But merely desiring a juror to attend at the trial of the cause is no ground for a new trial.[3]

Where, by a fraudulent trick upon the part of the defendant, the plaintiff 's counsel were taken by surprise, and the defendant thereby obtained a verdict, the Court granted a new trial.[4] Where a plaintiff was non-suited, in consequence of a refusal by the defendant's counsel at the trial to admit certain documents in evidence, which had been agreed to be admitted by the defendant's attorney's agent, the Court granted a new trial, with costs to be paid by the defendant.[5]

A new trial has been granted on account of the non-attendance of a material witness; and the Court in one case granted it without costs, where a material witness for the defendant was kept out of the way by the contrivance of the plaintiff, to prevent him from being served with a *subpœna;* but, in a later case, where a witness for the plaintiff was kept out of the way by the contrivance of the defendant, the Court refused a new trial: observing, that the plaintiff ought to have applied for a postponement of the trial, or withdrawn the record.[6] And the general rule is, that a new trial will not be granted, on the ground that evidence has not been given that might have been given at the trial;[7] and the Court will not, on motion for a new trial, hear affidavits of any facts which might have been brought forward at *Nisi Prius*.[8] The plaintiff

1 *Ante.*
2 *Coster* v. *Merest*, 3 B. & B. 272; 7 Moore, 87; and see *Spencer* v. *De Willott*, 3 Smith, 321.
3 *Snell* v. *Timbrell*, 1 Str. 643.
4 M. S. E. 1814; see *Anderson* v. *George*, 1 Burr. 352; *Edie* v. *East India Company*, 1 W. Bl. 298; *Hewlett* v. *Cruchley*, 5 Taunt. 277; *Lernane* v. *Mealin*, 11 Jur. 168, B. C.; and see *Long* v. *Bilke*, 1 Sc. N. R. 176. where the effect of a judgment produced in evidence was misrepresented.
5 *Doe Tindal* v. *Roe*, 5 Dowl 420.
6 *Turquhand* v. *Dawson*, 1 C. M. & R. 709; and see *Edwards* v. *Dignum*, 2 Dowl. 642; *Packham* v *Newman*, 3 *ib.* 165; *Henning* v. *Samuel*, 2 Dowl. 766: 3 M. & Sc. 818
7 *Cooke* v. *Berry*, 1 Wils. 98; and see 1 C. M. & R. 710, n.; *Macbeath* v. *Ellis*, 4 Bing. 573.
8 *Hope* v. *Atkins*, 1 Pri. 143.

ought, if unprepared with his evidence, either to make application to put off the trial before the jury are sworn, or should withdraw his record, and not take the chance of a verdict.[1]

The Court has granted a new trial where it appeared clearly that the plaintiff's case was a mere fiction supported by perjury, which the defendant could not, at the time of the trial, be prepared to answer.[2] It will, however, not in general be satisfied with the mere affidavit of the party making the application, contradicting the witnesses on the other side:[3] the witnesses must in general be indicted and convicted;[4] or some other satisfactory proof of the perjury must be offered to the Court. Even where the witnesses were indicted, the Court refused to stay execution until the indictment should be tried.[5]

Where a witness made a mistake in his evidence, by reason of which a verdict was given against the party who called him, the Court refused a new trial: although the mistake was explained by the affidavit of the witness himself;[6] but, under similar circumstances, the Court of Common Pleas granted a new trial.[7] Where a defendant insisted that he was surprised by a misstatement made by one of the plaintiff's witnesses, the Court refused a new trial: the misstatement having been made in answer to a question that was collateral and beside the issue.[8]

In some cases, where a party is taken by surprise, at the trial, the Court will grant a new trial.[9] Thus, it will be granted, if, by a fraudulent trick upon the part of the defendant, the plaintiff's counsel was taken by surprise, and the defendant thereby obtained a verdict.[10] But the Court never grants a new trial upon the ground of surprise, unless satisfied that the verdict was substantially wrong;[11] and it was refused where, by reason of the defen-

1 *Harrison* v. *Harrison*, 9 Pri. 89; *Edwards* v. *Dignum*, *ubi sup.*; *Emslie* v. *Wildman*, 8 Taunt. 236; 2 Moore, 179; see *Hoare* v. *Silvertock*, 19 L. J. C. P. 215.
2 *Fabrilius* v. *Cock*, 3 Burr. 1771. If the plaintiff has sworn falsely on a matter not material to the merits of the cause, a new trial will not be granted: *Honeyman* v. *Lewis*, 23 L. J. Ex. 204.
3 *Feize* v *Parkinson*, 4 Taunt. 640; see *Aliken* v. *Howell*, 1 N. & M. 191; *Sprague* v. *Mitchell*, 2 Chitt. 271, but see *Lister* v. *Mundell*, 1 B. & P. 427
4 *Beerfield* v. *Petrie*, 2 Tidd. 938; *Seeley* v. *Mahew*, 4 Bing. 561; *Hampshire* v. *Harris*, 3 Jur. 980, C. P.
5 Chitty's Arch. 591; *Warwick* v. *Bruce*, 4 M. & S. 140; see *Thurlell* v. *Beaumont*, 1 Bing. 339; 8 Moore, 612.
6 *Huish* v. *Sheldon*, Say. 27.
7 *Richardson* v. *Fisher*, 7 Moore, 546: 1 Bing. 145.
8 *Magnay* v. *Knight*, 2 Sc. N. R. 71: 1 M. & G. 944.
9 See *Todd* v. *Emby*, 2 Dowl. N. S. 570: *Belle* v. *Thompson*, 2 Chitt. 194; *Harrison* v. *Harrison* 9 Pri. 89; *Long* v. *Bilke*, 1 Sc. N. R. 176.
10 *Ante*, p. 1025.
11 *Tharpe* v. *Stallwood*, 6 Sc. N. R. 730; 1 D. & L. 24, per Coltman, J.

dants having insufficiently disclosed their case to their attornies, the latter were taken by surprise, and unprepared to prove a certain document at the trial, and a verdict was given for the plaintiff.[1] So a party nonsuited for nonproduction of a document from a public office, is not entitled to a new trial on the ground of surprise where he has served the clerk in the office with a *subpœna duces tecum* to produce the document, but has omitted to apply to the head of the office for permission for its production.[2] And where, at the trial, the defendant produced a deed which he had had notice to produce, and there being an attesting witness to it who was not called, the plaintiff was nonsuited, it was held, that the plaintiff was not entitled to a new trial on the ground of surprise, though he was not aware, before the trial, that there was an attesting witness: it not appearing that he had made any inquiry upon the subject.[3]

A new trial will seldom be granted, where a verdict has been given against a party, or a plaintiff has been nonsuited for want of evidence which might have been produced at the trial: because it would tend to introduce perjury;[4] even although the evidence was briefed, and his counsel thought fit not to produce it:[5] unless the verdict is manifestly against the justice and equity of the case.[6] But if new evidence, discovered after the trial, is such as to satisfy the Court that, if the party had had it at the trial, he must have had a verdict, the Court will grant a new trial upon payment of costs, in order to do justice between the parties.[7] The discovery of witnesses, who can contradict those produced on the former trial, seems to be no ground for a new trial.[8]

A cause having been stopped while a witness was under examination, and the plaintiff nonsuited, upon a statement by his counsel of the facts he was prepared to prove, the Court granted a new trial on payment of costs, upon an affidavit that the witnesses could have proved a more complete case than that presented by the counsel.[9]

1 *Ibid.*
2 *Austin* v. *Evans*, 4 M. & G. 430; 2 Dowl. 408.
3 *Rearden* v. *Minter*, 2 M. & G. 204: 9 Sc. N. R. 237.
4 *Cooke* v. *Berry*, 1 Wils. 98; *King* v. *Alberton*, 3 Salk. 361; see *Wits* v. *Polehampton*, 2 Salk. 647.
5 *Spong* v. *Hogg*, 2 W. Bl. 802; *Hall* v. *Stothard*, 2 Chitt. 267.
6 *Martyn* v. *Podger*, 5 Burr. 2631.
7 *Broadhead* v *Marshall*, 2 W. Bl. 955; *Weak* v. *Calloway*, 7 Pri. 677; *Thurtell* v. *Beaumont*, 1 Bing. 339.
8 *Dickenson* v. *Blake*, 7 Bro. P. C. ed. Toml. 177.
9 *Edger* v. *Knapp*, 6 Sc. N. R. 707; 1 D. & L. 73.

The Court will not, as a general rule, grant a new trial, to let the party into a defence of which he was apprised at the first trial.[1]

If a party is entitled to a new trial, *ex debito justitiæ*, upon one of several issues, the Court cannot confine the new trial to such issue only, but must grant it as to all of them.[2] Therefore, if the judge at the trial allows evidence, which is inadmissible, to be given upon one of several issues,[3] or, if he, in his direction to the jury, mistakes the law,[4] or, it seems, makes any other mistake, for which he might have been required to seal a bill of exceptions, a new trial can only be granted upon all the issues.[5] But if the granting of the new trial upon one of several issues is a matter in the discretion of the Court, as if the verdict upon such issue be against evidence or the like, it may be granted upon such issue only.[6] A jury having assessed damages upon an erroneous principle, the Court, in granting a new trial, refused to limit the inquiry to the question of damages.[7] Where, in trespass, there were several issues, one of them on a plea of *liberum tenementum*, and the judge at the trial improperly rejected evidence applicable to that issue only, the Court discharged a rule for a new trial, after a verdict for the defendant on several issues, on his consenting to the verdict being entered for the plaintiff on that issue, and gave no costs of the rule to either party.[8] Where there were two issues, and the jury found upon both, but the judge improperly discharged the jury upon the second issue, the Court held that the proper course was to apply to the judge to have the verdict corrected according to his notes.[9]

If the jury, at the second trial, finds for the party against whom the former verdict was given, the Court, if the case is doubtful, or the second verdict does not accord with the justice of the case, may be induced, under circumstances, to grant a third trial. It is entirely in the discretion of the Court, however, to do so or not:

1 *Vernon* v. *Hunkey*, 2 T. R. 113; see *Buxton* v. *Mardin*, 1 T. R. 84; *Ritchie* v. *Bowsfield*, 7 Taunt. 309; *Pickering* v. *Dawson*, 4 Taunt. 779; *Bodington* v. *Harris*, 1 Bing. 187.
2 *Earl of Macclesfield* v. *Bradley*, 7 M. & W. 570; 9 Dowl. 313: *Hutchinson* v. *Piper*, 4 Taunt. 555.
3 *Bernasconi* v. *Farebrother*, 3 B. & Ad. 373.
4 *Hutchinson* v. *Piper*, 4 Taunt. 555.
5 *Bernasconi* v. *Farebrother*, *ubi sup.*
6 *Earl of Macclesfield* v. *Bradley*, and *Huschinson* v. *Piper*, *ubi sup.*; but see Bull. N. P. 326, b., and see, as to a *venire de novo*, *Davis* v. *Lowndes*, 4 Bing. N. C. 478.
7 *Mahoney* v. *Frasi*, 1 C. & M. 325.
8 *Hughes* v. *Hughes*, 15 M. & W. 701; see *Baxter* v. *Nurse*, 6 M. & G. 935.
9 *Iles* v. *Turner*, 3 Dowl. 211.

for the losing party in such a case is not entitled to it by any rule or practice of the Court; it has accordingly been refused, where the second verdict was satisfactory.[1] It is also in the discretion of the Court to grant a third trial after two concurring verdicts;[2] but this is seldom done;[3] and the Court has refused to grant it, after a new trial for excessive damages, and the same damages given by the second verdict.[4] And so, also, where the two concurring verdicts were for the defendant: although the judge, before whom the second trial was had, expressed himself dissatisfied with the verdict.[5] But where, in such a case, the action was brought for a matter savouring of the realty, and the plaintiff would have been concluded by the verdict, the Court, under circumstances, set aside the last verdict, and ordered a nonsuit to be entered: leaving the plaintiff to contest the matter a third time, if he would.[6]

The application for a new trial must be made to the Court of Chancery, whether the trial was had before that Court, or a Court of Common Law.[7]

The application for a new trial must, in all cases, be made before the cause comes on for further hearing.[8] It is made by motion, of which notice must be given.

Where the trial has been had before a Court of Common Law, no positive time is fixed within which the application must be made. In *Legard* v. *Daly*, however,[9] Lord Hardwicke stated, as a reason which weighed greatly with him, in refusing an application for a new trial, the length of time (*viz.*, five years and a half) which had elapsed since the trial, which he said would be an objection even in Courts of Law; and he observed that, although it had not been set down till lately upon the equity reserved, it could not be said that the other side should not have applied for a new trial: for perhaps the defendant might have no reason to set it down.

1 *Parker* v. *Ansell*, 2 W. Bl. 963.
2 *Goodwin* v. *Gibbons*, 4 Burr. 2101; *Gibson* v. *Muskett*, 3 Sc. N. R. 427.
3 See *Foster* v. *Steele*, 3 Bing. N. C. 892.
4 *Clerk* v. *Udall*, 2 Salk. 649; *Chambers* v. *Robinson*, 2 Str. 692.
5 *Swinnerton* v. *Marquis of Stafford*, 3 Taunt. 232.
6 *Lee* v. *Shore*, 2 D. & R. 198; 1 B. & C. 94.
7 *Fowkes* v. *Chadd*, 2 Dick. 676; *Bootle* v. *Blundell*, 19 Ves. 500.
8 *Attorney-General* v. *Montgomery*, 2 Atk. 378; *Rodgers* v. *Nowell*, 6 Hare, 338; and see *Johnston* v. *Todd*, 5 Beav. 394, as to parties to be heard on the motion.
9 1 Ves. S. 192, 194.

Upon the application for a new trial, the judge's notes taken at the trial are the proper evidence of what was then proved;[1] and where the application is made for the new trial of an issue directed to a Court of Common Law, an *ex parte* application should be made to the Court of Chancery to send to the judge who tried the issue for his notes of the trial.[2] This application is not of course, but must be supported by a statement showing a reasonable ground for questioning the verdict.[3] If the parties agree thereto, the Court will allow copies of the judge's notes taken at the trial to be made for the parties.[4] The evidence given in the suit may be referred to by either party on the application for the new trial, although it was not actually made use of at the trial.[5] And any facts upon which the application is founded that cannot be collected from the judge's notes may be proved by affidavit;[6] and so at Law, where the new trial is moved for on the ground of the improper rejection or reception of evidence, or for misdirection, or on account of the verdict being against the evidence, no affidavit is necessary; but where the ground of the motion cannot be collected from the judge's notes, an affidavit is necessary;[7] and, as a general rule, affidavits of witnesses examined at the trial will not be received to explain or add to their evidence given thereat.[8] At law, the judge's notes are conclusive as to the evidence; and the Court will not allow them to be contradicted,[9] even upon affidavit; nor can affidavits be used to supply alleged omissions of evidence in the judge's notes.[10]

Upon an application for a new trial, the costs of the previous trial will, in general, be reserved until the further hearing;[11] the Court has, however, under the circumstances of the case, fre-

1 See Ord. 5 Feb. 1861, r. 14. In Chancery, it is a common practice for the parties to agree that notes of the evidence shall be taken by a shorthand writer instead of the Judge.
2 Chitty's Arch. 895.
3 *Morris* v. *Davies*, 3 Russ. 318. See also Memorandum, 6 Mad. 58: *Hungerford* v. *Jagoe*, 1 Joe. & Lat. 691.
4 *Hargrave* v. *Hargrave*, 10 Jur. 957, M. R.
5 *Slaney* v. *Wade*, 7 Sim. 595, 618.
6 See *East India Company* v. *Bazett*, Jac. 91; *Gibbs* v. *Hooper*, 2 M. & K. 353; *Wilson* v. *Beddard*, 12 Sim. 28; *Hargrave* v. *Hargrave*, 13 Jur. 463, M. R.; *Shields* v. *Boucher*, 1 De G. & S. 40; *M'Gregor* v. *Topham*, 3 Hare, 488, 496. As to the allowance of copies for counsel of the shorthand writer's notes of the evidence on the trial, see *Malins* v. *Price*, 1 Phil. 590: 9 Jur. 955.
7 Chitty's Arch. 1524.
8 *Phillips* v. *Hatfield*, 10 L. J. N. S. Ex. 33; 8 Dowl. 882; *Edger* v. *Knapp*, 7 Jur. 583, C. P.
9 *R.* v. *Grant*, 3 N. & M. 106; and see *Gibbs* v. *Pike*, 1 Dowl. N. S. 409; 9 M. & W. 351; and Ord. 5, Feb. 1861, r. 14.
10 *Coles* v. *Bullman*, 12 Jur. 588, C. P.
11 *O'Connor* v. *Malone*, 6 Cl. & F. 572, 598; and see *Bearblock* v. *Tyler*, Jac. 571: *White* v. *Lisle*, 3 Swanst. 342; *Duncan* v. *Varty*, 2 Phil. 896; *Corporation of Rochester* v. *Lee*, 2 De G. M. & G. 427, 431; Beames on Costs, 157; Morgan & Davey, 70.

quently imposed on the applicant the condition of paying the costs of the previous trial.[1] Where a new trial was directed on those terms, and the applicants did not proceed to a new trial, it was held that they were not compellable to pay such costs under the order.[2]

The following are such of the rules as to costs, on which the Courts of Common Law act in granting new trials, as would appear to be applicable, in granting new trials in Chancery. A new trial will be granted without costs, where it is a matter of right by reason of the misdirection or other mistake of the judge, or the like.[3] Where the new trial is granted for the misconduct of the jury, as where the verdict is perverse, or the like, the costs are usually directed to abide the event of the second trial.[4] If a party has obtained a verdict by trick, the Court will grant a new trial without costs, or perhaps, in a very gross case, will oblige him, and sometimes his attorney, to pay the costs.[5] Where the plaintiff had a material witness for the defendant concealed in his house, and prevented him from being served with a *subpœna*, it was granted without costs.[6] If granted on the ground of surprise not fraudulent, it seems to be on payment of costs.[7] Where a new trial is granted on the ground that the verdict is against evidence, the costs of the first trial abide the event, unless the Court otherwise orders.[8] Where the costs are ordered to abide the event of the second trial, if the same party succeed on both trials, he will be allowed the costs of the first as well as the second;[9] but, otherwise, the costs of the first will not be allowed.[10]

Where a rule for a new trial has been obtained on payment of costs, there is a broad distinction between these costs and costs in

1 *Edwin* v. *Thomas*, 2 Vern. 75; *Baker* v. *Hart*, 3 Atk. 542; *Cleeve* v. *Gascoigne*, Amb. 323, 324; *Standen* v. *Edwards*, Beames on Costs, App. No. 15; and see *Earl Darlington* v. *Bowes*, 1 Eden, 270.

2 *Lambert* v. *Fisher*, 7 Sim. 525, 527: and see *Howorth* v. *Samuel*, 1 B. & Ald. 566; *Jolliffe* v. *Mundy*, 8 L. J. Ex. 100; 7 Dowl. 225: 4 M. & W. 502.

3 *Vale* v. *Bayle* Cowp. 297: *Harris* v. *Butterley*, 2 *ib.* 485; *Jackson* v. *Duchaire*, 3 T. R. 553; *Goodright* v. *Saul*, 4 *ib.* 359; see *Doe Gilbert* v. *Ross*, 7 M. & W. 102; *Edwards* v. *Scott*, 2 Sc. N. R. 266; *Lord* v. *Wardle*, 3 Bing. N. S. 680: *Earl of Macclesfield* v. *Bradley*, 7 M. & W. 570.

4 *Hale* v. *Cove*, 1 Str. 642; *Hodgson* v. *Barvis*, 2 Chit. 266; *Shillitoe* v. *Claridge*, *ib.* 425; see *Brown* v. *Clarke*, 12 M. W. 25; 7 Jur. 1043, Ex.

5 *Anderson* v. *George*, 1 Burr. 352; *Trubody* v. *Brain*, 9 Pri. 76; see Hullock, 391.

6 Bull. N. P. 322; see *Turquand* v. *Dawson*, 1 C. M. & R. 709.

7 *Greatwood* v. *Sims*, 2 Chit. 269.

8 17 & 18 Vic. c. 125, s. 44; see *Meule* v. *Goddard*, 5 B. & A. 766; *Evans* v. *Robinson*, 24 L. J. Ex. 212. As to the meaning of "abide the event," see Chitty's Arch. 1530.

9 *Trelawney* v. *Thomas*, 1 H. Bl. 641; *Canham* v. *Fisk*, 2 C. & J. 126; *ib.* 158, n.: *Sherlock* v. *Barned*, 1 Bing. 21; but see *Hudson* v. *Majoribanks*, 8 Moore, 440: 1 Bing. 393.

10 *Austen* v. *Gibbs*, 8 T. R. 619; *Chapman* v. *Partridge*, 2 B. & P. N. R. 382; *Bird* v. *Appleton*, 1 East, 111; *Dodd* v. *Neal* 2 C. & M. 225; *Evans* v. *Robinson*, *ubi sup.*

the cause. The former costs do not include the costs of the pleadings, or of obtaining admission of documents, or of giving notice to produce, or of the briefs: in some cases, however, something may be allowed for amending the briefs.[1] Where there have been two trials, and the successful party is entitled to the costs of the second trial only, the Master, in taxing costs, may allow fees on the second trial with reference to those given at the first.[2] Where a party who succeeded on the second trial was not entitled to the costs of the first trial, it was held, that the Master was right in allowing the successful party all such costs of the first trial as were available for the second;[3] and, therefore, that he was right in allowing the costs of the briefs, *subpœnas*, and copies on the first trial, but not the fees on the briefs, or the consultation fees, or the costs of serving the *subpœnas* for the first trial.

At Common Law, unless the new trial is a matter of right, as in the case of a misdirection of the judge,[4] it may be directed upon terms: such as, that witnesses infirm, or going beyond sea, may be examined upon interrogatories, or that their evidence may be read from the judge's notes of the first trial;[5] that certain documents may be produced at the trial; that certain facts, not intended to be litigated, may be admitted;[6] or that the party may make discovery of certain facts upon oath.

The costs of the application for a new trial will, in general, be directed to follow the costs of the new trial.[7] If the application is refused, the costs are not costs in the cause, and cannot be recovered by the successful party: unless the motion is expressed to be dismissed with costs.[8]

The form of an issue cannot 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 rehearing of the decree or order directing it.[9] Where a new trial is directed, it is not usual

1 *Lord* v. *Wardle*, 6 Dowl. 174.
2 *Wilkinson* v. *Malin*, 2 Dowl. 65; *Lord* v. *Wardle*, *ubi sup.*
3 *Lambert* v. *Lyddon*, 4 D & L. 400.
4 See *Hawtayne* v. *Bourne*, 8 M. & W. 265, n.; *Earl Harborough* v. *Shardlow*, *ib.*; *Mahoney* v. *Frasi*, 1 C. & M. 325; 1 Dowl. 70; *DeBernardy* v. *Harding*, 22 L. J. Ex. 340.
5 *Anon.*, 2 Chit. 425; *Doe Gilbert* v. *Ross*, 7 M. & W. 102; *Anon.*, 7 Jur. 1038; 1 D. & L. 725.
6 See *Thwaites* v. *Sainsbury*, 7 Bing. 437
7 *Duncan* v. *Varty*, 2 Phil. 696, 700; and see *White* v. *Lisle*, 3 Swanst. 356; Beames on Costs, 157, n.; *Locke* v. *Colman*, 2 M. & C. 42, 48.
8 *White* v. *Lisle*, 4 Mad. 214; 226; and see *Devie* v. *Lord Brownlow*, 2 Dick. 796.
9 *White* v. *Lisle*, 3 Swanst. 351, n. (*a*): 1 C. P. Coop t. Cott. 361; see also *Legard* v. *Daly*, 1 Ves. S. 192; and *post*, *Rehearings and Appeals*.

or necessary formally to set aside the previous verdict: as no subsequent proceedings can be based upon it; and it should not be given in evidence at the subsequent trial.[1]

Orders granting or refusing applications for new trials of issues may be reheard,[2] and appealed from,[3] like other orders; and where the trial has been had by a jury before the Court itself, there is the same right of appeal from any order made by the Court, on an application for a new trial, as from any other order of the Court; and it is presumed that where the trial has taken place before the Court without a jury, an appeal will lie from an order of the judge before whom the trial was had, granting or refusing the motion for a new trial.

Section III.—*Further Hearing after the Trial.*

If the order for the trial of a question of fact has been made before the hearing, the cause must be brought to a hearing in the usual way; and the verdict upon the trial will form part of the evidence; but if the trial or assessment of damages has been directed at the hearing, the cause must be set down for further hearing.

The cause may be set down as soon as the trial has taken place.[4]

The Court will not stay the further hearing of the cause because an appeal from an order refusing a new trial is pending.[5]

The decree of the Court at the further hearing[6] is usually in accordance with the finding of the Court or jury upon the question of fact; or, if there have been more trials than one, with the last finding. The Court, however, will, even then, if it thinks that the question of fact has not been satisfactorily determined at the trial,

1 *O'Connor* v. *Malone*, 6 Cl. & F. 572, overruling *Baker* v. *Hart*, 3 Atk. 542. For form of Order, see Seton, 990.
2 *White* v. *Lisle*, 3 Swanst. 342.
3 *M'Gregor* v. *Topham*, 4 Hare, 162; 3 H. L. Ca. 132.
4 *Rodgers* v. *Nowell*, 6 Hare, 338.
5 *McGregor* v. *Topham*, 4 Hare, 162.
6 For forms of orders, see Seton, 971, 972, 992, 993.

direct a new trial or new isssue, in such form as may suit the justice of the case ;[1] or give a decision contrary to the verdict. Thus, in *Armstrong* v. *Armstrong*,[2] Sir John Leach, M. R., without directing a new issue, decided at once against the parties in whose favour the verdict was found, and his Honor's decision was supported, upon appeal, by Lord Brougham : but it is right to observe that, in that case, the issues appear to have been so framed that the verdict threw very little light upon the question which it was important to decide, and the whole matter was before the Court with sufficient precision to enable it to come to a decision without another reference to a jury. Where also, in a suit for specific performance, the agreement found by the jury was of such a nature that the Court would not enforce it, the bill was dismissed.[3]

If, after a question of fact has been directed to be tried, the cause is brought on for further hearing, and it appears that the parties have not gone to trial, the Court, if it is dissatisfied with the grounds upon which the trial 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 entered into a compromise with the debtor, subject to the opinion of the Court : upon the case coming on again for hearing, Sir William Grant, M. R., being of opinion that the compromise was improper, directed the parties to proceed to try the issue : the executor paying all the costs of the former proceedings at Law.[4]

The costs of an issue are in the discretion of the Court,[5] and do not follow the verdict as a matter of course. In general, they will only be disposed of at the further hearing of the cause.[6] If, however, the issue has been directed on an interlocutory application they may be disposed of previously.[7]

But although the costs of an issue, directed by the Court, are said to be discretionary, the general rule of the Court in awarding them

1 See *Blackburn* v. *Gregson*, 1 Bro. C. C. 420, 423, 424.
2 3 M. & K. 45, 62, 68.
3 *Morrison* v. *Barrow*, 1 De G. F & J. 633.
4 *Legh* v. *Holloway*, 8 Ves. 213.
5 See Seton, 978 ; *Corporation of Rochester* v. *Lee*, 2 De G. M. & G. 427, 431 ; *Stacey* v. *Spratley*, 4 De G. & J. 199 : 5 Jur. N. S. 503.
6 *Standen* v. *Edwards*, 1 Ves. J. 133, 135 : *Boyse* v *Colclough*, 1 K. & J. 124, 144.
7 *Duncan* v. *Varty*, 2 Phil. 696, overruling *Malins* v. *Price*, 2 Coll. 190 ; 9 Jur. 650 ; *Rigby* v *Great Western Railway Company*, 14 Jur. 710, 712, V. C. W.

is, that they follow the event, and are given to the successful party.[1] This rule, however, is liable to exceptions; thus, in the case of a bill to establish a will against an heir at law, he has a right to be satisfied 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 any special circumstances in the case which will induce the Court to refuse them.[2] The most usual case for refusing an heir at law his costs of an issue, is where he sets up insanity and fails to prove it: in such cases, the heir is not considered entitled to his costs of the issue;[3] he has however been allowed them even in such a case.[4] In some cases, the Court has gone the length of compelling an heir to pay the costs of an issue, but it must be a very strong case to induce the Court to do so; such as misconduct,[5] the spoliation or secreting of a will,[6] or where he vexatiously contests the will, by setting up a case of insanity, knowing that the devisor was perfectly sane.[7] The Court will, however, on the ground of vexation, decree the costs of an issue against an heir who fails, where he himself has filed the bill to set aside the will for insanity, instead of proceeding by ejectment;[8] and it seems that, even where the heir could not have proceeded by ejectment, in consequence of outstanding terms, and the Court, for that reason, dismisses the bill without costs, it still will order him to pay the costs of the issue.[9]

Where a new trial has been directed in consequence of the misdirection of the Judge,[10] or the miscarriage of the jury,[11] no order will in general be made as to the costs of the previous trial.

1 Beames on Costs, 187; Morgan & Davey, 69.
2 *Berney* v. *Eyre*, 3 Atk. 387; *Wright* v. *Wright*, 5 Sim. 449; see also, *Webb* v. *Claverden*, 2 Atk. 424: *Crew* v. *Jolliff*, Prec. in Ch. 93; *Wilson* v. *Metcalf*, 3 Mad. 45: *Grove* v. *Young*, 5 De G & S. 38, 40; *Stacey* v. *Spratley*, 4 De G. & J. 199; 5 Jur. N. S. 503.
3 *White* v. *Wilson*, 13 Ves. 87, 92: *Smith* v. *Dearmer*, 3 Y. & J. 278.
4 *Roberts* v. *Kerslake*, 1 K. & J. 751.
5 *Middleton* v. *Middleton*, 5 De G. & S. 656.
6 *Berney* v. *Eyre*, 3 Atk. 387.
7 *White* v. *Wilson*, *ubi sup.*
8 *Webb* v. *Cleverden*, *ubi sup.*; *Scaife* v. *Scaife*, 4 Russ. 309; *Swinfen* v. *Swinfen*, 27 Beav. 148.
9 *Tatham* v. *Wright*, 2 R. & M. 1, 32.
10 *Bearblock* v. *Taylor*, Jac. 571: *White* v. *Lisle*, 3 Swanst. 342, 343; *Corporation of Rochester* v. *Lee*, 2 De G. M. & G. 427, 431.
11 *Duncan* v. *Varty*, 2 Phli. 696, 700.

CHAPTER XXIII.

PROCEEDINGS UNDER DECREES FOR A PARTITION, TO SETTLE BOUNDARIES, AND TO ASSIGN DOWER.

SECTION I.—*Proceedings under Decrees for a Partition.*

In the case of the partition of an estate, where the titles of the parties are in any degree complicated, the difficulties which occurred in proceeding at Common Law led to applications being made for that purpose to Courts of Equity: where the object is effected by first ascertaining the rights of the several persons interested, and then making a partition of the estate according to such rights.[1] Formerly, a commission was always issued to make the partition required; and upon the return of the commission, and confirmation of the return by the Court, the partition was finally completed by mutual conveyances, of the allotments to the several parties; except in case of an advowson: for there the practice has always been to direct a partition by the decree.[2] Now, however, the partition is more usually made in Chambers; but sometimes at the hearing;[3] and where a commission is directed, liberty is sometimes reserved to the parties, before the commission is issued, to carry in a scheme for the partition before the Judge in Chambers.[4]

It will be observed that in England the practice as to partition is usually conducted before a Judge in Chambers; and the partition is made by a Commissioner or Commissioners duly appointed by the Court, or agreed upon in each case by the parties. With us, however, it is usual to refer the whole matter to a Master, and it is by

1 *Agar* v. *Fairfax*, 17 Ves. 552; Ld. Red. 120. As to partition in equity, see Seton, 574, *et seq.*; 2 L. C. Eq. 394, *et seq.*; Story Eq. Jur. s. 646, *et seq.*; and see 6 Jarm. Conv. by Sweet, 586, *et seq.*; Sudg. Pow. 836, *et seq.*; Smith's Comp. 680—685.

2 *Bodicoate* v. *Steers*, 1 Dick. 69; *Johnstone* v. *Baber*, 22 Beav. 562: 6 De G. M. & G. 439; 2 Jur. N. S. 1053; Seton, 585—588.

3 *Stanley* v. *Wrigley*, 3 Sm. & G. 18, 20; 1 Jur. N. S. 695; *Shepherd* v. *Churchill*, 25 Beav. 21; *Bowles* v. *Rump*, 9 W. R. 370, V. C. S. In *Howard* v. *Barnwell*, 1 N. R. 172, the Lords Justices intimated an opinion that, where an infant is a party, a commission should issue; see, however, Seton, 572, 576; and *Clarke* v. *Clayton*, 2 Giff. 333; 6 Jur. N. S. 1238; *Greenwood* v. *Percy*, 26 Beav. 572. For forms of decrees for a partition at the hearing, and in Chambers, see Seton, 571, 572.

4 Seton, 572.

him that the evidence is taken, the partition made, the boundaries fixed, and all the facts ascertained and set forth in his Report. The English cases, read with this explanation will not mislead. The practice where Commissioners are appointed is given, as cases may occur of a partition being required in a county where there is no Master. It may further be observed that the practice now to be pointed out is irrespective of that under our Statute as to the Partition and Sale of Real Estate, C. 86 of the Con. Sta. of U. C., which will be noticed presently.

When the partition is to be made by commission, and the title of the plaintiff and of all the other parties is clear upon the record, the Court will, at the original hearing, order a commission of partition to issue, in the first instance, without any previous inquiry. If the titles are not clear, the Court will direct an inquiry as to them. The plaintiff must, however, state upon the record his own title and the titles of the defendants; and must show that he and the defendants are among them entitled to the whole estate. If necessary, the Court will direct an inquiry to ascertain the shares in which they are so entitled; and then order a partition according to the rights of all or such of them as appear entitled: dismissing the bill as against those who do not appear to have any right.[1] The Court will not, however, grant such a reference in order to enable plaintiff to complete his own title.[2]

Where the Court directs such inquiries by the decree, it generally goes on, by the same decree to order a partition to take place, in the shares to which the parties are certified to be entitled, and the commission to issue; but further consideration should be adjourned, in case all parties interested are not parties to the suit.[3] The Court, however, sometimes abstains from ordering the commission to issue until the cause comes on for further consideration:[4] though this should not be done except in special cases, in consequence of the delay and expense it will occasion.

Where more than one commission is required, it may be ordered or provided for by the original decree; or a subsequent order for it may be obtained on motion in Chambers.[5]

1 Per Lord Eldon, in *Agar* v. *Fairfax*, 17 Ves. 552.
2 *Joye* v. *Morshead*, 6 Beav. 213, 219.
3 *Agar* v. *Fairfax*, 17 Ves. 533, 553; Seton, 578—579, and cases there cited. The practice as stated in *Cole* v. *Sewell*, 15 Sim 284, and *Attorney-General* v. *Hamilton*, 1 Mad. 214, is not now followed.
4 *Attorney-General* v. *Hamilton*, 1 Mad. 215; and see Seton, 578.
5 Seton, 576.

The names of the Commissioners should be agreed upon between the parties, who join and strike names. Each party appearing by a separate solicitor is entitled to name four Commissioners; but two only of each set of four can be retained; and not less than four names will be inserted in the commission,[1] unless the Court or Judge otherwise directs.[2] If the parties cannot agree upon the names, the Judge at Chambers will determine who shall be named, on a summons being taken out for that purpose.[3] To save expense however, it is very common for the parties to agree, amongst themselves, upon two persons to act as Commissioners: in which case, two fictitious names must be added, so as to preserve the form of the writ.[4]

The proceedings under the commission are open, and not secret; and no oath of secrecy is required to be taken by the Commissioners, or those employed under them.[5] To enable the Commissioners to perform their duty, they are armed by the commission with power to cause all such witnesses as they may see occasion, to come before them to be examined. This may be done by service of a *subpœna* and notice, in like manner as a *subpœna* and notice are served to procure the attendance of witnesses before an examiner; and, upon the witness attending, the oath may be administered to him by two or more of the acting Commissioners: the oath being, *mutatis mutandis*, the same in form as that administered by the Examiner. The attendance of the witness may be enforced, in the same manner as the attendance of a witness before the Examiner.

The Commissioners should, it seems, examine the witnesses apart from each other, if they have any suspicion of manufactured evidence; but otherwise, their proceedings should be open, as they act in a judicial capacity, in the nature of a Court, at which the parties and their agents have a right to be present, as was expressly directed by the writ of partition at Common Law.[6]

The Commissioners themselves examine the witnesses; and Lord

1 Braithwaite's Pr. 235. In *Galloway* v. *Mackersey* the commissioners were named in the decree directing the partition. The lands partitioned were in Tasmania; and the return was filed 18th January, 1864.
2 See *Watson* v. *Duke of Northumberland*, 11 Ves. 153, 163; *Howard* v. *Barnwell*, 2 N. R. 414, V. C. S.
3 *Morewood* v. *Hall*, and other cases cited in Seton, 582; *Howard* v. *Barnwell*, *ubi sup.*; Braithwaite's Pr. 235.
4 Braithwaite's Pr. 235.
5 See Lord Redesdale's opinion upon the Commission in *Curzon* v. *Lyster*, Seton, 1st ed. 191.
6 Lord Redesdale's opinion, in *Curzon* v. *Lyster*, Seton, 1st ed. 192.

Redesdale was of opinion that it would not be advisable for the Commissioners to let the solicitors for the parties put the questions: though he was not clear whether the parties had not a right to such assistance, if they thought proper to use it.[1] The witnesses may be examined upon interrogatories; but in that case, a direction to that effect must be inserted in the decree and commission.[2] The Commissioners are not bound, personally, to take the depositions: that is, to write down the answers of the witnesses; but they may employ clerks to do this part of the business. The clerks, however, must act entirely by their direction, and write the substance of what falls from the witnesses, in the language the Commissioners direct. If any dispute arises, as to the evidence given by a witness, the Commissioners must agree amongst themselves upon the words of the deposition, and, having done so, the deposition must be read over to the witness, and ought to be signed by him before he is dismissed.[3] If any of the Commissioners propose to receive evidence touching any matter not relevant to the business before them, the other Commissioners should object to receiving such evidence, and may refuse to sign the depositions, if taken, and to annex them to the return.[4]

The depositions on behalf of the different parties should be kept distinct. The depositions should, according to the directions in the decree and commission, be returned with the commission.[5]

According to the usual form of decrees made in cases of partition, all deeds and writings relating to the estates to be divided, in the custody of any of the parties, are to be produced before the Commissioners, upon oath, as the Commissioners shall require.[6]

The Commissioners, when once they are appointed, though named by the different parties, are Commissioners for all the parties.[7] In fact they are to act as judges: the whole power of the Court being delegated to them; and, if four act, and there is a difference of

1 Lord Redesdale's opinion, in *Curzon* v. *Lyster*, Seton, 1st ed. 196.
2 Braithwaite's Pr. 234.
3 Lord Redesdale's opinion.
4 *Ibid*, 195.
5 Braithwaite's Pr. 234. In *Watson* v. *Duke of Northumberland*, 11 Ves. 153, it was stated, at the bar, that upon very few commissions has any return been made of the evidence, *ib.* 157; and Lord Eldon said, he believed the practice to be as stated, that the return was made without the evidence; *ib.* 161. A compliance with the directions of the commission would, however, appear to be the proper course, and that now adopted: Braithwaite's Pr. 237, 238.
6 Seton, 571.
7 Per Lord Eldon, in *Watson* v. *Duke of Northumberland*, 11 Ves. 153, 160

opinion amongst them, one being of one opinion and three of another, the three make the return; and so, if three are present and two concur in opinion against the third, that is sufficient; but the commission does not authorise two out of four to act, where all four are present; and, therefore, it does not authorise a double return by two Commissioners one way, and by the other two another way: though if two only are present, a return by them will be good.[1]

As the Commissioners act as a court, their proceedings ought to be open. The parties or their solicitors should attend them; should point out what may tend to give the Commissioners full information on the subject; should produce their deeds and other evidence, as well written as oral; should know what evidence is given on both sides; should be at liberty to cross-examine the witnesses under the control of the Commissioners; and take every step necessary to discover the truth, and enable the Commissioners to make a proper return.[2]

The commission itself ought to be produced to the Commissioners when they meet, and should remain with them till their proceedings are closed, and their return annexed.[3]

The course to be pursued by the Commissioners, under a commission of partition, is very clearly pointed out by the terms of the commission. In the first place, they are directed to meet together, at some certain place by them appointed, and are from thence to "go to, enter upon, and walk over, the estate." In order that they may do this, they must first ascertain the estate which is the subject of the commission; and for that purpose, they must look into the bill and answers; and if, from thence, they can ascertain the property, they must stop there: if they find the descriptions in those instruments not sufficiently accurate to enable them to proceed, they must endeavour to supply the defect in the pleadings by evidence. But the pleadings must still be their guide as to what evidence they shall receive: for they are to divide "the estates in question in the cause,"[4] and no others; any evidence, therefore, touching estates not in question in the cause will be irrelevant to the business before

1 *Ibid*, 158, 162.
2 See Lord Redesdale's opinion, in *Curzon* v. *Lyster*, Seton, 1st ed. 192.
3 *Ibid*, 197.
4 In the modern form of commission, the estate to be partitioned is referred to by its description in the decree: to which the words, "in the decree, and in the pleadings of the cause, more particularly mentioned," are superadded: see Braithwaite's Pr. 233.

the Commissioners, and ought to be rejected by them, except so far as it may be necessary for the purpose of ascertaining what are the estates in question; and such evidence may be necessary, if there is any confusion or intermixture of boundaries,[1] between the estates in question and those not in question.

Having ascertained what the estate is, which is to be the subject of the partition, the next thing the Commissioners have to do is, to make "a fair partition, division, and allotment, thereof," into as many shares and proportions as the decree or order, under which the commission issues, directs. In doing this the Commissioners must exercise "the best of their skill, knowledge, and judgment;" and, provided they do that, and act fairly, the Court will not, it seems, distrust their return upon the mere allegation of conflicting opinions by different surveyors, with respect to the comparative value of the several lots: the Court considering that, as the Commissioners are named by the parties, and are, therefore, judges of their own choice, the principles which apply to arbitrators are properly applicable to them.[2] Where, however, it can be shown that the Commissioners have committed a gross error in judgment, (although there is no proof of partiality,) the Court will set aside their adjudication.[3]

It is to be observed, that, in making a partition in Chancery, every part of the estate need not be divided, but that it will be sufficient if each party have his proper share of the whole.[4] Thus, where two-thirds of an estate belonged to the plaintiff, and one-third to the defendant, and the estate consisted, amongst other things, of a mansion-house and of farms and lands about it, and the defendant insisted that he was entitled to have one-third of each allotted to him, Lord Macclesfield said, that although in making the partition care must be taken that the defendant should have a third part in value of the estate, there was no colour of reason that any part of the estate should be lessened in value in order that the defendant should have his third of it; which, if he should have one-third of the house and of the park, would very much lessen the

1 Lord Redesdale's opinion, in *Curzon* v. *Lyster*, Seton, 1st ed. 195.
2 *Jones* v. *Totty*, 1 Sim. 136; see also, *Manners* v. *Charlesworth*, 1 M. & K. 330; Coop. t. Brough. 52.
3 *Story* v. *Johnson*, 1 Y. & C. Ex. 538.
4 *Earl of Clarendon* v. *Hornby*, 1 P. Wms. 446; Sugd. Pow. 918; and see *Peers* v. *Needham*, 19 Beav. 316.

value of both.[1] So, if there be three houses of different values to be divided amongst three, it will not be right to divide each house; for that would be to spoil every house; but some recompense should be made, either by a sum of money or rent, for owelty of partition, to those who have the houses of less value.[2] The Commissioners, however, have no power to award sums to be paid by way of owelty, unless authorised by the decree.[3]

It has, however, sometimes happened, that the estate to be divided consists of one entire thing, such as a house,[4] or a cold bath:[5] in such cases, the partition must nevertheless be made, and the difficulty of doing it will be no reason for not effecting it. So, the rent payable in respect of water pipes, by a public company for supplying water, laid through the land, has been divided, by apportioning it between the parties, according to their respective quantities of the land through which the pipes ran.[6] In like manner, a mill may be divided, by giving to the parties every alternate toll dish: as was done at Common Law, in the case of a writ *de partitione faciendâ*.[7] In the case of advowsons, the partition is effected by directing alternate presentation: which, as we have seen, is done by the decree, without issuing a commission.[8] So also there may be a partition of a manor.[9]

The Commissioners having apportioned and divided the property, should proceed to set apart and allot the shares to the parties. This they should do, when it can be accomplished, by lot: for which purpose they should call in some indifferent person, and require that person to draw lots for the shares of each party.[10] It is to be observed, however, that the course of making the choice of shares, by lot, should not be resorted to where it cannot be done with fairness, and

1 *Earl of Clarendon* v. *Hornby*, 1 P. Wms. 446.
2 *Earl of Cleverdon* v. *Hornby*, 1 P. Wms. 446; *Peers* v. *Needham*, 19 Beav. 316.
3 *Mole* v. *Mansfield*, 15 Sim 41; Seton, 579 For form of decree, see *ib.* 580, No. 3.
4 *Turner* v *Morgan*, 8 Ves. 143, 145. The end of that case was, that the commission having been executed, an exception was taken by the defendant, on the ground that the Commissioners had allotted to the plaintiff the whole stack of chimneys, all the fireplaces, the only staircase in the house, and all the conveniences in the yard; and the exception was overruled by Lord Eldon; who said he did not know how to make a better partition for the parties; that he granted the commission with great reluctance, but was bound by authority; and that it must be a strong case to induce the Court to interfere, as the parties ought to agree to buy and sell; see 11 Ves. 157, n.
5 *Warner* v. *Baynes*, Amb. 589.
6 *Ibid.*
7 *Earl of Clarendon* v. *Hornby*, *ubi sup.*
8 Seton, 585—588: *Bodicoate* v. *Steers*, 1 Dick. 69; *Johnstone* v. *Baber*, 22 Beav. 562; 6 De G. M. & G. 439; 2 Jur. N. S. 1053.
9 *Hanbury* v. *Hussey*, 14 Beav. 152; Seton, 585; *Cattley* v. *Arnold*, 4 K. & J. 595.
10 Lord Redesdale's opinion, in *Curzon* v. *Lyster*, Seton, 1st ed. 197.

with due regard to the situation of the parties, and of the shares; but only when there are no circumstances to induce the Commissioners to allot the shares otherwise.[1] In such cases, it is the duty of the Commissioners to assign the shares to those parties to whom they would be of most value (independently of their value in the market), with reference to their respective situations in relation to the value of the property before the partition took place. Thus, where Commissioners were directed to divide lands equally between *A.*, *B.*, and *C.*, and they accordingly divided the lands into portions of equal value in the market, but assigned to *A.* an inn of which *C.* had been for many years the occupier, on which he had expended money in improvements, and adjoining to which he had purchased property for the purpose of his occupation, it was held by the L.C.B., Lord Abinger, that the adjudication of the Commissioners was wrong, and a fresh commission was directed to new Commissioners.[2]

The Commissioners, having divided and allotted the estate, should prepare their certificate: which must detail their proceedings, and appoint the shares of each party, according to their allotments, to be enjoyed by them in severalty: distinguishing each part, if so directed by the commission, by metes and bounds. There is no prescribed form of certificate: it is in the nature of a report; and, as a rule it should follow, as nearly as may be, the language of the commission; and the particulars, description, and quantities of the several parts of the estate may be described in the schedule.[3] The certificate should be signed and sealed by the Commissioners; and each schedule and plan, annexed thereto, should be signed by them; but their signatures need not be attested.[4] The Commissioners should also endorse on the commission their return thereto, and sign the same: adding the word "Commissioners" after their names.[5] The Commissioners are not limited as to time in returning the writ: they should, however, execute it without delay.[6]

If the Commissioners connot agree upon a division or allotment,

1 *Canning* v. *Canning*, 2 Drew. 434; 18 Jur. 640. The Court will not give any special direction as to the allotment, on the application of a stranger: *Wright* v. *Vernon*, 1 Dr. & S. 231.
2 *Story* v. *Johnson*, 1 Y. & C. Ex. 538, 546.
3 Braithwaite's Pr. 236, n.
4 Braithwaite's Pr. 238.
5 *Idid.*
6 Braithwaite's Pr. 238. For form of order *nisi* to compel return, see Seton, 583, No. 14.

they must make separate certificates:[1] though the consequence thereof will be, if the Commissioners are equally divided, that both returns will be quashed.[2]

The certificate having been signed and sealed by the Commissioners, must, together with any plans therein referred to, and the depositions of the witnesses, be annexed to the commission:[3] which must then be closed up and sealed by the acting Commissioners. It seems that if, by mistake, any document referred to by the Commissioners in their certificate has been omitted to be annexed thereto, the Court will, upon motion, direct it to be added.[4] If there are two certificates, they must both be annexed to the commission.

The commission, and certificate and other documents annexed sealed up as above mentioned, are then transmitted by the Commissioners to the Record and Writ Clerks' office, and there filed; and any party may obtain an office copy.[5]

The commission having been returned and filed, an order to confirm the certificate *nisi* may be obtained, on motion of course. This is generally done by the party suing it out; but if he neglects to do it, the other side may obtain the order.[6]

If any ground exists for objecting to the certificate, such as irregularity in its execution, or misconduct or partiality on the part of the Commissioners, a special motion must be made on notice, and supported by affidavits, to quash or suppress the certificate.[7] Formerly, exceptions could be taken to the certificate, but now it is conceived that, where the certificate is objected to, but it is not desired to suppress it, a motion should be made to vary it.

So, if there be a double return, and if one party alone applies to quash one of the certificates only, the Court will, if it sees proper, order that certificate to be quashed. This appears to have been done in *Randle* v. *Adams*,[8] where two certificates were made, and,

1 Lord Redesdale's opinion, in *Curzon* v. *Lyster*, Seton, 1st ed. 197.
2 *Watson* v. *Duke of Northumberland*, 11 Ves. 153, 162.
3 In the following order: 1. The commission; 2. The certificate; 3. The plans; and, 4. The depositions: Braithwaite's Pr. 238.
4 See *Manners* v. *Charlesworth*, 1 M. & K. 330, 334; Coop. t. Brough. 52, 56.
5 Braithwaite's Pr 238
6 For form of order, see Seton, 583;
7 *Peers* v. *Needham*, 19 Beav. 316; *Watson* v. *Duke of Northumberland*, 11 Ves. 155; *Jones* v. *Totty*, 1 Sim. 136; *Manners* v. *Charlesworth*, 1 M. & K. 330; Coop. t. Brough. 52. For form of order to quash, see Seton, 583, No. 17.
8 Cited in *Watson* v. *Duke of Northumberland*, *ubi sup.*

upon the application of the plaintiff, one of those certificates was suppressed and the other established: the former being considered, though nominally a return, as no return in fact; and therefore to be suppressed, as if never annexed to the commission. It does not appear, from the statement of the above case in *Watson* v. *Duke of Northumberland*, what the nature of the return suppressed was; but, in all probability, it was a certificate by one of the Commissioners only, in opposition to the certificate of his colleagues: in which case, the return being of one only would be a nullity, not fewer than two being authorized to act. If the return had been by two Commissioners against the return of two others, both the returns would, for the reasons before stated, have been nullities, and must have been quashed, as was the case in *Watson* v. *The Duke of Northumberland*,[1] and in *Corbet* v. *Davenant*:[2] in which latter case, the Court of itself refused to proceed, and ordered the return to be quashed.

If the return to a commission is quashed, the Court will order a new commission to issue; and in *Watson* v. *The Duke of Northumberland*,[3] where there were two returns, each by two Commissioners, it ordered the new commission to be directed to five Commissioners.

If the certificate of the Commissioners is not objected to, the order for confirming it should be made absolute, on a motion of course, supported by an affidavit of service of the order *nisi*, and the Registrar's certificate of no cause shown.[4]

When the decree directs the partition to be made in Chambers, or where, though a commission is directed to issue, the parties have liberty to carry in a scheme for the partition in Chambers before the commission is issued, and desire to avail themselves thereof,[5] a copy of the decree is left at Chambers, and an appointment to proceed thereon is taken out and served on the opposite parties, in the usual way. Upon the return of the appointment, directions will be given as to the further prosecution of the matter. Evidence, consisting usually of valuations and affidavits by surveyors, must then

1 11 Ves. 155. 162, 163.
2 2 Bro. C. C. 251.
3 11 Ves. 163. In *Canning* v. *Canning*, 2 Drew. 434: 18 Jur. 640, the new commission was directed to three Commissioners, see Seton, 583.
4 For form of order, see Seton, 583.
5 See *Howard* v. *Barnwell*, 1 N. R. 172, L.JJ.

be adduced to show the best mode of effecting the partition; and the scheme of the partition will be approved, without the expense of a commission.[1] As before mentioned, all this is usually done, in this Province, by a Master.

By a partition in Equity, the equitable right only is vested;[2] and, therefore, whether the partition is made at once by the decree, or is directed to be made in Chambers, or under a commission, the decree usually contains a direction that the parties shall execute mutual conveyances to each other of the allotted shares, according to their respective interests therein. The conveyances should always be directed to be settled by the Judge or a Master where infants or married women are interested; but if all the parties are *sui juris*, the conveyances are only directed to be settled by the Judge or Master in case the parties differ about the same.[3] When the conveyance has to be settled by the Judge, the procedure at Chambers is the same as in ordinary cases of settling deeds at Chambers.

One party cannot refuse to execute the conveyance to another on the ground that the remaining party has not executed the conveyance to him.[4]

A decree for a partition generally contains a direction, that, after the partition has been had, such of the title deeds in the possession of the parties as relate solely to any distinct part of the premises which shall be allotted to either of the parties alone, shall be delivered to or retained by him, and that the rest shall be deposited in Court for the mutual benefit of the parties, subject to further order; or shall be retained by the party having the custody thereof, he undertaking to abide by any order which the Court may make as to the same, with liberty for any party to apply to the Court for directions concerning the same.[5] In general, the party entitled to the estate of greatest value is entitled to the custody of the deeds; and he may be required to enter into a covenant to produce them, and allow copies of them to be taken.[6] When the parties are equally interested, the plaintiff will have the custody of the deeds.[7]

1 1st Rep. Eng. & Irish Com. App. 68.
2 *Whaley* v. *Dawson*, 2 Sch. & Lef. 372; *Miller* v. *Warmington*, 1 J. & W. 484, 493.
3 See forms of orders, Seton, 571, 572.
4 *Orger* v. *Sparke*, 9 W. R. 180, V. C. W.
5 *Jones* v. *Robinson*, 3 De G. M. & G. 910, 912; Seton, 581.
6 Seton, 577; see the general form of an order as to the title deeds, settled by Lord Hardwicke, Hand, 152; 3 De G. M. & G. 910, n.; and see *Jones* v. *Robinson*, *ubi sup.*: *Elton* v. *Elton*, 27 Beav. 632: 6 Jur. N. S. 136; and forms of decres in Seton; 581, 592.
7 *Elton* v. *Elton*, *ubi sup.*

With respect to the costs of a partition, the general rule of the Court is now understood to be that which was pronounced by the Court, in giving judgment in the case of *Agar* v. *Fairfax*:[1] that as the party came into Equity, instead of going to Law, for his own convenience, the rule of law should be adopted, and therefore, no costs should be given until the commission; and that the costs of issuing, executing, and confirming the partition, should be borne by the parties, in proportion to the value of their respective interests; but not the costs of any subsequent proceedings.[2] The costs of an infant,[3] or of a married woman,[4] or lunatic,[5] will be declared to be a charge upon his or her share, including costs before decree.[6]

The costs decreed in partition suits are as in other suits, party and party costs: and where any of the parties are not *sui juris*, costs as between Solicitor and client are not decreed even by consent.[7] In a suit for partition, in drawing up the decree the parties had omitted to have inserted a direction to tax the costs as between Solicitor and client, or to apportion them amongst the several parties according to their respective interests: on a motion for an order directing the Master to do so upon taxation, Spragge, V. C., made the order to apportion the costs, as that would effect a proper carrying out of the decree pronounced, but refused the order for taxation as between Solicitor and Client, that being a variation of the decree which could properly be done on re-hearing only.[8] In suits between joint owners for partition or Sale, the costs are to be borne by the parties in proportion to their respective interests in the property, except that in the case of partition the Court, if it sees fit, may give no costs to either party up to the hearing.[9]

Where one of the parties had made a lease of his undivided share, the costs of the lessee, who was a necessary party to the suit for

1 17 Ves. 533, 558
2 See Beames on Costs, 31; see also *Calmady* v. *Calmady*, 2 Ves. J. 568; *Baring* v *Nash*, 1 V. & B. 554; *Morris* v. *Timmins*, 1 Beav. 411, 418; *M'Bride* v. *Malcomson*, 2 Dr & Wal. 700; Seton, 581, 582; Morgan & Davey, 172.
3 *Shepherd* v. *Churchill*, 25 Beav. 21; *Cox* v. *Cox*, 3 K & J. 554. In recent cases, where it appeared to be for the benefit of the infant, the Court has directed the costs to be raised by a sale of the e tate, without a partition; *Hubbard* v. *Hubbard*, 2 H. & M. 38; *Donaldson* v. *Fairfax*, *ib* 40, n. (*a*); and see *Thackeray* v. *Parker*, 1 N. R. 567, V. C. W.; *Davis* v. *Tarvey*, 9 Jur. N. S. 954; 11 W. R. 679, M R.; *Griffies* v. *Griffies*, 11 W. R. 943, V. C. K.
4 *Fleming* v. *Armstrong*, 5 N. R. 181, M. R. In this case, the costs were directed to be raised by a sale of the estate, although there was the usual clause against anticipation,
5 *Singleton* v. *Hopkins* 1 Jur. N. S. 1199; 4 W. R. 107, V. C. S.
6 *Shepherd* v. *Churchill*, and *Cox* v. *Cox*, *ubi sup.*
7 *Harkness* v *Conway*, 12 Grant, 449.
8 *Bernard* v. *Jarvis*, 1 Cham. R. 24.
9 *Cartwright* v. *Diehl*, 13 Grant, 360.

the partition, were thrown exclusively upon the lessor, on the ground that, as such lessee was entitled to his costs, his landlord, who had been the means of bringing him into Court, was the proper person to indemnify him.[1]

It has been decided, that Commissioners of partition have no lien on the commission for their charges.[2]

Besides this mode of partition, it may be effected under the Ontario Statute 32 Vic., c. 33, amended in 1873. These Statutes have provided full details of the practice to be adopted under them: and it will be convenient here to refer to the clauses of the Chancery Act under which our Court sometimes proceeds. Sec. 45 of that Act (Con. Sta. U. C. C., 12) provides that, "In regard to the partition and sale of estates of joint tenants, tenants in common, and co-parceners, the Court shall possess the same jurisdiction as by the laws of England on the 10th August, 1850, was possessed by the Court of Chancery in England, and also by the laws of Upper Canada is possessed by the Courts of Queen's Bench and Common Pleas, or by the County Court." The fact that there is an outstanding term in land to portions of which infants are entitled, is no defence to a bill of partition, although it may influence the Court in deciding between a sale or a partition of the estate. To a bill of partition a lessee for years may be a necessary party.[3] In the case of an application by petition for partition under the Statute (c. 86, C. S. U. C.,) it was decided that partition, where ordered under that Act, is to be made by the real representative: that the question whether partition or sale should be ordered is proper to be referred to the real representative, who is to make sale if ordered:—that the Court may order a sale in the first instance if it see fit:—and that the Court will use its own machinery for carrying the purposes of the Act into effect.[4] As to this Act it may be observed that it presents no advantage over the ordinary practice of the Court under a bill for partition, and in the case just quoted the late V. C. Esten remarked that "The Court will use its own machinery for carrying the purposes of the Act into effect, so far as possible, consistently with the express directions of the Act, of which the provisions are somewhat singular,

1 *Cornish* v. *Gest*, 2 Cox, 27; Beames on Costs, 32: but see *Herbert* v. *Hedges*, 10 Ir. Eq. R. 479, cited Morgan & Davey, 174; *Williams* v. *Williams*, 10 W. R. 609, V. C. K.
2 *Young* v. *Sutton*, 2 V. & B. 365.
3 *Fitzpatrick* v. *Wilson*, 12 Grant, 440.
4 *Re Foster*, 1 Cham. R. 103.

and do not appear to have been necessary, or to have effected any improvement in the practice, so far as Courts of Equity are concerned." The report in a partition suit by bill under C. S. U. C. 86, does not require to be specially confirmed by the Court, but before it will be acted upon it will be examined by the Court, to see whether there is in it the manifest error referred to in Sec. 24 of the Act.[1]

Sec. 46 of the Chancery Act provides, that "In such cases, any Decree, Order, or Report, by which a partition or sale is declared or effected, or any deed executed by the Master of the Court, to give effect to such partition or sale, shall have the same effect at law and in equity as the record of a return in the Court of Queen's Bench, or Common Pleas, or in the County Court, has in matters of partition, or as Sherriff's deeds now have in other cases." Sec. 47, that "Any partition or sale made by the Court shall be as effectual for the apportioning or conveying away of the estate or interest of any married woman, infant, or lunatic, party to the proceedings by which the sale or partition is made or declared, as of any person competent to act for himself." And Sec. 48, that "An office copy of the decree, order, or report, declaring a partition, shall be sufficient evidence in all Courts of the partition declared thereby, and of the several holdings by the parties of the shares thereby allotted to them." Where, on the hearing of a cause for partition it was shown that a division of the land would be less beneficial to the owners than a sale, the Court without waiting for any return to that effect, ordered the land to be sold.[2] In this case a bill had been filed praying a sale, and the Court proceeded under the provisions of C. 86, Con. Stat. U. C. Where a decree, which reserved no further directions, directed that a sale or partition of the property should take place according as the Master should consider either course more for the interest of the parties, but contained no directions as to the conveyances or possession, or the execution of deeds, and the Master reported in favour of partition; the Court on motion, ordered the execution of conveyances, and the delivery of possession.[3] In a suit for partition, the greater part of the property, the subject of the partition, had been sold under the decree of the Court, but portions

1 *Dunn* v. *Dowling*, 1 Cham. R. 365.
2 *Bennett* v. *Bennett*, 8 Grant, 446.
3 *O'Lone* v. *O'Lone*, 2 Grant, 642.

of it still remained unrealized. It appearing that all prior charges on the property (such as the costs of the various parties to the suit, &c.), had been paid, and that the unrealized property was far less in value than the amount for which one of the co-owners (the plaintiff), was entitled to credit on account with the other co-owners; on a petition by the plaintiff, an order was granted vesting all the unrealized property in him.[1] Although partition may be directed of an estate subject to a mortgage thereon, still, if one of several co-tenants creates an incumbrance on his undivided share, and institutes proceedings to obtain a partition of the estate, the party holding the incumbrance must be brought before the Court, so as to bind the legal estate; and the party creating the charge must bear any additional expense occasioned thereby.[2]

Section II.—*Proceedings under Decrees to settle Boundaries.*

In a suit to ascertain boundaries, the decrees generally directs a commission to issue for that purpose.[3] It may, however, direct the question to be tried before the Court itself with or without a jury, or before a Court of Common Law.[4]

A commission to settle boundaries partakes very much of the same nature as a commission of partition; it is nearly in the same form, and is sued out, executed and returned, and the certificate of the Commissioners is objected to, confirmed, or quashed, in the same manner.[5] There is, however, frequently this difference between commissions to ascertain boundaries and commissions of partition, namely, that, in the case of a partition, the thing to be divided is clearly ascertained and described: whereas, in the case of a commission of boundaries, it is often impossible for the Commissioners to ascertain them with sufficient certainty to set them out. Where,

1 *Arnold* v. *Hurd*, 1 Cham. R. 252.
2 *McDougall* v. *McDougall*, 14 Grant, 267.
3 *Godfrey* v. *Littell*, 1 R & M. 59, 63; Taml 221; 2 R & M 630, 636. As to the jurisdiction, see *Speer* v. *Crawter*, 2 Mer. 410, 417; *Attorney General* v. *Stephens*, 1 K & J. 624: 1 Jur. N S 1039; 6 De G. M. & G. 141; 2 Jur. N. S. 51; *Godfrey* v *Littel*, *ubi sup.*; *Tulloch* v *Hartley*, 1 Y. & C C. C. 114; *Hicks* v. *Hastings*, 3 K. & J. 701; Seton, 590, 591; 2 L. C. Eq. 367, *et seq.*; Story Eq. Jur. s. 10. *et seq.* All parties interested must be parties; *Rayley* v *Best*, 1 R. & M. 659. For forms of decrees, see Seton, 588—590, 591.
4 *Godfrey* v. *Littel*, *ubi sup.*
5 See Braithwaite's Pr. 239; and cases cited below.

however, it is through the default of the tenant or copyholder that boundaries are confused, the Court provides for the case of its being impossible to ascertain them, by directing so much of the defendant's own land to be set out, as shall be equal to the quantity originally granted or leased.[1] In such case, the Commissioners must proceed accordingly.

It is to be observed that, in a bill by a prebendary against several of his lessees for a commission to ascertain the boundaries of his prebendal lands, which had become intermixed with their own lands, Lord Eldon held that the plaintiff had a right to name as many commissioners as the defendants.[2]

The decree, in a suit to settle boundaries, does not order mutual conveyances, as in the case of a partition; but directs that, after the lands have been set out, the defendant is to deliver possession thereof to the plaintiff, and that the plaintiff and his heirs are to hold and enjoy the same against the defendant, or any person or persons claiming under him.[3]

The further consideration of the suit is generally reserved until after the return of the commission, or trial of the question.[4] When, therefore, the commissioners' certificate has been confirmed absolute, the cause must be set down for hearing on further consideration, in the usual manner.

No certain rule appears to be laid down with reference to the costs of suits to settle boundaries. Where, however, it does not appear to have been owing to any default, either in the plaintiff or defendant, that the lands have been mixed or confounded, the Court will direct the costs to be borne by the plaintiff and defendant equally: though the interest of one party is more inconsiderable than the interest of the other.[5] The decision of the Court with respect to costs will also be influenced by the relation of the parties; and it is to be recollected, that it has been long settled that a tenant is bound (among other obligations resulting from that relation) to keep distinct from his own property during the tenancy,

1 *Speer* v. *Crawter*, 2 Mer. 410, 418; *Willis* v. *Parkinson*, 2 Mer. 507, 510; *Attorney-General* v. *Fullerton*, 2 V. & B. 263, 264; *Lord Abergavenny* v. *Thomas*, 1 West, 649; *Duke of Leeds* v. *Earl of Strafford*, 4 Ves. 180, 186; *Attorney General* v. *Penruddocke*, Seton, 589.
2 *Willis* v. *Parkinson*, 1 Swanst. 9
3 *Lord Abergavenny* v. *Thomas*, Seton, 591, No. 1.
4 See *Godfrey* v. *Littell*, Taml. 234: Seton, 588.
5 *Norris* v. *Le Neve*, 3 Atk. 82.

and to leave clearly distinct at the end of it, his landlord's property not in any way confounded with his own.[1] If, therefore, it should appear that a tenant has either voluntarily or negligently permitted the boundaries of his own land to get confused with that of his landlord, the Court will, in all probability, compel him to pay the costs of his misconduct or negligence.[2]

Section III.—*Proceedings Under Decrees to Assign Dower.*

Formerly, the Court would not assist a widow in the assignment of her dower,[3] out of her husband's estate, if there was any doubt as to her legal right. Where the title of dower was disputed, it referred her claim to the decision of a Court of Law:[4] either by directing an issue, or by ordering the bill to be retained for a certain time, with liberty to the plaintiff to bring a writ of dower, as she might be advised.[5] Now, however, it is presumed that the Court will itself determine the legal right.[6]

When the right to dower has been established or admitted, an inquiry will be directed what lands the husband died seised of wherein his widow is entitled to dower; and the dower will then be directed to be assigned.[7]

This may be done, either in Chambers,[8] or by directing a commission to issue, or by reference to a Master.[9] A commission to assign dower is nearly in the same form, and is made out, executed, and returned, in the same manner as a commission of partition.

It is to be observed that, as in the case of settlement of boun-

1 *Attorney-General* v. *Fullerton ubi sup.*
2 And see further as to costs, *Metcalfe* v. *Beckwith*, 2 P. Wms. 376; *Habergham* v. *Stansfeld*, Seton, 591, No. 4, where the costs were directed to be paid rateably; Beames on Costs, 35; Morgan & Davey, 174.
3 As to dower, and the jurisdiction of the Court in respect thereto, see Sudg. Stat. 244, *et seq.*; Seton, 673, *et seq.*; Tudor L. C. Conv. 55, *et seq.*; Story Eq. Jur. s. 624, *et seq.*; Smith's Comp. 188, *et seq.*; 2 L. C. Eq. 402, 403.
4 Ld. Red. 121, 122.
5 *Mundy* v. *Mundy*, 2 Ves. J. 122, 128; *Read* v. *Read*, Ld. Red. 122, n *(b)*; *Curtis* v. *Curtis*, *ib.*; 2 Bro. C. C. 620; *D'Arcy* v. *Blake*, 2 Sch. & Lef 387, 390.
6 Chancery Act, s. 26.
7 See form of decree in *Meggot* v. *Meggot*, Seton, 671, 672.
8 See forms of decree, Seton, 673; *Goodenough* v *Goodenough*, 2 Dick. 795.
9 Seton, 673, 674. 676; *Wild* v. *Wells*, 1 Dick. 3; *Huddlestone* v *Huddlestone*, 1 Cha. Rep. 38; *Lucas* v. *Calcraft*, 1 Bro. C. C. 134; 2 Dick, 594; *Mundy* v. *Mundy*, 2 Ves. J. 125; 4 Bro. C. C. 294.

daries, it generally forms part of the decree, that when the dower has been assigned, possession shall be delivered to the plaintiff.[1]

The widow is also entitled to an account of the arrears of her dower; and this, notwithstanding the death of the heir pending the suit: although at law her right to damages would have been lost by that event.[2] The widow's right to the rents and profits, accrued from the death of her husband, is not limited to the time of filing the bill.[3]

It may be mentioned here, that interest will not be allowed on arrears of dower.[4]

The original decree usually directs an account of rents and profits: whether the assignment of dower is to be made in Chambers or by commission.[6]

Lord Redesdale observes, that "in the two cases of partition and assignment of dower, as no costs can be given in a Court of Common Law upon a writ of partition or a writ of dower, no costs have commonly been given in a Court of Equity upon bills brought for the same purpose."[6] As respects dower, this appears to be the present rule of the Court, in cases where the widow comes into Court for the single purpose of having dower assigned her: the rule, however, is subject to exceptions where previous questions are raised, in litigating which the party is vexatious;[7] therefore, where the widow had, without any just pretence, been kept out of her dower, Sir William Grant, M. R., awarded her her costs.[8] In *Meggot* v. *Meggot*,[9] also, the Court appears to have awarded the widow her costs, up to the time of the decree: reserving the consideration of the subsequent costs until after the report.[10]

In Equity, as at Law, a widow is not entitled to arrears of dower, unless her husband died seised. In such a case, she is not, as a general rule, entitled to costs in equity, unless she has made

1 *Meggot* v. *Meggot*, Seton, 671, No. 1; *Goodenough* v. *Goodenough*, *ubi sup.*
2 *Curtis* v. *Curtis*, 2 Bro. C. C. 620: *contra*, Ld. Red. 122.
3 *Curtis* v. *Curtis*, *ubi sup*; *Mundy* v. *Mundy*, 2 Ves. J. 122, 128; *Oliver* v. *Richardson*, 9 Ves. 222.
4 *Lindsay* v. *Gibbon*, cited 3 Bro. C. C. 495; *Wakefield* v. *Childs*, 1 Fonb. 23.
5 See forms, Seton, 672, 676.
6 Ld. Red. 122.
7 *Lucas* v. *Calcraft*, 1 Bro. C. C. 134, see also Sir Samuel Romilly's note of S. C. *ib.* ed Belt, (*n*); *Bamford* v. *Bamford*, 5 Hare, 203, 205.
8 *Morgan* v. *Ryder*, 1 V. & B. 20; Beames on Costs, 22, n. *(f)*; and see *Fry* v. *Noble*, 7 De G. M. & G. 687; 2 Jur. N. S. 128; 20 Beav. 598; 1 Jur. N S. 767; *Harris* v. *Harris*, 11 W. R. 62, M.R.
9 Seton, 671, 672.
10 But see *Outhwaite* v. *Outhwaite*, referred to in Beames on Costs, 22, n. *(f)*. As to costs in a dower suit, see Morgan & Davey, 151.

a demand in writing, as required at law.[1] Where the annual value of a widow's dower was not large, and she made no demand for it, but resided on the property with her son, the heir, during his life, she, having no intention of claiming dower, a claim for arrears against his estate, after his death, was refused.[2] Where a testator devised one parcel of land to his wife in lieu of dower, and another parcel without expressing that it was to be in lieu of dower, and then devised his remaining lands to other parties, and the will contained other evidence shewing an intention that such last-mentioned devises should be free from dower: it was held, that on the widow electing to take dower, she forfeited, not only the first-mentioned parcel of land, but also the other. In case of a sale of land, a widow is not entitled, as compensation for her dower, to the present value of one-third of the interest in the purchase money; the value is to be computed with reference to the nature of the property.[3] Where property was conveyed to a husband, under an agreement with the grantee that the grantor should be allowed to remain in possession for life of a specified portion, held that the widow of the grantee had no right to dower out of this portion during the life of the grantor: and an action by her therefor was restrained.[4]

Where a wife joined in a mortgage, and on the death of her husband there was not sufficient assets to pay all his debts, the widow is not entitled to have the mortgage debt paid in full out of the assets to the prejudice of creditors.[5] The mere fact that at the death of, or alienation by the husband, his lands were of no rentable value, is not alone sufficient to disentitle the widow to claim damages, if the land has been subsequently made rentable by reason of improvements or otherwise, either by the heir or vendee: as, in such a case, a portion of the rent is attributable to the land.[6] The Court has jurisdiction in a suit, as well as on a petition, to decree a sale of an inchoate right of dower.[7] In case of land of which a widow is dowable, but in which her dower has not been set out, if the timber is cut down she is entitled to the income arising from one-third of the amount produced. In such

1 *Losee* v. *Armstrong*, 11 Grant. 517.
2 *Philips* v. *Zimmerman*, 18 Grant. 224.
3 *Stewart* v. *Hunter*, 2 Cham. R. 336.
4 *Slater* v. *Slater*, 17 Grant. 45.
5 *White* v. *Bastedo*, 15 Grant. 546.
6 *Wallace* v. *Moore*, 18 Grant. 560.
7 *Cassey* v. *Cassey*, 15 Grant. 399.

a case, the widow had reason to apprehend that the owner intended to fell the whole of the wood; it was shewn in fact he had no such intention, but he had an opportunity of undeceiving her, and did not avail himself of it: held, that proof that he had not the intention imputed to him, did not exempt him from liability to the costs.[1] Where, after a husband's estate had been transferred to *A*, a purchaser, his wife executed a deed to *A* containing a release of dower by her, but no words of release or conveyance by the husband: held, sufficient to bar the wife, without examination before magistrate or a judge.[2]

CHAPTER XXIV.

PROCEEDINGS IN THE JUDGES' CHAMBERS.

SECTION I.—*General Course of Proceeding at Chambers.*

Formerly, it was the practice, in every suit of any degree of complication, to refer to one of the Masters in Ordinary of the Court, either inquiries to be investigated, or directions to be carried into effect. The form of these references, and the circumstances under which they were made, constituted a most material part of the general practice of the Court. The Masters exercised an almost independent jurisdiction in carrying out the references. No communication took place between the Master prosecuting a reference and the Judge who directed it; but the Master completed the duty delegated to him, and then drew up a report: stating the result of his inquiries, and what he had done in obedience to the decree. After this report was made, the cause came again before the Court for a final settlement; and a decree was made, based upon the decisions and investigations of the Master. The parties might, however, by excepting to the report, appeal to the Court against the decision of the Master, and re-open all the questions that had been decided.[3]

1 *Farley* v. *Starling*, 18 Grant. 378.
2 *Heward* v. *Scott*, 2 Cham. R. 274.
3 As to the duties of the Masters in ordinary, see 1st Rep. Chan. Com. (1852) p. 26 *et seq.*

The Master's office was abolished in England in 1860, and the business formerly done by a Master is now done by a Judge in Chambers, assisted by officers answering very much to the old Masters, but now called "Chief Clerks." We, however, have retained the office of Master, and we have also a Judge sitting in Chambers, who is assisted by an officer styled the "Referee in Chambers." Order 210 provides that "A judge sitting in Chambers may exercise the same power and jurisdiction, in respect of the business brought before him, as is exercised by the Court; all orders made by a judge in Chambers are to have the force and effect of orders of the Court; and all, or any of the powers, authorities, and jurisdictions given to the Master by any act or acts now in force, or by any General Order or Orders of the Court, may be exercised by the judge sitting in Chambers."

The duties and powers of the Referee are pointed out by Orders 560 to 567 inclusive, which are as follows:

560. The Referee in Chambers is hereby empowered to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same, as, by virtue of any statute or custom, or by the practice of the said Court, is now done and transacted by a Judge of the Court sitting in Chambers, except the matters following:

1. Granting writs of *Habeas Corpus*, and adjudicating upon the return thereto;
2. Appeals and applications in the nature of Appeals;
3. Proceedings as to Lunatics under the Consolidated Statutes of Upper Canada, chapter 12, section 33, and the 28th Victoria, chapter 17, sections 5 to 11 inclusive;
4. Applications for Writs of Arrest;
5. Petitions for advice under the Property and Trusts Act, 29th Victoria, chapter 28, section 31;
6. Applications as to the custody of Infants, under the Consolidated Statutes of Upper Canada, chapter 74, section 8;

7. Applications as to leases and sales of settled estates; to enable minors, with the approbation of the Court, to make binding settlements of their real and personal estate on marriage; and in regard to questions submitted for the opinion of the Court in the form of special cases on the part of such persons as may by themselves, their committees, or guardians, or otherwise, concur therein, under the 28th Victoria, chapter 17, section 1;
8. Opposed applications for Administration Orders;
9. Opposed applications respecting the Guardianship of the person and property of Infants;
10. *Ex parte* Injunctions;
11. Proceedings as to Partition and Sale of Real Estate, under the Ontario Statute 32nd and 33rd Victoria, chapter 33;
12. Applications for Leave to Appeal or Re-hear after the time limited for that purpose has elapsed.

561. Notice of an application for an administration order, or respecting the guardianship of the person or property of an infant, may be in the following form: "Take notice that an application will be made to the Referee in Chambers on, &c., or, if opposed, then to a Judge in Chambers so soon thereafter as a Judge shall be sitting in Chambers," &c.; and in such case the application, if opposed, is to be heard by a Judge in Chambers forthwith, if a Judge happens to be then sitting in Chambers, or on the first Monday thereafter on which there shall be a Judge so sitting in Chambers.

562. In case any matter appears to the Referee proper for the decision of a Judge, he may direct the same to be heard before a Judge in Chambers.

563. The Orders regulating the conduct of business in Chambers are to apply to proceedings before the Referee in Chambers.

564. Where the Referee in Chambers deems it proper to award costs to either party, he may direct payment of a sum in gross in lieu of taxed costs, and direct by and to whom such sum in gross is to be paid.

565. All orders made in Chambers are to be signed by the Referee, and further authenticated by the stamp of his office; and such of the said orders as require entry are to be entered by the Entering Clerk in a separate book kept for that purpose as hitherto.

566. Appeals from orders of the Referee in Chambers are to be made within fourteen days.

567. The fees heretofore payable to the Judges' Secretary under the Tariffs referred to in Orders 309 and 353 respectively, are hereafter to be paid by law stamps.

An appeal will not lie from an order made by the Judges' Secretary until it is signed and entered.[1] A party cannot use affidavits not used before the Judges' Secretary, or make a new case on an appeal.[2]

The matters to be disposed of in Chambers are thus pointed out: Order 197 provides that "The following business shall be disposed of in Chambers, together with such other matters as the Court from time to time thinks may be more conveniently disposed of there than in full Court, *viz.:*

"1. For the Sale of the Estates of Infants, under Consolidated Statutes of Upper Canada, chapter 12, section 50;

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

"3. For the Administration of Estates upon motion, without bill;

"4. For time to answer or demur;

"5. For leave to amend bills.

"6. For changing the venue;

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

1 *Gibb* v. *Murphy*, 2 Cham. R. 132.
2 *Bank of Montreal* v. *Wilson*, 2 Cham. R. 117.

"8. For the production of documents;

"9. Relating to the conduct of suits or matters;

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

"11. For the payment into Court of moneys, by parties desiring, on their own behalf, to pay in the same."

Whatever applications can, under these orders, be made in Chambers, must be made.[1] The Court refused to hear, otherwise than in Chambers, a motion to extend the time for payment of mortgage money.[2] A commission *de lunatico inquirendo* will be granted in Chambers;[3] and so may a writ of *habeas corpus*.[4] But all applications in the nature of an appeal from a Master's judgment should be made in Court and not in Chambers.[5] Where a party moves in Court for what should properly be moved for in Chambers, the Court will not allow the party so moving any costs of the application, even if the Court feels itself called upon to grant the motion.[6]

Order 198 provides that "The course of proceeding in Chambers is, ordinarily, to be the same as the course of proceeding in Court on motion. Notice of the application (where the proceeding is not *ex parte*) is to be served in the same manner as a notice of motion returnable in open Court. In other cases, an appointment is to be obtained which may be in a form similar to the form set forth in Schedule K, hereunder written, with such variation as the circumstances of the case may require."[7] And Order 199, that "Where it appears upon the hearing of any matter that, by reason of absence, or for any other sufficient cause, the service of notice of the application, or of the appointment, cannot be made, or ought to be dispensed with, such service may be dispensed with, or any substituted service, or notice by advertisement, or otherwise, may be ordered."

The following Orders, as to the mode of taking accounts, establish a practice almost identical with that adopted in the Master's

1 *Moffatt* v. *Riddle*, 4 Grant, 44.
2 *Anon*, 4 Grant, 61.
3 *Re Stuart*, 4 Grant, 44.
4 *Re Paton*, 4 Grant, 147.
5 *Ledyard* v. *M'Lean*, 1 Cham. R. 183; *Fitzgerald* v. *U. C. M. Co.*, *Ibid*; *Jay* v. *Macdonell*, 2 Cham. R. 71; but see Order 591.
6 *Murney* v. *Courtney*, 10 Grant, 52; and see *King* v. *Connor*, 10 Grant, 364, to the same effect.
7 See Schedule K, Vol. III.

office: Order 200 provides that "Where an account is taken in Chambers, special directions may be given with respect to the mode in which the account is to be taken and vouched; and in taking the account, the books of account in which the accounts required to be taken have been kept, or any of them *shall*[1] be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised." This Order is very similar to Order 228, which will be noticed in describing the practice in the Master's office.

Order 201 provides that "An accounting party is to bring in his account in the form of debtor and creditor, and verify the same by affidavit, unless otherwise directed. The items on each side of the account are to be numbered consecutively, and the account is to be referred to by affidavit as an exhibit, and not to be annexed thereto, and is to be left at Chambers." And Order 202, that "A party seeking to charge an accounting party beyond what he has by his account admitted to have received, is to give notice thereof to the accounting party, stating, as far as he is able, the amount sought to be charged, and the particulars thereof, in a short and succinct manner." By Order 203, "No state of facts, charges, or discharges, are to be brought into Chambers; and where original deeds or documents can be brought in, no copies are to be made, without special direction;" and Order 204 provides that, "Where directed, copies, abstracts, or extracts of or from accounts, deeds, or other documents, are to be supplied."

The course of proceeding in Chambers is ordinarily the same as the course of proceeding in Court upon motions. The evidence made use of is usually adduced by affidavit. If affidavits in the cause are subsequently made use of at Chambers, the witnesses may be cross-examined thereon.[2]

Order 540 provides that "In all cases where, according to the present practice, a reference to the Master would be directed, the Court may dispose of such matters itself, if it thinks fit, and may direct the proceedings to be taken in full Court, or in Chambers, as it finds expedient."

1 By Order 550, this word "shall" is to be read as permissive.
2 *Spittle* v. *Hughes*, 11 Jur. N. S. 151; 1 W. R. 251, S. C.; and see *Jenner* v. *Morris*, 10 W. R. 640.

When a party moving desires to have his application heard before a Judge, it does not entitle him to have it heard at a future day, but it may be heard at once. The Court will not encourage the hearing of motions before a Judge, where the object of doing so is obviously to gain time after it has been refused by the Secretary.[1] An order made by a Judge on an appeal from the Secretary is a Chamber order; and if costs or further directions are reserved, they should be disposed of before a Judge in Chambers, and the order made thereon entitled In Chambers. Where, therefore, in such a case the cause was set down, and in the list of causes to be heard on further directions, it was held to be improperly set down, and the costs of the day given against the party setting it down.[2]

It will be convenient to introduce here several Orders relating to the sittings of the Court, and the regulation of Chamber business.

Order 590 provides that "A Judge will sit in Chambers every Monday, and on such other days as the state of business may require, to hear and dispose of such Chamber applications as cannot be heard and disposed of by the Referee."

Order 591, that "Appeals from the referee in Chambers, or from local Masters and others, when they are acting under Order 36, or under the Act for Quieting Titles, are to be heard in Chambers, and are to be set down for that purpose on or before the preceding Saturday. Seven clear days' notice is to be given of all appeals under the Act for Quieting Titles; and two clear days' notice of other appeals from the Referee in Chambers. All such appeals are to be argued by counsel."

Order 592, that "A Judge will sit in Court on Tuesday, Wednesday, and Thursday, and on such other days as the state of business may require, in every week, for the despatch of all business other than rehearings and Chamber business."

Order 593, that "The business before the Court will be taken as follows:

1 *Lachlan* v. *Reynolds*; *Monk* v. *Waddell*, 2 Cham. R. 454.
2 *Dudley* v. *Becrzy*, 2 Cham. R. 460.

"TUESDAY.—Motions.

"WEDNESDAY.—Hearings *pro confesso*; and on Bill and Answer; Motions for Decree; Further Directions; Petitions; Demurrers.

"THURSDAY.—Appeals from Masters' Reports."

Order 594, that "No orders of course, or orders made in Chambers, are to be entered, except—

"Decrees issued upon Præcipe;

"Decrees against Infants;

"Orders declaring persons Lunatics;

" for Administration;

" for the Sale of Infant's Estates;

" for Payment of Money into or out of Court;

" for Foreclosure or Sale;

" of Revivor;

" Vesting Orders;

and such other orders as may from time to time, in any particular case or otherwise, be directed to be entered."

The right to use the proceedings in the cause, as evidence at Chambers, is subject to the same rules and restrictions as govern the admissibility of similar evidence before the Court; therefore, evidence will not be admissible merely because it appears on the decree to have been taken at the hearing of the cause: for the evidence may be admissible against one defendant, or for one purpose, and not against another defendant, or for another purpose.[1]

The rules with respect to filing affidavits in proceedings before the Court have been before fully stated; and they are generally applicable to proceedings in Chambers.

1 *Handford* v. *Handford*, 5 Hare, 212; and see *Smith* v. *Althus*, 11 Ves. 564.

It seems, also, that the evidence of witnesses in another cause, between the same parties, may be read at Chambers without an order to warrant it;[1] though, as we have seen, notice is necessary to authorize the reading of such depositions or proceedings before the Court at the hearing.[2] In *Lubiere* v. *Genou*,[3] however, Sir Thomas Clarke, M. R., 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.

Oral evidence may also be made use of at Chambers.[4]

The attendance of a party or witness in Chambers is procured in the same way as before the Court at Examination and Hearing Term, or before a Master or Examiner, by *subpœna*, and when papers are required to be produced, a *subpœna duces tecum* is used.

The rules before stated as to the tender of expenses to witnesses, apply to persons summoned to give evidence in Chambers; and a party to the suit, when so summoned, is entitled, like a witness, to require the payment of his expenses before he is sworn.[5]

The Judge has the same power of ordering the production of documents, for the purposes of proceedings at Chambers, as he has for the purposes of proceedings in Court; and such production may be obtained in the ordinary way.

An order made in Chambers by the Judge in person is subject to appeal in the usual manner;[6] but the Court of Appeal will, in general, decline to hear appeals directly from Chambers, where the parties have not had an opportunity of being heard by counsel.[7]

1 *Anon.*, 3 Ath. 524.
2 Order 175.
3 2 Ves. S. 579.
4 See *Re Electric Telegraph Company of Ireland, Ex parte Bunn*, 24 Beav. 137; 3 Jur. N. S. 1013.
5 *Davey* v. *Durrant*, 24 Beav. 493; 4 Jur. N. S. 230
6 *Saunders* v. *Druce*, 3 Drew, 139; *Snowdon* v. *Metropolitan Railway Company*, 1 De G. J. & S. 408; 9 Jur. N. S. 583; but see *Re M'Veagh, M'Veagh* v. *Croall* 1 De G. J. & S. 399; 9 Jur. N. S. 587, where the Lord Chancellor declined to hear an appeal from an order made by V. C. Stuart at Chambers, in person, refusing with costs an application by summons, by a creditor, for production of documents, in the course of prosecuting accounts under a decree: notwithstanding the V. C. had declined to adjourn the question into Court for argument by counsel. In that case, the creditor subsequently moved before the Court below for an order similar to that refused in Chambers; and appealed against the Judge's refusal of the motion: see 1 De G. J. & S. 401; 9 Jur. N. S. 240.
7 *Stroughill* v. *Gulliver*, 1 De G. & J. 113; *Harrison* v. *Mayor of Southampton*, 29 L. T. 61 L. JJ.; *Hutchinson* v. *Swift*, 11 Jur. N. S. 274; 13 W. R. 532, L. JJ. Where the Judge declined to adjourn the matter into Court to be argued by counsel, the appeal was heard: *Ridgway* v. *Newstead*, 4 De G. & J. 15; but see *Re M'Veagh M'Veagh* v. *Croall*, 1 De G. J. & S. 399; 9 Jur. N. S. 587, *sup.*

Order 210 gives to all orders made by a Judge in Chambers the force and effect of Orders of the Court, and they are appealed in the same way.

Order 208 provides, that "The Court may adjourn for consideration in Chambers any matter which, in the opinion of the Court may be disposed of more conveniently in Chambers: and any matter pending in Chambers may be adjourned to open Court; and such matter may be so adjourned at the request of either party, subject to such order as to costs or otherwise, as the Court thinks right to impose." A Judge in Chambers has a discretion to refuse to adjourn any matter to be heard in Court.[1] By Order 209, "Matters adjourned from Chambers are to be heard in Court by one Judge, unless by special leave, which may be granted *ex parte*; and without such leave are not to come before the full Court, except by way of re-hearing the order made in Court thereon."

Order 205 provides, that "Where in the prosecution of any proceeding under a decree, it appears that some persons, not already parties, ought to be made parties, and ought to attend or be enabled to attend the proceedings, directions may be given for serving an office-copy of the decree upon such parties, and upon due service thereof, such persons are to be treated and named as parties to the suit, and shall be bound by the decree in the same manner as if they had been originally made parties to the suit." And by Order 206, "Every office-copy of a decree directed to be served under Order 205, is to be endorsed with a notice to the effect set forth in Schedule L,[2] hereunder written, with such variations as circumstances may require." Order 207 declares, that "A party served with an office-copy of a decrée under Order 205, may apply to the Court, at any time within fourteen days from the date of such service, to discharge the order, or to add to, set aside, or vary the decree."

1 *Walsh* v. *DeBlaquiere*, 12 Grant, 107.
2 For Schedule L, see Vol. III.

SECTION II.—*Proceedings originating in Chambers.*

1. *Administration of Estates on Notice of Motion.*

It is provided by Order 467, that "Any person claiming to be a creditor, or a specific, pecuniary, or residuary legatee, or the next of kin, or some one of the next of kin, or the heir, or a devisee interested under the will of any deceased person, may apply to the Court[1] upon motion, without bill filed or any other preliminary proceeding, for an order for the administration of the estate, real or personal, of such deceased person." And by Order 468, that "The notice of motion is to be in the form or to the effect set forth in Schedule U., hereunder written,[2] and must be served upon the executor or administrator."

It is to be observed, that by Order 552 it is provided, that "A notice of motion under Order 467, is to be served upon all proper parties, at least fourteen days before the day named for hearing the application."

An application was made by a creditor for an administration order under Order 15, of June, 1853. No evidence was offered beyond production of a certified copy of the will, showing the defendant to be executor. *Held*, that although strict proof of the claim, such as must be given in the Master's office, is not necessary, yet *prima facie* evidence of the applicant's having a right to call for the administration of the estate, must be furnished, and the motion was refused with costs.[3]

Where executors are charged with misconduct, a bill must be filed: *Per Spragge, V. C.*[4] Where an order for the administration of a deceased person's estate is granted upon the application of any person beneficially interested therein, the decree will not contain a direction to enquire as to wilful neglect and default,[5] *Per Esten, V.C.* "As I understand the practice prevailing in England, under the order similar to the one under which this application is made, the representatives are not made answerable for wilful default; to ob-

1 Although the word "Court" is here used, the motion is to be made in Chambers under Sec. 3 of Order 197; and in certain cases it is to be made before the Referee; see Orders 560, 561.
2 For Schedule U. see Vol. III.
3 *Re Clarke*, 2 Cham. R. 57.
4 *Re Babcock's Estate*, 8 Grant, 410.
5 *Harrison* v. *M'Glashan*, 7 Grant, 531.

tain such a direction there must be a case made for it by a bill filed for that purpose. The account to be taken therefore, will only be of what has actually come to the hands of the defendants."

In these two cases the application for the order was made by parties adverse to the executor. When he himself applies the rule is different. Where an executor or administrator applies for an order to administer the estate of the testator or intestate, the account will be directed to be taken out of what he has received, or which but for his wilful default might have been received,[1] *Per Esten, V. C.* "In *Harrison* v: *McGlashan*[2] the application was made on behalf of a party interested in the estate, and adversely to the executor. A different rule prevails in England where the application is on behalf of the executor or administrator. The usual decree must be made." In this case the plaintiff had asked for an inquiry as to wilful neglect or default. An administration order will not be granted where the grounds on which it is claimed are properly the subject of a bill.[3] In this case the plaintiff moved for an administration order, claiming to be a creditor upon covenant of testator for good title. Plaintiff had been ousted by title paramount. The application for the order had been answered by the personal representatives, setting up the Statute of Limitations. *Per Spragge, V. C.*, "The plaintiff now desires to take the case out of the Statute by showing fraud in the testator. I think that for such a case a bill is proper, and that the questions which will necessarily be raised can not properly be discussed without pleadings and upon affidavit evidence." Notice of motion for an order to administer the estate of Marshall deceased, who died intestate, had been served on his widow, E. N. M., as administratrix, the application was refused, there not being any evidence produced showing that letters of administration had been granted to her. *Spragge, V. C.*[4] "The Order 15[5] providing for the administration of estates without bill applies to simple cases only, and under it the Court will not grant an order containing special directions to enquire as to what would be proper to be allowed to the applicant (the widow and administratrix) for improvements made on the property, and for the maintenance

1 *Ledgerwood* v. *Ledgerwood*, 7 Grant, 584; but see *Carpenter* v. *Wood*, 10 Grant 354, shewing that this special enquiry is not necessary.
2 7 Grant, 531.
3 *Cameron* v. *Macdonald*, *Re Macdonald*, 2 Cham. Rep. 29.
4 *Re Marshall*, *Fowler* v. *Marshall*, 1 Cham. Rep. 29.
5 Order 467 is a copy of the Order 15 of June, 1853.

of the infant children of the deceased.[1] *Per Spragge, V. C.* "Upon this application being made, I stated my impression to be that it would not be proper to direct the special inquiries asked by the plaintiff, upon summary application under the General Order. Upon consideration I remain of the same opinion. There are no pleadings, and the case is supported by affidavit evidence. The plaintiff may take an administration order with the usual inquiries: if he desire more he must file his bill." The fact that the estate is small, that no imputation is made against the executors of it, and that it is inadvisable to incur legal expenses, are no answer to a motion by a legatee against the executors, for the usual administration order.[2] Besides the points above mentioned it was urged in opposition to the granting of the Order that it was discretionary with the Court, whether to grant the order or not, the words of the order being "if the Court shall think fit." *Per Vankoughnet, C.* "I could not prevent this legatee from filing a bill: and it is a general rule that any person interested in an estate may demand the intervention of the Court to administer it, no matter how correct the executors may have been. As to the words 'if the Court shall think fit' they mean merely that the Court must satisfy itself that the case is a proper one for summary administration under the order, and not one where a bill should properly be filed." In 1855 a motion had been made upon notice, for an administration order, under the Order of 1853 since which no step had been taken in the matter, and an application was now made to the Judge in Chambers for a direction that the registrar should draw up the order, but the application was refused: the cause having been allowed to sleep for four years, all parties were required to be served with a new notice.[3] In moving for an administration order, the letters of administration should be produced.[4] But where on an application for an administration order the fact of the defendant being administrator is not disputed, and the plaintiff has filed an affidavit that he is administrator, it is not necessary to give further evidence of the fact, or to produce the letters of administration, or a copy thereof.[5]

The power of making an order in England for the administration of real estate upon summons does not apply where there is an

1 *Barry* v. *Brazill*, 1 Cham. Rep. 248.
2 *Re Falconer*, 1 Cham R. 273.
3 *Re Forrester, Messner* v. *Forrester*, 1 Cham. R. 29.
4 *Re Israel*, 2 Cham. R. 392.
5 *Re Bell*, 3 Cham. R. 397.

intestacy nor where, under the will, the real estate goes to different persons: the intention being that the special jurisdiction should operate only where the real estate is vested in some person or persons having, with respect thereto, powers and duties as extensive, or nearly so, as those which the law itself confers upon executors and administrators.[1] And, generally, where, on the hearing of the summons, the Court has reason to see that difficult questions may arise, it may decline to make an order on summons: leaving the parties to their remedy by bill.[2] Thus, where, in answer to the application, the defendant set up a release, the validity of which was disputed by the plaintiff, the summons was dismissed;[3] and where there is a case of construction, a bill may, it seems, properly be filed;[4] but after the order has been made on summons, and the accounts taken, it is the practice for the Court to decide the rights of the parties, without requiring a bill to be filed.[5]

Our Order 467 is taken from the Imp. Sta. 15, 16, Vic. C. 86—but it goes further than that Statute—Sec. 45, applies to the granting of an administration order as to personal estate, and Sec. 47 extends the power to real estate "where the whole of such real estate is by devise vested in trustees, who are by the will empowered to sell such real estate." Our Order applies to real and personal estate generally, without any qualification, but our Court follows the English practice in declining to grant administration decrees on motion where the case presents difficulties; thus where a married woman applied as devisee and legatee, for an administration order, by motion, without bill, and it appeared that an award had been made, professing to determine all matters between the executor and the legatees interested in the estate, and it was said that the husband and wife had been parties to the reference, the wife acting therein through her husband as her agent, which they denied, it was held that the validity of the award could not be tried in the motion, and that a bill must be filed: more especially as other legatees, not parties to the motion, were interested in maintaining the award.[6]

The general rules as to the persons by and against whom a suit may be instituted, the parties to a suit, the authority to institute

1 1st Rep. Eng. & Ir. Com. App. 66.
2 Per V. C. Kindersley, in *West* v. *Laing*, 3 Drew. 331, 333.
3 *Acaster* v. *Anderson*, 19 Beav. 161.
4 *Smith* v. *Spilsbury*, 1 Dr. & S. 151; and see *Rump* v. *Greenhill*, 20 Beav. 512.
5 *West* v. *Laing*, *ubi sup.*; and see *Wadham* v. *Rigg*, 2 Dr. & S. 78: and *Vanrenen* v. *Piffard*, 13 W. R. 425, V. C. S.
6 *Nudel* v. *Elliott*, 1 Cham. R. 326.

proceedings, including the authority of a next friend to use his name, and the names and addresses of plaintiffs and next friends, apply (subject to the qualifications already pointed out), to suits commenced by motion, as well as to suits commenced by bill.

An application by administration notice of motion should be supported by evidence proving the plaintiff's title to sue, and that the defendants are the legal representatives of the deceased person. The fact that the defendant is the legal representative of the deceased person should be established by production of the probate or letters of administration, or by other primary evidence of the grant.

On an application under the General Orders of June 1853, No. 15 (of which No. 467 is a copy) on behalf of a legatee under the will of the deceased for an administration of the testators estate, Mowat, V. C., *held*, that the practice of filing an affidavit or affidavits, and referring thereto in the notice of motion was too firmly established to admit of alteration: the motion was therefore refused with costs.[1]

Order 469 provides that "Upon proof by affidavit of the due service of such notice of motion, or on the appearance in person, or by his solicitor or counsel, of the executor or administrator, and upon proof by affidavit of such other matter, if any, as the Court requires; the Court may make the usual order for the administration of the estate of the deceased, with such variations, if any, as the circumstances of the case require; and the order so made is to have the force and effect of a decree to the like effect, made on the hearing of a cause between the same parties."

And Order 470 that "the Court is to give any special directions touching the carriage or execution of the order which it deems expedient; and in case of applications for any such order by two or more persons, or classes of persons, the Court may grant the same to such one or more of the claimants, as it thinks fit; and the carriage of the order may be subsequently given to any party interested, and upon such terms as the Court may direct."

1 *Re Hamilton*, 2 U. C. L. J. N. S. 48.

It is provided by Order 471, that "An order for the administration of the estate of a deceased person may be obtained by his executor or administrator, and all the provisions of the foregoing orders are to extend to applications by an executor or administrator."

The two following orders apply to cases where inquiries as to real estate are desired. Order 472 provides that "No accounts or inquiries in respect of the real estate are to be directed, unless notice of the application has been given to the heirs or devisees interested therein, or one or more of them." And Order 473 that "After inquiries directed in respect of the personal estate, the Court may, in a proper case, after notice given to those interested in the real estate, or to one or more of them, make a supplemental order in respect of the real estate, upon such terms as the Court sees fit."

If the administration order is refused on the merits, the plaintiff cannot subsequently file a bill for the same purpose: he should appeal from the decision of the Judge refusing the order.[1]

On the defendant's submitting to pay the plaintiff's claim and costs, the proceedings will, as in other cases, be stayed. The defendant may either make the submission at the hearing of the notice, or he may move for that purpose, before or after the hearing. In a suit by a creditor for the administration of his deceased debtors estate, any party beneficially interested in the estate may apply to stay proceedings on payment of the creditors claim and costs. The right to do so is not confined to the personal representative.[2]

The practice before stated, as to service of notice of the decree, and obtaining leave to attend the proceedings, applies to suits commenced by notice of motion.[3]

If the order is made, it must be the usual administration order, with such variations as the circumstances of the case may require. Therefore, it must not contain a direction charging the defendant with what he might have received but for his wilful default: that being an order of a completely different character;[4] nor can a sub-

1 *Thompson* v. *Thompson*, 11 W. R. 797, V. C. K.
2 *Fitten* v. *Dawson*, 3 Cham. R. 461.
3 As to service out of the jurisdiction see also *Strong*, v. *Moore*, 22 L. J. Ch. 917: 1 W. R. 509, M.R. For forms, see Vol. III.
4 *Blakely* v. *Blakely*, 1 Jur. N. S. 368, V. C. K.; *Re Fryer, Martindale* v. *Picquot*, 3 K. & J. 317, *Partington* v. *Reynolds*, 4 Drew. 253; 4 Jur. N. S. 200; see *contra*, *Mutter* v. *Hudson*, 2 Jur. N. S. 34, V.C.S.; see also *Hodson* v. *Ball*, 1 Phil. 177.

sequent direction to take the account in that manner be added to the original order;[1] nor, in taking the accounts under the order, can the executor be charged upon an admission of assets:[2] although any auxiliary accounts or inquiries which may, in the course of the proceedings, be found necessary, may be thus added.[3]

The English practice as to the inquiry for wilful neglect or default on the part of an executor or administrator is as above stated; but, as before intimated, our Court has determined that the Master has power under Order 220 to enter into this inquiry without any special direction in the decree.[4] Under a decree for an account, it is the duty of the Master to find whether a defendant is or not chargeable as for wilful default, if the question arises, without any directions in the decree to that effect. Where, therefore, a Master reported only that rents and profits had come to the hands of the defendant, and after stating a number of facts, submitted to the Court whether he shall or shall not be charged, the matter was referred back to him to complete his report. It is not competent to a Master to abstain from deciding any question properly coming before him for his decision.[5]

The order, when made, has the force and effect of a decree to the like effect made on the hearing of a cause between the same parties.[6] Therefore, after the order has been made, an injunction may be granted, or a receiver obtained, to prevent the assets being wasted by the defendant;[7] or an injunction granted to stay an action at law by a creditor.[8] The fact that a creditor of an estate has proceeded at law after a decree for the administration of the estate of the testator has been obtained is not sufficient to deprive him of his costs, either at law, or of a motion in this Court to restrain his action.[9]

Where, under the order made in a suit commenced by notice of motion, the same relief can be obtained as in a suit subsequently

1 *Partington* v. *Reynolds*, *ubi sup.*
2 *Re Wiltshire*, 6 Jur. N. S. 190; 8 W. R. 133, V.C.S.
3 *Mutter* v. *Hudson*, 2 Jur. N. S. 34, V.C.S.; *Partington* v. *Reynolds*, *ubi sup.*; *Re Delavante*, *Delavante* v. *Child*, 6 Jur. N. S. 118, V.C.S.
4 *Carpenter* v. *Wood*, 10 Grant, 354.
5 *Walmsley* v. *Bull*, 2 Cham. R. 344.
6 Order 210.
7 *Brooker* v. *Brooker*, 3 Sm. & G. 475; 3 Jur. N. S. 381.
8 *Gardner* v. *Garrett*, 20 Beav. 469.
9 *Re Langtry*, 18 Grant. 530.

commenced by bill, the proceedings in the latter may, as in other cases, be stayed; but this will not be done if, in the latter suit, a larger amount of relief can be obtained than in the former.[1]

The accounts and inquiries directed by the order are prosecuted in the usual manner. The cause will then be heard upon further consideration, in the mode hereafter pointed out.

CHAPTER XXV.

PROCEEDINGS IN THE MASTER'S OFFICE.

SECTION 1.—*Proceedings under Decrees and Orders.*

According to the ancient practice of the English Court, all references to a Master used to be made to one of the two Masters sitting in Court, as assistants to the Lord Chancellor or Master of the Rolls, when the reference was made; but our practice, where there has been no previous reference, is to refer it to the Master in Ordinary, or to some Master in the country.

It may here be noticed that Orders 14, 15, and 16 pointed out the duties of the Accountant; but these were abrogated by Order 559, and his duties are now regulated by Orders 568 to 583, inclusive which are as follows:

Order 568 provides that "The Accountant is to have charge of the books required by the Orders relating to the Suitors' Accounts, Suitors' Fee Fund Account, Mortgages, and other investments, and is to be responsible for the due keeping of the said books in accordance with the said Orders, and for the correctness of all entries therein."

Order 569, that "The word "Accountant" is substituted for "Registrar" in Orders 255, 256, 352, 368, 369, 371, 373, and 486; and in Schedule V., Form No. 6; and for "Ledger Clerk" in Orders 353, 354, 356, and 357."

1 *Ritchie* v. *Humbertson*, 17 Jur. 756, V C.W.; *Rump* v. *Greenhill*, 20 Beav. 512; 1 Jur. N. S. 123; *Pigott* v. *Young*, 7 W. R. 235, V.C K: but see *Vanrenen* v. *Piffard*, 13 W. R. 425, V.C.S.

Order 570 declares that "The duties assigned by Orders 365 and 367 to the Registrar and Ledger Clerk are to belong to the Accountant alone."

By Order 571, "Money is to be paid out of Court upon the joint cheque of the Accountant and Registrar (or Registrar's Chief Clerk), countersigned as hitherto, and not otherwise."

Order 572 provides that "The fees heretofore payable in the Registrar's office upon the payment of money into or out of Court, and upon certificates as to the state of any account, are to be paid in the office of the Accountant."

Order 573, that "Where the Accountant is directed by an order to pay money to an unmarried woman, and the order does not extend to the transfer or delivery to her of any stocks or securities, and she marries before payment of the money, the Accountant, if the same does not in the whole exceed $600 of principal money, or $50 in annual payments, may draw for the money in favour of such woman, upon an affidavit of herself and her husband that no settlement, or agreement for a settlement, has been made or entered into, before, upon, or since their marriage; or in case any settlement, or agreement for a settlement, has been made or entered into, then upon an affidavit by the woman and her husband, identifying the settlement or agreement for a settlement, and stating that no other settlement or agreement for a settlement has been made or entered into as aforesaid, and an affidavit of the solicitor of the woman and her husband, that such solicitor has carefully perused such settlement or agreement for a settlement, and that, according to the best of his judgment, such money is not, nor is any part thereof, subject to the trusts of the settlement, or agreement for a settlement, or in any manner comprised therein or affected thereby."

Order 574 declares that "Where the Accountant is directed by any order to transfer or deliver any stocks, funds, shares, or securities to an unmarried woman, and the order does not extend to the payment to her of any money, and the woman marries before the transfer or delivery of the stocks, funds, shares, or securities, and the same do not in the whole exceed in value $600, then, upon an affidavit of the woman and her husband that no settlement, or

agreement for a settlement, has been made or entered into before, upon, or since their marriage; or, in case any such settlement, or agreement for a settlement, has been made or entered into, then, upon an affidavit of such woman and her husband, identifying such settlement, or agreement for a settlement, and stating that no other settlement, or agreement for a settlement, has been made or entered into as aforesaid, and an affidavit of the solicitor of such woman and her husband, that such solicitor has carefully perused the settlement, or agreement for a settlement, and that, according to the best of his judgment, the stocks, funds, shares, or securities, are not, nor is any part thereof, subject to the trusts of any settlement, or agreement for a settlement, or in any manner comprised therein, or affected thereby, the Accountant may transfer or deliver such stocks, funds, shares, or securities to such married woman."

Order 575 provides that "A similar course to that mentioned in Orders 573 and 574 is to be adopted in the case of money directed to be paid, and of stocks, funds, shares, and securities directed to be transferred or delivered to a woman who afterwards marries, where the aggregate value of such money, stocks, funds, shares, and securities does not exceed $600."

Order 576, that "Where money is directed to be paid out of Court to persons to be named in an order or a report, and a sum is reported or found to be due to any persons as legal personal representatives, the same, or any portion thereof, for the time being, remaining unpaid, may, upon proof to the Accountant of the death of any of them, be paid to the survivor or survivors of them."

Order 577, that "Where money is directed to be paid out of Court to the legal personal representatives of any person, or to any persons as legal personal representatives, the same, or any portion thereof, for the time being remaining unpaid, may, upon proof to the accountant of the death of any of such legal representatives, whether before, on, or after the day of the date of the order, be paid to the survivors or survivor of them."

By Order 578, "Where money is directed to be paid out of Court to any person named in the order, or named, or to be named, in any report, or his legal personal representatives, the same, or any portion thereof, for the time being remaining unpaid, may, on proof to

the Accountant of the death of such person, whether before, on, or after the day of the date of the order, to be paid to such legal personal representatives, or the survivors or survivor of them."

By Order 579, "Where stocks, funds, shares, or securities, are directed to be transferred or delivered out of Court to the legal personal representatives of any person, or to any persons as legal personal representatives of any person, the Accountant may, upon proof of the death of any such representatives, whether before, on, or after the day of the date of the order, transfer, or deliver such stocks, funds, shares, or securities to the survivors or survivor of them; and where stocks, funds, shares, or securities are directed to be transferred and delivered out of Court to any person or his legal personal representatives, the Accountant may, upon the proof of the death of such person, whether before, on, or after the day of the date of such order, transfer or deliver such stocks, funds, shares, or securities to such legal personal representatives, or the survivors or survivor of them."

By Order 580, "No principal sum of money, nor any stocks, funds, shares, or securities, shall, under Orders 578 and 579, be paid, transferred, or delivered out of Court to the legal personal representatives of any person, under any probate or letters of administration purporting to be granted at any time subsequent to the expiration of six years from the day of the date of the order directing such payment, transfer, or delivery."

Order 581 declares that "No interest or dividends shall, under Order 578, be paid out of Court to the legal personal representatives of any person, under any probate or letters of administration purporting to be granted at any lime subsequent to the expiration of six years after the day of the date of the order directing such payment, or after the last receipt of such interest or dividends under such order, which shall last happen."

Order 582, that "Where money is directed to be paid out of Court to any persons named or to be named in an order or report, and such money shall, by such order or report, be found to be due to them as partners, the same may be paid to any one or more of such partners."

Order 583, that "Where an order directing the investment from time to time of any interest or dividends accruing upon any stocks, funds, shares, or securities standing in the name of the Accountant, in trust, in or to the credit of any cause, matter, or account, or upon any stocks, funds, shares, or securities which may be directed to be transferred into the name of the Accountant, or to be carried over from one account to another, or upon any stocks, funds, shares, or securities which may be directed to be purchased with any cash in Court, or with any cash to be paid into Court with his privity, is brought to the Accountant for the purpose of having such direction for investment carried into effect, the Accountant may, from time to time, until he receives notice of an order to the contrary, without any further request, invest the interest or dividends so directed to be invested, together with all accumulations of interest or dividends thereon, as soon as conveniently may be after they accrue due and have been received, in the purchase of the particular description of stocks, funds, shares, or securities named in the order directing such investment, and place such stocks, funds, shares, or securities, when purchased, to the credit of the cause, matter, or account respectively, as may be directed by such order."

It may be mentioned, in this place, that after a cause has been referred to a Master, it cannot be withdrawn from that Master without an order of the Court, and that 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 shewn to be of a very urgent nature. In one case 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.[1] Sometimes, where the 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.[2]

1 *Anon.* 9 Ves. 341.
2 In one case it appears that, upon the death of a Master, a general order was made, that all matters referred to him should be transferred to another, Prac. Reg. 165.

The prosecution of the decree devolves upon the plaintiff, he being considered, in most cases, as the person principally interested in forwarding it. A reference upon an interlocutory order is, for the same reason, usually prosecuted by the party obtaining it, whether plaintiff or defendant. In order, however, to prevent delay in the prosecution of the decree by the party whose duty it is to prosecute it, it is provided, by Order 211, that "Every order referring any matter to the Master is to be brought into his office within fourteen days after the order is drawn up, or after the same should have been drawn up, by the party having the carriage of the same: otherwise any other party to the cause, or any party having an interest in the reference, may assume the carriage of the order, and carry the same into the Master's office." This order refers only to delay in taking out the order and bringing it into the Master's office; and Order 212 provides that "Where a party actually prosecuting a reference does not proceed before the Master with due diligence, the Master is at liberty, upon the application of any other party interested, either as a party to the suit, or as one who has come in and established his claim before the Master under the order to commit to him the prosecution of the order; and from thenceforth neither the party making default nor his solicitor is to be at liberty to attend the Master as the prosecutor of the order."

These orders are taken from Orders 17 and 56 of Lord Lyndhurst's orders. Our Order 584 provides that "Where there is undue delay in prosecuting a reference in the office of the Master in Ordinary, or any local Master, he may issue his warrant to the solicitors or parties interested, which may be transmitted by post, calling upon them to shew cause why the reference should not be duly proceeded with. In default of sufficient cause being shewn to excuse the delay, or upon default being made in attending upon the return of the warrant, the Master is to certify to the Court the circumstances of the case; and, thereupon, the reference in his office is to be deemed closed, and is not to be resumed until further order."

Order 585 provides that "In all cases under the foregoing order, the Master may order payment of fees and costs in such manner as he thinks fit."

Order 586, that "Where an appointment fails by reason of the non-attendance of any party, and the Master does not think fit to proceed *ex parte*, he may fix the amount of costs to be paid by the absent party to the party attending upon the appointment."

Where an order for administration has been granted to a devisee, who was also a creditor of the estate to a large amount, but did not state that fact when applying for administration, his silence as to it was considered a ground for sustaining an order transferring the conduct of the proceedings under the reference to another party under the will. No one has a special right to the conduct of proceedings in the Master's office upon a reference under an administration order, but *ceteris paribus*, it will be committed to those who have the greatest interest in conducting them properly and economically.[1]

Where the plaintiff, in a creditor's suit, delays in prosecuting the decree, the Court will give the carriage of it to another creditor on his indemnifying the plaintiff against future costs.[2] An application to compel a party having the carriage of an order made on an appeal from a Master's report to proceed with an enquiry in the Master's office should be made to the Master who has possession of the case.[3]

No order is necessary, under order 211, to authorize the defendant to take the carriage of a decree out of the plaintiff's hands.[4] In an administration suit, after delay on the part of the plaintiff, the conduct of the reference was given to a solicitor representing certain creditors of the estate. The plaintiff's solicitor, with the consent of the defendant's solicitor, but without notice to the solicitor of the creditors, or informing the Court that such solicitor had the conduct of the reference, applied in Chambers, and obtained an order to change the venue from Goderich to Stratford. Such order was, on application, set aside with costs.[5]

2.—*Warrant to Consider the Decree.*

Order 216 provides that "Upon the bringing in of an order, the solicitor bringing in the same is to take out a warrant (unless the

1 *Perrin* v. *Perrin*, 3 Cham R. 452.
2 *Patterson* v. *Scott*, 4 Grant, 145.
3 *Miller* v. *M'Naughton*, 1 Cham. R. 206.
4 *Smith* v. *Henderson*, 2 Cham. R. 304
5 *M'Connell* v. *M'Connell*, 3 Cham. R. 122.

Master dispenses therewith)[1] appointing a time, which is to be settled by the Master, for the purpose of taking into consideration the matters referred by the order, and is to serve the same upon the parties, or their solicitors, unless the Master dispenses therewith."

And Order 238, that "The Master is to keep in his office a book, to be called the "Master's Book," in which, upon the bringing in of an order of reference, are to be entered, the style of the cause, the name of the solicitor prosecuting the reference, the date of the order being brought in, and the proceedings then taken; and the Master is also to enter therein, from time to time, the proceedings taken before him, and the directions which he gives in relation to the prosecution of the reference, or otherwise."

It may here be mentioned that it is irregular to proceed with references in the offices of the Masters, unless by consent, during the long vacation.[2] It is presumed that under Orders 421, 422, and 425, this rule applies as well to the "Christmas" as to the "long" vacation.

It may also be mentioned that many of the profession are under the impression that a grace of half an hour is, or should be, allowed upon appointments and warrants in the Master's, Examiner's, or Deputy Registrar's offices (for in the Master's is combined these three offices). This is the practice in the Common Law Courts, but there is no authority for it in the Master's office. If the party conducting the enquiry do not attend precisely at the hour appointed, the Master, whether acting as Master, Examiner, or Deputy Registrar, may dismiss the warrant or appointment with costs; and the Masters will find that a strict adherence to this rule will ensure promptitude on the part of solicitors, and expedition in the business of their offices. In such a case, the Master should fix the costs at once, and make a direction in his book that they be paid to the opposite party before the party in default takes any further steps in the suit in his office. This direction, though binding on all parties, does not prevent the recovery of the costs by fi. fa. in the usual way.

1 It is usual to dispense with this warrant in simple cases
2 *Anderson* v. *Thorpe*, 12 Grant, 542.

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

"1. The parties who are to attend on the several accounts and enquiries;

"2. The time at which, or within which, each proceeding is to be taken;

"3. The mode in which any accounts referred to him are to be taken or vouched;

"4. The evidence to be adduced in support thereof;

"5. The manner in which each of the accounts and enquiries is to be prosecuted;

"And such directions may be afterwards varied, or added to, as may be found necessary."

Before the Master's office was abolished in England, the issuing of a warrant "to consider" was imperative in every reference, but our Court has left this in the discretion of the Master. The propriety of this is forcibly described in Daniel's Practice. In speaking of the English orders, which are very similar to ours, excepting as to the discretion given to the Master in issuing a warrant "to consider," he says:

"These orders appear to have been framed for the purpose of carrying into effect the recommendation of the commissioners for enquiring into the practice of the Court; and certainly if the objects suggested in their report as likely to result from the adoption of the recommendation could be attained, the continuance of these orders amongst the general orders of the Court would be most desirable. It is obvious, however, that, in many cases, the observance of them would be perfectly useless, and that in others, especially in those in which the enforcement of their provisions would be most desirable, it would be impracticable to carry them into effect. It is observed, by an intelligent writer upon this sub-

ject, 'that, in certain references, the obligation to take out this warrant is a tax upon the suitor, an expense without the slightest advantage; and there is something ludicrous in a warrant to consider how a decree dismissing a bill with costs, or containing a simple reference, is to be prosecuted.'[1] Where the decree is more complicated, and it is in those cases chiefly that the proposed meeting of all parties to consider the method of carrying on the decree would be attended with most advantage, how are the directions of the order to be complied with? It is to be recollected that, upon this attendance, the Master must, necessarily, be totally ignorant of any of the circumstances of the case; all that he has before him is a copy of the ordering part of the decree alone. He is in no situation to decide what parties are entitled to attend future proceedings. He may perhaps be able, in general, to decide what advertisements will be necessary in carrying on a creditor's suit, but how can he point out, without knowing more than he is likely to do from the mere ordering part of the decree, which of the several proceedings directed upon it may be properly going on *pari passu*, and, as to what particular matters, interrogatories for the examination of the parties, appear to be necessary? and whether matters requiring evidence shall be proved by affidavit or by examination of witnesses? All and each of these matters require, in cases which are at all out of the ordinary routine, a knowledge of the facts and circumstances of the case, which, in many of such cases, it would be impossible to acquire from the verbal information of the solicitors attending, or of their managing clerks, and indeed could only be properly brought before the Master in the form of a state of facts,[2] which would be attended with a considerable expense to the suitor, and was evidently not within the contemplation of the commissioners, in recommending the orders in question. It is true that, in some cases, a compliance with the directions of the 51st order might be productive of advantage, by affording an opportunity for suggestions and mutual communications to pass between the solicitors or their clients, in the presence of the Master; but, in the generality of cases, especially in contested ones, these are not very likely to occur; and, instead of the Master having to listen to useful suggestions and commu-

1 2 Smith's Ch. Pr. 100.
2 It is stated that, in acting under this order, Master Stratford compelled the party to bring in a state of facts, and proposal as to the manner of executing the decree. 2 Smith, 100.

nications between the solicitors, he would very probably be occupied in listening to discussions and arguments upon points as to which he has no power, from want of information, to come to a proper decision. It is evident, therefore, that, in most cases, a compliance with the terms of these orders, if not injurious, can be productive of little or no advantage whatever; and indeed, the impracticability of complying with the 51st order is so strongly felt, that, in some offices, the obligation to take out the warrant to consider the decree is dispensed with, although in others the Masters feel themselves bound to comply with the order."[1]

The warrant "to consider" is nevertheless very useful, though it is impossible to make all the directions mentioned in our orders

The solicitors of the parties all met together before the Master; the mode of prosecuting the decree is arranged; if an objection is raised to the attendance of any party, it is decided before any expense has been incurred; the number of parties who are to be served on the several proceedings is canvassed and fixed; certain times are limited for the several proceedings; and suggestions and mutual communications pass between the solicitors.

The particular cases in which it may be used to advantage will be pointed out hereafter.

3. *How the Warrant to Consider is taken out and underwritten.*

The warrant is headed with a short style of the suit—as Jones v. Smith—and is underwritten thus: "To consider the decree in this cause dated.....on.....next, at.....o'clock. The Master will fix the time to make it attendable. Serve a copy on the opposite solicitor.

This service need not be personal on the solicitor, but leaving a copy at his office is sufficient;[2] but it must be made between the hours of ten o'clock in the forenoon and four o'clock in the afternoon, except on Saturday, when it must be made between ten a.m. and two p.m.[3] If the service is made after these hours, it is deemed as made on the following day in the first case, and on the

1 2 Smith, 100.
2 *Price* v. *Price*, cited in 2 Smith's Prac. 104.
3 Con. G. O. No. 410.

Monday following in the second.[1] These orders apply to the service upon the solicitor of "pleadings," "notices," "orders," "and other proceedings."

There is a difference in the practice here among the various Masters as to the time required between the service of a warrant and its return. The English practice was to have one clear day between the service and return of a warrant "to consider," and two clear days between the service and returns of all other warrants, except in the case of a warrant "to sign," which required three days service. In our Court, the proper practice requires one clear day's service of a warrant "to consider," and two clear day's service of all other warrants.[2] Sundays and all other legal holidays are not counted—for instance, if a warrant "to consider" be served on Saturday, it cannot be made attendable until the Wednesday following; and if a warrant, not being a warrant "to consider," be served on Friday, it cannot be made attendable until the following Tuesday. When the service is required to be made upon a party who has appeared in person, the mode of service is pointed out in Orders 44 and 45.

The service of warrants was dispensed with on production of an affidavit shewing that the defendant could not be served.[3] Where the defendant, in a foreclosure suit, was served with the first warrant and had absconded, and the subsequent warrants had been left at his residence within the jurisdiction, such service was held sufficient.[4]

It is to be observed that wherever a charge, claim, bill of costs for taxation under the statute, or other document on which proceedings are to be taken under the reference, is left at the Master's office; the solicitor leaving it takes out a warrant, which he underwrites—"*On leaving the charge of.....*," *&c.* This is termed a "*Warrant on leaving*," and is served in the usual manner, but it is considered a mere formal one to afford the opposite party an opportunity of inspecting or obtaining a copy of the document left, that he may either admit or contest the facts stated, as he may be advised.[5]

1 Con. G. O. No. 411.
2 2 Smith's Prac. 104; 2 Daniell's Prac. 466. A warrant requires two days' clear service; *Sutherland* v. *Rogers*, 2 Cham. R. 191.
3 *M'Gill* v. *Knott*, 1 U. C. L. J. 57.
4 *White* v. *Courtney*, 1 Cham. R. 66.
5 2 Daniell's Prac. 466.

Upon the return of the warrant "to consider," the Master makes such directions (which he enters in the Master's Book) for the prosecution of the decree as to him may seem best, following as closely as possible the directions in Order 217. The Court, considering that it is impossible to map out the proceedings to be taken in a suit, have conferred upon the Masters the most ample powers enabling them to work the decrees brought before them almost in any way which may seem advantageous to the parties interested. These powers are more ample than those which were possessed by the Masters in England, and the consequence has been that the proceedings in the Masters' offices here are more simple and expeditious, and less expensive, than they would have been had the English practice been fully adopted. Our Court has provided, by Order 240, that "In giving directions, and in regulating the manner of proceeding before him, the Master is to devise and adopt the simplest, most speedy, and least expensive method of prosecuting the reference, and every part thereof; and with that view, to dispense with any proceedings ordinarily taken, but which he conceives to be unnecessary, and to shorten the periods for taking any proceedings; or to substitute a different course of proceedings for that ordinarily taken."

On every attendance before the Master under a decree or order, he marks in his book the names of the solicitors who attend, and no other attendance than those so marked will be allowed on taxation of costs, unless it can, in some other way, be shewn to the taxing officer's satisfaction that the attendance was actually made. This is, however, sometimes impossible to do, and it is, therefore, a matter of consequence to the solicitor that he ascertain from the Master, before he leaves his office, that his attendance has been properly marked, for it not unfrequently happens that this is omitted to be done, either from the solicitor coming in after the Master has commenced the proceedings, or from the hurry of business. This precaution is of greater importance in cases where the Master is at liberty, under the tariff, to allow $2 per hour, for this cannot be taxed unless a direction that it be allowed be made *at the time* in the Master's Book.

Order 229 provides that "No states of facts, charges, or dis-

charges are to be brought into the Master's office; and where original deeds or documents can be brought in, no copies are to be made without special direction."

Order 241 provides that "Where the Master directs parties not in attendance before him to be notified to attend at some future day, or for different purposes at different future days, it shall not be necessary to issue separate warrants, but the parties shall be notified by one appointment, signed by the Master, of the proceedings to be taken, and of the times by him appointed for taking the same."

A warrant shall be so underwritten as to explain clearly what proceedings are intended to be taken under it: and if proceedings are taken of which the warrant gives no notice, or which are inconsistent with the underwriting, in the absence of parties interested, and who might, if present, have opposed them, such proceedings will be set aside and the benefit of them refused to the parties so irregularly proceeding.

When a warrant was underwritten "to settle advertisement for sale of the balance of the unconverted assets of the estate," and without further warrant the accountant directed that an offer for certain bonds of the estate be accepted, and the purchaser, a party interested under the will, made a profit on such purchase, the Master, upon the question being submitted to him, declared said profits to belong to the general estate.[1]

Order 213 provides, that "Every reference is to be called on and proceeded with at the day and time fixed, unless the Master in his discretion thinks fit to postpone the same; and in granting an application to postpone the hearing of a reference the Master may make such order, as to the costs consequent upon such postponement as he thinks just." One of the Masters for the purpose of enforcing punctuality on the part of Solicitors in attending upon warrants, established the practice not only of giving costs—(usually $2.00 to each opposite Solicitor) against the party asking the adjournment, but of adding to his directions that these costs should be paid before the party seeking the adjournment again appeared in his office. And in cases where the party taking out a warrant failed to attend

1 *Denison* v. *Denison*, 3 Cham. R. 349.

at the hour, he, at the request of the opposite party in attendance dismissed the warrant with costs (usually $2.00) to be paid to the opposite party, before the party in default again appeared in his office. The effect of this order is that the defaulting party can do nothing in the Master's office in the suit, not even take out a new warrant until the costs are paid; the effect of this practice is to ensure great punctuality, and as a consequence corresponding expedition in the business of the office. It was however objected that the Master exceeded his authority in providing this mode of compelling payment of the costs, but the Court held in a case brought before them for the purpose of testing the Master's authority that the order was extensive enough to warrant the course he had adopted, and that he had a right to establish this practice if he thought fit.

Formerly in England the Master could not proceed with a reference *de die in diem*, without the special order of the Court—but that was altered, and our order 214 provides, that "As soon as the Master has entered upon the hearing of a reference he is to proceed therewith to the conclusion without interruption, where that is practicable: and where any reference cannot be concluded in a single day, the Master is to proceed *de die in diem*, without a fresh warrant, unless he is opinion that an adjournment other than *de die in diem*, would be proper and conclusive to the ends of justice: and when an adjournment is ordered, the Master is to note in his book the time and reason thereof." And order 215 provides, that "In no case is any matter to be discontinued or adjourned for the mere purpose of proceeding with any other matter, unless that course becomes necessary."

When the Master does not think it proper to compel the parties to go on *de die*, he adjourns the warrant to some specific day and hour, writing the adjournment in his book, and all the parties who have been served with the warrant "to consider" or a warrant to proceed, which has not been allowed to lapse, or has not been dismissed are as much bound by this direction for an adjournment as if they had been served with a warrant. Order 242 provides, that "Where parties are notified by appointment from the Master, of proceedings to be taken before him, no warrants are to be issued to such parties in relation to the same proceedings." And order 243, that "Parties making default upon such appointments, are to be subject to the same consequences as if warrants had been served upon them."

Order 231 provides, that "A party directed by the Master to bring in any account, or do any other act, is to be held bound to do the same in pursuance of the direction of the Master, without any warrant or written direction being served for that purpose."

The practitioner should take care that a warrant be not allowed to lapse for want of a proper adjournment. An adjournment by the Master keeps the warrant alive, and obviates the necessity of serving the parties anew. Where these are numerous, or where they appear in person, great difficulty is sometimes encountered through a neglect of this precaution, and the costs occasioned by it will be thrown upon the party guilty of the neglect. It frequently happens that a party is unable without any fault of his own, to proceed with the reference, in such cases it is usual and proper for the Master to grant an adjournment without costs.

Under the old English practice, the attendance of a party upon a warrant was not required until the second, and in most cases not before a third warrant had been served upon him, but here every warrant for attendance before the Master is to be considered *preemptory*; and the Master may upon the non-attendance of the party served proceed in his absence *ex parte*. In case of the non-attendance of the party who has taken out the warrant he cannot proceed *ex parte*, but must allow it to lapse. In such a case he will at the request of the opposite party in attendance enforce costs as already mentioned. In order to proceed *ex parte* he must be furnished with proof of service either by affidavit or admission of service of the warrant if there be one. If the attendance be as an adjournment made by himself, and noted in his book, no such proof is of course required.

4. *Parties Entitled to Attend in the Master's Office.*

The party conducting the cause in the Master's office must take care that all parties entitled to attend any proceedings under the decree or order have due notice of service of a warrant in the manner already stated. Who these are, where the parties are numerous, and their interests complicated is not always an easy task to ascertain, and the following general rules will be useful to the practitioner in pointing out to him the parties who ought to have notice of the proceedings in the Master's office.

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.

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 proceedings which relate to or may affect the fund out of which they are to be paid.[1] 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.[2]

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.[3]

Trustees are not allowed, (except in proceedings carried on by themselves,) to attend before the Master in cases where all the *cestui que trusts* are before the Court; but if there are any parties in *esse*, or who may come into *esse*, who may become interested, and

1 2 Smith, 161; *vide etiam, Chillingworth* v. *Chillingworth*, cited *ib.* p. 200.
2 2 Smith, 101.
3 *Ibid*, 102.

whose interests are only represented by the trustees and is not too remote; the trustees will be entitled to attend the proceedings affecting those interests.[1]

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 incumbrances who claim a priority over him, but not on those who do not charge to be of a prior date to his security.[2] The same rule applies to creditors coming in to prove their debts under a decree.

The above restrictions are adopted for the purpose of protecting the party or the funds upon which the costs of the suit will eventually devolve, from being put to expense, by the unnecessary attendance of parties before the Master; and the application of them is generally regulated by the Master to whose discretion it is left. By the 217th order, above referred to, the Master, strictly speaking, is bound, where it can be done, to point out, at the attendance upon the warrant, "*to consider*" the course of proceedings under the decree, who the parties are that are entitled to attend him, and in cases where he may be in a situation to do so, at such attendance, it is very desirable that the terms of the order should be complied with. It is obvious, however, that, in many cases, this would be impracticable; but as the order does not preclude the discussion of this point at any future stage of the proceeding, and the Master may, at any time, entertain an objection to a party attending before him, on the ground, that his interest does not entitle him to do so at the risk of throwing the expense of his attendance upon the fund or the party to be charged with the costs. If the Master, upon an objection being made to the attendance of a party before him, is of opinion that such attendance is inadmissable, he may refuse to mark the attendance of the solicitor of the party in his book, which will have the effect of depriving such solicitor of the costs of such attendance upon the general taxation of the costs.

If the Master should be considered to have come to an improper conclusion in not allowing a party to attend before him, the proper course to obtain the opinion of the Court upon the point would be

1 *Ibid.*
2 *Ibid.*

to appeal. On one occasion, an application by motion appears to have been made to the Court, on the ground that the Master had refused to mark in his book, the attendance of a solicitor, and the motion was ordered to stand over, that the Lord Chancellor might see the Master, when the object of the motion appears to have been obtained, and it was not mentioned again.[1]

One of several parties being out of the jurisdiction and alleged by the bill to be insolvent, a decree to take the accounts and wind up the affairs of the partnership has made in his absence ; and he after the decree had been carried into the Master's office returned to this Province, and was, by order of the Master, made a party defendant in his office. From this order the defendant so added appealed. *Held*, that under order 42, of the orders of 1853, S. 15, the Master had authority to add such party in his office, and the appeal was dismissed with costs.[2] Unless where the parties to be charged are too numerous to be made parties to the bill, or there is some other special reason, Order 42 of the orders of June 1853, is confined to cases where no direct relief is sought against the parties to be added, or where the object is to bind their interests by the proceedings in a manner similar to what is provided for by the 6th of the same orders.[3] Where a Mortgagor had conveyed his Equity of redemption, to the trustees of his marriage settlement in trust for his wife for life, the remainder to his children, and a bill of foreclosure was filed after his death against the trustees and widow, to which bill, the children being infants, were not made parties ; the Court granted a decree containing the usual reference to enquire whether a sale or foreclosure would be more beneficial to the infants ; and gave liberty to the Master to make the infants parties in his office if he should see fit.[4] On a motion for a final decree of foreclosure, it appeared that in proceeding under a decree several persons were made defendants in the Master's office, whom the Court thought were unnecessary parties to the taking of the accounts directed; the motion was refused, and the costs caused by making such unnecessary parties were ordered to be deducted from the plaintiff's bill; the amount then appearing to be due was ordered to be paid in two weeks, or in default foreclosure.[5]

1 2 Turner & V. 215.
2 *Patterson* v. *Holland*, 7 Grant, 563. Order 244 is a copy of this order.
3 *Rolph* v *U. C. B. Soc* 11 Grant, 275.
Dickson v. *Draper*, 11 Grant, 372.
Rice v. *Brook*, 1 Cham. R. 71.

It is to be noticed that the Master has not only the power of restricting the attendance of parties or their solicitors before him, in the manner above stated, but he is also empowered, in certain cases, to control the parties in their employment of solicitors: for Order 218 provides that "Where at any time during the prosecution of a reference, it appears to the Master, with respect to the whole or any portion of the proceedings, that the interests of the parties can be classified, he may require the parties constituting each or any class, to be represented by the same solicitor; and where the parties, constituting such class, cannot agree upon the solicitor to represent them, the Master may nominate such solicitor for the purpose of the proceedings before him; and where any one of the parties constituting such class, insists on being represented by a different solicitor such party is personally to pay the costs of his own solicitor, of and relating to the proceedings before the Master, with respect to which such nomination has been made, and all such further costs as are occasioned to any of the parties by his being represented by a different solicitor from the solicitor so nominated."

The general rule, that all persons having an interest in the result of the proceedings should have notice of the attendance before the Master, was held, in England, to extend to cases in which a defendant had allowed the bill to be taken *pro confesso* against him; but the practice is different in this country. Order 111 provides that "An order to take a bill *pro confesso* against a defendant does not require to be served; and all further proceedings in the case may be *ex parte* as to such defendant, unless the Court orders otherwise." But although the proceedings in the Master's office may, under the general order, be taken *ex parte* against a defendant, who has allowed the bill to be taken *pro confesso* against him, that mode of proceeding is irregular where an administration order has been obtained upon notice without bill filed.[1]

Parties who are entitled to attend upon the Master, 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.[2] Thus, if a debtor or creditor

1 *Jackson* v. *Matthews*, in *Re Patterson*, 12 Grant, 47; and see *Strachan* v. *Murney*, 6 Grant, 284.
2 2 Smith, 100.

account, or charges and discharges arising out of either, or charges or claims of creditors or others, are brought in, all the parties to the suit, liable to be affected by the results of these accounts or claims, are entitled to take copies of them.[1]

The right to take copies of proceedings in the Master's Office, extends not only to the copies of such matters brought in by the plaintiff, but to such as are brought in by the co-defendants; and, in fact, the right is solely regulated by the influence of the proceeding upon the estate or fund, and the interest of the party claiming to attend in the result of that proceeding.[2]

4. *Making or Adding Parties in the Master's Office.*

Order 244 provides that "Where, in proceedings before the Master, it appears to him that some persons not already parties ought to be made parties, and ought to attend, or be enabled to attend the proceedings before him, he many direct an office copy of the same to be served upon such parties; and upon due service thereof such parties are to treated and named as parties to the suit, and are to be bound by the decree in the same manner as if they had been originally made parties."

And Order 245, that "The office copy of a decree directed to be served under Order 244 is to be endorsed with a notice to the effect set forth in schedule L to these orders, with such variations as circumstances required."

And Order 246, that "A party served with an office copy of a decree under Order 244 may apply to the Court, at any time within fourteen days from the date of such service, to discharge the order, or to add to, vary or set aside the decree."

The practice as to adding parties in the Master's Office in Mortgage suits is peculiar, and will be dealt with specially.

The rule regulating the adding of parties, and the distinction between adding them, and merely serving them with notice of the proceedings before the Master are clearly laid down in *English* v. *English*,[3] in which it was held that where the usual decree is

1 2 Smith, 100.
2 2 Smith, 101.
3 12 Grant, 441.

obtained by one of an intestate's next of kin for the administration of his personal estate, the Master is not to make the other next of kin parties in his office, but is to see that all have been served with an office copy of the decree, under Order 6, of June 1853[1] before he reports, and generally speaking, before he proceeds with the reference. In such a case, the Court may dispense with service of the decree, on any of the next of kin, who are out of the Province, and the application for this purpose may be made *ex parte*. So when the decree is for the administration of real estate, all the heirs must be served with an office copy of the decree, *but are not to be made parties,* or served with the proceedings in the Master's office: though any of them may by notice, require to be served if they desire it. The rule is the same when some of the next of kin or heirs are infants. Order 60 before referred to, and Order 587 may be reproduced here. The first provides that "In all the above cases, the persons who, according to the practice of the Court, would be necessary parties to the suit, are to be served with an office copy of the decree (unless the Court dispenses with such service) endorsed with the notice set forth in schedule A. hereunder written and after such service, they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit: and upon service of notice upon the plaintiff, they may attend the proceedings under the decree. Any party so served may apply to the Court to add to, vary, or set aside the decree, within fourteen days from the date of such service."

This order was found inconvenient as the power to dispense with the service was confined to the Court; to remedy this Order 587 was promulgated which provides that "The Master may, while proceedings are pending in his office, and where he deems it advisable, appoint guardians *ad litem*: and he may also dispense with service of the decree upon the persons referred to in Order 60: and in such case he is to state the reasons thereof in his report."

Although the bill is *pro confesso* the defendant may appear in the Master's office, and cause mesne incumbrancer to be made parties, although there is no reference thereunto in the decree.[2] Or, he may appear and show that the amount advanced on a mortgage was less

1 Order 60 displaces this Order—there are slight differences between them, but these do not affect the question now under discussion.
2 *Cameron* v. *Lynes*, 1 Cham. Rep. 42.

than the consideration expressed in it.[1] He cannot, however, set up usury in such a manner.[2] Creditors or other parties proving debts or claims, are only entitled to attend in the proceedings brought in by themselves.[3]

5. *Production of Documents in Master's Office.*

The practice in England was to insert in the decree a direction that the parties should produce before the Master such deeds, books or papers as he should direct. This is usually omitted in the decrees of our Court, as it is provided by Order 222 that "The Master may cause parties to be examined, and to produce books, papers and writings, as he thinks fit, and may determine what books, papers and writings are to be produced, and when and how long they are to be left in his office; or in case he does not deem it necessary that such books, and papers or writings should be left or deposited in his office, he may give directions for the inspection thereof, by the parties requiring the same, at such time and in such manner as he deems expedient." The discretion of the Master is limited by the rules which guide the Court in compelling a discovery and production of documents in other cases.[4]

The Master may make this direction at any time during the reference. It is usually made during some sitting on a warrant, but any party may apply for a warrant *ex parte*, at any stage of the proceedings before him for production. The time given for production in such a case varies from two days to as many weeks,[5] according to the circumstances of the case.

Order 226 provides that "Under every order, whereby the delivery of deeds or execution of conveyances is directed, the Master is to give directions as to the delivery of such deeds, and to settle conveyances where the parties differ, and to give directions as to the parties to the conveyances, and as to the execution thereof;" and Order 230, that "Where directed, copies, abstracts of, or extracts from accounts, deeds, or other documents and pedigrees, and concise statements are to be supplied; and, where so directed, copies are to be delivered as the Master may direct."

1 *Penn* v. *Lockwood*, 1 Grant, 547.
2 *Ibid.*
3 *Hare* v *Rose*, 2 Ves. Sen. 558.
4 2 Daniell's Prac. 472, note (*e*).
5 Where the Order is to deposit with the Clerk of Records and Writs, or with a Deputy-Registrar, the time is ten days, by Order 134, but this is not binding upon a Master.

Under these orders, the Master has a right to require, by directions made in his book at any sitting under the reference, which the producing party is attending, or has been duly notified to attend, or by his warrant, that all such documents as he shall think proper shall be left in his office, and a refusal to leave them in pursuance of such direction or warrant is considered as a disobedience of the order of the Court, and may be treated accordingly.[1] *The warrant should be underwritten—"To produce before me,....., and deposit in my office, under oath, all such deeds, books, and papers as are in the custody or power of the.....relating to the matters referred to me, on.....next."* If any particular documents only are required, the underwriting should be varied accordingly.

6. *Mode of Proceeding to Obtain Production.*

Where a warrant is issued, it is to be served in the usual way: it is a two-day warrant. Where directions have been made, no service is requisite. The directions entered in the Master's Book may be in the form following: "And I direct that....., do, on or before .....next, produce and leave, under oath, in my office, all books, deeds, papers, and writings in his custody or power in any manner relating to the matters referred to me." At the time appointed, search for the papers and affidavit, and if the documents be not deposited, the Master will certify the fact, and on this the party requiring the production may proceed to attach the party in default. The Master's certificate should be dated on the day the motion comes on to be heard, where the proceedings have been had in Toronto, and where they have been had in an outer county, at the latest time possible to enable the party moving to produce it in Court when the motion comes on.[2] Formerly, the practice was to obtain an order *nisi* on the Master's certificate, but now, in lieu of an order *nisi*, notice is to be given of the motion for an order absolute.[3] And where the application for such order is made, by reason of default in production of books and papers in the Master's office, or in the office of

1 *Shirley* v. *Earl Ferrers*, 1 M. & C. 304; *Sidden* v. *Leddiard*, 1 Sim. 388 This latter case expressly decides that the order to produce involves an order to leave. It may here be mentioned that an order to produce cannot regularly be taken out after decree; *Cottle* v. *Vansittart*, 2 Cham. R. 396.

2 See *Hopkinson* v. *Leach*, 3 Swan. 98: *Carleton* v. *Smith*, 14 Ves. 180; *Somerville* v. *Joyce*, 1 Cham. R. 202.

3 Con. G. O. No. 295. This is a four clear day's notice: *Kelly* v. *Smith*, 1 Cham. R. 364.

the Clerk of Records and Writs, or in carrying in accounts, service of the notice of motion upon the solicitor of the party required to obey the same, is to be sufficient service. [1]

If an affidavit be filed, but the documents be not deposited, it is in the discretion of the Master to grant the certificate.[2] But where insufficient accounts are produced, the Master should issue a warrant calling on the parties for better—before he certifies.[3]

If the party is prepared to bring in the books and papers as required, he makes and files an affidavit similar to that used on the production of documents. If there is reason to suppose that the producing party has not made a full disclosure, the usual course is to examine him upon his affidavit. [4]

It may here be stated that the Master has jurisdiction in matters in his own office, and will not be interfered with on a motion in Chambers. An order to be directed to him to deliver up books, &c., in his hands was refused. [5]

If the party ordered to produce requires further time to enable him to do so, his solicitor should attend upon the return of the warrant, or at the time appointed by the Master's directions, and apply for time to do so according to the circumstances.

It may here be mentioned that the certificate of a Master as to the non-production of documents, cannot be contradicted: and that, where the Master certified that the writings were not delivered in, but the Clerk in Court offered to prove that they were delivered in, the Court would not suffer any averment to be made contrary to the certificate. [6] It is the practice here in cases where the party ordered to produce declines to produce all or some documents in his possession, but states in his affidavit the reason of such non-production, for the Master to decide upon the sufficiency of the reason. If he thinks it insufficient, he states so in his certificate, and the remedy of the party, if he thinks the Master in error, is by appeal from the certificate, or by moving to discharge it.

1 Con G. O. No. 296.
2 *Henna* v. *Dunn*, 6 Mad. 340.
3 *Merkley* v. *Casselman*, 1 Cham. R. 292.
4 The practice as to this is similar to that adopted in examining a party on his affidavit of production before decree.
5 *Nelson* v. *Gray*, 2 Cham. R. 454.
6 Sel. Ca. in Cha. 5 ; 2 Harr. Ed. Newl. 494, n.

A contempt incurred by the non-production of documents, pursuant to a Master's warrant or direction under a decree or order, can only be cleared in the same manner as other contempts, *i. e.*: by producing the Master's certificate of the party's having deposited the documents required, and moving to discharge the process upon payment of costs.

It may here be observed that besides the process of attachment, the party in default is exposed, in severe cases, to a writ of sequestration, but the practice on this point is described in another place.

When the books and papers are brought in, they should be deposited in a secure box, where all parties wishing to inspect them, or make extracts therefrom, are permitted to do so, on taking out the proper warrant for that purpose.[1]

In practice, this warrant is rarely taken out—but sometimes the solicitor producing requests the Master not to permit inspection without notice. In such cases, the party desiring inspection serves a warrant on the party producing, underwritten: "To inspect the books and papers produced by you on the....." This is a two-day warrant, and the parties, as well as the Master, are entitled to the usual fees on an attendable warrant. In the absence of this special request, the practice is to allow any party interested to inspect, the Master charging as for a search, and the party inspecting being entitled only to a common attendance.

As soon as the purposes of discovery are answered, the documents will be ordered by the Master to be re-delivered to the producing party.[2]

Where the party ordered to produce admits in his affidavit on production that he has certain documents but declines to produce them, he must, in the affidavit, state the grounds of his objection. It is the duty of the Master to decide upon the validity of the excuse offered, and this involves a knowledge of the rules which guide the Court as to the production of documents. The principles are the same whether the party be ordered to produce by the

1 Bennett, 80.
2 See *Dunn* v. *Dunn*, 3 Drew. 17; 18 Jur. 1068; on appeal, 7 De G. M. & G. 207; 1 Jur. N. S 122.

usual order to produce, or by the Master under a warrant or by his direction, and these will be discussed in a different part of this treatise.

7. *Evidence in Master's Office.*

Where the Court directs an enquiry into a fact, 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.[1]

The parties in the cause are, therefore, at liberty, in an enquiry in the Master's Office, to make use of all the proceedings which are of record in the cause, whether they be pleadings, such as bills, answers, &c., 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. The pleadings in the cause 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; thus, where the answer of one defendant, against whom the bill had been dismissed, was permitted by the Master to be read as an affidavit against another defendant, and the Master's report was excepted to on the ground that he had so done, Lord Langdale, M. R., allowed the exception: his Lordship observing, that certainly there is no rule more distinct as to evidence than this, that it ought not only to be evidence in a matter in issue between the parties, but it ought to be the evidence of a person disinterested and giving it for the purpose of declaring the truth, upon the occasion on which it is adduced, but that the answer is an answer which is put in to a bill, is put in by the defendant for the purpose of maintaining his own interest against that of the plaintiff, not for the purpose of declaring the truth as a disinterested witness between two other parties who are in contest together.[2]

The Master may also allow any parties who are competent for that purpose, to admit any given facts to be true, and it is directed by an old order of the Court, that if, before the Master, either party, by his counsel, clerk, or solicitor, admit a matter of fact,

1 *Smith* v. *Althus*, 11 Ves. 564.
2 *Hoare* v. *Johnstone*, 2 Keen, 553: *Kemp* v. *Wade*, *ib.* 686.

the Master shall take a memorandum thereof in his book of minutes or memorandums, and the party admitting shall, in his presence, subscribe such minutes or memorandums; which subscriptions shall be conclusive to the party on whose behalf the same was so subscribed, so as the other side shall not be put to any proof of the matter.[1]

It is to be observed, that the Master ought to take the admissions of such parties only as are competent to make them, and that neither infants nor married women will be bound by admissions to their disadvantage.

The right to use the proceedings in the cause as evidence before a Master upon a reference before him, must be understood to be subject to the same rules and restrictions as govern the admissibility 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 enquired into, it may be received as evidence before the Master, whether it was made use of at the hearing or not.[2] It seems, also, that the depositions of witnesses in another cause, between the same parties, may be read before a Master without an order to warrant it.[3] In *Lubiere* v. *Genou*,[4] the Master of the Rolls 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]

Our Order 175 directs that "A party shall be entitled, upon notice without order, to use depositions taken in another suit, in cases where, under the former practice, he was entitled, upon obtaining the common order for that purpose, to use such depositions."

And here it is necessary to call the practitioner's attention to the fact, that, in strict practice, wherever a reference to a Master is directed by a decree or decretal order, under which it becomes nec-

1 Prac. Reg. 364. The propriety of adhering to this rule is exemplified by what took place in *East India Company* v. *Keighley*, 4 Mad. 16, in which case the discussion before the House of Lords was principally upon the point, whether the Master's report that certain admissions were made before him, could be the subject of exception; as to which, *vide* Lord Eldon's judgment, *ib*.

2 *Vide Smith* v. *Althus*, 11 Ves. 564; for this reason, where the proofs in a cause merely go to charge or discharge a party in a matter of account, when the liability to account is admitted, such proofs are never read or entered as read: *vide Law* v. *Hunter*, 1 Russ. 101: *Walker* v. *Woodward*, *ibid.* 109.

3 *Anon.* 3 Atk. 524.

4 2 Ves. 579.

5 As to reading depositions in cross suits, *vide ante*.

essary to establish facts by the testimony of living witnesses, such testimony ought to be obtained by examination of the witnesses, and that a Master cannot, in any case, proceed upon an enquiry before him 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.[1] For this reason it is, that the Master cannot, strictly speaking, receive affidavits under a decree in which an infant is concerned.[2] And where a reference had been made to the Master, under the decree, of a question of legitimacy, and the Master proceeded upon affidavits obtained from America, the Vice Chancellor, Sir J. Leach, on a motion for that purpose, directed the Master not to proceed upon the affidavits, but gave the parties liberty, under the circumstances, to apply to the Court, if by death or otherwise it should become impossible to obtain, under a commission, the evidence of the persons who had made the affidavits.[3]

Gibbs v. *Payne*[4] is sometimes cited as if it warranted the Master in directing that evidence should be received by affidavit, instead of its being *viva voce:* but that decision was made under an order requiring the Master, when considering the decree, "to point out whether the matter requiring evidence shall be proved by affidavit or by examination of witnesses." We have no order as extensive as this. In that case the Master had not, on the consideration of the decree, decided to admit affidavits, but afterwards admitted them, although they were objected to; it was held, upon exceptions to the Master's report, that, as the Master had omitted to decide, at the time of considering his decree, whether the proofs should be by affidavit or examination, the practice remained as it was before the issuing of the order, and that the exception must be allowed. Mr. Daniel[5] makes the following remark in this case: "From the report of this case, it appears as if the Court considered that the 51st Order[6] empowered the Master, at the time of considering his decree, to determine upon the admission of affidavits, even where there was no consent by the other parties—*sed quære.*" It will be observed that, in this case,

1 *Rowley* v. *Adams*, 1 M. & K. 545; and *vide Willan* v. *Willan*, 19 Ves. 590—3.
2 But if the infant's solicitor concurs in the use of affidavits, the infant will be bound.
3 *Tillotson* v. *Hargrave*, 3 Mad. 494.
4 4 Sim. 554; 3 L. J. Ch. 40.
5 2 Daniell's Prac. 437—note *o*.
6 The Order above cited.

the admission of the affidavits had been expressly objected to by the opposite party. 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 *viva voce*.[1]

Where a Master had refused to allow evidence by affidavit, which it was contended he should have allowed, held, that this was such an exercise of his discretion as would require an appeal against it to be made to the Court, and not to a Judge in Chambers.[2]

In England, witnesses who had been examined in the cause were not allowed to be examined as to the same matters by the same party under the decree before the Master without a special order of the Court, and the reason for this restriction was "the danger of perjury, which would be incurred by a witness deposing 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."[3]

No order is necessary in our Court, but it is presumed that the Master here would be guided by the principles laid down by the English judges in dealing with applications for this order. In general, the Courts in England will not, by its order, sanction the Master in examining a witness already examined in the cause, as to matters upon which he has before been examined,[4] unless in cases where the first examination had failed accidentally, and without fraud, by reason of his then having been incompetent, as in *Sanford* v. .....,[5] in which case a witness had given evidence under a release executed by him, which, by mere accident, did not cover a very small debt due to him, in respect of which he was

1 *Morgan* v *Lewis*, 1 Newl. 333.
2 *Gould* v *Burritt*, 1 Cham. R. 250.
3 *Vaughan* v. *Lloyd*, 1 Cox. 312.
4 *Earle* v. *Pickin*, 1 R. & M. 547.
5 3 Bro. C. C. 370

interested at the time of his examination, and was, therefore, incompetent; and the Court made an order for his re-examination before the Master upon the same point.[1]

Where the reason upon which this rule is founded does not exist, the rule need not be observed; thus, where the witness has been examined only to prove exhibits at the hearing, he may be examined before the Master to prove other exhibits. It is also to be observed that the rule applies only to prevent a witness from being re-examined by the party who examined him before, and that it does not affect the case where a witness, who has been examined by one side before the hearing, is examined by the other side after the hearing. He is not, in such 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.[2]

With respect to the power which one party to the record has to examine another party as a witness before the Master, it is to be observed that the admissibility of a party as a witness depends upon the same rules and principles as the admissibility of parties to be witnesses before the hearing. For information upon this part of the subject, the reader is referred to another part of this treatise.

It was the practice in the Master's office in England for the party intending to examine witnesses to carry into the Master's office a state of facts, detailing the circumstances which he intended to prove. Our Order 229 declares that no state of facts shall be brought into the Master's office; and here, so soon as the necessary accounts are before the Master, he proceeds to take the evidence *viva voce*.

The depositions of the witness are taken in writing in the first person, by the Master, and, after being read over to the witness, are signed by him. It frequently occurs that on hearing his depositions read the witness desires alterations made. If the Master feels clear that the witness gave his evidence as he had taken it down, he should not alter it by erasure or interlineation, but should add the new statement of the witness to the end of the depositions. The object of this practice is to place before the

1 See also *Callow* v. *Mince*, 2 Vern. 472.
2 *Metford* v. *Peters*, 8 Sim. 630.

Court (in case of appeal) as clear a view as possible of the statements of the witness; for a witness who varies his evidence in important points cannot be trusted as implicitly as one who, having made a statement, adheres to it.

The Master at Toronto[1] has jurisdiction to direct evidence proposed to be used on an enquiry before him to be taken before a Master in an outer county, though not consented to.[2] It is the practice, also, to use before the Master the depositions taken before any Examiner of the Court; and Order 221 provides that "Under an order of reference, witnesses may be examined before any Examiner of the Court: and foreign commissions for the examination of witnesses without the jurisdiction of the Court, may, on the certificate of the Master, be issued by the Clerk of Records and Writs, upon *præcipe*." In moving for an order for a commission to examine a witness abroad, with a view of using his evidence in a pending reference to a Master, the proper evidence on which to obtain such order is the Master's Certificate, and not an affidavit as to the facts.[3]

In order to compel the attendance of a witness before the Master, a *subpœna* is taken out and served in the ordinary way; and if the witness is required to produce books or papers, it is filled up as a *duces tecum*. The rules governing the examination before the Master are the same as govern the Court at examination term: and these are given in another part of this work.

It may here be noticed that where the evidence given before a Master is conflicting, his judgment on it is, in general, accepted by the Court as correct, and not to be reversed on appeal;[4] but the Court intimated in the case that Masters should be careful not to attach too much weight to oral testimony in opposition to evidence of facts and circumstances. The Court will not interfere with the discretion of the Master in deciding on the relative veracity of witnesses, where evidence has been taken *viva voce* before him. Where the Master refused to open a case where the evidence was closed, on the ground that the applicant had not made such a case as entitled him to a new trial at law, the Court sustained his ruling.[5]

1 And it is presumed each Local Master.
2 *Re Casey, Biddell* v. *Casey*, 1 Cham. R. 198.
3 *Stephens* v. *Mears*, 1 Cham. R. 200.
4 *Day* v. *Brown*, 18 Grant, 681.
5 *Waddell* v. *Smyth*, 3 Cham. R. 412.

8.—*Claims and Accounts before the Master.*

Under the practice in the Master's office in England, a "state of facts" was frequently required to be filed before any evidence was taken. *A state of facts,* as its name imports, was a statement in writing made by a party who wished to prosecute or resist any enquiry before a Master of the facts and circumstances upon which he relied, either in support of his own cause, or a contradiction or defeazance of that of his adversary. It was, in effect, *the pleading of the party before the Master,* and was governed by nearly the same rules and principles as pleadings in the Court, although, not being signed, nor, in general, prepared by counsel, they were not always so strictly observed.

This proceeding is discontinued in our Court, and instead, the party brings in his claim, or account. For instance, in a mortgage suit for foreclosure or sale, the plaintiff brings in his account of the money claimed by him to be due on the mortgage:—in a redemption suit, the defendant brings in a similar account:—in a partnership suit, both parties bring in statements of the partnership dealings, shewing their respective claims or demands upon the partnership assets:—in an administration suit, the executor or administrator brings in a statement of his receipts and disbursements on account of the estate, and the creditors send in statements of their claims against it. The practice in these and analagous cases will be pointed out under their respective headings, but it may be well here to refer generally to the rules regarding these portions of the Master's duties.

It was formerly necessary to state in the pleadings many matters with which the Master is now permitted to deal without any specific reference having been made to them either in the pleadings or in the decree. Order 219 provides that "To enable the Master to exercise all, or any, of the powers conferred upon him by, or to take the accounts and make the enquiries referred to in the following Orders, it shall not be necessary that any of the matters therein mentioned shall be stated in the pleadings, or that evidence thereof shall have been given before the order of reference, or that the order should contain any specific direction in respect thereof.

And Order 220, that "Under an order of reference, the Master shall have power—

"1. To take accounts with rests or otherwise;

"2. To take account of rents and profits received, or which, but for wilful neglect or default, might have been received;

"3. To set occupation rent;

"4. To take into account necessary repairs, and lasting improvements, and costs, and other expenses properly incurred otherwise, or claimed to be so;

"5. To make just allowances;

"6. To report special circumstances;

"7. And generally, in taking the accounts, to enquire, adjudge, and report as to all matters relating thereto, as fully as if the same had been specially referred."

Where an order for the administration of a deceased person's estate is granted upon the application of any person beneficially interested therein, the decree will not contain a direction to enquire as to wilful neglect and default.[1] The Master would, in such a case, under the orders just cited, be at liberty to enquire into wilful neglect and default. Where an executor or administrator applies for an order to administer the estate of the testator or intestate, the account will be directed to be taken of what he has received, or which, but for his wilful default, might have been received.[2] In such a case, also, the Master has the power to enter into the question of wilful neglect or default without any mention being made of it in the order.

By the old English practice, a "state of facts" was brought into the Master's office, where an account was to be taken; but Order 227 provides that "Where any account is to be taken, the accounting party is, unless the Master otherwise directs, to bring in the same in the form of a debtor and creditor, verified by affidavit.

1 *Harrison* v. *M'Glashen*, 7 Grant, 531.
2 *Ledgerwood* v. *Ledgerwood*, 7 Grant, 584.

The items on each side of the account are to be numbered consecutively, and the account is to be referred to by the affidavit as an exhibit, and not to be annexed thereto."

It is important that in all these preliminary proceedings care be taken that they are in conformity with the directions of the Master and the practice of the Court—for they, in effect, form a portion of the "*Record*" to be tried in the Master's office; and if, on proceeding upon them, it is discovered that they are defective or irregular, it would be the duty of the Master to direct the alterations or additions to be made, and that the party in default should pay all costs occasioned by his irregularity.

It may here be observed that there was, at one time, a prevailing opinion in the profession that the "accounts" referred to in Order 220, which is similar to No. 42 of June, 1853, applied only to references between mortgagor and mortgagee; but Spragge, V.C., held that this construction of the order was too narrow, and in the particular case, that, where an account was directed of the dealing of a trustee with a trust estate, the Master had authority, and was bound, under the Order 42 of June, 1853, S. 13, without a special reference in the decree, to enquire as to wilful neglect or default on the part of the trustee.[1]

It may also be observed that where a party is in contempt for not bringing accounts into the Master's office, it is a sufficient clearing of his contempt to bring in such accounts, and the sufficiency of them will not be looked into.[2] It is a sufficient clearing of contempt if the party has done the act ordered to be done and paid the costs. It is not necessary that an order of court clearing his contempt should be made, unless he has been in custody, when an order is necessary for his discharge. Where a defendant, who had been in contempt for non-production of deeds, and afterwards produced, filed his affidavits, and paid costs of contempt, moved to dismiss, and it was objected that he had not cleared his contempt, no order having been made to that effect, the Secretary overruled the objection.[3]

1 *Carpenter* v. *Wood*, 10 Grant, 354; see *Walmsley* v. *Bull*, 2 Cham. R. 344, to the same effect.
2 *Clancy* v. *Patterson*, 2 Cham. R. 217.
3 *Duncan* v. *Trott*, 2 Cham. R. 487.

9. *Inquiries as to Heirs at Law, next of Kin, Creditors, &c.*

Having directed the reader's attention to the general nature of the proceedings before the Master, and to the powers with which the Master is invested to enable him to perform the duties imposed upon him by the order of reference, it becomes necessary now to point out the course to be pursued in the Master's office, upon the particular reference before him. The objects, however, for which references to a Master may be made, are so numerous and various, that it would be impossible, in a treatise of this nature, specifically to detail the course of proceeding which should be adopted in each; all that can be done, therefore, on the present occasion, is, to direct the practitioner to the practice in the Master's office, upon some of the most usual subjects of reference, from which he will be able, by analogy, to guide his steps upon others which are not of such frequent occurrence.

In doing this attention will, in this place, be directed to those references which are usually made by decrees or decretal orders, as those which are made upon interlocutory orders will come more properly under discussion in another part of the treatise, when the nature of interlocutory applications upon which they are founded shall be considered.

References to the Master upon decrees or decretal orders, are either—1. to make inquiries; 2. to take accounts and make computations; or, 3. to perform some special ministerial acts directed by the Court; to these may be added the taxation of costs; but as the subject of taxing costs will come more properly under consideration when we arrive at the general discussion of costs, which will form the subject of another chapter, it will not be now further alluded to than as it comes incidentally under our notice in the discussion of other matters.

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, the habit of the Court not being to refer abstract questions of law to the opinion of the Masters. Sometimes, however, questions of law are

so mixed up with the fact to be ascertained, that it is not possible to decide upon the one without giving an opinion as to the others. In such case, the Master is bound to give his opinion upon the law, as well as upon the matter of fact referred to him; as in the case of a reference to a Master to inquire whether a good title can be made to land, &c.

The most usual cases in which enquiries as to persons are directed to be made by a Master, 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. A similar inquiry is also necessary where it is referred to the Master 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.

Our Order 223 directs that "The Master may cause advertisements for creditors, and if he thinks it necessary, but not otherwise, for heirs or next of kin, or other unascertained persons, and the representatives of such as are dead, to be published as the circumstances of the case require: and in such advertisements he is to appoint a time within which such persons are to come in and prove their claims, and within which time, unless they so come in, they are to be excluded from the benefit of the decree."

Where the Court is called upon to administer the estate of one who has made an assignment for the benefit of his creditors it is usual in the decree to direct the Master to ascertain and report upon the amounts due to the creditors of the assignor; these are discovered by advertisement. And where it becomes necessary to ascertain who are the heirs, or next of kin on an administration or other suit in the nature of an administration suit, this is also done by advertisement, where their names are unknown. In an administration suit proper, the orders point out the precise mode of proceeding;[1] in other cases the proceedings are taken under Order 223.

10. *Proceedings to Advertise for Heirs, next of Kin or Creditors.*

Where a direction is made to inquire for heirs at law, next of kin, or creditors, the Master on considering the decree, or at a

1 Order 467, *et seq.*

subsequent attendance on a warrant directs an advertisement to be published in some newspaper published at or near the place where the parties are supposed to be, or where the Ancestor lived. It is usual to publish this three weeks, but the particular time is entirely in the discretion of the Master, who will be guided by the circumstances of each case. In the case of creditors who have signed a deed of composition, or an assignment for the benefit of creditors, and whose places of business are known, it is usual for the Master to direct that a printed slip of this advertisement be mailed to them.

The limitation of the day is made in compliance with the order which, as we have seen, directs that parties who do not come in and prove their debts, or otherwise establish their claims before it arrives, shall be excluded the benefit of the decree. It seems, however, that notwithstanding this peremptory direction, no objection can be offered to the reception of a charge or claim, by the Master, provided the same is left before the report has been signed. And that, afterwards, although such charge cannot be entertained by the Master, the Court will let in creditors, or next of kin, at any time while the fund is in Court.[1] And even where the money had been apportioned amongst the creditors (the assets being deficient), and transferred to the Accountant General, to pay them and the costs of the suit, a creditor, who swore that he was not aware of the decree, was allowed, on motion, to come in and prove his debt, upon payment of the costs of the application, and the expense incident to the same, in recasting the apportionment of the property amongst the creditors.[2] In *Gillespie* v. *Alexander*,[3] after the creditors, who had proved, had been paid their debts, and the residue had been ordered to be apportioned amongst the legatees, another creditor obtained leave to go in and prove his debt; but in the meantime the fund was apportioned, and out of it some of the legatees received the shares due to them on account of their legacies, and the remainder was carried over to the account of the other legatees, and Lord Eldon held, that the creditor was not entitled to receive the whole of his debt out of the funds of the other legatees remaining in Court, but only such part of it as should bear the same proportion to the whole, as the legacies given to those legatees bore to the

1 *Lashley* v. *Hogg*, 11 Ves. 602.
2 *Angell* v. *Haddon*, 1 Mad. 530.
3 3 Russ. 130.

whole amount of the legacies given by the will. His Lordship, however, reserved permission to the creditor to apply to the Court, as he might be advised, against such of the legatees as had received payment on account of their respective legacies, and directed that he and the legatees, out of whose funds he was to be paid in part, should be at liberty to apply to the Court, according to their respective rights and interests, with regard to the testator's estate remaining outstanding, as and when the same should be gotten in and received.

It is to be observed, that when a decree directs enquiries as to the next of kin, creditors, &c., 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.[1] Where, however, under a decree directing an account of the proceeds of a joint adventure (pronounced upon a bill filed by one partner on behalf of himself and all the others), in which an enquiry was directed as to who were concerned with the plaintiff in the adventure, with the usual direction as to advertisements, the Master not only reported those who had come in, but proceeded to state the names of several other persons, who, though they had not come in, were nevertheless considered by him entitled to shares of the fund; the Master of the Rolls, Sir W. Grant, on further directions, decreed an account to be taken, not only of what was due to those who had come in, but of what sums had been paid by the defendant, before the suit was instituted, to the other persons who were reported to be entitled to shares, but who had not come in, and of what remained in the hands of the defendant, beyond what had been so paid him; but Lord Eldon appears to have held that part of the decree to be wrong, and to have considered that, by analogy to the case of creditors, the parties, who did not come in, ought to be excluded from the benefit of the decree.

In the above case, Lord Eldon observed, that it was clear, by analogy, that if creditors did not come in, and were excluded from the benefit of the decree, "that would not prevent another bill, having due regard to costs," &c. With reference to this observation, it may be observed, that the rule of the Court is, that the distribu-

1 *Good* v. *Blewitt*, 19 Ves. 336.

tion of property, under the decree of the Court, amongst persons found by the Master's report to be entitled, does not conclude the rights of persons who have an equal or paramount title to those amongst whom the distribution has taken place;[1] such are only precluded from taking the benefit of the decree under which the distribution has been made, and they may, notwithstanding that decree, file another bill against the persons who have taken the property under it, to compel them to refund. Thus, after a distribution of the estate of a deceased person has taken place under a decree in a creditor's suit, a creditor, who has not come in under the decree, may sustain a suit against the creditors in an inferior or in an equal class with himself, to compel them to contribute, out of what they have received under the decree, towards payment of his demand. So, after a distribution of the property of an intestate, amongst the persons who have been found by the Master's report to be the next of kin of the intestate, persons claiming to be next of kin, either in opposition to, or conjunction with, those amongst whom the distribution has been made, may maintain a suit against them, for the purpose of compelling them to refund what they have received. Such a suit, however, can only, after a distribution, under a decree, be filed against the parties who have partaken of the distribution; it cannot be filed against the executor, or administrator, or other person who has acted under the direction of the Court in distributing the fund,[2] for the Court will not permit a party who has acted in pursuance of its decree in distributing a fund, to be afterwards charged for what he has done pursuant to its directions; therefore, after a distribution of assets has taken place under a decree ascertaining the rights of legatees (in pursuance of which advertisements have been published for all persons interested to come in and prove their claims before the Master), a bill, filed by a legatee against the executor, to render him liable for what has been distributed under the decree, will be dismissed, although it appears that the legatee filing the bill was ignorant of the former decree and proceedings.[3]

It is to be observed, however, that although a party making a

1 See *David* v. *Frowd*, 1 M. & K. 200; *Gillespie* v. *Alexander*, 3 Russ. 130; *Sawyer* v. *Birchmore*, 1 Keen, 391.
2 *Gillespie* v. *Alexander*, *ubi sup.*
3 *Farrell* v. *Smith*, 2 B. & B. 337; see also *Pooley* v. *Ray*, 1 P. Wms. 355; *Brooks* v. *Reynolds*, 1 Bro. C. C. 183; 2 Dick. 603, S. C.; and *Douglas* v. *Clay*, 1 Dick. 394; *Kenyon* v. *Worthington*, 2 Dick. 668.

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 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.[1] A creditor, therefore, or a legatee, who is entitled to the assets of a deceased debtor or testator, after payment of the debts, &c., may, after a decree in such a suit, file another bill against the personal representative for an account of the assets, and although in prosecuting the accounts of such suit, such creditor or legatee will be compelled to allow the demands admitted by the Court in the former suit, he will not be bound by any account of the property taken in his absence.[2]

This, 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 will not be 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.[3]

But although the distribution of property, under a decree of the Court, amongst persons found to be entitled, does not conclude the rights of persons who have an equal or paramount title, yet the Court will not assist such persons who, with full notice of the proceedings in the suit wherein the fund was distributed, have neglected to prosecute their claims: and, therefore, where, after a distribution had taken place in a suit, by the next of kin of an intestate, amongst the individuals who had come in under the decree, and established their claim as next of kin, and, after a lapse of two years from the distribution, a second bill was filed by persons claiming also to be next of kin, praying that the others might refund, and it appeared clearly, by the evidence, that the plaintiffs in the second suit knew of the proceedings in the first while they were in progress, but neglected to prosecute their claim under the decree, the Master of the Rolls dismissed the second bill, with costs.[4]

1 Lord Red. 135, 139.
2 *Ibid.*
3 *David* v. *Frowd*, 1 M. & K. 200.
4 *Sawyer* v. *Birchmore*, 1 Keen, 391.

It is also to be observed, that when a party, who has not come in under a decree, seeks to compel those who have benefitted by the distribution which has taken place under the decree to refund, he cannot proceed against one only for the whole amount of his demand, but he must proceed against them all, in order that they may all be compelled to contribute in proportion to what they have received;[1] and upon this principle the Court acted in *Gillespie* v. *Alexander*,[2] before referred to, where a partial distribution had taken place under the decree, amongst some of the legatees, and there were left in Court certain funds, which were directed to be appropriated to the legatees who had not been paid, and afterwards a creditor obtained permission to go in before the Master, to prove his debt, which he proved accordingly, Lord Eldon was of opinion that the creditor was only entitled to take out of the fund in Court, which had been appropriated to the payment of the unpaid legatees, such a proportion of his debt as the amount of the legacies unpaid bore to the other legacies, which had been paid. The principle in *Gillespie* v. *Alexander*,[3] was afterwards acted upon by Lord Lyndhurst, in *Greig* v. *Sommerville*,[4] in which a suit had been instituted to administer the personal estate of an intestate, and the Master reported that no debts had been proved; whereupon a decree was made, on further directions, in 1817, apportioning the whole residue amongst the plaintiff and the other next of kin. The plaintiff being an infant, his share, amounting to four-ninths of the fund, was retained, and carried to his separate account; and, in 1825, a foreign prince claiming to be a creditor of the intestate, petitioned for leave to prove his debt against the fund which had been carried to the separate account of the plaintiff, who, coming of age soon after, applied to have the fund paid out,—upon hearing the application, Lord Lyndhurst held, that if the debt should be established, it must be restricted to the proportion which the plaintiff's share bore to the whole amount distributed, and after reserving a sum equal to four-ninths of the claim, he directed the residue of the fund to be paid out to the plaintiff.

A creditor or other claimant desirous of coming in before the Master to prove his debt or to establish his claim, after a report has

1 *David* v. *Frowd*, *ubi sup.*
2 3 Russ. 130.
3 3 Russ. 130.
4 1 R. & M. 338.

been made, must move the Court, 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;[1] this motion must be supported by the affidavit of the claimant.

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 made the order, upon his giving security for the costs.[2]

The creditor may be cross-examined upon his affidavit.[3] In allowing costs to creditors the Master is to allow to each creditor the costs of proving and attending on his own claim only.[4] Our Order 225 provides that "The costs of proving such claims are, in the discretion of the Master, to be allowed to the creditor proving the same and added to their debts respectively, or to be disallowed. And in case of their being allowed, they may be allowed in gross, in place of taxed costs."

With regard to the enquiry as to the heirs or next of kin, any person, at the time appointed by the Master and inserted in the advertisement, who believes himself to sustain either of these characters, files his claim and affidavit supporting it. This affidavit, however, is not to be received as sufficient proof, this claim must be subsequently established by proper *viva voce* evidence, unless, by consent, affidavits are used instead.

A person claiming as heir at law, shows his title by means of a pedigree, which pedigree is proved by registers of burials and births, and the parties named in the certificates are identified with the persons through whom the claimant derives his title. Where it is impossible to obtain this strict proof of pedigree, entries in family Bibles, inscriptons on tombstiones, and even the declarations of deceased relatives are, under circumstances, received as evidence.[5] The succession to real property is regulated by the laws of the country where the land lies.[6]

1 2 Smith, 270.
2 *Drever* v. *Maudesley*, 5 Russ. 11
3 *Cast* v. *Poyser*, 26 L. J. Ch. 353.
4 *Hare* v. *Rose*, 2 Ves. S. 558.
5 See chapter on Evidence.
6 *Brodie* v. *Barry*, 2 V. & B. 131.

If a party seeks to establish his claim as one of the next of kin of an intestate, he proves his relationship to the intestate by the same description of evidence as is used to prove heirship. If one claimant has established the genealogy down to a certain person, any claimant may take up his proof from that point.

11. *Proceedings after Advertisement.*

At the time appointed by the advertisement, attend at the Master's office; produce and file an affidavit of its due publication, and of the slips having been mailed (if this direction were made), and the Master will proceed on the claims, or on the evidence as to the heirship, or relationship.

Our Order 224 provides that "The Master is to proceed on the claims brought in before him, pursuant to such advertisement, without further notice, and may examine witnesses in relation thereto at the time appointed in the advertisement, or thereafter, as he sees fit; and he is to allow, or disallow, or adjourn the claims, as to him seems just."

A person coming in to claim, under a decree as creditor, must bring in an affidavit shewing the nature of the debt or claim. *Such affidavit, however, is not intended as evidence to the Master, in proof of the debt, and must not be used by him as such.* "The meaning of the practice is, that a person shall not come here and claim a debt, without giving that assurance that it is due, which arises from his affidavit, which, also, if the debt is contested, affords a protection against the conclusion from other evidence that it is due, when the contrary may be within the knowledge of the party himself; but where the debt is contested, no attention is to be given to the affidavit."[1]

It may be mentioned, in this place, that a plaintiff in a creditor's suit, will be required to prove his debt before the Master, under the decree;[2] and where the decree directed an account of the estate of the plaintiff's testator, come to his hands, and of his debts, &c., and that the creditors should come in before the Master and prove their debts, and the Master doubted whether he could admit

1 Per Lord Eldon, in *Fladong* v. *Winter*, 19 Ves. 199.
2 Seton on Decrees, 55.

the plaintiff as a creditor to prove a debt due to himself, Lord Hardwicke directed that the plaintiff should be at liberty to go in before the Master and prove his debt, and that the Master should examine him relating thereto, notwithstanding he was a party.[1]

If it should be found necessary to examine any witness, either for or against the claim, such witness may be examined.

It seems, however, that in supporting charges in the Master's office, 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 in very contested cases only, or where fraud is suspected.[2]

It may be observed here, that where a person, not a party to the suit, carries in a claim before the Master, under the decree, the party representing the estate out of which the claim is made, has a right to the benefit of any defence which he could have made, if a bill had been filed by the claimant in equity, or an action had been brought at law to establish such claim. Therefore, as we have seen, an executor may, in the Master's office, set up the Statute of Limitations as a bar to a claim by a creditor under the decree, provided such claim was within the operation of the statute before the decree was pronounced.[3] 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, and afterwards come before the Court upon appeal.[4]

With reference to the effect of the Statute of Limitations, in barring a claim brought in by a creditor under a decree, it may be mentioned that in *Sterndale* v. *Hankinson*,[5] it was determined that where a bill is filed, by a creditor, on behalf of himself and all others, every creditor has an inchoate interest in the suit from the moment the bill is filed, and, from that moment, time does not run against him; so that a simple contract creditor, coming in under a decree made in such a suit, was admitted to prove, although

1 *Newman* v. *Norris*, 1 Dick. 259
2 2 Smith, 301.
3 It seems also, that the Statute may be set up in the Master's office as well by another creditor or legatee, as by the personal representative: *Shewen* v. *Vanderhorst*, 1 R. & M. 347; *sed query*, whether it can be set up by the Master? *ibid.*
4 Per Lord Hardwicke, in *Peacock* v. *Monk*, 1 Ves. 127—131.
5 1 Sim. 393.

there had been a lapse of more than six years between the filing of the bill and the decree. It is to be observed, however, that the case occurred before the statute,[1] and that the claimant was, moreover, a creditor by simple contract. Since that period, however, the statute 3 & 4 W. 4, c. 27, s. 40, has been passed, which operates as a positive bar to all actions, suits, or *other proceedings*, for the recovery of any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law *or in equity*, or any legacy, but within twenty years next after a present right to receive the same shall have accrued, &c.; and it has been held that a petition for leave to go in under a decree, to prove a debt before a Master, is a *proceeding* within the meaning of the above section.[2] The effect of the above alteration in the law, therefore, is to prevent all debts being proved before the Master, under a decree, after the period limited by the above section, in cases where they operate as charges upon land or rents and all legacies, leaving, however, the case of simple contract debts upon the footing on which they stood previous to the statute.

Where the Master is satisfied that the claim is properly made out, he marks it in his book as "allowed," and it will then form an item in his report,[3] and the opinion of the Court upon the propriety of the Master's determination may be taken by appealing from the report allowing the claim.

With regard to the costs of parties proving claims or accounting in the Master's office, our Court has, by a series of orders, changed, in several material points, the old practice in England. These will be pointed out when the method of taking accounts before the Master is enquired into.

Where the plaintiff, sueing on behalf of himself and the other next of kin of an intestate, alleges in his bill, but does not prove, that the next of kin are too numerous to be made parties by name, the Court will either allow the cause to stand over, or will direct an enquiry by the Master as to the next of kin.[4]

1 3 & 4 W. 4, c. 27.
2 *Berrington* v. *Evans*, 1 Y. & Col. 444; s. 24 of U. C. C. Stat. Ch. 88 is a copy of this section in the Imp. Stat.
3 Bennett, 54.
4 *Musselman* v. *Snider*, 3 Grant, 158.

12. *Enquiries as to Legacies and Annuities.*

It is to be observed, that the course of proceeding by advertisements to invite persons having claims to come in under a decree, is resorted to in those cases, only, in which it is unknown who the parties are, who may have such claims, or rather where it is possible that claimants may exist besides those who are already known. When all the persons who can claim are ascertained, or capable of being ascertained, without such a proceeding, it will, of course, be unnecessary to resort to it; therefore, when the Master is ordered to take an account of the legacies or annuities given by a will, no advertisement need be inserted in the public papers for such legatees to come in (unless the legacy is given to persons constituting a class, in which case it may be necessary to ascertain, by advertising, who the parties constituting that class are), because the legacies or annuities will appear by the will. If any of the legatees have been paid, it is necessary that their receipts, for each legacy, or other proper evidence of payment, should be produced, to authorise the Master to report that such have been paid; and the same observations will apply to annuities.[1]

It may here be mentioned that legatees are not necessary parties, defendants, in an administration suit.[2] And no interest is allowable in respect of arrears of an annuity.[3]

13. *Method of Taking Accounts in the Master's Office.*

The Master having on the warrant "to consider" directed the accounting party to bring in his account on a certain day named in the direction and entered in his book, the party so directed is at the time appointed to bring it in verified by affidavit. Our Order 227 provides that the accounting party is to bring in his account in the form of a debtor and creditor account. It is usual for the Master in partnership cases, when considering the decree, to proceed upon Order 228, which provides that "The Master, if he thinks fit, may direct that, in taking accounts, the books of account, in which the accounts required to be taken have been kept, or any of them, be taken as *prima facie* evidence of the truth

1 Bennett, 50.
2 *Harrison* v. *Shaw*, 2 Cham. R. 44
3 *Goldsmith* v. *Goldsmith*, 17 Grant, 213.

of the matters therein contained, with liberty to the parties interested to take such objection thereto as they may be advised." On the warrant "to consider," the Master makes an entry in his book reserving further directions.

The account having been brought in with an affidavit which is to be referred to as an exhibit, and is not to be annexed thereto,[1] it is usual for the opposite party to bespeak a copy before proceeding upon it.[2] The opposite party is entitled to time to examine the account and affidavit to ascertain whether or not they are prepared in conformity with the directions and practice. The Master has power to direct how and at what time the party objecting shall make his objection; but it will be found that on the whole it is more expeditious and less expensive to appoint a time when the parties shall attend before him for the purpose of objecting. This is better than appointing a day "to proceed," because on such a direction the accounting party may *subpœna* witnesses; and if it should appear that the account requires amendment, inconvenience and loss will follow. If, at the time appointed for objecting, no objection be made, the Master then appoints a time to proceed. Where the account is not in the form prescribed, it is in the discretion of the Master to certify that it is insufficient, and the accounting party may be proceeded against for contempt in the usual way. But this course should not be taken unless the party is contumacious.

The account having been properly brought in, the next step, according to the usual practice as laid down in the books, is for the opposite party to surcharge. This is done where it is thought that the accounting party has omitted to charge himself with moneys or property which he has received, or but for wilful neglect or default he might have received; the proceeding is called "surcharging," and the notice required to be given to the accounting party is called a "surcharge." The "record" to be tried before the Master is, in reality, incomplete until this is filed; and the practice has been to require it to be filed before the account is proceeded upon; but it will be found more convenient in most

1 Ord. 227.

2 Persons entitled to attend have a right to take copies of all writings and documents brought into the Master's office by any party to the reference, 2 Smith, 112; but they must be supplied by the Master, otherwise they will not be allowed on taxation.

cases for the Master to direct, on the warrant "to consider," that the parties be at liberty to surcharge when the accounting party has closed his evidence on the items of his account; because it frequently happens that the information on which a surcharge can only be framed is obtainable in no other way than on an investigation in the Master's office of the accounts. The consideration, therefore, of the "surcharge" will be deferred until the practice on the accounts is explained.

The next appointment, where the items of the account are numerous, should be "to query items." The object of this is to ascertain, before expense is incurred in preparing proof, what items the opposite party will admit. Order 232 provides that "Before proceeding to the hearing and determining of a reference, the Master may appoint a day in the meantime, if he thinks fit, for the purpose of entering into the accounts and enquiries, with a view to ascertaining what is admitted and what is contested between the parties." And Order 233, that "Where the Master has omitted to appoint a day for the purposes mentioned in Order 232, he may grant to the party bringing in accounts a warrant to proceed on the same, for the purposes aforesaid: such warrant to be underwritten as follows: 'On leaving the accounts of....., &c.; and take notice that you are required to admit the same, or such parts thereof as you can properly admit.'" And for the purpose of enforcing admissions where they can be made without detriment to the interests of the objecting party, Order 234 provides that "Where it becomes necessary to adduce evidence, or to incur expenses otherwise in establishing or proving items of account, or other matters which, in the judgment of the Master, ought, under all the circumstances, to have been admitted by the party sought to be charged therewith, and which the party has refused to admit, the Master, before making his report, is to proceed to tax such costs, occasioned by such refusal, as shall appear to have been reasonable and just, and shall state in his report the amount of such costs, and how the same were occasioned." And Order 235, that "The party to whom costs are payable under Order 234, is to be entitled, upon the Master's report becoming absolute, to the process of the Court to compel payment thereof, as in other cases." Order 236 provides that "Where the party entitled to receive the general costs of the cause is the party or-

dered to pay costs under Order 234, he is at liberty to deduct such costs from the general costs, where the general costs and the interlocutory costs are between the same parties."

It may be mentioned here, that a party conducting an account before the 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 may be necessary. In *Napier* v. *Staples*,[1] in Ireland, under decree for an account, the plaintiff had examined the defendant on three successive sets of interrogatories, and had filed a charge, which he amended three times, and had then sued out a commission and examined witnesses. He afterwards filed a further charge, and, after various delays, applied to the Master of the Rolls for liberty to file a sixth, which was refused; but, upon appeal, the Lord Chancellor, Sir A. Hart, gave him leave to file it, observing—"I am not aware that there exists any rule, such as has been assumed, that, in taking the account, a uniform series of proceedings is to be followed—a charge, discharge, and examination, and the subject is then dropped."....."It is not the course, in England, to comprise every thing in the first charge; on the contrary, in the majority of cases, the plaintiff, after he has brought in his charge, looks to the examination of the defendant to furnish him with further items; the Court always taking care, and this is the true principle, to indemnify the opposite party, and to guard against vexatious irregularity, by making the party pay all the costs incurred through his irregularity or delay." His Lordship afterwards said—"I do not lay any stress upon the point, whether the plaintiff knew of the existence of this item or not; I think that it is not material. Equity would not deserve the name, if it acted on a form to shut out a just claimant, because he came late, whether his doing so was optional or involuntary. But the same equal justice that admits the plaintiff's further charge, gives the defendant a further opportunity to discharge himself, and the order must be so. The defendant must have an opportunity of explaining his case, by evidence, and his denial of the receipt of this sum, by affidavit, will have very great weight in determining it."[2]

1 1 Moll. 228.
2 1 Moll. 231.

14. *Proceedings in the Appointment to Query Items.*

At the time appointed, the Master enters in his book the items to be vouched by their numbers and amounts, thus:

Proceeding in Schedule A Filed:

No. 1.....$100 00
No. 2..... 200 00
No. 3..... 300 00

It is, of course, convenient to have the whole schedule thus entered at once, as this saves trouble in referring to it subsequently; but where the items are numerous, this is sometimes difficult to do.

If No. 1 is allowed by the opposite party, on examining the voucher offered by the accounting party, the Master marks it with the word "Allowed," thus:

No. 1.—Allowed.....$100 00

If the voucher for No. 2 is not satisfactory to the opposite party, or to the Master, he marks it thus:

No. 2..... ? $200 00

It may here be remarked that there are four marks which the Master will find it convenient to adopt—"?"—"V"—"Allowed"—and "Disallowed." The first is used as already mentioned; the second is used when such evidence has been given as makes a good *prima facie* case in favor of the item, and on which the item will be allowed, unless the opposite party rebuts the case made, and this mark "V" (meaning "vouched") will stand until this item is fully disposed of, when the mark "Allowed," or "Disallowed," will be substituted, as the case may be. The mark "Allowed" is not used until all the evidence affecting the item is given, and the Master, after discussion, gives his judgment on it—this, so far as he is concerned, is final, unless he sees fit, on cause being shewn, to review the item, or receive further evidence. The mark "Disallowed" is used in the same way.

Many of the items in the Master's Book will, at the end of a reference, have attached to them the following marks, if this practice be followed :

No. 1.—Allowed.....V ? $100 00
No. 2.—Disallowed.....V ? 200 00

—for when such evidence is given upon a general item as amounts to *prima facie* proof, the Master draws his pen through the "?," and adds the letter "V"—and when the item is allowed or disallowed, he draws his pen through the "V," and adds the word "Allowed" or "Disallowed," as the case may be.

Where the account has been queried, the Master appoints a time "to proceed." This means that the accounting party is then to adduce evidence to establish the items of the account which have been queried. The "account" is spoken of in the English practice as the "discharge."

The account is vouched by the production of the proper vouchers, such as receipts, &c., which documents, when produced, are marked by the Master with the initials of his name, as a token of his inspection or allowance of them. It seems that the party producing vouchers does so at his peril, and that the Master is bound to admit them in evidence, unless the other side can lay a reasonable ground to shew that the voucher in question can be impeached, of which the Master is to judge.[1]

In a case in Ireland, Sir Anthony Hart, L. C., states the practice in England, where the item exceeds 40s., for the executor to produce the voucher, and to verify, by affidavit, the payment of the sums therein specified ; and then, if no objection is made, the Master gives the executor credit in the account. But if any party objects, the Master then requires the affidavit of the person who received the money ; and if this cannot be had, he then requires the affidavit of some person to verify the signature of the voucher. [2]

It is to be observed, that the necessity for producing the proper vouchers in support of the discharge, is not removed by the cir-

1 *Earl of Lonsdale* v. *Wordsworth*, 28 May, 1789 ; cited Bennett, 85.
2 *Bingham* v. *Lady Clanmorris*, 2 Moll. 20.

cumstance 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.[1]

It may be mentioned here, that 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 *vice voce*, yet still, if the solicitor for the infant acquiesces in the reception of affidavits, the infant will be bound by it. In a case in Ireland, before Sir A. Hart, L. C.,[2] where an infant was interested, an order appears to have been made by his Lordship 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.

If the defendant does not 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.[3]

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.[4] This rule appears to have been adopted from analogy to the rule at law in accounts, and as it is not sufficient at law, that the party should swear, to his belief only, that the money has been paid, but he must swear to the fact; so, in accounts under decree in equity, it is not sufficient to swear that he believes he paid the money, but he must peremptorily swear to the fact.[5]

1 *Davenport* v. *Davenport*, 1 Sim. 512.
2 *Young* v. *Reynolds*, 2 Moll. 21 n.
3 2 Smith, 121.
4 *Anon.*, 1 Vern. 282; *Marshfield* v. *Weston*, 2 Vern. 176; *Bingham* v. *Lady Clanmorris*, 1 Moll. 20; *Everard* v. *Warren*, 2 Cha. Ca. 249; but although a defendant in account shall be discharged by his oath of sums under forty shillings, a party shall not, by way of charge, charge another party so. *ibid.*; see also *Marshfield* v. *Weston*, 2 Vern 176. In *Whicherley* v. *Whicherley*, 1 Vern. 470, the Court having been informed that the course of the Court was, that an accountant was to be allowed, on his own oath, all sums not exceeding forty shillings each, so as the whole sum was not above £100, declares the rule seemed very unreasonable, and would consider how to rectify it.
5 *Robinson* v. *Cumming*, 2 Atk. 409—410. And, an executor may support his discharge by swearing to his belief that sums under forty shillings were paid by his testator himself.

But 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 book in support of his discharge;[1] 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:[2] 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.[3]

This rule is adopted, in equity, from analogy to the rule at law, which provides—"that if, to prove a debt, it be sworn that the defendant confessed it, but withal said at the same time, that he paid it, his confession shall be valid as to the payment as well as that he owed it." Upon this principle, it is held, that 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.[4]

It is to be observed, that it is considered necessary, in order to entitle the 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;[5] 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;[6] *a fortiori* is he precluded from discharging himself, in this way, by affidavit.[7] And it seems that it is not only necessary that the discharge should be by the same sentence with the charge, but it must form, as it were, one and the same transaction. In *Thompson* v. *Lambe*,[8] Lord Eldon said—"I am

1 *Darston* v. *Earl of Oxford* 1 Eq. Ca. Ab. 10 pl. 9.
2 *Carter* v. *Lord Colrain*, Barnardist, 126, acknowledged to be correct, 2 B. & B. 386.
3 *Boardman* v. *Jackson*, 2 B. & B. 382.
4 *Ridgeway* v. *Darwin*, 7 Ves. 404.
5 *Robinson* v. *Scotney*, 19 Ves. 582.
6 *Boardman* v. *Jackson*, 2 B. & B. 382.
7 *Ridgeway* v. *Darwin*, 7 Ves. 404.
8 7 Ves. 588.

clearly of opinion that a person, charged by his answer, cannot, by his answer, discharge himself; nor even by his examination, unless it is in this way: if the answer or examination states that, upon a particular day, he received a sum of money and paid it over, that may discharge him; 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." Upon the same principle it has been held, that a party charged with one sum of money cannot discharge himself by distinct independent items on the other side of the account.[1]

But this rule of evidence, so far as the Master's office is concerned, must now be considered as modified by a case decided by Lord Kindersley in 1865.[2] It was there held that—"The general rule of evidence, that if one side puts in evidence a document for the purpose of proving part of it, the other side has a right to have the whole put in, does not apply to merchants or traders' books of account containing entries of receipts and payments; and, therefore, if one side puts in such books of accounts to prove certain items of receipts, that does not entitle the other side to put those books in evidence to prove payments, unless the different items are so mixed up together as clearly to form one transaction. Although an entry of receipt is good evidence of such receipt as against the person making it, an entry of payment is not evidence of such payment in favour of such person." Lord Kindersley said: "In what I have observed, I assume that the different items were quite unconnected; but some entries of payments may be so made and entered, and so connected with entries receipts, that the use of the one by one party may entitle the other party to use the other, as where a receipt and payment are mixed up in the same transaction, and the payment is, in truth, merely a deduction from the receipt."

And where the accounts of a partnership between two had been carelessly kept, and, after the death of one, the other furnished to the executors of the deceased partner an account current of the partnership dealings, which afforded them the only evidence to

1 *Robinson* v. *Scotney*, *ubi sup.*
2 *Reeve* v. *Whitmore*, 5 Drew. & Smale, 446.

charge the surviving partner—held, that they were entitled to use it for that purpose in a suit instituted by the surviving partner to have the accounts taken, without being bound by the entries on the credit side of the account current. The Vice Chancellor held, that the Master had properly, upon the evidence of the account current, charged the plaintiff with the two sums in question, and was not bound to receive the items on the credit side of the account as conclusive evidence for the plaintiff.[1]

It is contrary to the ordinary course to charge partners with what, but for wilful default, they would have received.[2]

Under the head of "Just allowances," the Master may, on taking the account of subsequent interest, and taxing subsequent costs on a first or subsequent foreclosure, allow a sum paid for insurance, since the last foreclosure, and interest, under a provision in the mortgage, although the decree simply directed him, on each successive foreclosure, to compute subsequent interest and tax subsequent costs.[3] Under a decree for taking partnership accounts, in which the Master was directed to state special circumstances, and make all just allowances, the Master reported, that, in taking the accounts, he had, amongst other things, charged one of the partners for his board, &c., with the other, after the dissolution of the partnership; held, wrong, and that the objection could be taken on the hearing for further directions.[4] Allowances may be made by the Master to an incoming partner in respect of misrepresentation made to him by his co-partners, as to the liabilities of the business when he joined it. In such a case, the Master was held to have jurisdiction to charge the guilty parties with either interest or trade profits on the advance which such misrepresentations rendered it necessary for the incoming partner to make. Interest was allowed to and against each partner on advances by and to him during the partnership, One partner (*A*) was held to have been properly allowed by the Master for buildings, which such partner had erected for the purposes of the business, without the sanction of or reference to his co-partner, during a period that the existence of any partnership between them was not recognized

1 *Morehouse* v. *Newton*, 3 De G. & S. 307.
2 *Davidson* v. *Thirkell*, 3 Grant, 330.
3 *Bethune* v. *Calcutt*, 3 Grant, 648.
4 *O'Lone* v. *O'Lone*, 2 Grant, 125.

by either: the one (*A*) affirming it had been put an end to by a sheriff's sale, while the other (*B*) denied, affirming, on his part, that an award was valid, which, among other things, put an end to it: and which award the first (*A*) impeached, the Court having afterwards held that the partnership continued notwithstanding both sheriff's sale and award, and having directed the accounts to be taken accordingly.[1] In a suit to wind up the affairs of a partnership on the ground of alleged misconduct on the part of one of the partners, and the confidential clerk and manager of the partnership business, the Court, having reference to the facilities for investigating matters of account before the Master gave the clerk leave to carry in and prove any claim he had against the firm for his services, although it was clearly established that he had been guilty of gross misconduct, and might have been left to pursue his remedy at law for his demand, if any, and directed sufficient of the partnership funds to be reserved to satisfy the claim in the event of his succeeding in establishing it.[2] Under the usual directions for taking partnership accounts, it is within the province of the Master to entertain and adjudicate upon a claim by one partner for damages sustained through misconduct of the other, occasioning the dissolution of the partnership before the expiration of the term agreed upon.[3]

It seems, also, that, where the account is of long standing, the Court will sometimes permit the accounting party to discharge himself, upon oath, of all such matters as he cannot prove by vouchers, by reason of their loss; this was done in *Peyton* v. *Green*,[4] where, in regard that the account in question was of twenty years' standing, it was ordered that the defendant should prove his account by his own oath, for what he could not prove by books or cancelled bonds; and, in *Holstcomb* v. *Rivers*,[5] a similar direction was given, where the account was of fourteen years' standing only.

It appears, also, that if executors or trustees have been led to divest themselves of the fund, by paying it over to their co-trustees or co-executors, the Court will, on a proper case, permit the execu-

1 *Davidson* v. *Thirkell*, 3 Grant, 330.
2 *Newton* v. *Doran*, 3 Grant, 353.
3 *Doupe* v. *Stewart*, 13 Grant, 637. The Order referred to in this case is the same as Order 220.
4 1 Cha. Rep. 146; 1 Eq. Ca. Ab. 11 S. C.
5 1 Ch. Ca. 127.

tor or trustee so paying it over, to discharge himself by his own oath, and that it will do this in preference to permitting one co-executor or trustee to examine the others.[1]

But although, in the instances above stated, and in many others, 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.[2]

It may be noticed with reference to this part of the subject, that there are many cases in which the Court decreeing an account directs it to be taken with the admission of certain documents or testimonies not having the character of legal evidence; thus, if parties have been permitted, for a long series of years, to deal with property as their own, considering themselves under no obligation to keep accounts as if there was any adverse interest, having no reason to believe the property belonged to another; though it would not follow, that, being unable to give an accurate account, they should keep the property, yet the account would be directed, not according to strict course, but in such a manner as, under all the circumstances, would be fit.[3] It is to be observed, however, that it is not for the Master to decide, in such cases, as to the propriety of departing from the ordinary course of proceeding;—he cannot do so without the order of the Court, and that an order of the Court to this effect will not always be made until the difficulty of proceeding in the usual mode has become apparent upon an attempt to pursue it in the Master's office; thus, in *Lupton* v. *White*,[4] the Court refused to make such an order prospectively, but gave liberty to either party, if the Master, in taking the account, should find difficulty as to receiving any evidence, to apply to the Court for directions upon that particular point.

1 *Dines* v. *Scott*, 1 T & R. 358.
2 *Ibid.*
3 See *Lupton* v. *White*, 15 Ves. 433—443.
4 *Ubi sup.*

It may be mentioned here, that the Court will not allow anything to be placed to account, under the name of general expenses, but that the party must name the particulars.[1] So, also, where a party discharges himself, upon his oath, of sums under 40s., he must, in his affidavit, mention unto whom paid and for what and when.[2]

It will be recollected that, by Order 220, the Master, under an order of reference, has power to make "all just allowances."

Under this order, the Master is authorized to allow the parties such disbursements as may appear to have been fairly and properly made by them. It is to be observed, that it is not the ordinary course for the Court, in matters of this nature, to say, in the first instance, what is a just allowance; but that it generally leaves the determination as to what is to be considered a just allowance to the Master, and that the Court is not called upon to decide it, except upon appeal from the report.[3] In *Cook* v. *Collingridge*,[4] however, Lord Eldon, under the special circumstances of the case, made it part of the order that, as to such part of the allowance as should be claimed and objected to before the Master, he was to state his reasons for allowing or disallowing the same.[5]

With respect to what, by the practice of the Court, may be considered as just allowances, that must depend very much upon the circumstances of each case; it is, however, a settled rule that whatever a trustee or personal representative has expended in the fair 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 plaintiff could be entitled to nothing until the legacies were paid.[6] So where a trustee, in the fair execution of his trust, has expended money by reasonably and properly taking opinions and procuring directions

1 *Anon.* 1 Eq. Ca Ab. 11.
2 *Anon.* 1 Vern. 283.
3 *Brown* v. *DeTastet*, Jac. 284—294.
4 Jac. 607.
5 *Ibid*, 625.
6 *Nightingale* v. *Lawson*, 1 Cox, 23.

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*.[1] 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.[2]

The expenses of a sale may also be allowed, under the head of just allowance;[3] and a widow who was trustee for her son, of the real estate, whereof she was dowable, was allowed, in accounting for the rents and profits, to retain so much thereof as she was entitled to for her dower, under the head of just allowances.[4]

Where a party, upon whom the onus of proof lies, produces a receipt, or other proof of a conclusive nature, and closes his evidence, and the other side produces testimony tending to shake this evidence, further evidence in support will be allowed to be produced, though, in strictness, it may be such as might have been produced in the first instance.[5]

The Master is bound, equally with the Court, to allow a witness to be cross-examined in the whole case without regard to his examination in chief. But in some cases the Master may exercise a discretion as to who shall pay the fees of the examination.[6]

On an application from the Master's report setting out certain grounds of appeal—held, that where one defendant obtains an order and examines one of his co-defendants, he is thereby made a good witness in the cause. And where evidence affecting the account represented[7] as due on a second mortgage is taken in the absence of the personal representative of the mortgagee, it cannot be read against the equitable holder of such mortgage, although such equitable holder of such mortgage was a party to the suit when the evidence was taken, and cross-examined the co-defendant, whose evidence affected the mortgage.[8]

1 *Fearns* v. *Young*, 10 Ves 184.
2 *Ibid.*
3 *Crump* v. *Baker*, 18 Ves. 285.
4 *Graham* v. *Graham*, 1 Ves. 262.
5 *Moody* v. *M'Cann*, 1 Cham. R 88.
6 *Crandell* v. *Moon*, 6 U. C. L. J. 143.
7 *Grimshaw* v. *Parks*, *ibid*, 142.
8 *Grimshaw* v. *Parks*, 6 U. C. L. J. 142.

The Master, in taking the account, does not, in general, strike any balance till the whole account and surcharge (if any) have been gone through; but, contrary to the English practice, he is, under our orders,[1] at liberty to make rests in the account. It sometimes happens that in decrees directing accounts, the Court orders the Master, if he shall find that there are stated accounts, not to disturb them; this direction is usually inserted where a settled account is insisted upon in the answer and proved.[2] Where a settled account is insisted upon by the answer, but not proved, the order not to disturb the account will be accompanied by a direction that the plaintiff shall have liberty to surcharge and falsify.[3] A settled account must, in such cases, be established before the Master in the same manner as before the Court.

15. *Computation of Interest.*

A direction to the Master to compute interest upon debts, legacies, &c., frequently forms part of the decree. 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,[4] and upon his legacies, from the time and after the rate directed by the testator's will; from the end of one year after the testator's death.[5]

With respect to interest on specialty debts, no question can arise as to its computation,—the rate at which it is to be allowed upon such debts, generally appearing upon the deed or instrument by which the debt is created.

It is to be noticed however, that, with respect to a debt due on bond, the rule is to calculate interest up to the amount of the penalty of the bond;[6] the Master cannot go beyond the amount of the penalty[7] 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 which case the Master may calculate interest beyond the penalty of

1 Order 220.
2 *Cole* v. *Cole*, cited 14 Ves. 579.
3 *Kinsman* v. *Barker*, *ibid*; and see *Pollick* v. *Perry*, 5 Grant, 591, *post*.
4 Seton on Decrees, 51.
5 Seton on Decrees, 63.
6 *Sharp* v. *Earl of Scarborough*, 3 Ves. 557.
7 *Tew* v. *Earl of Winterton*, 3 Bro. C. C. 489; 1 Ves. J. 451, S. C. *Knight* v. *Maclean*, 3 Bro. C. C. 496; *Clarke* v. *Seton*, 6 Ves. 411; *Hughes* v. *Wynne*, 1 M. & K. 20.

the bond. It appears also not to be important, in such a case, which instrument was executed first, the bond or the mortgage,[1] nor that the party charged executed as a surety only.[2]

The rule which limits the computation of the amount due upon a bond to the amount of the penalty, has been held to extend to a bond for securing the payment of an annuity, at least till the decision of Sir L. Shadwell, V.C., in *Jeudwine* v. *Agate*;[3] this was generally supposed to have been the result of the decision of Lord Loughborough, in *Mackworth* v. *Thomas*,[4] but in *Jeudwine* v. *Agate*, the Vice-Chancellor held that, in point of fact, there was no such decision in *Mackworth* v. *Thomas*, and the opinion expressed by his Honor, after looking into the cases was—'that whenever there is a distinct agreement that a thing shall be done, whether it be the conveyance of an estate, the relinquishment of a right, the payment of an annual sum, or the payment of a sum of indefinte amount, (as in the case of *Weinholt* v. *Logan*)[5] there, notwithstanding the agreement appears in the form of a bond with a penalty, the court will consider that the recital in the condition of the bond is evidence of the agreement, and will not limit the relief it gives to the amount of the penalty.'[6]

It is to be observed however, that although his Honor is represented to have stated, that there was no such decision in *Mackworth* v. *Thomas*, as that contended for in *Jeudwine* v. *Agate*, he appears to have meant simply, that the facts in that case were not the same as those in *Jeudwine* v. *Agate*; and he takes a distinction between right to retain the arrears of an annuity claimed by an executor, in a suit for the administration of assets instituted by a creditor, (which was the case in *Mackworth* v. *Thomas*,) and a substantive right asserted by the executor himself, in a bill filed to enforce his right to relief out of the assets, (which was the case in *Jeudwine* v. *Agate*;) so that, in fact, notwithstanding the decision of his Honor in the latter case, the rule laid down, in *Mackworth* v. *Thomas*, may be considered as still the rule of the Court, in suits by creditors, for the administration of assets where the claim to the arrears of the annuity is made on behalf of the personal representative against whom the bill has been filed, though it is otherwise where a suit is instituted by the annuitant himself.

1 *Clarke* v. *Lord Abingdon*, 17 Ves. 106.
2 *Ibid.*
3 3 Sim. 129.
4 5 Ves. 329.
5 1 Clk. & Fin. 611.
6 3 Sim. 140.

Whilst upon this subject, it is right to mention that, till recent enactments, it was held in England that in suits for the administration of assets no interest was to be computed upon a judgment, unless an action at law had been brought upon the judgment, to recover interest in the shape of damages;[1] but in *Hyde* v. *Price*,[2] Sir Shadwell, V. C., held, that the circumstance of the creditor having filed a bill for the purpose of obtaining the benefit of his judgment in equity, (the situation of the assets being such as to render a bill the proper remedy,) was equivalent to the commencement of an action at law. His Honor also held, that the case was put in a more favorable position, by the Act of the 3 & 4 W. IV, c. 42, s. 28,[3] (by which it is enacted, that upon all debts or sums of money payable at a certain time, or otherwise, the jury, on the trial of any issue, &c., may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest from the time when such debts or sums were payable, if such debts or sums of money be payable by virtue of some written instrument, at a certain time; or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice, to the debtor, that interest will be claimed from the date of such demand until the time of payment,') which statute being of a remedial nature, his Honor thought it would be absolutely necessary for the Court to adopt as to many of its provisions. All difficulty, however, as to allowing interest upon judgments has been removed by our Common Law Procedure Act,[4] which enacts that upon any execution against the person, lands or goods, the sheriff may, in addition to the sum recovered by the judgment, levy the poundage fees, expenses of the execution, and interest upon the amount so recovered from the time of entering the judgment. So that now, no action at law, or suit in Equity, is necessary to enable a Master to compute interest on a judgment debt, but interest must be computed by the Master upon every sum of money due upon judgment, at the rate of six per cent. from the entry of it.

Formerly interest was allowed upon the arrears of an annuity, where they were secured by a bond with a penalty,[5] or where the

1 *Gaunt* v. *Taylor*, 3 M. & K. 302.
2 8 Sim. 578.
3 Our Stat. U. C. C. S. ch. 43, s. 2 is the same in effect.
4 Sec. 270.
5 *Newman* v. *Auling*, 3 Atk. 579.

annuity was given for maintenance,[1] or where it was left to a wife by her husband's will.[2] It has also been allowed, where there have been great arrears,[3] or where there has been an obstinate delay of payment,[4] or where the annuitant has been compelled, by the delay, to borrow money at interest.[5]

The allowance of interest on such arrears, was, however, always held to be discretionary in the Court; and, in later cases, it has been refused notwithstanding the existence of circumstances which before induced the Court to allow it.[6] In *Robinson* v. *Cumming*,[7] Lord Hardwicke said, there was no instance where the Court had ever allowed arrears upon such an annuity (viz: an annuity secured by grant, by way of mortgage, with power of entry in case of arrears), unless, indeed, the annuitant had entered and been in possession of the estate charged with the annuity, in which case the Court would not have obliged him to have quitted the possession, unless the grantor had agreed to allow him interest for the arrears of his annuity, down to the day. This seems to be consistent with the rule laid down by Lord Talbot, in the *Countess of Ferrers* v. *Earl Ferrers*,[8] viz: that 'arrears of an annuity or rent charge are never decreed to be paid with interest, but where the sum is certain and fixed; and also where there is either a claim of entry, or *nomine pœnæ*, or some penalty upon the grantor, which he must have undergone if the grantee had sued at law, and which would have obliged him to come into this Court for relief, which the Court will not grant but upon equal terms, and those can be no other than decreeing the grantor to pay the arrears with interest.'

With respect to debts upon simple contract, and other debts which do not carry interest upon the face of them, equity, in giving interest, *sequitur legem*; and the Courts will allow interest to be computed in the administration of assets upon all debts upon which interest is given by Courts of law.[9] Formerly, the rule appears to have been not to compute interest in equity, where it

1 *Ibid.*
2 *Litton* v. *Litton*, 1 P. Wms. 543; see also *Draper's Comp.* v. *Davis*, 2 Atk. 211.
3 *Batten v. Earnley*, 2 P. Wms. 163.
4 *Stapleton* v. *Conway*, 1 Ves. 428.
5 *Anon.* 2 Ves. 661; *Bignal* v. *Brereton*, 1 Dick. 278.
6 See *Tew* v. *Earl of Winterton*, 1 Ves. J. 451; 3 Bro. C. C. 489 S. C.; *Anderson* v. *Dwyer*, 1 Sch. & Lef. 301.
7 2 Atk. 411.
8 Ca Temp Talb. 2.
9 *Boddam* v. *Ryley*, 1 Bro. C. C. 239; *Parker* v. *Hutchinson*, 3 Ves. 135; *Upton* v. *Lord Ferrers*, 5 Ves. 803; *Lowndes* v. *Collens*, 17 Ves. 29.

could only be given at law in the form of damages,[1] although for a long time a distinction appears to have existed, and still exists, in favour of allowing interest to be computed upon promissory notes, and upon all other sums payable on demand, or on a day certain, upon which interest may, according to the practice of Courts at law, be calculated either from the time of the demand made, or from the fixed period of payment.[2]

It is to be remarked, that, where there has been a stated account between the parties, the balance appearing due on such an account will carry interest;[3] because, in such a case, it is held that there is an implied contract on the part of the debtor to pay, and all contracts to pay give a right to interest from the time when the principal ought to be paid.[4] Such balance, however, must appear upon a regular statement of accounts, and, to constitute such a statement, there must be a settlement or acknowledgment by *the debtor*, raising the contract to pay as the ground upon which alone interest will be given.[5]

It may be mentioned here, as a general rule, that a charge of debts on real estate does not entitle simple contract creditors to interest.[6] In *Barwell* v. *Parker*, Lord Hardwicke is reported to have said, that if a man, in his life, creates a trust for the payment of debts, annexes a schedule of some debts, and creates a trust term for the payment, as that is in the nature of a specialty, that will make them, though simple contract debts, carry interest.[7]

It seems, however, that, in order to effect this, the deed must have been executed by the simple contract creditors, and that they must have given up their right to sue the debtor upon his debt, otherwise there would be nothing to shew that they had contracted for a specialty, by taking a security upon the land, and discharging the person of their debtor.[8]

1 *Rigby* v. *Macnamara*, 2 Cox. 420 ; *Bell* v. *Free*, 1 Swanst. 91.
2 *Lowndes* v. *Collens*, 17 Ves. 27 ; *Upton* v. *Lord Ferrers*, 5 Ves. 803 ; *Parker* v. *Hutchinson*, *ubi sup.* The Statute before referred to, by authorizing juries to compute interest upon such debts or sums of money as are therein mentioned, instead of giving it in the form of damages for withholding payment, has done away with many of the distinctions formerly existing upon this point.
3 *Barwell* v. *Parker*, 2 Ves. 363. *Vernon* v. *Cholmondeley*, Bunb. 119 ; see 2 Eq. Ca. Ab. 532, pl. 17, 20 ; *Blaney* v. *Hendricks*, 2 Blackst. Rep. 761 ; 3 Wils. 205, S. C.
4 *Boddam* v. *Riley*, 2 Bro. C. C. 2 ; 4 Bro. P. C. 561, 8 vo. ed but see Exp. Furneaux, 2 Cox, 219 ; and Exp. Champion, 3 Bro. C. C. 436.
5 *Ibid.*
6 *Barwell* v. *Parker*, 2 Ves. 363 ; *Earl of Bath* v. *Earl of Bradford*, *ib.* 588 ; *Lloyd* v. *Williams*, 2 Atk. 109 ; *Hamilton* v. *Houghton*, 2 Bli. 186 ; *Shirley* v *Earl Ferrers*, cited *ib.* ; see *contra*, *Maxwell* v. *Wettenhall*, 2 P. Wms. 26.
7 *Barwell* v. *Parker*, *ubi sup.* ; *Stewart* v. *Noble*, Vern. & Scriv. 528, 537.
8 *Hamilton*, v. *Houghton*, 2 Bli. 186.

It may be mentioned here, that, in *Shirt* v. *Westby*,[1] a charge, by will, on real estate of the simple contract debts of another person was considered as a legacy, and interest was ordered to be computed on such debts.

With respect to the rate at which interest is to be computed, the usual rate of interest allowed in this Court, upon legacies and portions, is six per cent.

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.[2]

It is to be observed, that the Court never directs interest to be computed on debts not previously carrying interest,[3] and that in computing subsequent interest on the debts which carry interest, although it was formerly held that interest, when computed by the Master, became principal, and would carry interest;[4] the rule now is, not to compute interest upon interest reported to be due, even in the case of a mortgage,[5] though the practice formerly was to consider the interest as principal from the date of the Master's report,[6] the ground of which practice was, that as the party came for the favour of the Court;—he was ordered to pay a given sum on a certain day, and if he did not, he was put under terms of paying what would indemnify the other party completely.[7]

When the Master is ordered to compute interest with rests, the object of the Court is to charge the accounting party with compound interest. It appears, however, that formerly a difference of practice prevailed amongst the Masters upon this point, and that some of them, at the time of the rests, carried the interest to a separate column, and computed subsequent interest on the principal only, and thus charged the party with simple interest only; the proper course, however, is to add the interest to the principal, at the time of the rest, and to compute interest upon the aggregate sum.[8]

1 16 Ves. 393.
2 Seton on Decrees, 58.
3 *Creuze* v. *Hunter*, 2 Ves. jun. 165; 4 Bro. C. C. 316, S. C.
4 See *Bacon* v. *Clerk*, 1 P. Wms. 480.
5 *Whatton* v. *Cradock*, 1 Keen, 26; and see *ante*, 644.
6 *Turner* v. *Turner*, 1 J. & W. 47; *Perkyns* v. *Baynton*, 1 Bro. C. C. 574; and see *Brown* v. *Barkham*, 1 P. Wms. 653; *Butler* v. *Duncomb*, 1 P. Wms. 453; *Astley* v. *Powis*, 1 Ves. 496; and *Creuze* v. *Hunter*, *ubi sup.*
7 *Turner* v. *Turner*, *ubi sup.*
8 *Raphael* v. *Boehm*, 11 Ves. 97, 103.

Where the defendant was, at the dissolution of partnership, to receive £150 more than the plaintiff, and it appeared that settlement of accounts had been delayed by the misconduct of the defendant—held, that he was not entitled to interest on the £150 from the time of the dissolution.[1]

To save interest by an appropriation of the purchase money, the money should be separated from the purchaser's general bank account, and notice must be given to the vendor.[2] Where defendant had retained moneys, and did not shew that he had deposited them for safe keeping, or kept them in his hands unemployed, he was held to be properly charged with interest.[3]

It very frequently happens that an improper mode of calculating interest is adopted by parties bringing accounts into the Master's office, by which compound interest is charged. The true rule of calculating interest where payments have been made is laid down in *McGregor* v. *Gaulin*.[4] It was there held, that the method usually adopted in making out an account between debtor and creditor, upon a loan of money—*viz.*, that of charging first the interest upon the whole debt for the whole period, as if no payment had been made, then allowing interest upon each payment from the time it was made, and so deducting all the payments and interest from the whole debt and interest—*is not the correct way* of arriving at the balance. It is so much in favour of the debtor, that, where there has been a long arrear of interest, and payments made on account by the debtor not covering the interest alone, the debtor, in a few years, without adding any payment in the meantime, will make *his creditor his debtor* to a very large amount.

Per Robinson, C.J.: "It is obvious upon reflection, and I wonder I did not see it when brought to my attention by Mr. Kirkpatrick in another case which I have alluded to, and where it made only the difference of a few shillings or pounds; I believe, nevertheless, that the mode adopted by Messrs. Baldwin & Wilson is often adopted and submitted to; and where the periods are not long, and large sums have not been paid for interest, it does not much signify; but in this case the interest on the £400, for nearly

1 *O'Lone* v. *O'Lone*, 2 Grant, 125; and see *Davidson* v. *Thirkell*, 3 Grant, 330.
2 *G. W. R. Co.* v. *Jones*, 13 Grant, 355.
3 *Beaton* v. *Boomer*, 2 Cham. R. 89.
4 4 U. C. Q. B. 378.

twenty years, amounts to £440, and goes, in fact, to discharge so much of the debt, though the defendant did nothing more than merely pay the interest that he ought to have paid as it accrued, and had no pretence to receive interest on that payment, because it had not been the foundation of any calculation of interest against him on the other side of the account."

In a year or two more, by the mere effect of allowing to the debtor interest upon sums that he had paid for interest, the scale would have been turned against the creditor, and in ten years' time, if the calculation on the same principle were carried on, the creditor would owe the debtor nearly half as much as he had lent him, without any new payment being made in the meantime."

And in *Barnum* v. *Turnbull*:[1] "Where various payments had been made upon a note payable with interest *not always sufficient to cover the interest due at each time of payment*—held, that the usual mode of adding the interest to the principal, deducting the payment and charging interest on the balance, could not be adopted, but that interest could only be computed on the balance of principal remaining due at each payment. *Per* Burns, J.: "This case is a contract to pay a specific sum, at a specific time, with interest. If the payments made had always exceeded the interest due, then there would be no necessity for keeping a separate statement of an interest account, for it would be obvious enough that any balance due could only be principal. But in this case, where the payment made was often not sufficient to discharge the interest due at the time, then adding the interest, to the principal, and deducting the payment, and then computing interest on the balance, amounts to, and is a computation of, compound interest. The computation adopted by the defendant is the correct mode—allowing the payment made only to sink so much of the principal as the payment exceeds the interest due, and then computing interest on the balance."

As the very frequent occurrence of bringing in accounts so framed as to give the creditor compound interest gives rise to great inconvenience, since the Master must either delay the proceedings until a correct account is prepared, or he must rectify the calculation himself in drafting the report, a form of account is appended, which the Master should insist on being followed in all cases:

1 13 U. C. Q. B. 277.

Principal due on the mortgage in the bill mentioned, given by A. B. to C. D., dated 1st January, 1860, securing $1,000, and interest at 6 per cent		$1000 00
Interest thereon to 1st January, 1861	$60 00	
Deduct cash paid 1st January, 1861	30 00	
	$30 00	
Interest on $1000 from 1st January, 1861, to 1st January, 1862	60 00	
	$90 00	
Deduct cash paid 1st January, 1862	150 00	60 00
		$940 00
Interest on $940 from 1st January, 1862, to 1st January, 1863,	$56 40	
Deduct cash paid 1st January, 1863	500 00	443 60
		$496 40
Interest on $496 40 from 1st January, 1863, to 1st January, 1864	$29 78	
Deduct cash paid 1st January, 1864	20 00	
	$9 78	
Interest on $496 40 from 1st January, 1864, to 1st January, 1868	119 13	128 91
Balance due 1st January, 1868		$625 31

Of which $496 40 is principal.

It will be seen that, by using two columns, one for principal and another for interest, the calculation is kept clear, and at the end the Master sees at a glance what sum is principal on which he may, at a future time, be called on to compute subsequent interest—and, besides, this mode is free from the errors mentioned in *McGregor* v. *Gaulin*, and *Barnum* v. *Turnbull*.

16. *Of the Persons who are Bound to Pay and Entitled to Receive Interest.*

Interest is not payable upon a mere contract for lending money, even where the contract is under seal, unless there be an agreement express, or implied, for the payment of interest; and except in the case of mercantile securities, or where the promise to pay interest is to be inferred from the usage of trade.[1]

1 *Calton* v. *Bragg*, 15 East, 223; *Higgins* v. *Sargent*, 2 B. & C. 348; *Page* v. *Newman*, 9 B. & C. 348.

But upon bond,[1] and mortgage debts, interest is payable, though it be not expressly reserved, unless the contract expressly provide for conveyance on payment of the principal,[2] and where interest is given, the mortgage is a security as well for the interest as the principal. Interest has also been given at law, both on appeal and in the court below[3] in an action on an instrument whereby the debtor acknowledged that he owed a certain sum, for which he had given a promissory note, payable at a day named, and had deposited the title deeds of an estate, and engaged to execute a mortgage thereof. And it was said by counsel, that in M. T. 1812, interest had been allowed on a letter promising to give a bond. It has been lately doubted[4] whether a mere deposit of title deeds, without a legal security, will make a debt bear interest which bears none in its nature; but the anonymous case above cited seems to dispose of the question, unless it be thought that the want of a promise to make a mortgage may make a difference. It is, however, well settled,[5] that the deposit of deeds alone with intent to create a security, is sufficient to make an equitable mortgage without any express agreement: so that to raise a right to interest no promise seems necessary.

A charge of debts by will, upon real estate, does not entitle simple contract creditors to interest, unless the debtor have given to the debts the quality of specialties in his lifetime, as by making a schedule of debts and creating a trust term for payment thereof.[6] If the debtor execute a deed of trust for the benefit of his creditors, those who execute the deed become mortgagees, and get a right to interest; but they have no such right under a mere covenant on the part of the debtor to pay the debt. If, by the terms of the deed, some of the creditors are to be paid their debts, and others are to be paid their debts with interest, the latter class have a priority as to interest.[7]

Where an award, made under an arbitration, directed the payment of a sum of money on given days, without interest, out of the proceeds of securities not then realized, and a considerable

1 *Farquhar* v. *Morris*, 7 T. R. 124.
2 *Thompson* v. *Drew*, 20 Beav. 49.
3 *Anon.*, 4 Taunt. 876.
4 *Ashton* v. *Dalton*, 2 Coll. 565.
5 *Ex parte Kensington*, 2 Ves. & B. 83,
6 *Stewart* v. *Noble* Vern. & Scriv. 528—537; *Barwell* v. *Parker*, 2 Ves. 364.
7 *Jenkins* v. *Perry*, 3 Y. & C. 178.

time elapsed before the securities were realized, it was held, that although the money was awarded to be paid on certain days, so that interest might be recoverable from those days on the contract,[1] yet the proceeds of the securities could not, on that account, be made liable for interest, contrary to the agreement, though the debts in respect of which the award was made were debts bearing interest.[2]

Interest arises on a mortgage from day to day;[3] but it is said,[4] that it ought not to run, in the case of a general and national calamity, during such time as, in consequence thereof, nothing is paid out of the land assigned for payment of interest. The person who takes the produce of the security is entitled to the interest to the time of his death, or other termination of his interest; and the interest of money secured on mortgage has thus been paid over to the administratrix of a tenant for life, though the mortgage money was subject to a trust to be applied in the purchase of land; and it was not taken as rent unapportionable before the Act 4 & 5 Will. 4, c. 22, s. 2.[5]

The agreement to pay interest up to a certain time does not even at law exclude a contract to pay it after that time; the reservation of interest shows that the debt was intended to bear interest, and makes it reasonable to suppose that it should continue to do so. So, where, in a mortgage, dated February, 1834, from B. to A., it was recited, that to induce A. to make the advance, C. had agreed to covenant for the due payment of interest, and B. covenanted to pay the principal and interest in February, 1835, and C. covenanted that B. and C., or one of them, during the continuance of the security, would pay the interest to become due by even half-yearly payments; C.'s covenant was held to extend to the interest, so long as the principal remained unpaid.[6]

The mortgagee in possession, who holds over after payment of everything due to him, will be charged with subsequent receipts, and interest from the filing of the bill,[7] or from the date of a prior

1 *Lowndes* v. *Collens*, 17 Ves. 27.
2 *Collett* v. *Newnham*, 1 Drew. 447.
3 *Wilson* v. *Harman*, 2 Ves. 672.
4 *Basil* v. *Acheson*, 15 Vin. Abr. 474: 2 Eq. Ca. Abr. 611.
5 *Edwards* v. *Warwick*, 2 P W. 171.
6 *Price* v. *Great Western Railway Company*, 16 M. & W. 244; *King* v. *Greenhill*, 6 M. & G. 59.
7 *Quarrell* v. *Beckford*, 1 Mad. 269.

notice if such have been given,[1] to pay over his receipts as directed by the notice. And where[2] a mortgagee denied by his answer that the mortgage was satisfied, the assertion being false, he was charged with interest from the time at which he had been fully paid.

If the mortgagor come to the court to restrain the mortgagee from using his remedy at law, the indulgence will only be granted upon payment to the mortgagee of the principal sum and all interest which appears to be due to the time of payment; but in a proper case, the payment of interest may be ordered to be made without prejudice to any question in the cause; as if the mortgagor contend that he was prevented from redeeming at the time for which notice was given, by the negligence or default of the mortgagee. And if such a case be established, the surplus interest may be ordered to be repaid.[3]

If a scrivener take money and give a note to place it out at interest, he is bound to do so, and is answerable for the interest, except so far as the employer may have accepted any security which he may have effected.[4]

The Court allows the mortgagee interest in certain cases upon money which he has laid out for the benefit of the estate or the support of his security: payments so made being treated as further advances. Thus, interest will be allowed on fines paid by the mortgagee for the renewal of leases upon which the estate is held, though there be no covenant by the mortgagor for renewal.[5] So on money laid out in supporting the mortgagor's title where it has been impeached,[6] or in the redemption of land tax;[7] and generally upon money laid out in lasting improvements or otherwise for the benefit of the estate, where the principal so laid out is allowed.[8] And interest has been given upon premiums paid for keeping up life policies, to which the security was made subject, under a provision charging the security with payment of all such sums as a

1 *Archdeacon* v. *Bowes*, *M'*Cle. 149.
2 *Montgomery* v. *Calland*, 14 Sim. 79.
3 *Lord Midleton* v. *Eliot*, 15 Sim. 531.
4 *Barwell* v. *Parker*, 2 Ves. 364.
5 Bac. Abr. 922. *Manlove* v. *Bale*, 2 Vern. 84.; *Lacon* v. *Mertins*, 3 Atk. 4: *Woolley* v. *Drag*, 2 Anst. 551.
6 *Godfrey* v. *Watson*, 3 Atk. 518.
7 *Knowles* v. *Chapman*, Set. Dec. 226, ed. 2.
8 *Quarrell* v. *Beckford*, 1 Mad. 281; *Webb* v. *Rorke*, 2 Sch. & Lef. 676.

surety should be compelled to pay, with interest thereon;[1] but interest was not given under that provision upon costs paid by the surety; though it will be directed upon costs also, where they have been paid under an order of the Court, which declared the person paying them to be entitled to an indemnity for so doing,[2] as well as upon interest which the owner of an unincumbered estate has been compelled to pay, where the former owner has covenanted to indemnify him against such incumbrances.[3]

If the mortgagee omit to attend at the time and place fixed by the Court for payment, he will be allowed no interest beyond that day; but where the[4] omission arose from a mistake, and the mortgagor also neglected to attend, the mortgagee was not compelled to wait another six months, but a new time was fixed for payment at the end of ten days.

Executors who refuse a tender, properly made, of the mortgage debt, on the ground that they have not proved the will, can demand no further interest:[5] for they are entitled before probate to receive the money.

A mortgagee will be allowed no interest upon a debt which would have been satisfied but for his wrongful or inequitable act, during such time as the debt has thereby remained unsatisfied. Thus,[6] where a vendor who had become liable to an action by the purchaser upon a covenent for quiet enjoyment, delayed the purchaser's action, by setting up an acknowledgment, improperly obtained from the mortgagee of the latter (whose mortgage he paid off), that the payment was in full of all demands in respect of the covenant; interest on the mortgage debt was refused during the delay of the action, because the damages recovered at law would, but for the delay, have swept away the mortgage debt, so that the interest could never have accrued.

A prior incumbrancer is not by mere *laches* in enforcing payment of his interest, deprived of his right to that interest as against the *puisne* incumbrances, the latter being not without remedy;[7] be-

1 *Hodgson* v. *Hodgson*, 2 Keen, 704.
2 *Wainman* v *Bowker*, 8 Beav. 363.
3 *Executors of Fergus* v. *Gore*, 1 Sch. & Lef. 107.
4 *Hughes* v. *Williams*, 1 Kay, iv., and form of order there.
5 *Austen* v. *Dodwell's Executors*, 1 Eq. Ca. Abr. 319.
6 *Thornton* v. *Court*, 3 De G. M. & G. 293.
7 *Aston* v. *Aston*, 1 Ves. 263.

cause he may redeem and get the estate himself. And this, it is said, even though he let the interest run in arrear with an ill intent to get the estate itself; but if there be fraud or collusion it will be otherwise.[1] The doctrine must be taken to imply, that the *puisne* incumbrancer knows that the interest is running in arrear, for otherwise he would have no warning to exercise his right of redemption.

So, the neglect, without fraud, of the incumbrancer to demand interest from the tenant for life, will not prejudice his right against the remainderman.[2]

The adult tenant in tail of an incumbered estate is not obliged to keep down the interest on the charge; because, having or being by his own act able to acquire full power over the estate, neither the issue in tail nor the remainderman have any equity to call for an indemnity against the arrears of interest accrued during the possession of their predecessor.[3] And on the other hand, if the tenant in tail die without barring the entail, after keeping down the interest, or taking an assignment of the mortgage (in which case he is considered to have paid himself the interest out of the rents and profits), the issue in tail have the benefit, and the personal representatives of the tenant in tail have no equity to charge the reversion with interest accrued during his life.[4]

And so it is if the husband of tenant in tail seised in right of his wife, take in the mortgage, for he takes subject to all the rights and remedies of the mortgagee and the reversioner, and, after receiving the rents during the wife's life, cannot come against the estate for the interest.[5]

But, in such a case, an account will be directed of the profits accrued since the death of the wife, and subsequent interest will be allowed.

An infant tenant in tail, however, being unable to make the estate his own, is not upon the same footing as an adult, but is in

1 *Bentham* v. *Haincourt*, Prec. Ch 30; *Chapman* v. *Tanner*, 1 Vern 267
2 *Loftus* v. *Swift*, 2 Sch. & Lef. 642; *Roe* v. *Pogson*, 2 Mad. 457; *Wrixon* v. *Vize*, 2 Dru. & War. 203.
3 *Chaplin* v. *Chaplin*, 3 Atk. 234: *Burges* v. *Mawbey*, T. & R. 167.
4 *Amesbury* v. *Brown*, 1 Ves. 477.
5 *Ibid.*

the position of a tenant for life,[1] who is bound[2] (as is also the tenant for years)[3] to keep down the interest of the charge during the continuance of his estate, to the extent of the rents and profits, and who is not exempted from this duty by the possession of an absolute power of appointment, by virtue whereof he is able, like the tenant in tail, to make the estate his own.[4]

It is incumbent on the reversioner to see that this duty be performed by the tenant for life;[5] and if it be neglected, the reversioner,[6] or it seems the next tenant for life,[7] may file his bill to make the rents amenable, and may compel the tenant for life to answer what has accrued. But if the reversioner stand by and allow the rents to be received and not applied in payment of interest, the reversion will be charged, and the reversioner cannot afterwards establish a debt against the assets on the ground that the rents were sufficient.[8]

The reversion may also be charged, if the rents be insufficient, and the arrears of interest have thus been thrown upon the reversioner, where, having accrued during the time of one tenant for life, they were discharged by the trustees of a subsequent life estate.[9]

And if the tenant for life of an incumbered estate charge the estate under a power, with a principal sum and interest, and then mortgage both the charge and the interest, and keep down so much of the interest as the estate will not pay, out of his own moneys, the amount so paid (in the absence of any intention to exonerate) will be charged upon the reversion; and the next in remainder cannot[10] redeem the mortgage of the charge, without discharging the interest so paid by the mortgagor, and for which he was an

1 *Sarjeson* v. *Cruise*, cited 1 Ves. 477, 480; S. C. *Sargeson* v. *Sealy*, 2 Atk. 412, and T. & R. 176; *Burges* v. *Mawbey*, T. & R. 177. But note, that Sir T. Plumer, M.R., puts a wrong construction upon the words of Sir W. Grant, M.R., in *Bertie* v. *Lord Abingdon*, 3 Mer. 566. The latter is supposed to have said that "there could be no question as to the obligation of an infant tenant in tail to keep down the interest." His words really were, "There can be no question *in this case* with respect to the obligation, &c." *i.e.*, the question does not arise here. For the question was not between real and personal representatives, between whom there is no equity, but only between the representatives and those in remainder.

2 *Revel* v. *Watkinson*, 1 Ves. 93; *Amesbury* v. *Brown*, *ibid*, 477; *Faulkner* v. *Daniel*, 3 Hare, 199; *Bulwer* v. *Astley*, 1 Ph. 422; *Playfair* v. *Cooper*, 17 Beav. 187; and see T. & R. 174; 19 Jur. 580

3 1 Ves. 480.

4 *Whitbread* v. *Smith*, 3 De G. M. & G. 741.

5 2 Jo. & Lat. 160; Kay, 339.

6 5 Ves. 106; and see *Hayes* v. *Hayes*, 1 Ch. Ca. 223.

7 *Revel* v. *Watkinson*, 1 Ves. 93.

8 19 Beav. 54.

9 *Sharshaw* v. *Gibbs*, Kay, 333.

10 *Lord Kensington* v. *Bouverie*, 19 Jur. 577.

incumbrancer on the estate. And it seems that if the estate be clearly charged under the power with interest, as well as principal moneys, it will not be material that the trusts of the term, limited to secure the charge, relate only to the principal. Nor will any weight be given, in such a case, to arguments founded upon the inconvenience of taking the necessary accounts of the rents and profits received by the former tenant for life.

If a mortgagee, who has suffered the interest to run in arrear, purchase the estate of the tenant for life, the surplus rents received after the purchase, beyond the current interest of the mortgage, must be applied in discharge of the arrears; and the mortgagee cannot charge the arrears upon the inheritance:[1] for the vendor under whom he claims was bound to keep down the interest.

If an estate have been partly in the possession of a tenant for life, and partly of a person who takes under the limitations of a prior settlement (as a jointress), and, therefore, is not bound to pay the interest on the incumbrances, the tenant for life must discharge the arrears, which accrued at the time of the paramount estate, out of the additional rents received at its expiration.[2]

The case of *Tracy* v. *Lady Hereford* has been stated[3] by an eminent Judge to establish the general proposition, that a tenant for life in remainder must bear the arrears of interest which accrued during the estate of a prior tenant for life; but this construction has been repudiated as inequitable and unnecessary for the determination of the case in which it was laid down.[4] The rule goes no farther than to make each tenant for life bear the arrears which have accrued during his own time, although during part of the time another may have been in possession of part of the estate under a paramount title;[5] and to liquidate such arrears he must furnish all the rents if necessary during the whole of his life; but subject, it seems, to this equity,[6] *viz.*, that if the settlor of the estate be to the tenant for life *in loco parentis*, and the tenant for life not otherwise provided for, a reasonable maintenance shall be allowed him out of the rents and profits.

1 *Lord Penrhyn* v *Hughes*, 5 Ves. 99. So as to a purchaser who actually pays off the arrears. *Whitbread* v. *Smith*, 3 De G. M, & G. 741; and see *Ruscombe* v. *Hare*, 2 Bl. N. S. 192.
2 *Revel* v. *Watkinson*, 1 Ves. 193; *Tracy* v. *Lady Hereford*, 2 Bro. C. C. 128.
3 5 Ves. 106. 4 See 2 Jo. & Lat. 160; Kay, 339.
5 *Id. and Tracy* v. *Lady Hereford*, *supra*.
6 *Revel* v *Watkinson*, 1 Ves. 193; Butler's case cited there; T. & R. 174 Note, however, that in *Revel* v. *Watkinson*, the bill was by a subsequent tenant for life, which tends to show that he was then considered liable for the arrears.

And where the incumbrances on the estate consist of annuities, the measure of the tenant for life's liability is the value of the annuity, which the decree will direct to be ascertained: and the interest of the estimated amount will be kept down by the tenant for life.[1] And so the tenant for life, during whose time an annuity prior to his estate has run in arrear, will not be ordered to pay the arrears, but only so much as, during the continuance of his life estate, will keep down the interest of the charge, which those arrears constitute upon the *corpus* of the estate.[2]

If arrears of rent, which, in the view of a court of equity, are specifically applicable to the payment of interest, be received by the tenant for life, he cannot retain them when the interest is in arrear, though they all accrued in his own time; especially if he were party to a transaction in which those rents were assumed to have been applied in payment of the interest.[3]

With respect to the infant tenant in tail, there is an apparent disagreement from the general authorities in an earlier case,[4] in which the Court refused to order the executors of an infant tenant in tail to pay the arrears of interest out of the infant's personal estate; and the observations of the Court, as reported in Peere Williams, tend to show that the decision was upon the general ground that the tenant in tail is not bound to keep down the interest. It has, however, been suggested,[5] that the real ground was not that the infant was not liable to keep down the interest, but that it ought not to be paid out of his personel estate; for, *per* Lord Hardwicke,[6] the rents and profits were the fund out of which the guardian should have paid the interest. And so it was held in the case of *Burges* v. *Mawbey*.[7]

And the like rule, no doubt, applies to the infant tenant for life.

Where the estates of the husband and wife were mortgaged to secure the husband's debt, and payment was enforced out of the produce of the wife's estate, it was held, that the representatives

1 *Bulwer* v. *Astley*, 1 Ph. 423.
2 *Playfair* v. *Cooper*, 17 Beav. 187.
3 *Caulfield* v. *Maguire*, 2 Jo. & Lat. 141.
4 *Chaplin* v. *Chaplin*, 3 P. Wms. 229.
5 Per Sir T. Plumer, T. & R. 177.
6 In *Serjeson* v. *Sealey*, cited T. & R. 177.
7 T. & R. 167, 178.

of the wife should have no interest on the sums which the husband's estate had thus become liable to recoup to them; and consequently that a judgment creditor of the wife, claiming against the husband's estate upon the foundation of this equity, could have no interest upon the debt which he recovered.[1] The husband and wife are not bound to keep down the interest of a mortgage on the wife's estate for the benefit of her heir; though for what he may have actually paid in respect of such interest, he will have no allowance. And as tenant by the curtesy, he must keep down, after his wife's death, the interest on the original debt, and on the arrears which have accrued during her life.[2]

The order of the Court, directing a receiver to keep down the interest of incumbrances, does not amount to an appropriation of the rents and profits to that purpose, so as to make the rights of the parties where the interest has not been paid or applied for, the same as if interest had been actually paid.[3] The order is partly made in justice to the incumbrancers, partly for benefit of the estate, lest the incumbrancers should proceed in respect of their unpaid interest; but if they do not apply for it, they are presumed to be content with their security for principal and interest, and the estate remains burthened with the arrears, for which there is no equity against the surplus rents paid over by the receiver.

17. *Of Payment of Interest on Arrears of Annuities, and on Bond and Judgment Debts.*

As a general rule, interest is not allowed upon arrears of an annuity, though it be charged upon land, but under special circumstances only. It was held by Lord Hardwicke, that if the annuity were given for maintenance, or there were a penalty for securing the payment of it, interest should be given on the arrears.[4] But the rule as to maintenance has not been followed;[5] and it has been long held, that the security of a bond and penalty raises no equity for interest on the arrears, because no interest was recoverable at law on a judgment debt, though damages were given in the nature

1 *Lancaster* v. *Evors*, 10 Beav. 266. 154.
2 *Ruscombe* v. *Hare*, 2 Bli. N. S. 192.
3 *Bertie* v. *Lord Abingdon*, 3 Mer. 560.
4 *Newman* v. *Auling*, 3 Atk. 579; see also *Ferrers* v. *Ferrers*, Ca t. Talb. 2.
5 *Tew* v. *Earl of Winterton*, 1 Ves. jun. 450: *Creuze* v. *Hunter*, 2 *ibid.* 157; and see *Mellish* v. *Mellish*, 14 Ves. 516.

of interest.[1] And the disinclination to give interest has gone so far, that the Court has even refused it when the annuity had been enjoyed for many years, and the assignee had been deprived of possession by the act of the Court; and this, although the fund out of which it was payable was productive, and the interest of it actually went into the pocket of the owner of that fund.[2] But this seems to have been an extreme case; and though mere legal delay be no ground for giving interest, either on an annuity or a judgment,[3] yet it seems clear at the present day, that if the annuitant had the means of recovering his annuity at law, but was restrained from doing so at the instance of the person liable to pay the annuity: or if the latter come for the help of the Court against the hardship to which he would be exposed at law, the Court will give interest on the arrears, on the principle of restoring the annuitant to the position he would have been in if the Court had not interfered.[4] And if the person liable to pay the annuity have grossly misconducted himself, in evading payment of the annuity,[5] or in disputing its existence on unjust grounds, as by setting up the destruction of a bond after admitting that it was caused by an accident,[6] or have otherwise, by his conduct or absence, delayed the proceedings of the creditor, interest will be given: especially if the person liable to the payment were a party to the creation of the obligation.[7]

Interest has been given on the aggregate amount of arrears due at the death of the surviving grantor of an annuity, the fund having been accumulating for many years in court, and there having been no person for a long time after the death of the surviving grantor who could have been sued on the judgment.[8]

To avoid circuity of action, the Court will also give interest where there would be a clear case for damages at law, under a covenant for payment of the annuity, and it is clear that the measure

1 *Booth* v. *Leycester*, 3 My. & C. 459; *Gaunt* v. *Taylor*, 3 My. & K. 302. It does not appear that 1 & 2 Vic. c. 110, s. 17, giving interest on judgment debts, has made any alteration in the practice of Courts of Equity in this respect.
2 Per Sir J. Leach, cited 3 D. & W 138.
3 *Martyn* v. *Blake*, 3 D. & W. 1 5; *Berrington* v. *Evans*, Younge 276.
4 *Booth* v. *Leycester*, 1 Keen, 247; *Taylor* v. *Taylor*, 8 Hare, 120.
5 *Martyn* v. *Blake*, 3 D. & W. 125.
6 *Crosse* v *Bedingfield*, 12 Sim. 35; and see 10 Hare, 136.
7 *Booth* v. *Leycester*, 3 Myl. & C. 459.
8 *Hyde* v. *Price*, 8 Sim. 578 But this decision is not a strong one. It was pronounced before judgment was given on the appeal in *Booth* v. *Leycester*, 3 M. & C. 459; see *Jenkins* v. *Briant*, 1 Sim. 272; and see 10 Hare, 135.

of damages would be the amount of the arrears with interest thereon ;[1] as if there be a covenant to indemnify the annuitant against prior incumbrances, by the claims of the owners of which the perception of the annuity was prevented, especially if this have occurred in consequence of the acts of the covenantor. But such a case will not arise on a mere covenant to pay the annuity, with a clause enabling the annuitant to enter and hold until payment[2] of the annuity, and of such costs, losses, damages, and expenses, as shall be occasioned by non-payment thereof; for such expressions only amount to an indemnity against the costs incident to entry and possession, and loss from enforcing the security.

Although, as a general rule, the Court refuses interest on arrears, yet, if the annuitant have entered into possession, he will not be obliged to quit possession unless the grantor will allow him interest ; but he cannot have this relief on the ground that there was a power in the grantee to enter, if he did not do so. The grantee must first avail himself of his remedy, and then seek the consequent relief.[3] Nor will it be assumed,[4] in favour of the claim for interest, that the annuitant would have used his legal remedies, but for the presence of a receiver appointed by the Court ; or admitted, that by reason of the receiver's appointment, the annuitant is to be considered as having been restrained from using his remedies. And the annuitant will not even have the benefit of an accidental union in himself, of the right to the annuity, and the title to the term by which it is secured, where there is a contest respecting the annuity ; on the ground that the annuitant may not, as a trustee of the annuity, use for his own benefit a power thus accidentally acquired.

Although interest will be given where the arrear has been caused by the act of the party liable for the payment, in taking away the legal right of the annuitant, it is different where there is a substantial dispute as to the annuity, in consequence of which the money has been brought into court for the benefit of all parties.[5] Where the fund in Court has been invested, application should be made to the Court to set aside and keep distinct a part of the fund

1 *Martyn* v. *Blake*, 3 D. & W. 125 ; see also *Gay* v. *Cox*, 1 Ridg P. C. 153.
2 *Booth* v. *Leycester*, 3 M. & C. 459.
3 *Robinson* v. *Cumming*, 2 Atk. 409 ; *Booth* v. *Leycester*, 3 My. & C. 459.
4 *Taylor* v. *Taylor*, 8 Hare, 120.
5 *Taylor* v. *Taylor*, *supra*.

or income required for satisfaction of the annuity; and if this be omitted, and the accumulations be carried to a general account, the profit produced by a part of the fund will not be separated for the benefit of the annuitants. This application, it seems, should be made immediately after the title to the annuity has been established.[1]

The discretion of the Court in this matter is not affected by the Statute 22 Vic. c. 43, s. 3, Con. Stat. of U. C., which gives to juries at the trial of an issue, or on an assessment of damages, power to allow interest to creditors upon debts or sum certain. As appears by direct authority,[2] and incidentally by decisions made since the passing of the English Statute, 3 & 4 W. IV. c. 42, s. 28, of which ours is nearly a transcript; although, by one learned Judge, it was said to be the absolute duty of the Court to adopt this and other provisions of the Act, by applying the spirit of them to the practice of the Courts of Equity.[3]

Bond debts generally carry no interest, either at law or in equity, beyond the amount of the penalty, which is taken to represent by the agreement of the parties the ultimate amount of the debt. But the conduct of the obligor, the interference of the Court, and other special circumstances, make in this case also exceptions to the general rule.[4] And if there be a bond and a mortgage to secure the same sum, with all interest that may grow due thereon, interest will be carried under the mortgage beyond the penalty of the bond; for the amount of the penalty is not to prejudice the mortgage.[5] And it matters not whether the mortgage precede or follow the bond. Interest will also be given in such a case where the mortgagor, is a surety, as the creditor may make the mortgage as available as if it were given by the principal debtor. But a trust for payment out of the proceeds of real estate, of bond debts, together with the interest due and to grow due for the same, to the day of payment, will not[6] carry interest beyond the penalties of the bonds;

1 *Booth* v. *Leycester*, 3 My. & C. 459.
2 *Re Powell's Trust*, 10 Hare, 134.
3 *Hyde* v. *Price*, 8 Sim. 578.
4 *Tew* v. *Earl of Winterton*, 3 Bro. C. C. 489; *Mackworth* v. *Thomas*, 5 Ves. 329; *Clarke* v. *Seton*, 6 Ves. 411; *Atkinson* v. *Atkinson*, 1 Ba. & Be. 239.
5 *Clarke* v. *Lord Abingdon*, 17 Ves 106
6 *Hughes* v. *Wynne*, 1 My. & K. 20; *Clowes* v. *Waters*, 16 Jur. 632.

for, as interest does not grow due beyond the penalties, by virtue of the rule under consideration, the trust will be satisfied by payment of interest to the amount of the penalties.

It has been said,[1] that if the bond be tacked to another security, as to the mortgage for securing other sums, the mortgagor may not redeem unless he will pay the interest which is above the penalty. This is doubted by Mr. Powell,[2] because tacking is only to avoid circuity of action, but it is supported by Mr. Coventry[3] on the ground, that the excess of interest may be tacked in the nature of further advances. The doubt of Mr. Powell seems more correct in principle than the reason against it; for a bond is allowed to be tacked to prevent a circuity of remedy in respect of a recoverable debt, and not to make a new remedy where there was none before: and we have seen that, as a general rule there is no remedy for interest beyond the penalty. Neither can interest in arrear be turned in such a manner into principal, as the treating it as a further advance would imply.

The proposition may, however, be supported upon the principle, that a person, who comes for the aid of equity to compel redemption, must do equity by payment of all interest; and the rule has been so laid down where a mortgagee has tacked a judgment to his mortgage.[4]

Interest has been given beyond the penalty to a judgment creditor, who was a trustee in possession under the will of the debtor, on the ground that he might have retained the rents (though he did not do so) to pay the interest due to himself, and that but for the filing of the bill he would have retained possession as trustee.[5]

18. *Of the Conversion of Interest in Arrear into Principal.*

It was said[6] to be always a rule, that the assignee of a mortgage should have interest for the interest due at the assignment: but now,[7] if there be an arrear of interest on a mortgage, and an assign-

1 *Peers* v. *Baldwyn*, 2 Eq. Ca. Abr. 611.
2 Pow. Mort. 355, ed. 6.
3 *Ibid* note (*q.*)
4 See *Godfrey* v. *Watson*, 3 Atk 517.
5 *Atkinson* v. *Atkinson*, 1 Ba. & Be. 239.
6 *Anon.* 1 Ch. Ca. 258.
7 *Ashenhurst* v. *James*, 3 Atk. 271: *Earl of Macclesfield* v. *Fitton*, 1 Vern. 168; *Matthews* v. *Walwyn*, 4 Ves. 118; *Chambers* v. *Goldwin*, 9 Ves. 254; *Mangles* v. *Dixon*, 3 H. L. C. 737.

ment be made by the mortgagee with the concurrence of the mortgagor, the interest paid by the assignee shall be taken as principal, and carry interest; but where it is assigned without the concurrence of the mortgagor (unless it seems[1] he first refuse, either to pay off the debt, or to join in the assignment), the assignee must take only upon the same terms with the assignor; that is, he will be entitled as against the mortgagor to no more than is actually due on the security, without reference to what he may have paid, and the interest which he pays will not be taken as principal.

The mere privity or assent of the mortgagor to the account is not sufficient[2] to change the interest into principal, even if he sign the account; for no intent is thereby shown to alter the nature of that part of the debt which consists of interest. On the other hand, conversion may take place on the mere written consent of the mortgagor, or person entitled to redeem, without his being actually a party to the assignment, or even on inference of his consent arising from his acts or from his acquiesence; thus, where interest had been paid for many years upon an ascertained balance of principal and interest, reported due at the date of a decree for sale, the court inferred an agreement that interest should be paid as the price of forbearance to enforce the sale.[3] And again, where a *puisne* incumbrancer, who had purchased the equity of redemption under a decree of the court, took in two judgments prior to a mortgage security, at the desire of the mortgagee, who was unable to take them in himself, the Court considered[4] his consent to be equivalent to his joining in the deed, and allowed the judgment creditor interest on all that he had paid.

Inquiries will be directed as to what is due on the mortgage, and what has been paid by the assignee.[5] If it be denied that anything was due at the time of the assignment, the inquiry will be, what was due at the time of the mortgage, what at the time of the assignment, and what remains due; and if it appear as the result of the inquiry that nothing was due at the time of the assignment, the assignment will be declared void as against the estate of the

1 *Anon.* Bunb. 41.
2 *Brown* v. *Barkham*, 1 P. Wms. 652.
3 *M'Carthy* v. *Llandaff*, 1 Ba. & Be. 375.
4 *Ashenhurst* v. *James*, 3 Atk. 271. There seems formerly to have been a practice of adding the interest to the principal, upon assignment, after forfeiture by non-payment of interest, though the time for payment of the principal had not arrived. See *Gladwyn* v. *Hitchman*, 2 Vern. 135.
5 *Smith* v. *Pemberton*, 1 Ch. Ca. 67.

mortgagor. But if otherwise, and the assignment were made without the mortgagor's privity, he or those claiming under him will be at liberty to redeem on payment of what has been found due on the original security.[1]

As to the conversion of interest into principal, as between the mortgagor and mortgagee, the later authorities agree that, by an original stipulation in the mortgage deed, this cannot be done; but the interest must first be due before any agreement to turn it into principal will hold good.[2] It was decided at an early period by Lord Keeper North,[3] that such interest as was reserved in the body of the deed should be reckoned principal; because, being ascertained by the deed, an action of debt would lie for it, and it was reasonable that damages should be given for its non-payment. But this doctrine assumed the validity of the bargain, which was afterwards denied, on the ground of usury; and upon that ground alone the rule just stated appears to stand. For, although Lord Eldon said, that such a bargain was neither illegal nor unfair, he added that the Court would not allow it, because it tended to usury, though it was not usury;[4] and another learned Judge,[5] who questioned the accuracy of this language, considered that the doctrine could not be supported, except on the ground that, some advantage being supposed to arise to the mortgagee, *ultra* the £5 per cent. interest, and that advantage being secured by an original stipulation, the contract savoured of usury. The getting a collateral advantage has also been mentioned as a reason for the rule,[6] but this seems to be merely a form of usury;[7] and if it be, as it clearly is,[8] lawful to turn interest into principal by agreement after the interest has become due, and provided there be no oppression; there seems no reason, save that of usury, why the like bargain may not be made on the original contract, when the parties are dealing at arm's length, and the mortgagor may be able to choose his own lender. It is, therefore, submitted, that, with the abolition of the laws against usury, all reason for the

1 *Matthews* v. *Walwyn*, 4 Ves. 129: *Lunn* v. *St. John*, cited there.
2 *Lord Ossulston* v. *Lord Yarmouth*, Salk. 449; *Broadway* v. *Morecraft*, Mos. 247; Sir Thomas Meer's case cited, For. 40; *Ex parte Champion*, 3 Bro. C. C. 440; *Ex parte Bevan*, 9 Ves. 223; *Morgan* v. *Mather*, 2 Ves. jun. 21.
3 *Howard* v. *Harris*, 1 Vern. 194.
4 *Chambers* v. *Goldwin*, 9 Ves. 271.
5 Alderson B., in *Blackburn* v. *Warwick*, 2 Y. & C. 92; see also *Sackett* v. *Bassett*, 4 Mad. 58, where an issue was directed.
6 9 Ves. 272.
7 See *Barnard* v. *Young*, 17 Ves. 47; *Leith* v. *Irvine*, 1 My. & K. 284.
8 *Blackburn* v. *Warwick*, 2 Y. & C. 92; *Thornhill* v. *Evans*, 2 Atk. 331

prohibition of original contracts to turn interest into principal, except where fraud and oppression are in question, has ceased.[1] A part agreement to add two per cent. to the rate of interest reserved by a mortgagee, in consideration of an extension of time, was held insufficient to charge the extra interest.[2]

An exception to the rule against the conversion of interest into principal, by a stipulation *a priori*, is founded on the law respecting mercantile transactions; for as by that law it was allowable to make rests in transactions between merchants, by previous agreement, such being the usual course of trade,[3] so it was held in equity,[4] that securities upon land might, notwithstanding the usury laws, be given to secure the final balances due on such transactions; and this exception is applicable to dealings between bankers and their customers.[5] Whether such rests could be made at shorter intervals than a year seems to have been doubted, though the rule amongst merchants does admit of half-yearly and quarterly rests; and such have also been allowed on admissions in the case of a mortgage.[6]

But these decisions were prior to the changes which were made in the laws of usury before they were finally abolished; and from the construction put by several eminent judges[7] upon the statute 2 & 3 Vict. c. 37, which abolished usury as to contracts above 10*l.*, with an express exception of securities upon land; it was held to follow,[8] that where money was paid to bankers in discharge of a security taken by them upon land, for the balance due from a customer, which balance was partly made up of discount upon bills charged at a higher rate than 5*l.* per cent., the excess of interest charged for discounting such of the bills as were within the statute 2 & 3 Vict. c. 37, must be disallowed.

1 In a case in which, after interest had become due, the mortgagee took a second security for a sum composed of the principal and interest already due, with interest on that interest, the Master came to the singular conclusion that the second transaction was a satisfaction of the first mortgage, but was itself void for usury; thus holding the same deed to be at once good against the creditor for one purpose, and bad for another. The question of usury afterwards went to a jury *Sackett* v. *Bassett*, 4 Mad. 58.
2 *Totten* v. *Watson*, 17 Grant, 233.
3 *Ex parte Bevan*, 9 Ves. 223
4 *Lord Clancarty* v. *Latouche*, 1 Ba. & Be. 420.
5 *Rufford* v. *Bishop*, 5 Russ. 346.
6 *Ibid.*
7 See *Ex parte Warrington*, 3 De G. M. & G. 159; *Lane* v. *Horlock*, 1 Drew, 587; *James* v. *Rice*, Kay. 31.
8 *Thomas* v. *Cooper*, 18 Jur. 688.

It has been said, that interest upon interest in arrear, when the mortgage is paid off, is never allowed in equity;[1] which probably depends on the rule that interest on arrears will not be given on an agreement made before the arrears were due; but such an agreement for the reason given above would probably now be held good.

An agreement to turn arrears of interest into principal must be made fairly, and is generally and most properly upon the advance of fresh money.[2] It is clearly not looked upon with favour by the Court, and will be avoided by circumstances which show extortion; as if the interest on the arrears be fixed at a higher rate than that on the original security.

The infant heir of the mortgagor has been held[3] bound by an agreement of this kind, made to prevent the mortgagee from entering; it being clearly for her benefit, and made with the privity of her nearest relations.

And such an agreement, made by the assignee of the equity of redemption, in trust for the payment of debts, and to pay the surplus to the mortgagor, has been held[4] to bind the mortgagor's heir, though no party thereto.

But such an agreement made in favour of the first mortgagee will not hold against later incumbrancers of whom he had notice; for the same reason which prevents a mortgagee from tacking further advances against such subsequent incumbrancers.[5]

19. *Of Computing Subsequent Interest.*

It was formerly the practice of the Court, upon enlarging the time for payment of the mortgage debt, to direct subsequent interest to be computed on the aggregate amount of principal, interest and costs found due by the former report, and from the confirmation thereof;[6] the reason of which was, that as the fur-

1 *Thornhill*, v. *Evans*, 2 Atk. 330.
2 *Ibid.*
3 *Earl Chesterfield* v. *Lady Cromwell*, 1 Eq. Ca. Abr. 286.
4 *Conway* v. *Shrimpton*, 2 Eq. Ca. Abr. 738; 5 Bro. P. C. 187.
5 *Digby* v. *Craggs*, Ambl. 612; 2 Eden, 201.
6 *Bickham* v. *Cross*, 2 Ves. 471; *Creuze* v. *Hunter*, 2 Ves. jun. 157; *Turner* v. *Turner*, 1 Jac. & W. 39.

ther time was given to the mortgagor, by the favour of the Court, he was put upon terms, by which the other party would be indemnified for the delay; or, it has been said,[1] that he might suffer for disobeying the order of the Court for payment on the day fixed. But the practice was not followed in suits in which the delay was not granted by the favour of the Court, and it seems to have prevailed in suits for sale and payment of incumbrances;[2] the distinction between such suits in which the delay does not arise from the default of the mortgagor, and in which the practice might be highly injurious to the interests of other creditors, and suits for foreclosure, having been long recognized; but in a suit for sale, an order has been made to compute interest on the principal only, without prejudice in case there should be a surplus.[3]

At the present day, it is the practice in suits for administration where the mortgaged estate has been sold, to compute subsequent interest on the principal only.[4] And it is the same in foreclosure suits, for the time for redemption is now enlarged, on payment within a fortnight, or other short time, of the interest and costs already found due,[5] or if the object be to suspend the execution of a decree until the hearing of an appeal, then the interest from the filing of the bill, with costs, will be ordered to be paid.[6] The result of which is,[7] that the interest and costs being already paid, subsequent interest can be given on the principal only. Yet, if, for any special reason, the Court should enlarge the time, without ordering immediate payment, it seems it would still be proper to compute the subsequent interest on the aggregate of the principal, interest and costs.

In a modern case, however,[8] where a sum of money was charged upon an estate belonging to several persons, who desired to pay off the charge instead of having it raised under the decree, an owner who had not obeyed the order for payment of his proportion was allowed further time to do so without paying interest on the whole amount found due; though it was admitted that, in

1 *Brown* v. *Barkham*, 1 P. Wms. 652
2 *Harris* v. *Harris*, 3 Atk. 722.
3 *Neal* v. *A. G.* Mos. 246.
4 *Whatton* v. *Cradock*, 1 Keen, 267; *Brewin* v. *Austin*, 2 Keen, 211.
5 *Edwards* v. *Cunliffe*, 1 Mad. 287; *Jones* v. *Creswicke*, 9 Sim. 304.
6 *Monkhouse* v. *Corporation of Bedford*, 17 Ves. 381.
7 *Brewin* v. *Austin*, 2 Keen, 211; *Whatton* v. *Cradock*, 1 Keen, 267; notwithstanding *Bruere* v. *Wharton*, 7 Sim. 483.
8 *Wilkinson* v. *Charlesworth*, 2 Beav. 470.

strict justice, the owner of the charge was entitled to such interest, and though the principle adopted in foreclosure suits under the old practice seems to have been applicable.

Where an infant heir had revived and carried on a creditor's suit commenced by the mortgagor, but neglected to pay the money on the day appointed by the decree, the subsequent interest was directed,[1] in accounts taken in a foreclosure suit instituted by the mortgagee, to be taken from the confirmation of the former report, on the sum thereby reported due; the former decree having been sigued and enrolled, and the infant, subject to his right to surcharge and falsify, being held to be bound thereby; and as this was not a case in which the person in default was seeking the indulgence of the Court, the decision seems still to be of authority.

Where interest runs on the whole sum found due by a report, it so runs only from the confirmation of the report, and up to that time on the principal only.[2]

Where the question of interest is not reserved by the decree, it is properly a matter of rehearing, or to be determined on further directions where they are reserved, and should not be brought forward by petition; which is only proper for carrying out the directions of the decree.[3]

20. *Of the Right to set off Arrears of Interest.*

Where a mortgagee bequeathed a sum of money upon trust for the benefit of the mortgagor, the devisee of the latter was held not to be entitled, upon redemption, to have the amount due to the mortgagor at his death, for arrears of interest on the legacy, set off against the amount due from him on account of the mortgages; because set-off does not take effect *ipso jure*, or without a process in our courts, but the debts subsist notwithstanding the cross demands, and may be separately assigned; and if the mortgagor had sold the estate subject to the mortgage, the purchaser could not have come for such an account. But before the death of the mortgagor, it seems the set-off might have been directed, upon taking the accounts.[4]

1 *Badham* v. *Odell*, 4 Bro. P. C. 349.
2 *Jacob* v. *Earl of Suffolk*, Mos. 27.
3 *Creuze* v. *Hunter*, 2 Ves. Jun. 164; *Goodyere* v. *Lake*, Amb. 584, and see in *Lord Midleton* v. *Eliot*, 15 Sim. 531.
4 *Pettat* v. *Ellis*, 9 Ves. 563.

Where incumbrancers had enforced their lien against the assignees of the bankrupt's estate, in a chancery suit, in which the subject of the security had been sold, and the proceeds applied in reduction of the debt, the mortgagees, in proving for the residue, were allowed to set off the income of property accruing after the bankruptcy, against the interest on the debt since the same period.[1]

21. *Of the Right to Interest under the Statutes of Limitation.*

It was provided by 3 & 4 Will. 4, c. 27, s. 42,[2] that, after the 31st day of December, 1833, no arrears of rent or of interest in respect of any sum of money charged upon, or payable out of, any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be discovered by any distress, action or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: provided that where a priority incumbrancer (which includes a judgment creditor)[3] shall have been in possession or receipt of the rents and profits within one year before an action or suit shall be brought by a *puisne* incumbrancer of the same land, the *puisne* incumbrancer may recover in such action or suit the arrears which have become due during the whole period of the prior incumbrancer's possession or receipt, though such time may have exceeded six years.

Before the day appointed for this act to take effect—*viz.*, on the 1st of June, 1833—another act, being c. 42, of the same session of Parliament, came into force, by which twenty years was assigned (s. 3) as the time of limitation for actions of covenant or debt upon any bond or specialty, and this, which was at first confined to England, was, in 1840, extended to Ireland by 3 & 4 Vict. c. 105, s. 32.

The result of these several enactments is, that although no more than six years' arrears of rent or interest is recoverable in respect

1 *Ex parte Penfold, Re Barker*, 4 De G. & S. 282.
2 In order to apply the English cases on this subject these Statutes must be compared with ours, but it will be found that in all material points they are very nearly alike.
3 2 D. & W. 390.

of any sum charged upon or payable out of any land or rent, yet by means of an action of covenant or debt upon specialty the limitation is twenty years, the provision of the second act of Will. 4 in England, and of the act of Victoria in Ireland, being considered as exceptions from the first act of Will 4.[1]

If, therefore, there be a mortgage, annuity, or charge, without any covenant for payment, or with a simple covenant for payment without mention of arrears of interest, the principal sum only in case of the mortgage or charge can be recovered for twenty years under s. 40, of 3 & 4 Will. 4 c. 27 (which provides for the recovery of the principal), and no more than six years' arrears of interest thereon, or arrears of the annuity, are recovered under s. 42 of the same act. And the covenant for payment of the principal in nowise enlarges the remedy of the creditor as to interest; especially if, as may happen in the case of a charge, the parties entitled to the money are not those with whom the covenant is made, and who, therefore, cannot sue upon it.[2]

Before the courts had arrived at the conclusion above pointed out, as to the true construction of these statutes, it had been held[3] by Sir J. Wigram, V. C., that the provision of c. 42 of 3 & 4 Will. 4, was an exception out of the enactment of c. 27, not merely—as limited by these authorities—enabling the interest of money charged on land, and secured by specialty, to be recovered against the person of the debtor, by action on the bond of covenant, but that it was a complete exception for all purposes; so that where the debt was secured by specialty, the twenty years' interest might be recovered, as well against the land as against the person of the debtor. This, as a general decision, cannot be supported against the later and higher authorities which have been just cited; but so far as it rested upon the particular circumstances of the case (and the Vice-Chancellor's observations show that in a great measure, though perhaps not entirely, it did rest upon those circumstances) it appears to remain unaffected by the other authorities. In the case before V. C. Wigram, the author of the incumbrances was not alive, as he was in the later case of *Hunter* v.

1 *Paget* v. *Foley*, 2 Bing. N C. 679; *Strachan* v. *Thomas*, *Sims* v. *Thomas*, 12 A. & E. 536; *Harrisson* v. *Duignan*, 2 D. & W. 295.
2 *Hodges* v. *Croydon Canal Company*, 3 Beav. 86; *Hunter* v. *Nockolds*, 1 Mac. & G. 641; *Hughes* v. *Kelly*, 3 D. & W. 482; *Greenway* v. *Bromfield*, 9 Hare, 201.
3 *Du Vigier* v. *Lee*, 2 Hare, 326.

Nockholds.[1] Now, we have seen, that although a mortgagee cannot tack the covenant or bond of the mortgagor against him to the mortgagee, yet to avoid circuity he may do so against the heir; and all the authorities show that though the mortgagee can recover but six years' arrears of interest against the mortgaged estate, he may recover for twenty years under the covenant. Part, therefore, of the debt may be considered to be secured by the mortgage and other part by the specialty; and the mortgage debt, and the specialty debt, may accordingly be tacked against the heir of the mortgagor, where he is bound by the covenant;[2] provided there be no creditors, or persons having a lien on the estate subsequent to the mortgage, whose rights, according to the rule of tacking already stated, would interfere with this process. And this, it seems, may be done in a redemption suit,[3] although no case for tacking have been made on the pleadings, for there the court puts the mortgagor, who is seeking relief against the legal rights of the mortgagee, upon the terms of paying all that is due; but in a foreclosure suit, the Court, although recognizing the right to tack the interest, whether by virtue of a covenant contained in the mortgage or in some other deed, has refused to allow it, where no case was made for that kind of relief on the pleadings.[4]

The proceeds of sale of mortgaged premises, sold under the power of sale in a mortgage deed by the trustees of the mortgagee, were paid into court in a suit for the administration of the mortgagee's estate: and there being nearly twenty years' arrears of interest due on the mortgage, exceeding in amount the fund in court, the trustees petitioned for payment out of the fund to satisfy such arrears, and the assignee of the mortgagor was served with the petition—held, that the petition was not a suit to recover arrears of interest within the 42d sec. of the statutes 3 & 4 Will. 4, c. 27, and, therefore, that the mortgagee's trustees were entitled to receive their six years' interest, and the fund was ordered to be paid over to them.

The decision in *Mason* v. *Broadbent*, 33 Beav. 296 questioned it. In *Edmunds* v. *Waugh*, 1 L.R. Eq. 418, V.C. Kindersley held, in this

1 1 Mac. & G. 640.
2 *Du Vigier* v. *Lee*, 2 Hare, 326; *Elvy* v. *Norwood*, 5 De G. & Sm. 240; 16 Jur. 493.
3 *Elvy* v. *Norwood*, *supra*.
4 *Sinclair* v. *Jackson*, 17 Beav. 405. But *Du Vigier* v. *Lee*, was a foreclosure suit, and no such case was made.

case, that in a *redemption* suit more than six years' interest can be recovered—that the mortgagor is bound to pay up all interest.

The Court will not, to avoid circuity of action, enforce an obligation indirectly where the consequence would be an evasion of the Statute of Limitations. Therefore, where an annuitant filed a bill to raise the arrears of his annuity against a purchaser, subject to the annuity, of the estate charged, an account of arrears for more than six years was refused,[1] though the result was to drive the annuitant to sue the personal representatives of the grantor of the annuity, upon his covenant, at law, for twenty years' arrears; the representatives so sued being entitled to sue the purchaser again, in equity, in respect of their testator's right to an indemnity, against the covenant; which circuity might have been avoided, by enforcing the same obligation against the purchaser in the first suit. The decision, however, rested much on the circumstances that the covenantor's representatives were not parties to the suit, that the obligation was personal only, and that there was no proof that the covenantor's estate was damnified.

The 42nd section of the statute, as we have already had occasion to observe, is affected by the 25th section, which relates to cases of express trust.

It has been determined, in England,[2] that a foreclosure suit, although in terms it only seeks the exclusion of an equity, is in substance a suit for the recovery of the mortgage money, and as such falls within sec. 40 of 3 & 4 Will. 4, c. 27; but this opinion, though at first[3] accepted by Lord St. Leonards, was afterwards dissented[4] from by him; because, he observes, a foreclosure suit does by no means necessarily, though it may incidentally, lead to the payment of the money; but the act applies strictly to an action or suit to recover the money secured by any mortgage, &c. The terms of the 42nd section are different: the language being that no arrears shall be recovered by any distress action or suit, nor by any suit for the recovery of the arrears. Now, if, in a foreclosure suit, the principal and twenty years' arrears of interest be paid off, those arrears are recovered by the suit, and are, therefore, within the very words of the act.[5]

1 *Harrisson* v. *Duignan*, 2 D. & W. 295.
2 *Dearman* v. *Wyche*, 9 Sim 575.
3 *Henry* v. *Smith*, 2 D & W. 387.
4 *Wrixon* v. *Vize*, 3 D. & W. 104.
5 *Sinclair* v. *Jackson*, 17 Beav. 405; *Du Vizier* v. *Lee*, 2 Hare, 326.

The operation of the statute as to interest, or arrears of an annuity, will not be hindered by a mere finding of the Master in his report that the estate is subject to an incumbrance;[1] but it will be otherwise if the person entitled to the charge be a party to the report, and have carried in a claim upon which the report was founded.[2]

Where a mortgage stipulated that up to a certain day the interest to be charged should be 8 per cent., and if the principal were not then paid 12 per cent. should thereafter be charged. *Held*, that the stipulation for payment of 12 per cent. was not by way of penalty, but an agreement to pay that rate from the day named. After default in payment of a mortgage, a tenant who had been put in possession by the mortgagor, promised to pay the mortgagee rent, but failed to do so. *Held*, that the mortgagee was not chargeable with such rent.[3] *Per VanKoughnet, C.* "I am of opinion that the Master was right in calculating interest at the rate of twelve per cent. from the time of default as stipulated for in the mortgage. This stipulation cannot be treated as a penalty for enforcing payment of a smaller rate of interest, or of a particular sum at a fixed day. What the mortgagee offers and what the mortgagor agrees to is this: that the mortgagee will let the mortgagor have the money at 8 per cent. up to a named day, to be then repaid, and if the mortgagor retains it for a longer period he shall pay twelve per cent. on it for such period. This is the contract of the parties, and there is nothing illegal in it, nothing against which the Court can or should relieve." A loan of money was made for two months at two per cent. per month, at the expiration of which time it was contemplated a new arrangement would be made. After the expiration of the two months, no other arrangement having been effected, the Court held the lender entitled to claim interest at the rate originally agreed upon, and to sell the notes held by him as security to repay himself the amount of his claim: subject only to the question whether he had sold the notes for the best price that could be obtained for them, and as to which the Court directed an enquiry before the Master.[4]

1 *Harrisson* v. *Duignan*, 2 D. & W. 295.
2 *Greenway* v. *Bromfield*, 9 Hare, 201.
3 *Waddell* v. *M'Coll*, 14 Grant, 172.
4 *O'Connor* v. *Clarke*, 18 Grant, 422.

22. *Taking an Account with Rests.*

This expression means simply "taking an account, charging compound interest." For instance, an executor or trustee guilty of gross misconduct may be punished by taking his accounts "with rests." If it be found, for example, that in 1860 he had in his hands $1000 for which he has not properly accounted, or which he has improperly used, or invested, the account with rests would be made up thus:

Balance in hands of trustee on 1st January, 1860	$1000 00
Interest thereon to 1st January, 1861	60 00
	$1060 00
Interest on $1060 from 1st January, 1861, to 1st January, 1862	63 60
	$1123 60
Interest on $1123 60 from 1st January, 1862, to 1st January, 1863	67 41
	$1191 01
Interest on $1191 01 from 1st January, 1863, to 1st January, 1864	71 46
	$1262 47

and so on to the date of the report.

By the English practice, the Master was not at liberty to take an account in this way without the special direction of the Court, embodied in the decree, or by a separate order—but our orders[1] permit the Master to take accounts with rests if he thinks a proper case is made before him, without any direction from the Court, and without any case being made for the purpose in the pleadings. The following authorities collected from Williams on Executors shew the cases in which the Court in England have thought fit to charge executors or trustees with simple interest in cases of neglect merely, and with compound interest in cases of positive and gross breach of trust by ordering the account to be taken "with rests:"

This may be the proper place to enquire, under what circumstances executors or administrators shall be charged with interest

1 Order 220.

on the assets retained in their hands. There are two grounds on which an executor or administrator may be charged with interest: 1st. That he has been guilty of negligence in omitting to lay out the money for the benefit of the estate; 2nd. That he himself has made use of the money, or has committed some other *misfeasance*, to his own profit and advantage.[1]

1st. With respect to neglect on the part of the executor in not laying out balances, it must be observed, that it frequently may be necessary and justifiable for an executor to keep large sums in his hands to answer the exigency of the testator's affairs,[2] especially in the course of the first year after the decease of the testator; in which case such necessity is so fully acknowledged, that, according to the ordinary course of the Court, the fund is not considered distributable until after that time.[3] But if the Court observes that an executor keeps money dead in his hands without any apparent reason or necessity, then it becomes negligence, and a breach of trust, and the Court will charge the executor with interest.[4] And it seems that outstanding demands, even on probable grounds, are no reason why the executors should not lay the testator's money out.[5] But an executor shall not be charged with interest for a balance in his hands, retained under a fair apprehension of his right to it.[6]

As to the rate of interest which the executor shall pay, the rule appears to be, that in these cases, where negligence alone is imputable to him, he shall be charged only with 4*l.* per cent., in respect of the balances, which he ought to have laid out, either in compliance with the express directions of the will, or from his general

1 *Rocke* v. *Hart*, 11 Ves. 59, 60; *Tebbs* v. *Carpenter*, 1 Mad. 306, 307; *Kildare* v. *Hopson*, 4 Bro. P. C. 550, Toml. ed; *Lincoln* v. *Allen*, 4 Bro. P. C. 553, Toml. ed; *Ashburnham* v. *Thompson*, 13 Ves. 401.

2 See *Dawson* v. *Massey*, 1 Bal.. & B. 231.

3 *Forbes* v. *Ross* 2 Cox, 115, 116, by Lord Thurlow.

4 *Littlehales* v. *Gascoyne*, 3 Bro. Chan. Cas. 73; *Browne* v. *Southouse*, 3 Bro. Chan. Ca. 108; *Franklin* v. *Frith*, 3 Bro Chan Ca. 433; *Hall* v. *Hallett*, 1 Cox, 134; *Seers* v. *Hind*, 1 Ves. jun. 294; *Longmore* v. *Broom*, 7 Ves. 124: *Ashburnham* v. *Thompson*, 13 Ves. 401; *Turner* v. *Turner*, 1 Jac. & Walk. 39; *Goodchild* v. *Fenton*, 3 Younge & Jerv. 431. In order to give a claim for interest, there must be a clear case of improper retention of balances to a considerable or substantial amount; *Jones* v. *Morrall*, 2 Sim. N. S. 241, 252. See also *Davenport* v. *Stafford*, 14 Beav. 319. The executors may be charged with interest on balances, though not claimed by the bill; 1 Jac. & Walk. 39; see 2 Sim. N. S. 241.

5 3 Bro Chan. Ca. 434; 1 Mad. 305. It was resolved by Sir Joseph Jekyll, in *Taylor* v *Gerst*, Mosely, 99, that if money placed out at interest be called in by the executor without any cause, he shall pay interest for it; but in *Newton* v *Bennet*, 1 Bro Chan. Ca. 361, Lord Thurlow said, that an execut r had an honest discretion to call in a debt bearing interest if he thought the same in hazard. It should seem that he ought to lay it out again immediately in the three per cents.

6 *Bruere* v *Pemberton*, 12 Ves. 386. An administrator *pendente lite* is not liable to pay interest upon a balance in his hands, during the pendency of the suit in the Ecclesiastical Court; *Gallivan* v. *Evans*, 1 Ball. & B. 191.

duty, where the will is silent on the subject.[1] In order to induce the Court to charge the executor with more than 4*l.* per cent. a special case is necessary.[2]

But, 2dly. Where there has been a direct breach of trust, the executor may be charged with a higher rate of interest. With respect to employing the assets to his own advantage, Lord Hardwicke, on two occasions,[3] expressed an opinion that an executor might do so without impropriety, and without being liable to any charge for interest. But this doctrine has been entirely overruled by more modern cases.[4] And it is now established, that if the executor makes use of the money, he ought to pay the interest he made:[5] upon the principle that he ought not to derive any profit from the trust property. Hence, it has become a settled rule, that if a trustee, having trust money in his hands, knowingly applies it to his own use, or in his trade, he shall be charged with interest at the rate of 5*l.* per cent.[6]

If the fund is employed in trade, the *cestui que trusts* have a right to an option of taking either the interest or the profits which have arisen from the trade:[7] but they must elect to take either the profits for the whole period or the interest for the whole period.[8] If it be shewn that the executor used the property in his trade, and the amount of the profits made by him does not appear, the Court takes it for granted that he made 5*l.* per cent. at the least, and it is incumbent on him to shew that he made less.[9] It has been further established, that if an executor or other trustee mixes trust funds with his private moneys, and employs them both in a trade or adventure of his own, the *cestui que trust* may, if he prefers it, insist upon having a proportionate share of the profits, instead of interest on the amount of the trust funds so employed.[10] And it should seem to be now settled, that an executor, who, being a

1 *Dornforth* v. *Dornforth*, 12 Ves. 130, note (29), 2nd. ed. S. C. cited 1 Mad. 302; *Ashburnham* v. *Thompson*, 13 Ves. 401 *Rocke* v. *Hart*, 11 Ves. 58, 60, 61. *Tebbs* v. *Carpenter*, 1 Mad. 307; *Sutton* v. *Sharp*, 1 Russ. Chan. Ca. 151; *Melland* v. *Gray*, 2 Coll. 295.
2 1 Mad 306; *Mousley* v. *Carr*, 4 Beav 449
3 *Adams* v. *Gale*, 2 Atk. 106: *Child* v. *Gibson*, 2 Atk. 603.
4 *Perkyns* v. *Baynton*, 1 Bro. Chan. Cas. 375; *Newton* v *Bennet*, 1 Bro. Chan. Cas. 361; *Forbes* v *Ross*, 2 Bro. Chan. Cas. 430: *Tebbs* v. *Carpenter*, 1 Mad. 304.
5 *Forbes* v. *Ross*, 2 Cox, 116; *Rocke* v. *Hart*, 11 Ves. 60.
6 *Mousley* v. *Carr*, 4 Beav. 49.
7 *Burden* v. *Burden*, cited 1 Jac. & Walk. 134.
8 *Heathcoate* v. *Hulme*, 1 Jac & Walk. 122
9 *Rocke* v. *Hart*, 11 Ves. 61. It should seem, that interest shall in no case be charged at less than 5*l.* per cent., when the fund has been embarked in trade without authority: 1 Jac & Walk. 134, 135. See also. *Robinson* v. *Robinson*, 1 De G. M. & G. 257 by Lord Cranworth.
10 *Docker* v. *Somes*, 2 M. & K. 655: *Wedderburn* v *Wedderburn*, 2 Keen, 722; 4 Mylne & Cr. 41. *Willett* v. *Blanford*, 1 Hare, 253: *Portlock* v *Gardner*, 1 Hare, 594, 603.

trader, and having, of course, an account with a banker, places the assets at his banker's in his own name, by that means increasing the balances in his favor, acquiring additional credit, and enjoying in his business the advantages naturally arising from that circumstance, must be considered as having employed the money for his own benefit, and must, therefore, be charged with interest at 5*l.* per cent.[1]

There are many other cases where executors, who have applied the assets in direct dereliction of their duty, have been charged with 5*l.* per cent. interest. Thus, in *Forbes* v. *Ross*,[2] there was an express trust, by a direction in the will, to lay out the fund in the purchase of lands, or upon heritable or personal securities, at such a rate of interest as the executors should think reasonable; so that they were at liberty, using their discretion soundly and fairly and honestly, to lend it to anybody that they might suppose would give a reasonable interest for it, considering at the same time the degree of responsibility of the person to whom it was lent. They lent the fund to one of themselves, on bond at 4*l.* per cent., when 5*l.* per cent. might have been made by heritable or government securities: And it was held, that he should be charged with 5*l.* per cent. interest. So, in *Piety* v. *Stace*,[3] the will directed the executor to place the money in the public funds, or upon mortgages, or other good securities, and to pay the dividends and interest to certain persons for life, and after their death to dispose of the capital in a certain mode: The executor called in part of the property which was out on security, used it generally in his trade, and in various transactions in the public funds, paying only the dividends of the stock to the persons entitled under the will, and he lent part to his son: And Lord Alvanley directed an account of all the executor had made, with the interest at the rate of 5*l.* per cent. upon the balances in his hands. In *Pocock* v. *Reddington*,[4] the executor and trustee having been guilty of a breach of trust by selling out stock and dealing improperly with the money, Lord Alvanley held that the *cestui que trust* had an option to have the

1 *Treves* v. *Townshend*, 1 Bro Chan. Cas. 385; *Rocke* v. *Hart*, 11 Ves. 61; *Sutton* v. *Sharp*, 1 Russ. Chan. Cas. 151, 152. S P. although the Will authorized the executor to invest the residue on "good private securities." *Westover* v. *Chapman*, 1 Coll. 177. See also, *In re Hilliard*, 1 Ves, jun. 90; *Melland* v. *Gray*, 2 Coll. 295; *Williams* v. *Powell*, 15 Bea. 461. But see *contra*, *Perkyns* v. *Baynton*, 1 Bro. Chan. Cas. 375; *Browne* v. *Southouse*, 3 Bro. Chan. Cas. 107.
2 2 Cox, 113; S. C 2 Bro. Chan. Cas. 430.
3 4 Ves. 620.
4 5 Ves. 794.

stock replaced, or the money produced by the sales, with interest at 5*l.* per cent. or more, if more had been made by it, and the costs occasioned by the executor's misconduct.[1] In *Mosley* v. *Ward*,[2] an executor in trust for infants, unnecessarily calling in the property, out upon good security at 5*l.* per cent. except a small part, keeping large balances in his hands, and using it as his own, was ordered by Lord Eldon to be charged with interest at 5*l.* per cent. and costs. In *Bick* v. *Motley*,[3] the Master found that two executors had, by signing joint cheques, enabled each other to receive sums belonging to the estate of their testatrix, when they were both largely indebted to that estate; and that the sums so received by them were debts proveable under their respective commissions, both executors having become bankrupt: Sir C. Pepys, M. R., said, that as, in respect of such sums, the executors had each committed a *devastavit*, each was chargeable, according to the uniform practice of the Court, with interest at 5*l.* per cent. upon the sums which he had enabled his co-executor to receive: And his Honor accordingly made an order, that interest at that rate should be added to the principal sums to be proved against the bankrupts' estates respectively.[4] In *Jones* v. *Foxall*,[5] and *Williams* v. *Powell*,[6] Romilly, M. R., stated the rule as established by the authorities, that if an executor has retained balances in his hands, which he ought to have invested, the Court will charge him with simple interest at 4*l.* per cent. on the balances; but if, in addition to such retention, he has committed a direct breach of trust, or been guilty of misconduct, he will be charged after the rate of 5*l.* per cent.[7]

But in the later case of *The Attorney-General* v. *Alford*,[8] Lord Cranworth, C., said he could not understand the principle on which the Court can proceed *in pœnam* to punish the executor for his misconduct by making him account for more interest than he has received: And his Lordship stated his opinion to be, that the Court ought, in the case of an executor who has money in his hands which he ought to invest and does not invest, to charge him only

1 See also *Bate* v. *Scales*, 12 Ves. 402.
2 11 Ves. 581.
3 2 M. & K. 312.
4 See also *Munch* v. *Cockerell*, 9 Sim. 391, 351; confirmed, as to charging the trustees with interest at 5*l.* per cent., by Lord Cottenham. 5 M. & Cr. 178, 220.
5 15 Beav. 388.
6 15 Beav. 461.
7 See also the rule stated by the same Judge in *Knott* v. *Cottee*, 16 Beav. 80.
8 4 De G. M. & G. 843, 851, 852.

with the interest which he has received, or which the Court is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive, that he is estopped from saying that he did not receive it: And the learned Judge added, that misconduct did not seem to him to warrant the conclusion that the executor did in point of fact receive, or is estopped from saying that he did not receive, the interest, or that he is to be charged with anything he did not receive, if it is not misconduct contributing to that particular result: And his Lordship proceeded to hold (varying a decree of Stuart, V.)[1] that an executor who, for several years, had retained funds in his hands uninvested, which he ought to have invested, was chargeable only with simple interest at 4*l.* per cent., there being no circumstances to lead to the conclusion that he had made any profit by his misconduct: If, indeed, it had appeared that he had improperly used the money for his own purposes, the Court would not enquire what had been the actual proceeds of his speculation, but would infer that he either did make 5*l.* per cent., or ought to be estopped from saying that he did not.

As a general rule, the Court decrees the computation of simple interest to be made.[2] But there are instances in which an executor has been charged with compound interest. Thus, in *Raphael* v. *Boehm*,[3] a legacy was given to the executor, with a declaration in the will that such a legacy should be in full for the trouble he might have in performing the duties of the will, and that he should not have any claim for commission, or derive any advantage from keeping in his possession any sums of money, without duly accounting for the legal interest thereof: The testator then disposed of the residue upon certain trusts for his children, and directed that a sufficient part of the interest of the portions should be applied to the maintenance, &c., of each child, and the surplus should be accumulated: The executor did not lay the money out as directed, but kept upwards of 30,000*l.* in his hands, and used it in his trade, so that there was a wilful violation of the will, which prohibited retainer and directed accumulation: And Lord Loughborough decreed, that an account should be taken from the moment

1 2 Sm. & G. 488.
2 *Robinson* v. *Cumming*, 2 Atk. 410.
3 11 Ves 92. 13 Ves. 407, 590.

of the testator's death, and interest be charged upon all the sums received, and rests to be made half-yearly upon the balance, including intermediate interest; so that double compound interest was given. The cause came on afterwards before Lord Eldon, upon exceptions to the Master's report, and though his Lordship did not approve of the decree, yet he agreed in the propriety of giving compound interest. So in *Knott* v. *Cottee*,[1] where there was an express trust for accumulation, Romilly, M. R., held that, though the circumstances were not such as to make it right to charge the executor with more than 4*l*. per cent. interest on moneys which he had improperly invested, yet it was a case for annual rests. And other instances, where, in executors' accounts, interest has been given with rests, will be found in the cases cited in the note below.[2] And it has been held by Romilly, M. R., on two late occasions,[3] that if an executor employs the assets in trade or speculation, for his own benefit, he shall be charged either with the profits actually so obtained by him for the use of the money, or with compound interest at 5*l*. per cent.

His Honor, however, observed, that the principle on which executors have been charged with compound interest has not been clearly defined, nor are the decided cases by any means free from obscurity or contradiction. The principle of some of them seems to have been, that the Court ought to visit the executor, as it were, with a penalty, when he has not merely misconducted himself, but has derived, or tried to derive, a profit for himself from the use of the money. And it has not unfrequently been said, that in order to make out a claim for compound interest, a very strong case of violation of duty is required.[4] But there has already been occasion to mention that, in the latest case on this subject,[5] Lord Cranworth repudiated the doctrine of *punishing* the executor, and maintained the principle, with respect to compound as well as simple interest, that the Court ought to charge him only with the interest which he has received, or which the Court is justly entitled to say he ought to have received, or to presume he did receive.

1 16 Beav. 77.
2 *Stackpool* v. *Stackpool*, 4 Dow. 209; *Willson* v. *Carmichael*, 2 Dow. & Clark, 58: *Walker* v. *Woodward*, 1 Russ. Chan. Ca 107. See also on this subject, *Binnington* v. *Harwood*, 1 Turn. & R. 481, and Lord Brougham's judgment in *Docker* v. *Somes*, 2 M & K. 655.
3 *Jones* v. *Foxall*, 15 Beav. 388; *Williams* v. *Powell*, *ibid.* 461.
4 See *Crackelt* v. *Bethune*, 1 Jac. & Walk. 586: *Tebbs* v. *Carpenter*, 1 Mad. 290.
5 *Attorney-General* v. *Alford*, 2 Sm. & G. 488.

It may here be observed, that a considerable difference of opinion has existed as to the effect of a direction to the Master "to make annual rests" in taking the account. In *Heighington* v. *Grant*,[1] Lord Langdale, M. R., after reviewing all the authorities, denied that a direction to ascertain balances, to compute interest on such balances, and "in taking the said accounts" to make annual rests, followed by a direction that the party shall be charged with interest, "after the rate and in the manner aforesaid upon such balances," could, without more, be considered as a direction to charge the defendant with compound interest, as so much principal received into the account of the following year: And his Lordship expressed his opinion that where compound interest is intended to be charged, a specific direction for that purpose should be given. But on appeal to Lord Cottenham, C., his Lordship, in an elaborate judgment, arrived at a different construction of the direction in question, and held that, under it, the interest computed on the balance due at the end of the first year was to form part of the balance due at the end of the second year, and upon which interest was then to be computed, and so on from year to year to the end of the account.[2]

It may be observed, that our Court, in cases of this description, usually adopts the legal rate of interest—six per cent.—and in this country we have not separate rates of interest applicable to different cases.[3]

In a suit against an executor for an account, it appeared that before the institution of the suit he had represented to the guardian of the infant plaintiff that the estate was indebted to him, as such executor, in £16; but in his answer to the amended bill admitted his indebtedness to the estate in the sum of £187 11s. 6d., while the Master reported the true amount to be £366 2s. 8d. The defendant had also stated in his answer to the original bill that he had received £519 4s. 5d., which sum, he alleged, he had received payment of in goods instead of money, in consequence of the debtor's embarrassments, and that he had not applied any part of this to his own use: while the fact, as afterwards discovered, was that the payment was nearly all in money, and that all received had been applied by the executor in his own use. The Court, under

1 5 M. & Cr. 258.
2 5 M. & Cr. 258.
3 Per Esten, V.C., in *Wiard* v. *Gable*, 8 Grant, 459.

the circumstances, charged the executor with costs of the suit, with interest on the balances from time to time in his hands, and directed the account to be taken with annual rests.[1]

It may here be mentioned that where the account is directed to be taken "with rests," the interest is to be compounded every year; sometimes, in very gross cases, the Court has ordered the "rest" to be made every six months—in such cases, the interest is, of course, doubly compounded.

Although the rule is that the executors or trustees will be charged with what they ought to have made, with what they actually did make, or with what they must be presumed to have made out of the moneys of the testator come to their hands; still where such moneys had, before the repeal of the usury laws, been invested in first-class security at the rate of six per cent. per annum, the Court, on appeal from the Master's report, considered the executors were not called on, at the risk of being charged with the extra amount of interest, to call in these moneys and re-invest the same at the rates which the evidence shewed moneys could be loaned at. It also appearing that part of the moneys of the estate had been loaned by the executors to themselves, they were charged with the higher rate of interest thereon.[2] The report in an administration suit found £1403 chargeable against an executor—of this sum, £1247 was for the price of land claimed and received by the executor, the testator's son, as heir and his claim to this had long been acquiesced in by the other parties interested till held otherwise in this suit, when this purchase money was declared to pass under the testator's will to the claimant and others as legatees. A sum of £133, the value of the testator's chattel property left by this executor in the hands of the testator's widow, and finally lost to the estate, made up the remainder of the sum charged to this executor, except a balance of about £34. Under the circumstances, the executor was allowed his costs as of an administration out of the estate, and was not charged with interest on the balance in his hands, which he was requested to pay into Court within a month after deducting therefrom his share of the estate as legatee.[3] The widow of an intestate married again, and

1 *Erskine* v. *Campbell*, 1 Grant, 570.
2 *Smith* v. *Roe*, 11 Grant, 311.
3 *Blain* v. *Terryberry*, 12 Grant, 221.

allowed her husband to use the moneys of the estate in her hands: *Held*, on appeal from the report of the Master that she was liable to pay interest at six per cent., and no more.[1]

The estate of a trustee who had retained money in his hands for six years after he should have paid it over, and had rendered an account claiming a balance in his favor, was held chargeable with interest at six per cent., with annual rests.[2]

At and before making a voluntary settlement of real estate, the settlor stipulated verbally with the trustee that the settlor's son should receive all moneys receivable under it, and should accumulate and dispose of the same by investment or otherwise, and that the trustee himself should have no trouble or concern in the matter. The son accordingly received the rents for several years, and, without the knowledge of the trustee, misappropriated them. *Held*, that the trustee was not liable to make good the loss.[3]

An executor or trustee who has been guilty of negligence merely in omitting to invest moneys, will be charged with interest at six per cent.[4] Where an executor had committed a breach of trust in selling lands to pay debts, for which the personal estate come to his hands had proved more than sufficient, and had also applied trust moneys to his own use, the Court ordered the account to be taken against him with annual rests.[5] Although, in this case, the account was taken with rests by the order of the Court, on further directions the Master had full power to do it under the decree without any special directions, and would probably have done so had he been desired. Although the Court will order executors or trustees to make good moneys lost by neglect or default, it will not also charge them with interest on these sums.[6] *Per* Spragge, V. C.: "At the hearing of the cause on further directions, I disposed of the case with the exception of one point—the decree directed the defendants to be charged with the amount of certain rents which, but for their wilful neglect or default, they might have received; and Mr. Becher, for the plaintiff, asked, on further

1 *Fielder* v. *O'Hara*, 14 Grant, 223.
2 *Small* v. *Eccles*, 12 Grant, 37.
3 *Mitchell* v. *Richey*, 12 Grant, 88.
4 *Wiard* v. *Gable*, 8 Grant, 458; and see *McLennan* v. *Heward*, 9 Grant, 178.
5 *Wiard* v. *Gable*, *ubi sup.*
6 *Vanston* v. *Thompson*, 10 Grant, 542. But see *Sovereign* v. *Sovereign*, 15 Grant, 559, where it was held that executors and trustees may be charged with interest as well as principal in respect of sums lost through their misconduct, though the principal never reached their hands.

directions, that they should be charged with interest upon these amounts. I stated my impression to be against the claim, and Mr. Becher was to furnish authorities, if he could find any, in support of his position. None have been furnished to me. The authorities that I have seen are the other way. *Lawson* v. *Copeland*[1] and *Tebbs* v. *Carpenter*[2] were both, like this, cases where executors were charged with the amount of rests which, but for their wilful neglect and default, they might have received; and in each case interest on the amount was asked for and refused by the Court. The general rule seems to be, that the Court contents itself with charging trustees with the principal only of what they might have received, but have not received; and does not, in addition, charge them with interest." Where an executor had retained money in his hands unemployed, for which, on passing his accounts, he was charged with interest and rests—held, notwithstanding that having reference to the condition of the estate and of the facts of the case, he should be allowed his commission and costs of the suit.[3] In taking the accounts in the Master's office, it is improper to charge a mortgagee in possession with annual rests on rents received by him, until he is paid off in full.[4]

Where, in taking an account upon a mortgage, the Master had taken the same against the mortgagee with rests, and on an appeal from the Master's report it appeared that, at the date of the mortgage, a balance was due by the mortgagee to the mortgagor, and the mortgagee went into possession of the property, part of the arrangement being that he should apply the rests, &c., to the paying off of two prior mortgages, but it was not known that they were due at the time of the moneys being received, so that the holder of the incumbrances could have been compelled to accept payment, the Court, if desired by the mortgagee, ordered a reference back to the Master to ascertain this fact.[5] Where it appeared that an agent had received large sums of money for his principal, and had used it for many years in his own business, instead of remitting it as he might and should have done, to his principal, he was charged with six per cent. interest and annual rests.[6]

1 2 B. C. C. 159.
2 1 Mad. 290.
3 *Gould* v. *Burritt*, 11 Grant, 523.
4 *Coldwell* v. *Hall*, 9 Grant. 110.
5 *Williams* v. *Harris*, 10 Grant, 553.
6 *Landman* v. *Crooks*, 4 Grant, 353.

23. *Rests Against a Mortgagee in Possession.*

The usual[1] mode of taking accounts against the mortgagee in possession, is to set the total amount of rents and profits received by, or found to be chargeable to, him against the whole amount due upon the mortgage debt—*viz.*, in discharge successively of the interest of the mortgage debt, and of money advanced for costs and improvements, and then of the principal of the same moneys:[2] but in certain cases in accounts of real estate,[3] where the receipts of the mortgagee[4] are more than sufficient to cover the interest, the annual surplus will be considered as applicable in reduction of the principal money, which is called taking the accounts *with rests.*

It is not, of course, to direct rests against the mortgagee in possession,[5] and although the facts that the interest has not been in arrear, and that the rents and profits have exceeded the interest, are reasons for directing them to be made, they will not be directed on account of every trifling excess of interest.[6] On the other hand, rests are not usually directed, where the interest was in arrear at the time of taking possession,[7] and the liability to this mode of account does not, without special reason, attach to a mortgagee who has taken possession when an arrear of interest was due, after that arrear has been paid off.[8] As, where for ten years the mortgagee's receipts were less than his payments, but exceeded them during the rest of his possession, though not to an amount sufficient to discharge the mortgage debt; and the Court refused to order rest against him.[9] Because rests are not directed from a particular period of the account, when the arrear of interest only is discharged.[10] But from the time of payment of the principal they will be directed from a particular period.[11]

Nor is the fact that an arrear of interest is or is not due at the time of taking possession, altogether decisive upon the question of rests, but the general right of a mortgagee not to be paid piece-

1 Pow. Mort. 958 a, ed. 6.
2 *Webb* v. *Rorke*, 2 Sch. & Lef. 661.
3 *Robinson* v. *Cumming*, 2 Atk. 410.
4 *Thorneycroft* v. *Crockett*, 2 H. of L. C. 239.
5 *Davis* v. *May*, Coop. 238; 19 Ves. 382; *Donovan* v. *Fricker*, Jac. 165.
6 *Shephard* v. *Elliot*, 4 Mad. 254: *Gould* v. *Tancred*, 2 Atk. 533.
7 *Wilson* v. *Cluer*, 3 Beav. 136.
8 *Finch* v. *Brown*, 3 Beav. 70.
9 *Latter* v. *Dashwood*, 6 Sim. 462.
10 *Davis* v. *May*, Coop. 238; 19 Ves. 382.
11 *Wilson* v. *Metcalfe*, 1 Russ. 530; *Wilson* v. *Cluer*, 3 Beav. 136.

meal, as well as the circumstances of the particular case, will be considered.[1] So that if the mortgagee have been driven by the acts of others to take possession, have been harrassed by litigation, and thereby put to costs (even though the costs have afterwards been adjudged to be paid him by his opponent), and his own conduct have been free from harshness or vexation, rests will not be directed against him, though as to other circumstances he might be within the general rule.

Where, however, the mortgagee has taken possession, under circumstances which do not subject him to annual rests, and there is afterwards a settled account, by which it appears that no interest is due, or that if any be in fact due, it has been satisfied as interest by being turned into principal, and the mortgagee continues in receipt of rents more than sufficient to satisfy the interest of such principal, the settlement is considered as a rest made by the parties: and the mortgagee will thenceforth be treated as a mortgagee who takes possession, with no interest in arrear, and will be subject[2] to annual rests.[3] Where the mortgagee takes possession after bills have been indorsed to him for the arrears of interest, which bills become due and are dishonored after possession taken, the interest is considered to be in arrear at the time of taking possession, and no rests will be made.[4]

The mortgagee in occupation is as much within the principle upon which rests are directed as he who merely receives the rents and profits, and the Court can accordingly direct rests to be made[5] in taking accounts of occupation rents.

Where an incumbrancer denies his character as such, and sets up an adverse title, he will not be suffered to turn round, being de-

1 *Horlock* v. *Smith*, 1 Coll. 287; *Gould* v. *Tancred*, 2 Atk. 534; and see *ibid*, 411.
2 *Wilson* v. *Cluer*, 3 Beav. 136.
3 *Direction to make Rests.*—"Take an account of what shall be coming due on account of rents and profits, to be applied in the first place in payment of interest and principal, and make annual rests; and in taking such account make all just allowances." *Yates* v. *Humbly*, 1 Mad. 14. But the following is more strict:—"Take an account, &c.; and in taking the said account, make annual rests of the clear balance, and compute interest on such respective balances at 5*l*. per cent.; and in making such annual rests, except the first, include in the balance then stated the interest of each preceding balance, so as to charge the defendant with compound interest thereon." *Cotham* v *West*, Rolls, 15th November, 1836, R. L.
4 *Dobson* v. *Land*, 4 De G. & S. 575.
5 *Wilson* v. *Metcalfe*, 1 Russ. 530 Make annual rests in the account of the rents received by, and on the occupat on rent accrued due from, the late A. N. in her lifetime; and also on the rents received by, and occupation rent accrued due from, the said defendants, or any of them, since the death of A. N.; and compute interest after the rate of 4*l*. per cent. upon such rents and occupation rents respectively. *Ibid.*

feated, and claim all the benefits attached to the character of a fair creditor; but rests will be directed[1] against such an incumbrancer, where in an ordinary case none would have been directed according to the general principles of the Court.

Annual rests cannot be made in taking the accounts, unless they be directed by the decree.[2]

And the Court will not at first give the direction unless it can be founded upon something in the bill, such as a suggestion that the rents and profits exceeded the interest; or unless some case be made for keeping the question open for future determination.[3] But if, at a later stage of the cause, it appear as the result of enquiries already directed, that the mortgage debt was paid off during the mortgagee's possession by means of the rents and profits, rests will be directed[4] from that time, though no foundation were laid for them, or direction given by a previous order. And this may be done where, pending the proceedings under the decree, and prior to the report or certificate, the mortgagee for the first time becomes overpaid by the receipt of rents, though he will not be charged[6] with interest on the surplus received prior to the date of the report, but will be charged with the sums subsequently received, with interest thereon at four pounds per cent. from the times when they were received.

A false statement by the mortgagee, in his answer, that the mortgage remains unsatisfied, will also be a reason for a subsequent direction to make rests.[6]

And if rests have been directed in a redemption suit, which is afterwards abandoned, and a foreclosure suit commenced by the mortgagee, the accounts will be taken in the new suit on the footing of the former decree, up to the date thereof, and therefore with rests; though there be no evidence in the new suit to warrant a decree with rests.[7]

1 *Incorporated Society* v. *Richards*, 1 Dru. & War. 258, 290.
2 *Gould* v. *Tancred*, 2 At. 533; *Webber* v. *Hunt*, 1 Mad. 13; *Fowler* v. *Wightwick*, cited there; *Donovan* v. *Fricker*, Jac 165. But see our Order 220.
3 *Neesom* v *Clarkson*, 4 Hare, 97.
4 *Wilson* v. *Metcalfe*, 1 Russ. 530.
5 *Lloyd* v. *Jones*, 12 Sim. 490.
6 *Montgomery* v. *Calland*, 14 Sim. 79. In *Quarrell* v. *Beckford*, 1 Mad. 269, simple interest only was asked for and given.
7 *Morris* v. *Islip*, 20 Beav. 654.

It has been said, that the sums which a mortgagee in possession receives in respect of the mortgaged premises, at times between the dates of the annual rests, must be applied, when they exceed the interest, to sink the principal.[1] But this intimation was founded upon the usury laws, since the repeal of which[2] it is presumed that no such rests will be made unless for particular reasons they are specially directed.

Where the direction is to ascertain the balances in the hands of an accounting party, at the end of each year, and to compute interest thereon, at the end of each year, the terms of the decree will be satisfied[3] by calculating interest upon each balance of principal, for the year following that in which such balance is ascertained, and charging the party with the aggregate of the sums of interest, in addition to the ultimate balance of principal. But if the decree also direct annual rests, and that the party be charged with interest on the balances, at the rate and in the manner directed in respect of the former computation of interest, the interest calculated on the original balances, instead of being carried to a separate account, and added together to form the ultimate balance, must be added[4] from time to time to the balance of principal found due, and the future interest must be calculated on such joint balances of principal and interest.[5]

And if the decree direct,[6] that when and as often as the rents and profits exceed the interest of the mortgage debt, they are to be applied in reduction of the principal, the sums received by the mortgagee between the dates of the annual rests, calculated from the date of the mortgage deed, are to be applied whenever they exceed the interest, in reduction of the principal; and the rests will thenceforth be calculated from the time of such excess.

The estate of a bankrupt executor has been charged with the amount of rests, notwithstanding the bankruptcy.[7]

1 *Binnington* v. *Harwood*, T. & R. 477.
2 17 & 18 Vic. c. 90.
3 *Heighington* v. *Grant*, 5 Myl. & C 258.
4 *Heighington* v. *Grant*, 5 Myl. & C. 258; *Raphael* v. *Boehm*, 11 Ves. 92.
5 See *Yates* v. *Hambly*, 1 Mad. 14; *Cotham* v. *West*, Rolls, 15 Nov. 1836, R L.
6 *Bennington* v. *Harwood*, T. & R. 477.
7 *Dornford* v. *Dornford*, 12 Ves. 127.

Half-yearly rents have been directed against an executor, but the course was strongly disapproved.[1]

Besides the evidence of vouchers, the accounting party is frequently obliged to give *viva voce* evidence. The rules as to this are precisely the same as at the examination before a Judge in examination term. The Master takes the depositions in writing, and makes the witness refer to the items of the account as to which he is speaking by their numbers, thus: "As to No. 1 of plaintiff's account marked A. I was his clerk in 1860, and saw him pay this sum to A. B.," &c., &c.

"As to No. 2, I recollect," &c., &c. This mode of taking the evidence facilitates references to the depositions when the Master comes to settle the report.

24. *Proceedings on Surcharge.*

After the accounting party has given all the evidence he desires on his account, the Master requires the opposite party to say whether or not he desires to surcharge. Any party interested may do this. If it be desired, the Master appoints a time at which the surcharge is to be brought in. Order 237 provides that "A party seeking to charge an accounting party beyond what he has in his account admitted to have received, is to give notice thereof to the accounting party, stating, so far as he is able, the amount so sought to be charged, and the particulars thereof in a short and succinct manner."

At the time appointed the parties attend, and if the opposite party does not desire time to examine it for the purpose of ascertaining whether or not it be prepared in accordance with the Master's directions (if there be anything special in them) and the practice, the Master appoints a time to proceed on it. But if time to consider it be desired, the Master appoints a time to hear any objections which may be offered. In the meantime the opposite party usually bespeaks a copy of the surcharge from the Master. At the time fixed to hear objections, the Master decides upon any that may be made, and if the surcharge be defective he requires it

1 *Raphael* v. *Boehm*, 11 Ves. 111.

to be corrected, and makes such order as to costs as to him may seem reasonable. If no objections be made, or when the surcharge is forfeited, he appoints a time "to proceed" on it. This proceeding is precisely similar to proceeding on an account—the same description of evidence is used—the Master enters in his book the items, and marks them as he does in the case of an account, with this exception, that no warrant to query is usually issued, though in a proper case this may be done.

The Master, having received all the evidence on the surcharge, then proceeds to "Hear and determine," or "Settle the report"—for these phrases are synonymous. He begins with the account, and item by item, after examining and discussing the evidence in support of each, allows or disallows it, marking it accordingly. He proceeds with the surcharge in the same way, and having done this the result is a matter of mere addition and subtraction.

Order 247 directs that "As soon as the hearing of any matter pending before the master is completed, he shall so inform the parties to the reference then in attendance, and make a note to that effect in his book; and after such entry no further evidence is to be received, or proceedings had, without the special permission of the Master; and the Master may proceed to prepare his report or certificate without further warrant, except the warrant to settle, which is to be served on the parties as the Master directs."

In a creditor's suit, a witness was examined by the plaintiff with the view of disallowing the claim of an alleged creditor after the evidence had been closed, the plaintiff moved the Court (on affidavit stating that he had since learned that the witness could have deposed that the alleged creditor had admitted a settlement of his claim) for leave to re-examine the witness, but the motion was refused with costs.[1]

The Master has power at any time before the report is actually signed and given out, to open the case on a proper application by either party: and he is not bound to require the application to be made on affidavit, though in special cases that is the better course. The warrant to settle is seldom served. This is done only in cases

1 *Patterson* v. *Scott*, 1 Grant, 582.

where a lengthy reference in which the solicitors or parties interested have not kept themselves acquainted with all the steps in the Master's office, from not being directly interested in the later proceedings. Where the parties are all present when the hearing is closed, it is usual for the Master to make a direction fixing a time to settte the report, and this direction made in the presence of the parties is equivalent to the *service of a warrant.*

At the time appointed, the Master goes over each enquiry directed by the decree, and enters in his book, briefly, his finding as to it. These entries form the groundwork of the report. After having determined upon the finding which he is to make to each enquiry (this being done after discussion with the solicitors), and ascertaining the precise totals of the sums to be allowed on the account and surcharge, he appoints a time to settle the draft of the report. He prepares the draft in the meantime, and at the time appointed reads it to the parties in attendance—marking, as he sees fit, such alterations as may be suggested. This being done, he signs the draft, and, in important cases, makes a final appointment to sign the engrossment. In ordinary cases, this appointment is dispensed with, but the report, in strictness, shall bear date on the day of the engrossment being actually signed. If an appointment "to sign" be made, the parties attend at the time named, he signs the engrossment, and gives it to the party conducting the reference, or, if desired, any party interested may take a duplicate and file it. Upon this, the Master becomes, as to it, *functus offic o.* Evidence must not be received by the master after he has settled his report.[1] But, as before remarked, the Master has power at any time before the report is actually given out to entertain an application for leave to give further evidence, which he may grant or refuse in his discretion.

The Master's report had been confirmed; the cause came on for further directions, when the Court, from the facts stated in the report, entertaining great doubt as to the correctness of the Master's finding, declined to act on it, though it refused then to alter it.[2] The Court must give credit to what the Master reports as occurring in his presence.[3] Pending an enquiry before the Mas-

1 *Thompson* v. *Lambe*, 7 Ves. 587.
2 *Gregory* v. *West*, 2 Beav. 542.
3 *Walmsley* v. *Walmsley*, 3 J. & L. 556.

ter, the Court will not interfere with his conduct. The dissatisfied party must wait until the report is made, and then appeal from it before it is confirmed.[1] The Master's report speaks from its date.[2]

A local Master, in making his report, is not at liberty to date it until the costs taxed by himself have been finally revised and settled by the Master in Ordinary under the General Orders.[3]

25. *Master's Report.*

A report is 'a Master's certificate to the Court, how the facts or matters referred to him are or do, upon examination, appear to him, or of something of which it is his duty to inform the Court.'[4]

Formerly there appears to have been an opinion prevalent in the profession, that there was a difference between a report and a certificate. In *Jones* v. *Powell*, [5] Sir A. Hart, V. C., said, that the difference between a report and a certificate was, that, with respect to the former, the Court had laid it down as an inflexible rule, that before exceptions could be taken to it, objections must be carried in before the Master; but that there was no such rule with respect to the latter. In *Chennel* v. *Martin*,[6] however, the present Vice Chancellor, Sir L. Shadwell, after a very careful investigation of the subject, came to a different conclusion, and expressed his opinion to be that there is no distinction between a Master's report, and a Master's certificate, and that Master's reports and Master's certificates are convertible terms. But, be this as it may, the dispute is merely one respecting terms; for, that there is a practical distinction between some reports or certificates of Masters and others, with regard to the power of taking exceptions to them, without previous objections having been carried in, is undubitable; and the terms 'Master's certificate,' and 'Master's report' appeared to have been opposed to each other for the purpose of marking the distinction; 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 decretal order upon which it is intended to ground a further decree, and whilst

1 *Maddeford* v. *Austwick*, 11 Sim. 209.
2 *Jennings* v. *Elster*, 1 M. & K. 440.
3 *Waddell* v. *McColl*, 14 Grant, 211.
4 Prac. Reg. 377.
5 1 Sim. 387.
6 4 Sim. 340.

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 decretal order.[1]

On the present occasion, observations will be directed to the reports or certificates made by Masters upon which further decrees or decretal orders are to be founded, and which for the purpose of distinguishing them from reports or certificates of the other description, will be termed 'reports.'

Master's reports are either *general or separate*. General reports embrace the whole matter referred to the Master by a particular decree or order; but a separate report embraces only one distinct object of the reference.

Separate reports are made in cases in which it may be inconvenient to the parties to wait till the general report for the opinion of the Master, upon a particular matter before him under the decree. By the old practice of the Court, a separate report could not be made without a special direction in the decree, or special order made upon motion or petition for that purpose, which, however, was granted for asking, at the expense of the party applying;[2] but, by Lord Lynhurst's Orders,[3] it is provided, that in all matters referred to him, the Master shall be at liberty, upon the application of any party interested, to make a separate report or reports, from time to time, as to him shall seem expedient; the costs of such separate reports to be in the discretion of the Court.

The party desirous of obtaining a separate report, must take out a warrant to shew cause why a warrant on preparing a draft of such separate report should not be issued, and, if the Master concurs in

1 It is to be observed, that, in most of the cases in which a Master is required to certify, it is necessary for him to exercise some degree of judgment or discretion; in such cases the certificate is liable to exception, for the purpose of taking the opinion of the Court as to the correctness of the judgment exercised by the Master; there are, however, other cases in which the Master is required to make a certificate, which do not call for the exercise of any judgment, as in the case of certificates to the Court of the proceedings in his office, of the same nature is a certificate of the fact of documents not having been deposited pursuant to an order, which, according to the recent decision of Lord Langdale, in *Kemp* v. *Wade*, 2 Keen, 687 (confirming that of Sir A. Hart, V.C., in *Jones* v. *Powell*, 1 Sim. 387), is a certificate which does not admit of exception. In fact, certificates of this description are of the same nature as the certificates of any other officer of the Court, who certifies as to a mere matter of fact belonging to his department, such as the certificate of the clerk in Court, of documents not having been deposited with him, pursuant to an order of the Court, which certificate, if wrong in point of fact, must be quashed, upon motion, and not excepted to.

2 2 Harr. ed. Newl. 478.

3 Order 1828, LXX.

his view of the subject, the warrant issues and the separate report is prepared accordingly.[1] If no cause is shewn upon the return of this warrant, a warrant to prepare the report must be issued and served, after which no further evidence can be received as to the matter to be comprised in the separate report.

The form, manner of preparing, objecting, appealing from,[2] and confirming separate reports, are nearly the same as upon general reports, the only difference being, that, when it is intended to act upon them, the cause is not set down for hearing upon further directions, as it is upon a general report, but the Court is moved for such directions as arise out of the separate report.

By one of Lord Coventry's Orders, after stating 'that the Masters of the Court do sometimes, by way of inducement, fill a leaf or two of the beginning of their reports, and sometimes more, with a long and particular recital of the several points of the order of reference,' it is ordered, 'that they shall forbear such iterations, the same appearing sufficiently in the order, and without any other repetition than this, "according to an order, or by the direction of an order, of such a date," shall fall directly into the subject matter of their report, setting down the same clearly, but as briefly as they can, for the ease both of the Court and parties.'[3] This order, however, so far at least, as restricts the recitals of the points of the order, in the commencement of the decree, is generally observed; but it is the practice of the Masters, in their reports, to specify the particular head of each direction contained in the order separately, and then to dispose such direction before he proceeds to report upon another. This method of preparing reports is most useful, since it keeps all the separate subjects of reference distinct from each other, and enables the Master to give his conclusions upon each in a clear and distinct form. And it is to be remarked, that 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;[4] and, where a separate report has been made, it will be

1 2 Smith, 158.
2 Where a party to a suit objects to a separate report, he must except to it in the usual manner, and cannot proceed by petition, *Drever* v. *Maudesley*, 7 Sim. 240.
3 Beames's Ord. 81.
4 Bennett, 18.

necessary to allude to it in the general report, specifying the particulars of it, so that the Court may see that all the inquires of directed by the decree, have been, in some way or other, disposed of by the Master.[1]

The Master, however, must not go beyond the matters referred to him, and it is laid down, in one of Lord Bacon's Orders,[2] that if a Master reports as to matter which is not referred to him, his report, so far as relates to that matter, is a nullity. It has been decided that, in such a case, the proper course is, not to except to the Master's report, but, before it is confirmed, to apply to the Court, that it may be referred back to the Master to review his report, but that, if no such application is made, and the report should be confirmed, the Court will pay no attention to it, except so far as it is warranted by the decree.[3]

It may be stated, with reference to this part of the subject, that no exceptions will lie to a Master's report, upon the ground that he has introduced irrelevant matter, and that, where exceptions were taken, because a Master had set forth in his report certain parts of an affidavit, and had annexed to his report certain schedules and inventories, which it was insisted upon were irrelevent, and occasioned great and unnecessary expense, the Master of the Rolls, Sir J. Leach, would not permit the exceptions to be argued.[4]

Generally speaking, it is the duty of the Master to meet all the difficulties that may arise in the discharge of this office. In some way or other, he must so provide as that all the accounts and inquiries, directed by the decree, shall be fully taken;[5] at least it is the Master's duty to go on with them, until he finds a difficulty arising from want of sufficient powers, and then an application must be made to the Court, either by the Master or by the parties, to do that which is necessary in order to supply the defect of his authority.[6] A motion, however, cannot be made for the purpose of getting the Court to point out to the Master the form in which he is to make his report.[7]

1 Bennett, 18.
2 Beames's Ord. 23.
3 *Jenkins* v. *Briant*, 6 Sim. 605.
4 *Rufford* v *Bishop*, 5 Russ. 347.
5 See *Paynter* v. *Houston*, 3 Mer. 302.
6 *Ibid.*
7 *Agar* v. *Gurney*, 2 Mad. 389.

When the Master is directed to ascertain a fact, he must not content himself with stating the circumstances and leaving the Court to draw its own conclusion, but he must draw the conclusion himself; thus, where it was referred to the Master to report whether a particular individual was living or dead, and the Master stated the circumstances, viz: that the individual went to America; that, upon his arrival there, a letter was received from him, and that, since that period, which was fourteen years before the date of the report, he had not been heard of, Lord Eldon, acting upon what he understood to have been Lord Alvanley's course, sent it back to the Master to report whether the individual was dead or not.[1] It may be mentioned here, that, 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 one way or the other, the Master is bound to find in favor of such presumption.[2] The Master, however, is not bound 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 upon the facts so reported; and it would not be a proper ground of exception, that the Master had omitted to point out the consequence.[3]

It is not, indeed, the general practice, unless in particular cases, for the Master, upon references to inquire into facts, to state the special circumstances of the case in his report, without he is expressly directed to do so. By Lord Clarendon's Orders,[4] the Masters are not, upon the importunity of counsel, how eminent soever, or their clients, to return special certificates, unless they are required by the Court to do so, or that their own judgment, in respect of difficulty, leadeth them to it, such kind of certificates, for the most part, occasioning a needless trouble rather than ease to the Court, and certain expense to the suitor. It is to be observed, however, that, under this order, considerable discretion is left to the Master, and that, notwithstanding it, he may, and frequently does, state special circumstances in his report, without any specific order to warrant it.[5] It is, nevertheless, frequently the practice, where it is apprehended that particular circumstances may come out upon

1 *Lee* v. *Willock*, 6 Ves. 605; see also *Dixon* v. *Dixon*, 3 Bro. C. C. ed. Belt, 510.
2 See *Fenner* v. *Agutter*, 1 M. & K. 120.
3 Per Sir C. C. Pepys, M.R., *Bick* v. *Motly*, 2 M. & K. 312.
4 Beames's Ord.
5 See *Anon.* 2 Atk. 620: *Champernowne* v. *Scott*, 4 Mad. 209.

inquiries before the Master, which may influence the opinion of the Court, when the cause comes on upon further directions, to ask, at the hearing, for a specific direction in the decree or order, that the Master may be at liberty to state special circumstances.[1] Under such a direction, however, the Master must not set forth the evidence with his opinion upon it, but he should state the matter of fact, for the judgment of the Court, in the same manner as in Courts of Law; they only state the facts allowed by both sides, in a special verdict, but never meddle with any part of the evidence on either side.[2]

But although the Master does not, unless under special circumstances, 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. When he reports upon accounts, he generally states the result of the accounts in the body of the report, and refers to schedules as to particular items. These schedules must be annexed to the report and filed with it, and it will not be sufficient that they should be entered in a book kept in the Master's office, in the same manner as the accounts of receivers.[3]

This was the English practice, but the rule is modified by our order 249, which provides that, "In the Master's reports no part of any account, charge, affidavit, deposition, examination, or answer brought in or used in the Master's office is to be stated or recited, but instead thereof the same may be referred to by date or otherwise, so as to inform the Court as to the paper or document so brought in or used."

It must clearly appear that the Master reports on the question referred to him. No inference will be drawn from the mode in which the account is taken.[4] The Master's report is *prima facie* evidence of what it contains unless appealed from. No motion founded on such reports can be entertained while the appeal is unheard. But *quære* in regard to such matters as do not enter into the appeal.[5]

Where the costs of certain proceedings were allowed by the Master against the estate of a deceased person not a party to the

1 Seton on Decrees, 24.
2 *Duchess of Marlborough* v. *Wheat*, 1 Atk. 454.
3 *Smith* v. *Smith*, 2 Dick. 789.
4 *Edwards* v. *Burling*, 2 Cham. R. 48.
5 *Nichols* v. *Macdonald*, 6 Grant, 594.

suit at any time, without showing why they were allowed, the Court, at the hearing on further directions, notwithstanding the report had not been appealed from, refused to carry out that portion of the Master's finding, and directed the question to be spoken to and additional information furnished to the Court,[1] where it appeared by the will of a testator that the legacies left by it were payable with interest and the order in which they were payable. It is not necessary for the Master to state those facts in his report, but he should state whether any payments have been made on account of them,[2] where in a suit against executors a decree was made referring it to the Master to administer the estate, the Master is not required to take any account of such portions of the estate as are left to trustees to be administered.[3]

Although the Master gives out the report to the party conducting the reference, Order 254 provides that "Any party affected by it may file the same, or a duplicate thereof, and the filing of a duplicate shall have the same effect as the filing of the report."

It sometimes occurs that the party having the carriage of the decree, and conducting the reference, and who is therefore entitled to the report, declines to take it. In such a case Order 251 provides that "As soon as the Master's report or certificate is prepared, it is to be delivered out to the party prosecuting the reference, or in case he declines to take the same, then, in the discretion of the Master, to any other party applying therefor, and a common attendance is to be allowed to the party taking the same."

The practice in England required a three day warrant to sign the report, but we have no such rule, the Master may appoint any time—the same day, if he chooses, on which the report is settled—if a warrant be taken out, it, like all other warrants, except the warrant "to consider," requires two clear day's service.

There are some special rules to be observed by the Master in framing his report, which it may be well to notice here. Order 250 provides that "Reports affecting money in Court, or to be paid in Court, are to set forth in figures, in a schedule, a brief summary of

1 *Taylor* v. *Craven*, 10 Grant, 488.
2 *Clouster* v. *McLean*, 10 Grant, 576.
3 *Ibid.*

the sums found by the report, and which may be paid or payable into or out of Court," and Order 255 that "Where the Master is directed to appoint money to be paid at some time and place, he is to appoint the same to be paid into some Bank at its head office, or at some branch or agency office of such Bank, to the joint credit or the party to whom the same is made payable, and of the Registrar of the Court; the party to whom the same is made payable to name the Bank into which he desires the same to be paid, and the Master to name the place for such payment." Order 256 provides that "Where money is paid into a Bank, in pursuance of such appointment, the party paying may pay the same either to the credit of the party to whom the same is made payable, or to the joint credit of the party and the Registrar; and if the same be paid to the sole credit of the party, such party shall be entitled to receive the same without the order of the Court." And Order 257 that "Where default is made in the payment of money appointed to be paid into a Bank, the certificate of the Cashier, Manager, or Agent of the Bank, where the same is made payable, or of the like Bank officer, shall be sufficient evidence of default. Where the affidavit of the party entitled to receive the same is by the present practice required, the same shall still be necessary."

Order 313 provides that "No sum is to be inserted in the report of a local Master as taxed and allowed for costs, until revision by the taxing officer, as provided for by Orders 311 and 312; but in a case of urgency, a writ of execution may issue to levy debt or costs, or both upon the order of a judge, subject to the future revision by the taxing officer." Order 310 that "No bill of costs, where the amount claimed exceeds thirty dollars, is hereafter to be taxed by the Accountant, Registrar, or Judge's Secretary, but every bill exceeding that sum is to be taxed by the taxing officer, notwithstanding anything to the contrary contained in the Order."

Order 317 provides that "Where in a suit for administration, or partition or partition and sale, the Master finds that the costs amount to 25 per cent. of the value of the property involved in the suit, he is to certify to the Court the amount of the costs, and the special circumstances, if any, connected therewith."

Reports on sale are special, and will be noticed when sales under the decree of the Court are considered.

It may here be mentioned that order 239 provides that, "Upon the application of any person the Master is to certify, as shortly as he conveniently can, the several proceedings had in his office in any cause or matter, and the dates thereof.

Solicitors should be careful to bear in mind the effect of Order 248, which provides that, "Parties are to raise before the Master in respect of any matter presented in his office, for his decision, all points which may afterwards be raised upon appeal; and in case an appeal is allowed on any ground, not distinctly taken before the Master, the Court may order the appellant to pay the costs of the appeal."

Where an appeal from the report of the Master in a foreclosure suit failed on the main point, and succeeded only in respect of a small sum, the Court gave the respondents the costs of the appeal.[1]

26. *Separate Reports.*

The Master has power to make a separate report without a special direction in the decree; and such reports are subject to the same rules as general reports.[2]

27. *Correcting errors in Report.*

The Master in making a subsequent report, is not at liberty to correct an error in his previous report, and if the objection (that he has made such correction) be apparent on the face of the report, the objecting party is not driven to appeal.[3] A clerical error in a report, whereby the time for payment of mortgage money was materially shortened, was allowed to be amended on an *ex parte* application of the plaintiff[4] when a bill has been taken *pro confesso* against the defendant on a sale decree, and no subsequent incumbrances proved, after the final order had been made, and the advertisement of sale published, it was discovered that the Master had omitted to include in his report two items of interest amounting to a large sum, as set forth in the plaintiff's affidavit of claim, the error appearing on the face of the paper filed. —On an affidavit stating these facts, and on production of the papers

1 *Brownlee* v. *Cunningham*, 13 Grant, 586.
2 *Drever* v. *Maudesley*, 7 Sim. 240.
3 *Crooks* v. *Street*, 1 Cham. R. 78.
4 *White* v. *Courtney*, 1 Cham. R. 11.

from the Master's office, *Esten V. C. held,* that there was no necessity for appointing a new day for payment, and made an order referring it back to the Master to take a fresh account of the plaintiff's claim to amend his report, and leave was given to fix a new upset price, and to postpone the sale if necessary.[1] Upon an appeal from the Master's report, although it would have been more satisfactory to the Court, and also in accordance with the practice, to have referred the case back to the Master, or directed re-argument of the case, the Court, considering the great delay and expense to which the parties had been already subjected, undertook the settlement of the account, and made an order varying the finding of the Master to suit the true state of the accounts between the parties, so far as the evidence would enable them to do.[2] Where the correction to be made in the Master's finding is simple, a reference back to him for that purpose need not be directed, the necessary alteration can be made by the order drawn up upon the appeal.[3]

An order to correct a clerical error in a Master's Report will be granted *ex parte.*[4]

The Master before whom the accounts had been taken, after finding that the amount due to the plaintiff was $476.62, stated that the same was equal to £109. 3*s.* 1*d.* instead of £119. 3*s.* 1*d.*, and directed payment by the defendant of the smaller sum, and Taylor moved *ex parte* for an order to correct the report, citing *White* v. *Courtney* 2 Chamb. Rep. 11. VanKoughnet, C.—You may take the order correcting the error.

A similar order to correct a clerical error in a Master's report was granted *ex parte* by his Lordship, in 27th of October, 1864, in *Heward* v. *Elliot.* The Court will at almost any stage of a cause make a special order for the correction of slips in a Master's report.[5]

In *Simpson* v. *Ottawa*[6] it was held by V. C. Mowat that a motion to correct a clerical error in a report should be on notice unless on consent of all parties.

1 *Bessy* v. *Graham,* 9 U. C. L. J. 82.
2 *Saunders* v. *Christie,* 7 Grant, 149.
3 *Teeter* v. *St. John,* 10 Grant, 85.
4 *Watson* v. *Moore,* 1 Cham. R. 266.
5 *Morley* v. *Matthews,* 12 Grant, 453.
6 2 Cham. R. 12.

In a foreclosure suit a judgment creditor proved in the Master's office £30 too much as his claim. The Mortgagor did not appear in the Master's office, and some months after, this defendant, the judgment creditor, had been paid in full, the mortgagor discovered the mistake. An application was then made to have the amount overpaid refunded. It was contended that the report, so far as the claim of the judgment creditor was concerned, must be considered his report, and that the mortgagor was entitled to have it rectified with costs. *Landars* v. *Allan*, 6 Sim. 620; *Taylor* v. *Baker*, 5 Price 306 were cited. *Esten*, *V. C.* granted the application with costs, August, 1861.[1]

If the decree directs the taxation of costs, the Master taxes them, but before inserting them in the report they must be revised, and the report should not bear date until they have been returned to him by the revising officer.[2]

It may here be mentioned that no costs are allowed for any attendance in the Master's office, for the purpose of settling or signing the Report after the bill has been returned by the revising officer.

The practice as to revision is pointed out by Orders 311, 312 and 313. Order 311 provides that "Every local Master is forthwith after taxing a bill of costs, to transmit the same by mail to Toronto, addressed "To the Taxing Office of the Court of Chancery, Toronto," and he is to allow in the bill the postage for the transmission and return of the bill, and shall prepay the same: and is to allow in the bill the sum of one dollar as a fee for the revision of the bill by the Taxing Officer at Toronto, and a law stamp for that sum, with postage stamps for the postage, is to be paid at the time of taxation by the party procuring the bill to be taxed: and the local Master is to transmit with the bill to the Taxing Officer at Toronto, the law stamp, and the necessary stamp for postage on the return of the bill to the local Master." Order 312 that "The Taxing Officer at Toronto, after receiving the bill of costs, is to examine the same, and to mark in the margin such sums (if any) as may appear to him to have been improperly allowed, or to be questionable: and he is to revise the taxation, either *ex parte*, or upon notice to the Toronto agent

1 *B. B N. A.* v. *McDonald*, 2 Cham. R. 88.
2 *Waddell* v. *McColl*, 14 Grant, 211.

(if any) of the solicitor whose bill is in question, as in his discretion he may see fit: but notifying such agent (if any) in all cases where the taxation is clearly erroneous, or where the amount in question is so large as in the judgment of the Taxing Officer to make such notification proper. Such notification may be by appointment mailed to the address of the agent (if any). If upon the revision the sums disallowed shall amount to one-twentieth of the amount allowed upon taxation, the Taxing Officer is to add to the amount taxed off, the amount of postages, and the sum of one dollar aforesaid, and is thereupon to re-transmit the bill so revised to the Local Master."

28. *Filing the Report.*

The Solicitor on receiving the Report proceeds to file it in Toronto, in the Office of the Clerk of Records and Writs; filing in an outer County is of no avail. Order 252 provides that "A report is to become absolute without an order confirming the same, at the expiration of fourteen days after the filing thereof, unless previously appealed from." In a mortgage case the report must be filed before the day appointed for payment.[1]

It may here be mentioned that the time of vacation is not to be reckoned in the computation of the times appointed or allowed for Master's reports becoming absolute.[2] It is not distinctly expressed in the Orders, but it is presumed that the word "Vacation" in Order 408 includes both the "Long" and the "Christmas" Vacation, though under the Orders of 1853 the Christmas Vacation was not excepted in this computation of time allowed for amending a bill.[3]

On a motion for final order for foreclosure in a *pro. con.* case, the report appeared not to have been filed until after the day mentioned for payment had passed, when the plaintiff waited fourteen days that it might be confirmed, and then moved it was held irregular, and that a new day for payment must be named.[4] By an order in an infancy application under 12 Victoria, it was referred to the Master to take an account of the value of the crops grown on the premises during a given year, and of what had become thereof, and

1 *Mills* v. *Dixon*, 2 Cham. R. 53.
2 Order 408.
3 *Connolly* v. *Montgomery*, 1 Cham. R. 20.
4 *Mills* v. *Dixon*, 2 Cham. R. 53.

how much had been converted by one J. O. to his own use beyond one-third thereof: and it was ordered that said J. O. on service of the order and report should pay into Court the amount found due by the Master. *Held*, that the order being final, so far as J. O. was concerned, the report made in pursuance thereof did not require confirmation.[1]

It is to be observed, that, those reports only, require confirmation which come within the description of 'reports strictly so called,' that is to say, 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 denomination 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. So, also, if it be merely a report or certificate of having computed subsequent interest, or of having apportioned a fund between parties, upon principles and in the proportions declared by the Court in a decree or decretal order, but upon which no further order is to be made.

These certificates require no confirmation by the Court, but are complete as soon as they are filed;[2] though they are liable to appeal, if any of the parties are dissatisfied with the Master's determination.

It may be mentioned here that there are certain certificates which, although they are made by the Master, in the course of proceedings under decrees and decretal orders, are, nevertheless, complete as soon as they are filed, and require no confirmation.

The certificates alluded to are those which are made by the Master, pending the prosecution of a reference before him, for the purpose of informing the Court of his having performed certain interlocutory acts which are necessary to enable him to fulfil the duty imposed upon him, but which do not form the principal object of the decree under which he is acting. Of this nature are certificates given by the Master of having approved of a conveyance, or of his having ordered the production of documents, pursuant to the decree, and that the documents ordered to be produced were either pro-

1 *Re Yaggie*, 1 Cham R. 168.
2 2 Smith, 358.

duced or not produced before him. These certificates, although liable to appeal, do not require confirmation,[1] and, in fact, they partake more of the nature of certificates, upon matters referred to the Master, by interlocutory application in the course of the cause, than of reports; and, although the directions in the decree, by which they are authorized, are now generally introduced into the decree itself, it is probable that they formed, originally, the subject of specific orders made upon special application.

29. *Appeal from the Report.*

In England the practise was instead of appealing from the Report, to file exceptions to it, which were afterwards argued before the Court: And the object of allowing the iuterval of three clear days, between the service of the warrant on 'signing the report,' and the time appointed for the attendance upon such warrant, was to allow parties who were dissatisfied with the Master's judgment, an opportunity of stating their objections to it in writing. The reason for the adoption of this proceeding, is thus stated by Lord Chief Baron Gilbert[2] —'The ancient rule was, that the party should never except, but where he had first objected to the draft of the report before the Master; and, where there was no objection brought in, it was allowed as good cause to discharge the exception; and it were to be wished that this good rule was strictly followed, since, if the party had objected, he might have shewed the Master his error, and the report would have been altered in that particular, and never troubled the Court. Whereas it often happens, that the party will conceal some material objection and keep it *in petto* from the Master; and when this comes on by way of exception, it makes a variance in the report, as it might not have done if it had been faithfully disclosed and laid before the Master.'

The rule mentioned by the Lord Chief Baron, was promulgated by Lord Keeper North, in 1683,[3] and was in fact, with little varia-

1 In *Scott* v. *Livesey*, 2 S. & S. 300; the Vice-Chancellor, Sir J. Leach, is reported to have said, that whenever exceptions would lie to a Master's report, it must be regularly confirmed before any order can be made upon it; this however, must be a mistake, as the only report of this nature which requires confirmation, is that of a person being the purchaser of a lot at a sale before the Master, with respect to which it is to be observed, that the object of requiring this report to be confirmed is, not to enable the parties to bring the decision of the Master under the review of the Court, but to afford time between the service of the order *nisi*, and the absolute confirmation of the report, to others to come in and open the biddings, so as to secure the sale of the estate to the best possible advantage.

2 For. Rom. 167.

3 Beames's Ord. 259.

tion, the rule of the English Court; the practice of the Court requiring that, in all cases of reference to a Master, under a decree or decretal order, upon his report, as to which a further decree or decretal order was to be founded, no party was at liberty, without a special order, to except to the report, unless he had previously to the Master's signing the report, carried in objections, in writing, to the draft report, specifying the points in which he considered the Master's report to be wrong.[1]

But here, the judgment of the Court is obtained in the Master's findings by way of appeal. Our Order 253 provides that "An appeal shall lie to the Court, upon motion, at any time after the signing of the report until the expiration of fourteen days from the filing of the same in respect of the finding of the Master upon any matter presented in his office for his decision, without written objections or exceptions being previously taken."

It may be explained here that where the expressions "*except to the report*," and "*exceptions*" are used in the quotations from English cases, they have the meaning here attached to "*appealing from the report*," and "*objections by appeal.*" The English cases are applicable here except where a difference is pointed out; and in reading them they become intelligible by attention to the meaning of these phrases.

All parties to the record who are interested in the matter in question may take exceptions to the report, 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.[2] Creditors too, who have established their claims before the Master, are[3] permitted to except to the report, although not parties to the suit; so, also, are creditors who have preferred their claims, but have been rejected by the Master.

The same thing may be done by persons, claiming as next of kin, whose claims have been disallowed by the Master,[4] or by a purchaser under a decree for sale in the Master's office.[5]

1 *Pennington* v. *Lord Muncaster*, 1 Mad. 555.
2 *Trezevant* v. *Fraser*, MS. 11 Jan. 1836.
3 *Wilson* v. *Wilson*, 2 Moll. 328,
4 *Walker* v. *Wingfield*, Reg. Lib. 1809, B. fo. 10, cited *ibid.*
5 *Ker* v. *Cloberry*, Reg. Lib. 1812, A. 734, cited *ibid.*

When exceptions to a report have been set down, they are argued, and disposed of by the Court; it may be mentioned, 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.[1] It may also be mentioned, that, upon hearing exceptions to a Master's report, you cannot read affidavits made subsequent to it,[2] or any evidence which was not before the Master when he made the report. In *Ridifer* v. *O'Brien*,[3] where it was admitted, on the argument of the exceptions, that there was no sufficient evidence before the Master to warrant a different finding by the Master, but it was contended, that additional evidence, which had been since procured, was admissible to shew that the report was incorrect; the Vice Chancellor would not permit any argument upon the evidence which was not before the Master, and, on over-ruling the exception, refused to direct the Master to receive the additional evidence, but allowed the matter to go back to the Master, with an intimation, that, if he refused to receive the additional evidence, the exceptant might make a distinct motion that he should be ordered to receive it.

It may be stated here, that, when it appears upon the hearing of the exceptions, that the excepting party did not lay a material piece of evidence before the Master, which he had then in his power, and that the error in the Master's report was owing to such omission, the Court will not direct the Master to review his report upon any other terms than the exceptant's giving up his deposit.[4]

The rule which precludes the reading of any evidence which was not before the Master, also precludes the reading of any parts of a defendant's answer, which were not read in the Master's office.[5]

It may be mentioned, that if a Master improperly rejects evidence which has been tendered to him, it should form a specific subject of exception to his report.

It is to be observed, that it is not competent to the Court upon exceptions, to make an order which is not quite consistent with

1 2 Smith, 376.
2 *Davis* v. *Davis*, 2 Atk. 21.
3 3 Mad. 44.
4 *Hedges* v. *Cardonnell*, 2 Atk. 408.
5 *Rands* v. *Pushman*, 6 Sim. 46.

the original decree; from the time of the pronunciation of the decree, all the subsequent 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.[1]

If, upon argument, the exceptions are over-ruled, the over-ruling them 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.[2] So also, 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 over-ruled.[3]

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 the Master, 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.[4]

It may be mentioned, that where there are several parties appearing by different solicitors, and each takes exceptions to the report, and the exceptions are allowed, the costs of all the excepting parties will in general be given to them, although the exceptions are in each case the same.[5] It should be recollected, that if the costs of exceptions to a report are not ordered to be costs in the cause, they cannot be allowed as such.[6]

It may be mentioned, in this place, that sometimes, upon the argument of exceptions, the Court will think it right, 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,[7] or to make inquiry into some facts which may be necessary to enable the Court to come to a proper conclusion; in such cases, the Court usually ad-

1 Per Lord Eldon in *Brown* v. *De Tastet*, Jac. 293; see also *E. I. Company* v. *Keigley*, 4 Mad. 16.
2 2 Smith, 379.
3 *Ibid.*
4 *Ibid.*
5 *Trezevant* v. *Fraser*, MSS. 11 Jan. 1836.
6 2 Smith, 383.
7 See *ex parte Charter*, 2 Cox, 168.

journs the consideration of the exceptions, or of the particular exception in question, till after the Master shall have made the supplemental report. 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.[1] In all such cases, the course of the Court is to postpone the consideration of the disposal of the deposit paid, upon filling the exceptions, and of the costs till the ultimate decision upon the exceptions.

Where a party had delayed for one day beyond the time allowed for that purpose, to give notice of an appeal from the Master's report, and the other side, instead of moving to set the proceedings aside, served notice of a cross appeal. *Held,* that he had waived the irregularity. By the Master's report, executors were found indebted to the estate, one of whom, being dissatisfied with the finding of the Master, gave notice of appeal to the plaintiff, but did not serve any notice of appeal on the other executor. *Held* irregular—and that a special application would be necessary to be allowed to give notice of the appeal, after the regular time for so doing—in fact, that the interest of the party not served was the same as the party appealing made no difference in respect to his right of being present upon the argument of the appeal.[2] All applications in the nature of an appeal from a Master's judgment should be made in Court and not in Chambers.[3] By Sec. 17, of Order 42, of the Orders of 1853, reports of the Master became absolute in fourteen days from the signing thereof, unless previously appealed from: but when the fourteen days so given had been allowed through oversight to expire before giving notice of appeal, leave to do so was granted on payment of the costs of the application.[4]

An appeal from the Master's report, after it has been absolutely confirmed by lapse of time, will not be entertained without leave first given on special application. Parties who have no further interest in the matter to which the Master's report relates, cannot appeal from it.[5]

1 *Wilson* v. *Metcalfe*, 3 Mad. 45; see also *Gregg* v. *Taylor*, 4 Russ. 279.
2 *Larkin* v. *Armstrong*, 1 Cham. R. 31.
3 *Ledyard* v. *McLean*, ; *Fitzgerald* v. *U. C. B. Soc.* 1 Cham. R. 183.
4 *Cozens* v. *McDougall*, 1 Cham. R. 29. Order 252 is a copy of this order so far as it relates to th time for appealing.
5 *Thompson* v. *Luke*, 10 Grant, 281.

In *Ledyard* v. *McLean* already cited, the Chancellor said: "My brother Judges and myself have settled that in future all motions in the nature of an appeal from the Master's judgment must be made in Court, otherwise we might have a student of one year's standing discussing the propriety of a Master's decision."

Where a Master had refused to allow evidence by affidavit, which it was intended he should have allowed—*Held*, that this was such an exercise of his discretion as will require an appeal against it to be made to the Court and not to a Judge in Chambers,[1] *Per Spragge, V. C.*—"This is in the nature of an appeal from the Master's decision, and should therefore be to the Court, that being now the settled practice. When I say that all applications in the nature of an appeal from a Master's decision should be to the Court, I do not mean as to the taxation of costs—that, of course, comes on in Chambers." The motion was adjourned into Court.

Notice must be given of a motion for leave to appeal from the Master's report after the usual fourteen days from the filing has elapsed.[2] On a motion for leave to appeal against a Master's report after the fourteen days given by the General Orders, it is not necessary to state in the notice of motion the points on which the party desires to appeal, provided they appear in the papers filed in support thereof.[3] A motion for leave to appeal from a Master's report after the time limited has expired need not be made before a judge—it may be made before the Referee.[4] A motion to refer a report back to the Master will not be entertained, even on consent.[5] A motion to refer a report back to the Master will not be entertained in Chambers, although the Master certified that he had made a mistake.[6] An appeal from a Master's certificate of costs should be to the Court, not to a judge in Chambers.[7] The Court will not entertain an appeal from the Master, where the matter in question is one involving only a very trifling amount, and no point of principle is involved—where, therefore, an appeal was brought where the matter in question was only some $6 or $10, the appeal

1 *Gould* v. *Burritt*, 1 Cham. R. 250.
2 *Cade* v. *Newhall*, 1 Cham. R. 200.
3 *Romanes* v. *Herns*, 2 Cham. R. 363.
4 *Russell* v. *Brucken*, 3 Cham. R. 488.
5 *Graham* v. *Godson*, 2 Cham R. 472.
6 *Bently* v. *Jack*, 2 Cham. R. 473.
7 *Grahame* v. *Anderson*, 2 Cham. R. 303.

was dismissed with costs.[1] Where a proper case was made explaining the delay, leave to appeal from the Master's report was granted, although the time limited for appealing had expired. It is not necessary on such an application to show the sufficiency of the grounds for appealing.[2] But this case was overruled by *Dickson* v. *Avery*,[3] where it was held, that on an application for leave to appeal from the Master's report, besides accounting for the delay, it is necessary that the party appealing should make out a *prima facie* case for appeal. A party seeking leave to appeal, after the time limited for appealing has expired, must account satisfactorily for the delay, and show some reasonable grounds why such an indulgence should be granted. A party will not be aided by the Court in setting up a technical defence to defeat a claim just in itself, where leave to appeal, after the usual time, was asked under circumstances, which, in an ordinary case, would have been sufficient to sustain the application, but the case sought to be made by the appellant was *strictissime juris*, and with the view of defeating an equitable claim, the motion was refused with costs.[4] There is no appeal from a decision on a question which is by the practice purely within the discretion of the judge. An appeal from a Master was allowed after an interval of six months (the long vacation intervening) when it was considered that the interests of justice warranted it.[5] A motion by way of appeal from an order made in Chambers, must be actually made within the fourteen days limited by the Consolidated Orders: and it is not sufficient to give the *notice* within the fourteen days. *Aliter*, in the case of an appeal from a Master's report.[6]

On an application for leave to appeal from a Master's report after confirmation, it must be shewn that the Master is wrong, or, at least, that there is some reasonable ground for doubting the correctness of his decision.[7]

Leave to appeal from a report was refused with costs where it appeared that the object of the appeal was to fix executors with interest upon a sum which they had invested, and upon which a loss occurred.[8]

1 *McQueen* v. *McQueen*, 2 Cham. R. 344.
2 *McQueen* v. *McQueen*, 2 Cham. R. 471.
3 3 Cham. R. 222.
4 *Gilbert* v. *Jarvis*, 2 Cham. R. 259.
5 *Chard* v. *Meyers*, 3 Cham. R. 120.
6 *Jackson* v. *Gardner*, 15 Grant, 425.
7 *Thompson* v. *Walker*, 1 Cham. R. 266.
8 *Coates* v. *McGlashan*, 2 Cham. R. 218.

By the Order 42 of the Orders of 1853 the Master here has been given a greater discretion as to the conduct of references before him than the Masters in England had. The Master overruled certain objections raised before him as to the regularity, in point of form, of certain proceedings in his office. On an appeal from this decision, the Court considered that if he had allowed the objections he would not have taken an improper view of them; but refused to interfere with the Master's ruling, and dismissed the appeal, but without costs.[1]

It may here be mentioned that Order 320 provides that "In the case of an appeal from a Master's report, the Court may give the costs of the appeal, or any part thereof, to a successful appellant."

Where an appeal from a Master's report failed on the main point, and succeeded only in respect of a small sum, the Court gave the respondents the costs of the appeal.[2] Where, on an appeal from the Master's report, some of the objections are allowed with costs, and some are disallowed with costs, the appellants are entitled to all the costs of the appeal that are exclusively applicable to the objections allowed, and to a share of these costs common to all the objections according to, not the mere number of the objections as stated in the notice, but to the really distinct grounds of appeal. The same rule applies to the respondent's costs.[3] Where it was considered that the finding of the Master was, under the circumstances, a fit subject for discussion, the Court, although it dismissed an appeal from the finding of the Master, did so without costs.[4] The proper mode of appealing from the Master's certificate of taxation is by motion, and not by petition.[5]

There may, in a proper case, be an appeal from the Master's finding as to the admissibility of evidence, before the Master makes his report.[6] Where an incumbrancer, who objected to the order of priority in which he was placed, appealed from the finding of the Master: the Court considered this the more convenient course to adopt, although it was open to him to have moved to

1 *Sculthorpe* v. *Burn*, 12 Grant, 427.
2 *Brownlee* v. *Cunningham*, 13 Grant, 586.
3 *B. of Montreal* v. *Ryan*, 13 Grant, 204.
4 *Secord* v. *Terryberry*, 14 Grant, 172.
5 *Re Ponton*, 15 Grant, 355.
6 *McDonald* v. *Wright*, *ibid*, 552.

discharge the Master's order.[1] Where a party appealed on certain grounds against the Master's report, and some of these grounds were allowed, and the report referred back to be reviewed: *Held*, that an appeal against the further report thereon would not be for matters disposed of by the first report, and not objected to on the first appeal.[2] *Semble.*—Appeals from the Master's ruling, as well as appeals from his reports, should be to the Court, and not in Chambers.[3] Under the order of this Court, abolishing exceptions to the Master's report, the appellant occupies the same position as under the practice he would have done before the Master on bringing in exceptions, and with that single restriction the whole case is open to him on the appeal.[4]

Where a report was referred back to the Master at the instance of the defendant, a mortgagee, to ascertain a particular fact, and the Master, without being directed so to do, called upon the defendant for an affidavit shewing what moneys he had received, &c., and the defendant filed his own affidavit shewing that the moneys with which he was chargeable had been received by him at dates subsequent to what the Master had previously found by his report, and which he varied accordingly: *Held*, on appeal, that the Master was wrong in thus proceeding, and the report was sent back to be reviewed in this respect.[5] Where both parties had proceeded on the assumption that the evidence before the Master in taking the accounts under the decree would be before the Court on further directions, and had, in consequence, allowed mutual claims of interest and commission to be submitted by the Master to the Court, without his setting forth sufficient to enable the Court to dispose of them, and the report was besides so expressed as to render the defendant's chargeable with sums for which it did not appear to have been intended to make them liable, the Court, on further directions, referred the case back to the Master to review his report.[6]

1 *McDonald* v. *Rodger*, 9 Grant, 75.
2 *Ross* v. *Perrault*, 13 Grant, 206.
3 *Jay* v. *McDonnell*, 2 Cham. R. 71.
4 *Davidson* v. *Thirkell*, 3 Grant, 330.
5 *Williams* v. *Haun*, 10 Grant, 553.
6 *Gould* v. *Burritt*, 11 Grant, 234.

30. *Proceedings to be taken on Appealing from Master's Report.*

The party intending to appeal prepares his notice of appeal which states as briefly as possible the objections he has to the Master's proceedings. This is served upon all the parties entitled to notice of proceedings in the Master's office. It need not be served upon parties who have merely been served with an office copy of the decree and have not been made parties. The motion is set down for argument at the times specified in Order 416, *and notice of it is served on the same parties as the notice of appeal. It is a seven days' notice under Order* 418.

The appeal, however, cannot be heard in the month of June. Order 420 provides that, "No cause set down for argument of demurrer, or by way of motion for decree, or on bill and answer, or on appeal from a Master's report, or on further directions, or on any petition mentioned in Order 418, adjourned over from the day for which such cause was originally set down, is to be brought on for argument during the month of June; and, except on circuit, no cause is to be heard during the month of June, unless counsel certify that no point is involved in it, on which it may be necessary for the Court to reserve judgment."

31. *Review of Report.*

Although the usual course by which a review of a Master's report is to be procured is by appealing from it, there are many cases in which the Court will direct the Master to review his report without requiring an appeal taken; or, if there be an appeal, will direct it to be reviewed upon grounds independent of those taken on the appeal; and sometimes the Court will direct a Master to review his report, in order to afford a party an opportunity to appeal.[1]

A reference back to the Master to review a report which has not been appealed from 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

1 *Vallence* v. *Weldon*, 1 Dick, 290.

found sufficient facts for the Court to found its judgment upon.[1] So, also, if the Master has exceeded his authority, it will either direct him to review his report or take no notice of his finding.

We have seen before that, where the report is the consequence of an order pronounced 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.

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 being properly raised by exceptions, the Court has, upon motion, ordered the Master to review his report; as where, upon a reference of an examination for impertinence, the Master certified, generally, that the examination was impertinent, the Vice Chancellor, on motion, referred it back to the Master to review his certificate, and state in what respects he considered the same impertinent.[2]

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.[3] The Court has, also, as we have seen,[4] referred a report, as to title, back to the Master to be reviewed, upon application, by motion, even after the report has been confirmed.

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;[5] and, even then, it will not be allowed unless a very strong case is made.[6]

Where a reference back to the Master to review his report is directed, the Master is, as of course, at liberty to receive further

1 *Turner* v. *Turner*, 1 Dick. 313; 1 Swanst. 156, n. S. C.
2 *Anon.* 3 Mad. 246
3 As to the cases in which the Court will send it back to the Master to review his report as to a title see *ante*.
4 *Ibid.*
5 *Drought* v. *Redford*, 1 Moll. 573.
6 *Turner* v. *Turner*, 1 Jac. & W. 39.

evidence. Where the Court, on a reference back to the Master, does not mean that he shall take further evidence, the order contains a direction to that effect: unless the reference back is expressed to be for a purpose on which further evidence cannot be material. The Court will, at almost any stage of a cause, make a special order for the correction of slips in a Master's report.[1]

A motion to correct a clerical error in a report should be on notice, unless on consent of all parties: [2] though it was held in an earlier case that an order to correct a clerical error in a Master's report will be granted *ex parte*.[3]

32. *Setting Aside Report.*

In a partition suit, a gentleman who was not a solicitor, nor a clerk of any solicitor in the cause, was employed by the defendant's solicitor to attend to the case for the defendant, and gave a consent in good faith, but inconsiderately, and without the knowledge or authority of, or communication with, the defendant or his solicitor, to a mode of partition suggested by the opposite party. *Held*, that the consent might be relieved against on terms, it not appearing that the plaintiff would thereby be prejudiced.[4]

In a partnership suit the usual decree had been made, and the Master made a general report finding that a certain balance was due from the defendant to the plaintiff, but that all the partnership assets had not been realized. After the report had been signed, the defendant applied for leave to carry into the Master's office and prove a charge and discharge. It appeared that the defendant had been guilty of gross negligence in omitting to bring these papers into the Master's office, and no explanation was now attempted of his neglect to do so; but the Court was of opinion that the report was erroneous in finding a sum to be due from the one party to the other before the assets were realized and the liabilities paid; and, as the report which had been made could not be acted upon, the defendant's application was granted on terms.[5]

1 *Morley* v. *Matthews*, 12 Grant, 453.
2 *Simpson* v. *Ottawa*, 2 Cham. R. 12
3 *Watson* v. *Moore*, 1 Cham. R. 266.
4 *Rolfe* v. *Coote*, 1 Cham. R. 308.
5 *Smith* v. *Crooks*, 3 Grant, 321.

CHAPTER XXVI.

ON 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 Master shall have made his report, it is necessary, in order that a complete termination should be put to the suit, and that it should be wound up in all its parts, that it should be set down again to be heard for "further directions," which process must be repeated as often as any further directions are reserved by the last decree pronounced.[1]

Where the consideration of further directions has been reserved by a decree till after the Master has made his report, the Court will not allow a case to be set down for further directions before a report has been made, even though it is found that the reference to the Master has become useless; thus, where a decree directed an issue, and also directed an inquiry before a Master, and reserved the consideration of further directions until after the trial, and, after the report, the Court would not permit the cause to be set down upon the further directions without a report from the Master.[2] The proper course, in such a case, would have been to have obtained a variation in the decree by rehearing.[3]

The Court also refuses, in general, to interfere after a reservation of further directions in a summary way,[4] unless liberty has been given to the parties, by the decree, 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.

But although the Court will not, after such a reservation, entertain a summary application relating to the general matters of the suit, it will, it seems, entertain applications for collateral matters,

1 Where the consideration of costs is reserved as well as of further directions, the cause must also be set down 'upon the matter of costs.'
2 *Dixon* v. *Olmius*, 1 Ves. J. 153.
3 *Ibid*: perhaps the necessity of a rehearing might have been obviated by going before the Master under the decree and then waiving the inquiry.
4 *Cooke* v. *Gwyn*, 3 Atk. 689.

such as the appointment of a receiver.[1] The Court will also, upon consent, permit a bill to be dismissed, without requiring the cause to be set down on further directions.[2]

It is to be noticed, that it is only where further directions are reserved, by a decree or order, that it is required to set the cause down for hearing for such further directions; where a decretal order is made upon motion, such as a reference to a Master in an interpleading suit to enquire into the title, the Court will proceed upon the report on motion.[3] Thus, in *Walters* v. *Pyman*,[4] where, upon a reference of this description, the Master reported against the vendor's title, the Court, upon motion, dismissed his bill with costs. So in *Shore* v. *Collett*,[5] where the Master reported in favour of the vendor's title, and exceptions were taken to the report, which were overruled, the Court entertained a motion that the purchaser might pay in the residue of his purchase money and interest. So, after a decretal order, made on motion, for an account of the incumbrances on the estate, and to settle their priorities, an order for further directions and costs appear to have been made on petition.

Further directions upon a separate report, are generally given after the confirmation of the report, and so are all such further directions as are necessary upon a report made by the Master, upon orders obtained.

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, as we have seen, send it back to the Master to review his report, or such part of it as the Court sees reason to be dissatisfied with. The Court, however, will not send it back to the Master to review his report, for the purpose of deducing consequences from the facts which he has stated in his

1 *Cooke* v. *Gwyn*, *ubi sup.*
2 *Anon.* 11 Ves. 169.
3 *Brooke* v. *Clarke*, 1 Swanst. 550.
4 19 Ves. 351.
5 Cooper, 234.

report, but will itself draw the conclusions from the facts stated,[1] as it will where the Master has drawn conclusions from the facts he has stated, which conclusions, but not the facts, are considered erroneous.[2]

In general, if the case is such as will anmit of it, the Court will, upon the first hearing for further directions, make a final decree; and, when the reference to the Master has been merely to make preliminary inquiries, it will, when the case comes before it upon the report, declare the rights of the parties in the matters in question. If the declaration of the Court, or the result of the former inquiries, render any further reference to the Master necessary, the Court will take this occasion to make such further reference, reserving again the consideration of the further directions until after the Master shall have made his further report, and this it will repeat as often as it may appear to be necessary.

It is to be remarked, that, where a question has been raised upon the pleadings, but no direction or reservation of it has been given with respect to it by the decree, the Court will not take it into consideration upon further directions: thus where, in a suit for the specific performance of an agreement for the sale of a copyhold estate, the defendant insisted by his answer that he was not bound to perform his contract, unless it could be shewn that the copyholders of the manor were entitled to dig marl and brick earth on the lands holden by them, and the original decree merely directed the usual reference as to title, the Court on the hearing upon further directions, refused to direct a reference to the Master, to inquire whether the copyholders of the manor were entitled to dig marl and brick earth, &c., (although a petition, praying that it would do so, had been presented, and ordered to come on with the further directions,) upon the ground that, as the point was raised by the answer, if the Court had thought it necessary to inquire into the fact, a direction to that effect would have been contained in the original decree, and that, to grant the prayer of the petition, would be to alter, entirely, the decree made at the original hearing, which it is not competent for the Court to do at the hearing on further directions.[3]

1 *Bick* v. *Motly*, 2 M & K. 312.
2 *Adams* v. *Claxton*, 6 Ves. 555.
3 *LeGrand* v. *Whitehead*, 1 Russ. 309.

In fact, the Court will not alter a decree in the minutest particular without a rehearing,[1] unless in the case of an information relating to a charity, in which case the Court will correct an omission of the original decree upon further directions.[2]

It seems, formerly, to have been considered that no direction could be given at a hearing upon further directions, for the computation of interest, where the question of interest had not been reserved by the original decree. In *Ryves* v. *Coleman*,[3] it was said, by Lord Hardwicke, that, generally, no interest could be allowed where it was not ordered or reserved by the decree; but that, notwithstanding, there was no particular reservation of interest by a decree, yet there was a discretionary power in the Court to allow interest upon special circumstances. In *Champ* v. *Mood*,[4] his lordship also observed, that the reservation of further directions in general had not been taken to reserve interest, and that interest ought to be expressly directed by the decree to be reserved; but he admitted that there might be a case where, it having been pointed out in the cause, the Court would take interest to be reserved on such general directions; that after a direction of a trial at law, reservation of general directions would be taken to include costs, interest, and everything; but he held that in the common case of a reference to a Master, it was taken to be otherwise: and, in *Hearle* v. *Greenbank*,[5] interest not having been reserved by the decree, Lord Northington said he could not order it on further directions, but recommended the plaintiff to rehear the cause, merely to introduce a reservation of interest. In a previous case, however, *Goodyere* v. *Lake*,[6] Lord Hardwicke had, according to the report in Ambler, held it to be clear, that, under the general reservation of further directions, the Court might give interest, though not reserved by the decree, and referred to a case of *The Hudson's Bay Company* v. *Sir Stephen Evans*, in which it was done; and, in *Sammes* v. *Rickman*,[7] and *Margarum* v. *Sandiford*, there cited, it was so held accordingly. And, in *Creuze* v. *Hunter*,[8] Lord Roslyn said, he had thought that if interest was not given

1 *Lord Shipbrooke* v. *Lord Hinchinbrooke*, 13 Ves. 387—394.
2 *Attorney-General* v. *Whiteley*, 11 Ves. 241.
3 2 Atk. 440.
4 2 Ves. 474.
5 1 Dick. 370.
6 Amb. 584; 1 West, 490, S. C.
7 2 Ves. J. 36.
8 4 Bro. C. C. 318; 2 Ves. J. 164, S. C.

by the decree, or reserved, it was matter of rehearing, and that, in strictness, this was the rule, but that, if the point was made upon the hearing for further directions, he saw no objections to its being then given if the case would warrant it; and he expressed himself satisfied with the authority of *Margarum* v. *Sandiford* that it might be so.[1] The practice, therefore, of directing the computation of interest, upon further directions, where it has not been reserved by the original decree, is now considered as established; and not only will the computation of simple interest be so directed, but, where the Court finding large sums of money in the hands of an agent, receiver, trustee, or personal representative, it will direct the Master to ascertain the balance from time to time in the hands of the accounting party, and to compute interest on them.[2] And the Court has even gone the length, on further directions, of charging an accounting party with interest on the balance 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.

This was done in the case of executors, in *Turner* v. *Turner*;[3] and, in *Pearse* v. *Green*,[4] where an agent appeared, by the Master's report, to have had large sums of money in hand, the Master of the Rolls referred it back to the Master to ascertain the balances in the agent's hands, and to compute interest upon them. It is to be observed, that, in the above cited case of *Turner* v. *Turner*, the direction to compute interest, notwithstanding there was none prayed by the bill, was founded on the circumstance that, at the time the bill was filed, there did not appear to have been any money in the hands of the executors, and that the balances arose subsequently to the institution of the suit, and, therefore, could not be adverted to in the original bill; and the same ground appears to have furnished the foundation of the decree in *Wilson* v. *Metcalfe*;[5] in that case, the bill originally prayed the redemption of a mortgage of an estate of which the mortgagees were in possession at the time it was filed, the value of the estate, (which, since the mortgage, had been greatly augmented by allotments under an Enclosure Act,) was not, at that time, known, and it was supposed

1 See also, *Maghee* v. *Mahon*, 1 Moll. 147
2 *Pearse* v. *Green*, 1 Jac. & W. 135.
3 1 Jac. & W. 43.
4 *Ubi sup.*; see also *Good* v. *Blewitt*, there cited.
5 1 Russ. 530.

that there would be a balance found due to the mortgagees; consequently the bill did not pray an interest against them. It appeared, however, upon the Master's report, that the whole of the principal money and interest due on the mortgage had been paid off before the suit was instituted, and, therefore, that there was a large balance due from the mortgagees to the mortgagors; under these circumstances, when the cause came on, for further directions, upon the Master's report, the Court directed rests to be made, and interest to be computed on the balances from time to time in the hands of the mortgagees.

From the above cases it might be inferred, that it is in those cases only, in which the circumstances were such, at the time of filing the bill, that a claim for interest did not or could not be known to exist, that the Court will, upon further directions, make an order to compute interest upon balances, although there is no prayer for interest in the bill; this, however, does not appear to be the case, as, both in *Pearse* v. *Green*,[1] and in *Good* v. *Blewitt*, there cited, the bills were filed for the express purpose of enforcing an account and payment of balances, and decrees for interest were made, although no interest appears to have been prayed, nor was the consideration of it reserved.

It is to be remarked, that it is only in cases where it appears, from the Master's report, that there is an equitable right to charge an accounting party with interest, (as where an agent, or trustee, or personal representative, has, for a long time, had a considerable sum of money in his hands, belonging to the parties in the suit,) that the Court will direct a computation of interest when it has not been reserved by the original decree; where this does not appear by the report, the Court has no foundation upon which to make such a direction, and, it seems, that it will not entertain a petition for the mere purpose of bringing before the Court facts which do not otherwise appear, upon which to ground a direction to the Master to inquire into balances and charge interest.[2]

1 1 Jac. & W. 135

2 *Parnell* v. *Price*, 14 Ves. 502 (first edition). The author thinks it right to call the reader's attention to a very material discrepancy between the report of *Parnell* v. *Price*, in the original and second editions of Mr. Vesey's reports. In the report, as it appears in the original edition, it is stated that 'the directions were given for interest and costs upon the Master's report, and that the inquiry prayed by the petition was *refused*;' whereas, in the second edition, it stands thus: 'The directions were given for interest and costs upon the Master's report, and the inquiry prayed by the petition was *granted*.' In the first edition, also, the following passage occurs, which is wholly omitted in the second, viz.: 'The *Lord Chancellor* and the *Registrar* (Mr. Croft), being applied to by his Lordship, said, there was no instance of such a petition;' and this appears to be in conformity with the decisions in *Creuze* v. *Hunter*, 2 Ves. J. 157; and 4 Bro. C. C. 157, S. C. and *Bruere* v. *Pemberton*, 12 Ves. 387; see also *LeGrand* v. *Whitehead*, 1 Russ. 309.

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 the computation of interest 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 a direction for so charging him on further directions, even where it was prayed by the bill and refused at the hearing from deficiency of proof.[1]

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.[2]

The Court, however, will not, (even though a new state of circumstances appears by the Master's report, shewing 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,) make any order, upon further directions, which will have the effect of varying or impugning the original decree, and therefore, where a prior decree had ordered the costs of a mortgagee to be taxed, it has held, upon further directions, that he would be entitled to be paid those costs, although it appeared, by the report, that he was paid off before the commencement of the suit, and that he had set up an improper defence.[3]

Upon the same ground, when costs of a party 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 of the same party 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.[4]

1 *Franklin* v. *Beamish*, 2 Moll. 383.
2 *Attorney-General* v. *The Mayor of Galway*, 1 Moll. 95.
3 *Wilson* v. *Metcalfe*, 1 Russ. 530.
4 *Trezevant* v. *Fraser*, Rolls, Aug. 1839.

As the Court will not allow any variation to be made in the original decree upon the hearing of the cause for further directions, so it will refuse to entertain an objection to it on a ground which might have been made at the original hearing; thus, where a suit was instituted by a solicitor, for the payment of his bill of costs, and it appeared, by the answer, that the bill of costs had not been signed conformably to the act of Parliament, whereupon the bill was duly signed, and the fact of the signature put in issue by a supplemental bill, and a decree was made at the Rolls, referring it to the Master to tax the bill, &c.—Upon the case coming on before Lord Brougham, on appeal from the order made by the Master of the Rolls on further directions, his Lordship held, that the defect in the suit, as originally instituted, arising from the bill of costs not having been duly signed, was not cured by the supplemental bill, and that the bill ought, at the original hearing, to have been dismissed with costs; but as that had not been done, and the decree had not been appealed from, it was not open to the defendant to take the objection upon further directions.[1]

But several of the above propositions have been qualified by decisions in our own Court.

The decree being defective in several particulars, the Court, on further directions, supplied, as far as possible, the defects of the decree without a rehearing of the cause.[2] Under a decree for taking partnership accounts, in which the Master was directed to to state special circumstances, and make all just allowances, the Master reported that, in taking the accounts he had, amongst other things, charged one of the partners for his board, &c., with the other after the dissolution of the partnership: *Held* wrong, and that the objection could be taken on the hearing on further directions.[3] Where a decree which reserved no further directions, directed that a sale or partition of the property in question should take place according as the Master might consider either course more for the interest of the parties, but contained no directions as to the conveyance or possession, or as to the execution of the deeds, and the Master reported in favor of a partition. The Court, on motion, ordered the execution of conveyances, and the delivery of

1 *Pritchard* v. *Draper*, 1 R. & M. 191.
2 *Robertson* v. *Myers*, 1 Grant, 560.
3 *O'Lone* v. *O'Lone*, 2 Grant, 125.

the possession of the property agreeably to the finding of the Master.[1] Where a decree, *pro confesso,* reserves further directions, and it is not necessary to serve notice on any of the parties, the cause may be set down on further directions, at any time before the sitting of the Court.[2]

SECTION II.—*Setting down on Further Directions*

Where there has been no appeal, and the report has been confirmed by being filed fourteen days: or where in the case of an appeal, it has been dismissed, the cause may be set down for hearing on further directions—and if the party desires he may anticipate the decision of the Court in the appeal and the hearing on further directions may be set down for the same day as the hearing in the appeal though, of course, the appeal must be disposed of before the cause can be heard on further directions. *The Solicitor serves a notice of the hearing on the same parties as are entitled to notice of appeal, and sets the cause down in one of the days mentioned, in Order 416. It is a seven days notice, and the cause must be entered with the Clerk of Records and Writs at least seven days before hearing*

Order 418 provides that "Causes set down by way of motion for decree, or on bill and answer, or for hearing *pro confesso,* or for argument of demurrer, or *upon further directions,* or on appeal from Master's report, or for re-hearing, or upon petition under Order 330, or upon motion or petition to discharge an order of revivor, or to add to, vary, or set aside a decree, are to be entered with the Clerk of Records and Writs at least seven days before the day for which they are set down; and seven day's notice of the hearing or motion is to be served upon all parties entitled to notice thereof. And Order 419, that "Where further directions have been reserved, if the party having the conduct of the cause does not set the same down for hearing on further directions, and serve notice thereof within fourteen days after the confirmation of the report, any other party affected by the report may set the same down, and serve notice of the hearing." No cause set down for hearing on further directions will be heard in the month of June, under Order 420.

1 *O'Lone* v. *O'Lone,* 2 Grant, 642.
2 *Cook* v. *Gingrich,* 12 Grant, 416.

The course of proceeding upon the hearing of a cause upon 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. If default is made by any party in appearing, upon the production of an affidavit of service, an absolute order will be pronounced.

It may be mentioned that 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 promote his own interest.

In a case where fourteen days have elapsed since the confirmation of the Master's report, the plantiff will not be permitted to set down the cause on further directions for a distant day, to the delay of the defendants. Where, under such circumstances, the cause has been set down on further directions by both parties, a motion by the plaintiff to strike the cause out of the list, the setting down by the defendant being for the earlier day, was refused with costs. A notice of motion on grounds of irregularity should state the grounds of the alleged irregularity.[1]

As a general rule the evidence in the Master's office is not looked at on further directions.[2] It has sometimes been held that the evidence before the Master may, without any agreement, be looked at on further directions:[3] but in the later case of *Curling* v. *Austin*,[4] the contrary was held: and I took the same view in *Gould* v. *Burrit*,[5] a decision which I believe has been acted upon ever since.[6] In the case of *Gould* v. *Burritt* the V. C. said "Both parties have evidently been proceeding throughout on the assumption that the report was to be read by the Court in the light of the evidence, papers and books which the Master had before him, and that the Master's findings might be both explained, and supplemented by a reference to these, for all the purposes with which the Court has to deal on further directions. Yet the settled practice is clearly against such a course; and it would be extremely inconvenient, and add greatly to the expense of suits, if the practice were not so."

1 *Poole* v. *Poole*, 2 Cham. R. 379.
2 Per Mowat, V.C., in *Stewart* v. *Fletcher*, 18 Grant, 25.
3 *Dymock* v. *Ashton*, 7 L. J. O. S. 120; *Needby* v. *Needby*, 21 L. J. N. S. Ch. 4 6.
4 2 Dr. & Sm. 129.
5 11 Grant, 234.
6 Per Mowat, V.C., in *McGill* v. *Courtice*, 17 Grant, 273.

An order made upon further directions is, in fact, a decree of the Court; is drawn up, passed, entered, worked in the Master's office, and enforced as other decrees.

CHAPTER XXVII.

PROCEEDINGS IN THE MASTER'S OFFICE UNDER AN ADMINISTRATION ORDER OR DECREE.

Having considered the general mode of proceeding in the Master's office; the practice in particular matters, will now be considered; and, first as to "Administration."

Where a party interested in the estate of a deceased person, whether as creditor, heir, devisee, legatee, or as next of kin, desired an account to be taken of the estate, and the dealings of the Executor or Administrator to be required into, he was formerly obliged to file a Bill; but our order provides a remedy in simple matters by way of what is termed an "Administration Order."

The cases in which this order can be obtained, and the mode of obtaining it, have already been pointed out. The practice on it in the Master's office will now be considered.

The decree or order made at the hearing of an administration suit, ordinarily directs accounts to be taken of the personal estate of the deceased; of his debts; of his funeral expenses; and of the legacies and annuities bequeathed by his will; and orders an inquiry to be made as to what parts of his personal estate are outstanding or undisposed of. If the administration extends to the real estate, the decree or order further directs inquiries to be made as to what real estates the deceased died seised or possessed of, and as to the incumbrances affecting the same; and usually directs the real estate to be sold with the approbation of the Master; and sometimes an account is directed to be taken of the rents and profits received by the trustees.

The enquires usually directed by an Administration Order are those set forth in Schedule J., referred to in order 187.

The order having been obtained, the next step is to bring it into the Master's office. For this purpose a copy is filed with him, and his first duty is to ascertain whether there are any persons interested in the estate, who are not already before the Court. Where there is a will, it, or probate of it, should be produced before him, which will shew in most cases all the parties interested in the disposition of the estate. Where there is no will, evidence should be given before him. Either *viva voca*, or as is usual, by affidavit, showing who are interested either as heirs, or next of kin. Having ascertained the names of these parties, he proceeds to direct that they be served with an office copy of the decree, endorsed with the notice referred to in Order 60. These persons are not made parties in the Master's office, but it is the duty of the Master "to see that all have been duly served with an office copy of the decree as provided for by the general order, before he reports, and *generally speaking, before he proceeds with the reference on the other matters embraced in the decree.*"[1]

On reference to this notice it will be observed that no time is mentioned when the proceedings in the Master's office will be taken. To give this information to the party served, a warrant "to consider" is to be attached to the office copy of decree served, and then the party will have full notice of what has been done, as well as of the time when further steps will be taken. This Order 60, (which is taken from Order 6, of the Orders of June, 1853, s. 2, though it is more extensive,) provides that "In all the above cases, (referring to Order 58,) the persons who according to the practice of the Court, would be necessary parties to the suit, are to be served with an office copy of the decree (unless the Court dispenses with such service,) endorsed with the notice set forth in Schedule A. hereunder written, and after such service they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit; and upon service of notice upon the plantiff, they may attend the proceedings under the decree. Any party so served may apply to the Court to add to, vary, or set aside the decree, within fourteen days from the date of such service." It may here be ob-

1 Per Mowat, V.C., in *English* v. *English*, 12 Grant, 443.

served that Order 587 declares that the Master, instead of the Court, "may also dispense with service of the decree upon the persons referred to in Order 60; and in such case he is to state the reasons therefor in his report."

It is not necessary that the return of the warrant "to consider" should be delayed until the expiration of the fourteen days given to the party served within which he may apply to the Court to add to, vary, or set aside the decree. The Master appoints the time in his discretion, having regard to the residence of the parties to be served, and their ability to attend if they feel disposed to do so. The warrant to consider is also served upon the party, upon whom the notice of motion for the Administration Order was served; or where a Bill was filed, upon those who answered; a party against whom the bill was allowed to be taken *pro confesso* is not entitled to any notice of the proceedings in the Master's office. It was held in *Jackson* v. *Mathews*—Re Pattison[1] that although proceedings in the Master's office may, under the general order, be taken *ex parte* against a defendant, who has allowed a bill to be taken *pro confesso* against him, that mode of proceeding is irregular, where an Administration Order has been obtained upon notice without bill filed. If either of the parties entitled to the notice is an infant, a guardian *ad litem* must be appointed before any proceedings are taken; though the office copy decree, notice and warrant be served upon the infant in the same way, and under the same rules as govern the service of a bill on an infant. To save time and expense it is usual to serve the office copy decree, notice and warrant at the same time as the notice on which a guardian *ad litem* is appointed, is served. The guardian appointed, will find it his duty to attend upon the warrant to consider.

The rules to be observed in making parties in the Master's office, and the distinction between making these parties, and serving them with notice of the proceedings in the Master's office, are clearly laid down in *Rolph* v. *U. C. Building Society*,[2] and in *English* v. *English*, above cited.[3]

All parties entitled to notice having been duly served they are now fairly in the Master's office, and there need be no further ex-

1 12 Grant, 47.
2 11 Grant, 275.
3 12 Grant, 443.

pense or delay in serving them with any future warrant, as they are now bound by the Master's directions, as entered from time to time in his Book.

On the return of the warrant to consider the Master proceeds to make such directions as are requisite. In an ordinary case of administration, whether it be under an order obtained without bill or under a decree obtained on a bill, the first step is to advertise for creditors. The Master directs the publication of the advertisement mentioned in Order 475, and his direction may be entered in his book in the following terms:—

"I direct that an advertisement for creditors under Order 475 be published in the——Newspaper[1] *once in each week for the——weeks*[2] *immediately preceding the——day of——*[3] *by which time the creditors of the said A. B., deceased, are to send in their claims against his estate to——*[4] *Now I appoint the——day of——*[5] *at 10 a.m., to adjudicate on the said claims."*

I further direct that the making of the affidavit required by Order 480 be adjourned until further directions are made concerning it.[6]

And I further direct that the executor do, on the——day of——[7] *at 10 a.m., file at my office the following accounts viz:*[8]

I. An account of the present estate not specifically bequeathed of ——— deceased, the testator (or intestate) come to the hands of the said ———, or to the hands of any other person or persons by his order or for his use.

II. An account of the said testator's (or intestate's) debts (and so on following the terms briefly of the decree).

Our Order 475, directs that "Every advertisement for creditors affecting the estate of a deceased person, which is issued pursuant

1 Some newspaper published in the vicinity where the deceased lived, or where his creditors (if any), might reasonably be supposed to be found.
2 Usually "three" weeks.
3 The time appointed for creditors to send in their claims.
4 The executor, or his solicitor, according to the direction of the Master.
5 A day subsequent to the time appointed for the claims to be sent in, usually within three days thereafter.
6 It will be found in practice that this is the most convenient mode of working these Orders, as it is in most cases impossible to say when the executor will be in a position to make this affidavit, but it must of course be made before the Master does actually adjudicate on the claims.
7 The day appointed by the advertisement to adjudicate on the claims.
8 The decree must be followed strictly; the accounts above mentioned are those usually directed by the ordinary administration decree.

to an order, is to direct every creditor, by a time to be thereby limited, to send to such other party as the Master directs, or to his solicitor, to be named and described in the advertisement, the name and address of such creditor, and the full particulars of his claim, and a statement of his account, and the nature of the security (if any) held by him; and such advertisement is to be in the form set out in Schedule V. form No. I. with such variations as the circumstances of the case require; and at the time of directing such advertisement, a time is to be fixed for adjudicating on the claims."

And Order 476, that "No such creditor need make an affidavit, or attend in support of his claims (except to produce his security, if any), unless he is served with a notice requiring him so to do as hereinafter provided" by Order 482. Order 477 provides that, "Every such creditor is to produce before the Master, the security (if any) held by him, at such time as is specified in the advertisement for that purpose, being the time appointed for adjudicating on the claims; and every creditor is required by notice in writing to be given to the executor or administrator of the deceased, or by such other party as the Master directs, in the form set forth in schedule V. form No. 2, is to produce all other deeds, and documents, necessary to substantiate his claim before the Master, at such time as is specified in the notice." And Order 478 that, "In case a creditor neglects or refuses to comply with the next preceding order (477), he is not to be allowed any costs of proving his claim unless the Master otherwise directs." When the claims are received by the person designated in the advertisement, Order 479 provides that, "The executor or administrator of the deceased, or such other party as the Master directs, is to examine the claims sent in pursuant to the advertisement, and is to ascertain, as far as he is able, to which of such claims the estate of the deceased is justly liable." And Order 480 that, "The executor or administrator, or one of the executors or administrators, or such other party, either alone or jointly with his solicitor, or other competent person, or otherwise as the Master directs, is, at least seven clear days before the day appointed for adjudication, to file an affidavit which may be in the form No. 3 in schedule V., verifying a list of the claims, the particulars of which have been sent in, pursuant to the advertisement, and stating to which of such claims, or parts thereof, respectively, the estate of the deceased is, in the opinion of the respondent, justly liable, and

his belief that such claims, or parts thereof respectively, are justly due, and proper to be allowed, and the reason for such belief." And Order 481 that, "In case the Master thinks fit so to direct, the making of the affidavit referred to in Order 480, is to be postponed till after the day appointed for adjudication, and is then to be subject to such directions as the Master may give." Order 482 provides that, "At the time appointed for adjudicating upon the claims, or at any adjournment thereof, the Master may allow any of the claims, or any part thereof respectively, without proof by the creditors, and may direct such investigation of all or any of the claims not allowed, and require such further particulars, information or evidence relating thereto, as he thinks fit, and may, if he so think fit, require any creditor to attend and prove his claim, or any part thereof; and the adjudication on such claims as are not then allowed is to be adjourned to a time to be then fixed."

Order 483 provides that, "Notice is to be given by the executor or administrator, or such other party as the Master directs;

I. To every creditor whose claim, or any part thereof has been allowed without proof by the creditor, of such allowance, and such notice may be in the form No. 4 in Schedule V.

II. And to every such creditor as the Master directs to attend and prove his claim, or such part thereof as is not allowed, by a time to be named in such notice (which may be in form No. 5 in schedule V.), not being less than seven days after such notice, and to attend at a time to be therein named, being the time to which the adjudication thereon has been adjourned; and in case any creditor does not comply with such notice, his claim, or such part thereof as aforesaid, is to be disallowed, unless the Master thinks fit to give further time." And Order 484 that, "A creditor who has not before sent in particulars of his claim, pursuant to the advertisement, may do so seven clear days previous to any day to which the adjudication is adjourned." Order 485 provides that "After the time fixed by the advertisement no claim is to be received (except as before provided in case of an adjournment) unless the Master thinks fit to give special leave upon application, and then upon such terms and conditions as to costs and otherwise as the Master directs." And Order 486, that "Where an order is made for payment of money out of

Court to creditors, the party whose duty it is to prosecute such order is to send to each creditor or his solicitor (if any) a notice that the cheques may be obtained from the Registrar; and such notice may be in form No. 6 in schedule V. and such party is, when required, to produce any papers necessary to enable the creditors to receive their cheques." Order 487 provides that "Every notice required to be given by the order from No. 467 to No. 486 inclusive, is, unless the Master otherwise directs, to be deemed sufficiently given and served if transmitted by post, prepaid, to the creditor to be served according to the address given by the creditor in the claims sent in by him pursuant to the advertisement, or, in case the creditor has employed a solicitor, according to the address given by him.

Order 474 provides that, "In taking an account of a deceased's personal estate under an order of reference, the Master is to enquire and state to the Court what, if any, of the deceased's personal estate is outstanding or undisposed of; and is also to compute interest on the deceased's debts from the date of the decree and on legacies from the end of one year after the deceased's death, unless any other time of payment is directed by the will.

The claims of creditors, and the accounts of the Executor or Administrator supported by the proper affidavit having been brought in; the proceedings upon them will now be considered, and first as to the claims. One object of the Court in framing these orders evidently was to reduce expense. Under the old practice the creditor was obliged in every case to verify his claim by affidavit, and where any party insisted upon it, the Master was bound to see that the claim was irrespective of the affidavit, duly proven by such evidence as would be necessary at *nisi prius* before a jury. But now neither affidavit, nor *viva voce* evidence is necessary unless the Master specially directs it, and it is presumed that in carrying out the spirit of the orders, he will not require any such evidence unless there is a fair doubt of the correctness of the claim. The orders have deprived him of more of the power which he possessed under the old practice, for under Order 482 he may make such directions as to proof of the claim as he may think the justice of the case requires. The Orders evidently contemplated that claims should be brought in immediately, according to the advertisement, and though this is desirable, the Master has power to receive them at any time

before he signs and gives out the Report. The bias of the Court, under the practice, in the Master's office in England, on applications on behalf of claimants to be let in to prove, was in favor of the creditor; and so long as any part of the assests remained unadministered, if a reasonable excuse for delaying to make an earlier claim was established, the Court assisted the creditor.[1]

If a creditor does not come in till after the Executor has paid away the residue, he is not without remedy, though he is barred the benefit of that decree. If he chooses to sue the legatees, and bring back the fund, he may do so; but he cannot affect the legatees, except by suit, and he cannot affect the executor at all.[2] But in such a case the Executors must be called on, to account, before the legatees can be called upon to pay; and proceedings against the latter were stayed until the Executors should be made parties.[3]

If some of a class of claimants come in before the Master and prove their claims, and others do not, the Court will not on motion order a part of the fund apparently belonging to the latter to be set apart for them. (*Good* v. *Blewitt, Coop.* 198.) In the case last cited a bill was filed on behalf of the captain, and all other the unsatisfied mariners and persons entitled to shares in the prize-money arising from the capture of an East Indiaman. The decree directed an inquiry who were the parties entitled to share the net produce arising from the capture. The Master, in his report, amongst other things, stated in a schedule a list of persons who had not come in, but who appeared to be claimants, and a motion was made to pay the sum appearing to belong to them into court. The Court said it could not be granted, as these persons might not choose to come in and become parties to this suit, and that they might afterwards file a bill for themselves. (*Good* v. *Blewitt,* Coop. 198.)

In a suit instituted in 1814, to administer the personal estate of an intestate who died in 1807, the Master reported that no debts had been proved; and by the decree on further directions in 1817, the whole of the residue was apportioned and distributed; but as the plaintiff was then an infant, his share, amounting to four-ninths

1 *Lashley* v. *Hogg*, 11 Ves. 602; *Angell* v. *Haddon*, 1 Mad. 602; *Gillespie* v. *Alexander*, 3 Russ. 130; *Hartewell* v. *Colvin*, 16 Beav. 140.
2 *Gillespie* v. *Alexander*, 3 Russ. 136.
3 *Elliot's Executors* v. *Drayton*, 3 Desau. 29

of the fund was retained and carried to his separate account. In 1825, a foreign prince, claiming to be a creditor of the intestate, petitioned for leave to prove his debt against the sum remaining in Court, and the plaintiff coming of age soon after, applied to have that sum paid out: held, that the creditor was not precluded by the previous proceedings, or the lapse of time, from tendering such proof before the Master; but that every defence should be allowed there, which would have been competent upon a new bill; that the debt, if established, must be restricted, as against the fund in Court, to that proportion which the plaintiff's share bore to the whole amount distributed; and, therefore, that after reserving a sum, equal to four-ninths of the claim, the residue of the fund ought to be paid out to the plaintiff. (*Greig* v. *Somerville*,[1] 1 R. & M. 338.)

A person residing out of the jurisdiction, and who claimed to be a creditor, but who had omitted to bring in his claim before the Master had made his report, petitioned to have his claim referred to the Master; the Court made the Order upon his giving security for costs.[2] If after a decree for the administration of the assets, any creditor files a bill, or brings an action for the payment of his debt, he may be restrained by injunction from proceeding with such suit or action. The application may be made, either by the plaintiff or by the Executor; or in the case of a bond creditor, by the heir-at-law.[3] A creditor having proved his claim in the Master's office, afterwards proceeded to sell under a *fi. fa.*, upon the application of a co-defendant, the sale was restrained with costs.[4]

In a suit by one or more creditors on behalf of all, as each creditor has a right to question the claim of the other, because it may interfere with his own, and as all are not before the Court at the hearing, the plaintiff in such a suit is called upon to prove his debt over again before the Master, although he may have established it in Court.[5]

Unless the claims can be sufficiently supported by documentary evidence, they are supported by an affidavit proving the debt, and swearing that the whole debt remains due, and, if the nature of the

1 Eng. Chan. Reps. iv. 453.
2 *Drever* v. *Maudesley*, 5 Russ. 11.
3 *Martin* v. *Martin*, 1 Ves. 211.
4 *Cahuac* v. *Durie*, 9 Grant, 485.
5 *Owens* v. *Dickenson*, C. & P. 56; *Field* v. *Titmus*, 1 Sim. N. S. 218.

claim admits it, by showing that it is fair and reasonable, and that the party has no security, or if he has any security, that he has no other security except such security. The items of the account are annexed to and verified by the affidavit.

If a mortgagee is willing to come in under the decree, and proof of his claim is required, his claim is supported by the production of the mortgage deed, the execution of which is duly verified by affidavit. If the mortgage has been assigned or transferred, he produces the transfer of mortgage, and an affidavit verifying the execution of the same; the affidavit states what, if anything, has been received for principal money, what on account of interest, and what remains due.

If the mortgagee has been in possession, he sets forth, in a schedule to his affidavit, his receipts and payments; and the latter are duly vouched by the production of receipts in the same manner, as the credit side of a debtor and creditor account. The interest[1] on the amount of the mortgage money is computed after the rate of interest mentioned in the security, up to the date of the report, and is added to the principal.[2] If, after the report, there is a direction to compute subsequent interest, the same is computed on the principal sum found due by the report,[3] but not on the interest nor on the costs.[4]

Claims by mortgagees will be fully considered when the subject of forclosure is reached. The rules governing the proof of such debts in an administration suit are the same as in suits for foreclosure or sale under a mortgage.

If an executor or administrator wishes to retain a sum in payment of his own debt, he should set up the claim by his answer, and also on the credit side of his account; but it is not necessary for him to make a separate claim on the subject. An executor may retain his own debt, although it is barred by the statute.[5] Funeral and testamentary expenses, and the costs of administration previous

1 See *Thompson* v. *Drew*, 20 Beav. 49, where the mortgage deed contained no provision for interest.
2 As to how many years of interest on a mortgage debt are recoverable, see *Sinclair* v. *Jackson*, 17 Beav. 405.
3 *Brewin* v. *Austin*, 2 Keen, 211.
4 See *Mason* v. *Bogg*, 2 M. & C. 443, as to the principles upon which a specialty creditor, whose debt is also secured by a mortgage or lien, should prove his debt under a decree in a creditor's suit.
5 *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415.

to the suit, are included in the credit side of his account; but the costs of the suit cannot be included therein. These are disposed of by the Court when the cause comes on for further consideration.

This last remark must be taken in a qualified sense, for although the question of costs is usually reserved by the decree in administration suits, until after the accounts are taken, and the Master has made his report, an executor is permitted to advance moneys for the costs of the suit where they are necessarily advanced to protect the interests of the estate.[1]

Section II.—*Of the Right of the Executor or Administrator to retain a Debt due to him from the Testator or Intestate.*

As an executor or administrator, among creditors of equal degree, may pay one in preference to another, so it is another of his privileges that he has a right to retain for his own debt due to him from the deceased, in preference to all other creditors of equal degree.[2]

This remedy arises from the mere operation of the law, on the ground that it were absurd and incongruous that he should sue himself, or that the same hand should at once pay and receive the same debt: and, therefore, he may appropriate a sufficient part of the assets in satisfaction of his own demand; otherwise he would be exposed to the greatest hardship; for since the creditor who first commences a suit is entitled to a preference in payment, and the executor can commence no suit, he must in a case of an insolvent estate necessarily lose his debt, unless he has the right of retaining. Thus, from the legal principle of the priority of such creditor as first commences an action, the doctrine of retainer is a natural deduction.[3] But the privilege is accompanied with this limitation, that he should not retain his own debt as against those of a higher degree; for the law places him merely in the same

1 *Re Babcock's Estate*, 8 Grant, 409.
2 *Woodward* v. *Lord Darcy*, Plowd. 184. Dyer 2, *a in marg.* as to an executor; and *Warner* v. *Wainford*, Hob. 127; *Bond* v. *Green*, 1 Brownl. 75; S. C. Godb. 217, pl. 310, as to an administrator.
3 2 Black. Com. 511; 3 Black. Com. 18; Toller, 295; Godolph. Pt. 2. c. 11, s. 3.

situation as if he had sued himself as executor, and recovered his debt, which there could be no room to suppose during the existence of those of a superior order.[1]

This privilege of the personal representative to retain for his own debt exists, notwithstanding a decree for an account has been made, in a suit by the other creditors for the administration of the assets: and notwithstanding the assets out of which he seeks to retain his debt came to his hands after the decree; for the decree does not affect the legal priorities of creditors: and there is no distinction in this respect between assets possessed prior to the decree and subsequent to it.[2]

The right of retainer is not lost by the circumstance of the executor or administrator having paid into court, in a creditor's suit, the money which has been received on account of the assets of the deceased: And where the fund in court is insufficient to discharge the debt of the executor or administrator, his right of retainer will prevail against the plaintiff's right to have the costs of the suit satisfied.[3]

It should seem, however, that an executor cannot retain, out of such of the assets as are merely *equitable*, to pay the whole of a debt due to him from the deceased, but only a proportionable part with the other creditors: For in equity all debts are equal; and a Court of Equity will never assist a retainer.[4]

An executor or administrator may retain not only for debts which he claims beneficially, but also for those to which he is entitled as trustee. Thus, in *Plumer* v. *Marchant*,[5] A., before his marriage, covenanted with B. and C. to leave them by his will, or that his executors, within six months after his death, should pay them 700*l.* in trust to pay the interest to his wife for life, and on her death to

1 3 Black. Com. 18; Com. Dig. Admon. (C 2): 1 Saund. 333 (note 6, to *Hancocke* v. *Prowd*), Godolph, *ubi sup.*; Toller, 295. However, according to the opinion of other writers, the principle on which the executor's right to retain is founded, is "*In equali jure potior est conditio possidentis:*" Fonblanq. Treat. Eq. B. 4, Pt. 2 c. 2, s. 2, note (*m*).

2 *Nunn* v. *Barlow*, 1 Sim. & Stu. 588.

3 *Chissum* v. *Dewes*, 5 Russ. 29: *Langton* v. *Higgs*, 5 Sim. 228; *Tipping* v. *Power*, 1 Hare, 405, 411; *Hall* v. *M'Donald*, 14 Sim. 1.

4 *Anon.*, 2 Cas. Chanc. 54; *Hopton* v. *Dryden*, Prec. Chanc. 181; S. C. 2 Eq. Cas. Abr. 450; *Baily* v. *Ploughman*, Mosely, 95; *Chambers* v. *Harvest*, *ibid*, 123; *Hall* v. *Kendall*, *ibid*, 328. It was stated by Verney, M. R., that "the rule of this Court in cases of retainer is, unless the party can show a *legal* right to retain, we never give it him; if he can show a legal right, we never take it away from him: *Chapman* v. *Turner*, Vin. Abr. Exors. (D. 2) pl. 2.

5 3 Burr. 1380 (cited 3 A. & E. 858, *per curiam.*)

divide the principal among his children, and, in default of children, as he should appoint, and bound himself, his heirs, executors, and administrators in a penalty for performance: On his dying before his wife, without issue and intestate, it was holden that B., in the character of administrator, might retain assets to that amount during the life of the widow, against a bond creditor who sued before the six months were elapsed.

Conversely, the executor or administrator may retain (at all events in equity) for debts due to another in trust for him. Thus, in *Cockroft* v. *Black*,[1] where the testator, before marriage, gave a bond to a trustee for his wife, to leave her 100*l.* at his death if she survived him; Lord King, C., held that she, as executrix of her husband, might retain this 100*l.* so due to her trustee, out of the assets. The same doctrine was acted upon by Lord Loughborough in *Franks* v. *Cooper*,[2] where it was holden that an administratrix might retain in respect of a bond given by the intestate to another person, as her trustee, to secure an annuity to her;[3] and by Sir John Leach, V. C., in *Loomes* v. *Stotherd*;[4] in which last case his Honor held, that, as an executor may retain his own debt or the debt of his trustee, so a devisee of the realty may retain for his own specialty debt, or the debt of his trustee.[5]

The executor's right of retainer, under an obligation made to his trustee, has also been recognized in the Courts of Common Law. Thus, in *Roskelley* v. *Godolphin*,[6] a husband, on marriage, gave a bond to trustees conditioned to pay 3000*l.* to the wife, if she survived him: The husband died, leaving a daughter and the wife living: The wife administered *durante minore ætate* of the daughter: and it was holden by the Court of King's Bench that she might retain for the money due on the bond. So in *Marriot* v. *Thompson*,[7] a husband, prior to his marriage, gave a bond to two trustees conditioned to leave to his wife 400*l.* at his death: The marriage took place, and he afterwards died, having appointed her his executrix: And the Court of Common Pleas held, that she

1 2 P. Wms. 298.
2 4 Ves. 763.
3 There being in this case a deficiency of assets, it was directed that a value should be set on the annuity at the time of the death of the intestate, not including the arrears since.
4 1 Sim. & Stu. 461.
5 See further on the right of the heir to retain, *Player* v. *Foxhall*, 1 Russ. Chan Ca. 538.
6 Sir T. Raymond, 483; S. C. *nom. Boskellett* v. *Godolphin*, Skinner, 214; S. C. *nom. Rookelley* v. *Godolphin*, 2 Show, 403.
7 Willes, 186.

might retain for the sum due on the bond, and plead such retainer to an action brought against her by another bond creditor of the husband. So in *Loane* v. *Casey*,[1] a widow, who was sued as executrix of her husband, was allowed, by the same Court, to retain out of his personal assets sufficient to answer the breach of a covenant entered into by her husband, previous to the marriage, with a trustee for securing a provision for herself: And De Grey, C. J., said that Lord Hardwicke had determined to the same effect in the case of a child's portion; and that wherever an executor had a right to a sum of money, whether it were strictly a debt due to himself or nominally to another, he might retain it: The Chief Justice also mentioned a case before Eyre, C. J., where a widow executrix was allowed to retain the money with which she had paid a mortgage on her jointure, the husband having covenanted it to be free from incumbrances; this being a satisfaction for his breach of covenant.

It must, however, be observed, that in the two earlier of the decisions at law above stated, the Court took a distinction with respect to the executor's right to retain, between cases where the payment, under the contract with the trustee, is to be made to the party seeking to retain, and those in which the payment is to be made to the trustee, in trust for the executor or administrator. Thus, in *Roskelley* v. *Godolphin*,[2] Raymond, J., said, that if the *payment had been to be made to the trustees*, though in trust for the wife, there could have been no retainer. So in *Marriot* v. *Thompson*, the Court, in giving judgment, laid down, that if the money in the condition *had been to be paid to the trustees*, and not to the executrix herself, she could not in that case have retained.

It must be further remarked, that where the *corpus* of the trust money is to be paid to the trustees, in trust, not to pay the capital sum to the executor or administrator, but to provide him an annuity by means of the interest or other proceeds, it has been holden that the right of retainer for the principal sum does not exist at law: Thus, where a covenant was made with trustees in a deed of settlement before marriage, that the executors or administrators of the intended husband should pay to the trustees the sum of

1 2 W. Black. 965.
2 Sir T. Raym. 484.

to an order, is to direct every creditor, by a time to be thereby limited, to send to such other party as the Master directs, or to his solicitor, to be named and described in the advertisement, the name and address of such creditor, and the full particulars of his claim, and a statement of his account, and the nature of the security (if any) held by him; and such advertisement is to be in the form set out in Schedule V. form No. I. with such variations as the circumstances of the case require; and at the time of directing such advertisement, a time is to be fixed for adjudicating on the claims."

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his belief that such claims, or parts thereof respectively, are justly due, and proper to be allowed, and the reason for such belief." And Order 481 that, "In case the Master thinks fit so to direct, the making of the affidavit referred to in Order 480, is to be postponed till after the day appointed for adjudication, and is then to be subject to such directions as the Master may give." Order 482 provides that, "At the time appointed for adjudicating upon the claims, or at any adjournment thereof, the Master may allow any of the claims, or any part thereof respectively, without proof by the creditors, and may direct such investigation of all or any of the claims not allowed, and require such further particulars, information or evidence relating thereto, as he thinks fit, and may, if he so think fit, require any creditor to attend and prove his claim, or any part thereof; and the adjudication on such claims as are not then allowed is to be adjourned to a time to be then fixed."

Order 483 provides that, "Notice is to be given by the executor or administrator, or such other party as the Master directs;

I. To every creditor whose claim, or any part thereof has been allowed without proof by the creditor, of such allowance, and such notice may be in the form No. 4 in Schedule V.

II. And to every such creditor as the Master directs to attend and prove his claim, or such part thereof as is not allowed, by a time to be named in such notice (which may be in form No. 5 in schedule V.), not being less than seven days after such notice, and to attend at a time to be therein named, being the time to which the adjudication thereon has been adjourned; and in case any creditor does not comply with such notice, his claim, or such part thereof as aforesaid, is to be disallowed, unless the Master thinks fit to give further time." And Order 484 that, "A creditor who has not before sent in particulars of his claim, pursuant to the advertisement, may do so seven clear days previous to any day to which the adjudication is adjourned." Order 485 provides that "After the time fixed by the advertisement no claim is to be received (except as before provided in case of an adjournment) unless the Master thinks fit to give special leave upon application, and then upon such terms and conditions as to costs and otherwise as the Master directs." And Order 486, that "Where an order is made for payment of money out of

An executor of an executor is entitled to retain, out of the assets, debts due from the testator, either in his own right or as the executor of the deceased executor.[1] So where a bond creditor took out administration *de bonis non* to his debtor, and died before he had made any election in what particular effects he would have the property, altered by retainer; it was held that the executor of the creditor, in accounting for the assets of the debtor, might deduct the debt.[2]

But it was lately held,[3] that the administrator *cum testamento annexo* of a deceased executor, in accounting for the executor's receipts of the assets, was not entitled, by way of discharge, to the amount of a debt owing from the testator to the executor jointly with another person as partner, the executor having predeceased such partner, without having, in point of fact, done any act in the exercise of his right of retainer. It was not, however, at all questioned in this case, but indeed conceded by the Court (Wigram, V. C.) that one of two partners to whom a debt is due, being made an executor, might retain that debt. But it was ruled that if such an executor dies, so that the interest in the debt wholly devolves on his surviving partner, the right of retainer ceases, and cannot be exercised as the representative of the executor.

In case a married woman be executrix, the husband may retain, if the testator was indebted to him, or, which is the same thing, to the wife before marriage.[4] So it seems clear that if the husband be executor, he may retain for a debt contracted by the testator with the wife *dum sola*.[5]

It is clear, as there has already been occasion to show, that an executor *de son tort* cannot retain for his own debt, even of a superior degree to that upon which he is sued. There is, indeed, one exception to this rule: for a party who, by stat. 43 Eliz. c. 8, becomes executor *de son tort*, in consequence of a gift to him of the

1 *Hopton* v. *Dryden*, Prec. Ch. 180; *Thompson* v. *Grant*, 1 Russ. Chan. Ca. 540, *in notis*: But not the executor of one of several executors, one or more of whom is still living: Prec. Ch. 181

2 *Weeks* v. *Gore*, 3 P. Wms. 184, note to *Croft* v. *Pike*, in which latter case a point arose, but was not decided, viz., whether if a debtor dies, having made his creditor executor, and then the executor dies, having intermeddled with the goods, but before probate, and before any election made, his executor can retain.

3 *Burge* v. *Brutton*, 2 Hare, 373.

4 Toller, 359.

5 *Prince* v. *Rowson*, 1 Mod. 208; 2 Mod. 51.

intestate's effects by an administrator who has obtained the grant fraudulently, is, by the express provision of that act, allowed to retain.[1]

If the same person be the personal representative both of the creditor and of the debtor, he may retain out of the effects of which he is possessed as the representative of the debtor to satisfy the debts due to him as the representative of the creditor.[2]

If there are two joint and several obligors, and one of them dies, having made the obligee his executor, in such case the obligee, if he has not received satisfaction out of the assets of the deceased obligor, may sue the survivor; for, being jointly and severally bound, he may sue which of them he pleases, and though the debt be one, yet the obligations are several; and no assets appear of the value of the debt to retain; and there might be a judgment against which he could not retain.[3]

So if the obligor appoint the obligee his executor, and there are no assets out of which he may retain, the obligee may sue the heir if he is bound.[4]

If two are *jointly* bound in an obligation, the one as principal, and the other as surety, and on the principal's death the surety becomes his personal representative, and on forfeiture of the bond discharges the debt; it has been held, that he cannot retain: for, by joining in the bond with the principal it became his own debt.[5] Yet in such case it should seem that he might retain for the money paid, as constituting a simple contract debt.[6] Indeed, in *Bathurst* v. *De la Zouch*,[7] where the executor had become bound with his testator in a bond for another person, Lord Bathurst, C., held that the executor was entitled to retain out of the testator's estate the whole of what was due on the bond.

Damages which in their nature are arbitrary, such as damages founded on *tort*, cannot be retained.[8]

1 Com. Dig. tit. Administrator, (C. 3); Wentw. Off. Ex. Ch. 14, p. 336, 14th ed.; *Vernon* v. *Curtis*, 2 H. Black. 26, note (*b*); Toller, 366.
2 *Burnet* v. *Dixe*, 1 Roll. Abr. 922: Exors. (L.) 2; S. C. *semble nom. Burdet* v. *Pix*, 2 Brownl. 50; *Fryer* v. *Gildridge*, Hob. 10; *Thompson* v. *Cooper*, 1 Coll. 85.
3 *Crosse* v. *Cocke*, 3 Keb. 116; *Cock* v. *Cross*, 2 Lev. 73, S. C. *semble*, 1 Freem. 49, 50; 3 Bac. Abr. 10, tit. Exors. (A.) 9.
4 *Wankford* v. *Wankford*, 1 Salk. 304.
5 *Anon.*, Godb. 149, pl. 194; 4 Leon, 236, pl. 362.
6 Toller, 298. 7 2 Dick. 460.
8 *Loane* v. *Casey*, 2 W. Black. 968, by Blackstone, J.

Where there are co-executors or co-administrators, each being a creditor of the deceased, the one cannot retain for his own debt to the prejudice of the other; for several joint executors or administrators are considered but as one person in law; the possession of one is the possession of the other; the receipt of one is the receipt of the other; and, therefore, the retainer of one must be considered as the retainer of the other, and must ensure for their mutual benefit, in the discharge of the debts of both in proportion.[1]

In *Kent* v. *Pickering*,[2] where, in a creditor's suit, a balance had been found, by the Master's report, to be jointly due from two executors to their testator's estate, and one of the executors was a creditor, it was held by Lord Langdale, M. R., that such executor had a right to retain his debt out of the assets consisting of the balance due from himself and his co-executor.

It should seem that an executor or administrator may retain for a debt due to himself, though it may be more than six years old; for as an executor may pay a debt to another though he might have pleaded the Statute of Limitations, why may he not pay himself?[3] In *Hopkinson* v. *Leach*,[4] Sir John Leach, V. C., was of opinion that the executor might retain in such a case: But his Honor directed the opinion of a Court of Law be taken. The right to retain has been lately confirmed in *Stahlschmidt* v. *Lett*.[5]

It is held to be optional in an executor or administrator, either to *plead* a retainer of a debt due to him, or give it in evidence on a plea of *plene administravit*.[6]

An executor has a right to retain a debt barred by the Statute of Limitations.

Where the personal estate of a testator is exhausted, has the executor in Upper Canada a right to retain such a debt out of the proceeds of real estate?[7]

1 *Chapman* v. *Turner*, 11 Vin. Abr. 72, tit. Exors. (D.) 2; S. C. 9 Mod. 268.
2 2 Keen, 1.
3 But see *Shewen* v. *Vandenhorst*, 1 Russ. & M. 349; 2 Russ. & M. 75.
4 7 May, 1819, M.S.; Mad. Prac. 583, 2nd ed.
5 1 Sm. & G. 415.
6 *Bond* v. *Green*, 1 Brownl. 75; *Plumer* v. *Marchant*, 3 Burr. 1380, 1385; *Loane* v. *Casey*, 2 W. Black. 965.
7 *Crooks* v. *Crooks*, 4 Grant, 615.

A woman possessed of real estate sold the same, her husband joining in the conveyance thereof, and receiving to his own use the purchase money: in consideration of which he agreed to settle on the wife certain other property which he held under lease with the right of purchase, and the lease was accordingly assigned to a trustee for the use of the wife, the husband at the time promising to pay the amount agreed to be paid for the purpose of obtaining the conveyance of the fee:—the husband having died, and his estate being in the course of administration in the Court of Chancery, and his widow having brought a claim into the Master's office for the amount necessary to procure the conveyance of the fee: *Held*, on appeal from the Master's report, that the Master had properly received parol evidence to establish such claim of the widow.[1] *Per* Spragge, V. C.: "In *Clifford* v. *Turrell*,[2] before Sir J. S. Knight Bruce, it was proved by parol that the payment of an annuity, and the providing a house, formed part of the consideration for the assignment of a lease of a farm, and the purchase of farm stock and furniture; the assignment itself stating a consideration, but not stating the annuity and house as any part of the consideration; and the Vice Chancellor decreed specific performance as to the annuity and house. I think that case governs this." Where an executor of a creditor is also administrator or executor of such creditor's debtor, the right of retainer arises where there are any assets, and he will be assumed to have exercised such right without any actual act of appropriation being established, and though his claim would otherwise be barred by the Statute of Limitations. The right of retainer out of legal assets applies to *equitable* as well as to *legal* debts, especially in a case where there is no competition of creditors. Where a member of a partnership whose accounts the Master was directed to take, was, by order, made a party in the Master's office, but on subsequent enquiry it appeared that all liability on his part was barred by the Statute of Limitations, the Master, on the application of the party added, discharged his former order, holding that he was not a necessary or proper party, and that all partnership accounts required to be taken could be taken in his absence.[3]

1 *Ross* v. *Mason*, 9 Grant, 568.
2 1 Y. & C. Ch. 138.
3 *Kline* v. *Kline*, 3 Cham. R. 161.

Executors finding it impossible to wind up the estate of the testator so long as certain partnership accounts remained unsettled, became personally liable to the surviving partner for the payment of a sum supposed to be equal to his share in the estate, and he, thereupon, released to them all his interest in the partnership estate, which was by them wound up and the proceeds applied in liquidation of the testator's debts. On a reference to the Master, this arrangement was found beneficial to the testator's estate, and the same was so declared by the Court, and the executors were held to be entitled to a first charge on the proceeds of the estate for the moneys paid by them to the surviving partner, and for what they still owed him on their personal obligation.[1] An executor has a right to retain a debt barred by the Statute of Limitations.[2] *Quære:* Where the personal estate of a testator is exhausted, has the executor a right to retain such a debt out of the proceeds of the real estate?[3]

Claim by Judgment Creditor.

The claim of a judgment creditor[4] is supported by the production of an examined and verified copy of the judgment; but generally it is sufficient to support the claim by an affidavit, that in or as of.....term, in the year....., I recovered a judgment by confession in her Majesty's Court of.....; against....., the testator, for the penalty of a bond bearing date, &c., and executed, &c., by the testator to me, in the penal sum of £.....conditioned for payment to me of the sum of £....., with interest at..... per cent.; and the affidavit concludes, that the whole of the said principal sum of £.....and interest is now due and owing to me from the estate and effects of the said testator, and for payment whereof, I, the said....., have no other security than the said judgment. The affidavit is varied according to the nature of the original debt. It is not necessary that a judgment or a decree should be revived for the purpose of the debt being proved.[5]

1 *Harrison* v. *Patterson*, 11 Grant, 105.
2 *Crooks* v. *Crooks*, 4 Grant, 615.
3 *Ibid.*
4 *Derbyshire & S. R. Co.* v. *Bainbrigge*, 15 Beav. 146; *Bennett* v. *Powell*, 3 Drew. 326; *Beavan* v. *Oxford*, 3 S. & G. 11; *Reece* v. *Taylor*, 5 De G. & S. 480.
5 *Mildred* v. *Robinson*, 19 Ves. 587.

In a suit to administer the estate of a testator, judgments obtained against his executors are payable according to their respective dates out of legal assets.[1]

A more detailed consideration of debts due on judgments will be made when the subject of Foreclosure is reached.

A claim brought in for a bond debt[2] is supported by affidavit, which, after setting forth the name and description of the creditor, and the nature of his original debt, whether special or otherwise, and that the testator was in his lifetime, and at the time of his death, justly and truly indebted unto me in the sum of £..... for money lent and advanced, or for goods sold and delivered, or as the case may be, proceeds as follows :—for securing the repayment whereof, with interest, the said testator made and executed a bond or obligation in writing, bearing date the.....day of....., in the penal sum of £.....conditioned for the payment to me, ..., my executors, administrators, and assigns, of the sum of £....., with interest, on the.....day of..... And concludes, that the whole of the said principal sum of £....., and interest, is now due and owing to me from the estate and effects of the said testator, and for payment whereof I have no other security than the said bond.

It was not the practice in the Master's offices in England to require proof of the consideration for which the bond was given, as in the case of simple contract debts, unless a case of suspicion against the bond was raised.[3] If strict proof is required, the execution of the bond is proved.[4] Under a decree in a suit by a bond creditor on behalf of himself and the other creditors on the estate, the executor may, in the Master's office, impeach the validity of the bond upon grounds which were not in issue in the cause at the hearing.[5]

Interest on a bond debt is computed after the rate of interest covenanted to be paid. If, instead of a given per centage being

1 *Dollond* v. *Johnson*, 2 Sma. & G. 301.
2 When a bond debt is barred by 3 & 4 W. IV. c. 42, see *Roddam* v. *Morley*, 2 K. & J. 336.
3 *Rundell* v. *Lord Rivers*, 1 Phill. 90: *Whitaker* v. *Wright*, 2 Hare, 310.
4 *Rundell* v. *Lord Rivers*, 1 Phill. 90.
5 *Whitaker* v. *Wright*, 2 Hare 310.

mentioned in the bond, it is conditioned to pay legal interest, that is considered to mean 6 per cent. If the bond mentions 6 per cent., but a subsequent agreement or understanding has been entered into to reduce or increase the rate of interest, and the same is proved, and the fact corroborated by the payments agreeing with the reduced rate of interest, the interest will be computed after such reduced or increased rate. In calculating interest on a bond debt, the computation may be continued until the principal and interest reach to the amount of the penalty,[1] but, generally, interest cannot go beyond the penalty.[2]

If a claim is brought in for a bill of exchange, the affidavit, after stating that the testator was, at the time of his death, truly indebted to me, proceeds that the estate of the said testator is still justly and truly indebted to me, upon and by virtue of a certain bill of exchange, bearing date, &c., drawn by me upon the testator, and accepted by the testator in the sum of £....., payable to me or my order,.....months after the date thereof. The affidavit concludes, that the creditor has not received anything, or states what he has received, and that he has not any other security. If insisted upon, the testator's handwriting to the bill of exchange must be proved. A claim brought in for the amount due on a promissory note is supported by an affidavit to the same effect as a claim for a bill of exchange, excepting as to verbal alteration. Interest is calculated on each of these securities from the time when the bill or note became payable,[3] unless any other time is mentioned.

If a claim is brought in by a banker, the affidavit states that some time previous to....., the testator opened an account with ....., of the city of....., bankers. That on the.....day of ....., the testator's pass-book was made up and sent to him, or settled, or as the case may be; that the sum of £.....was then due upon the balance of account for principal and interest, and that the same now remains due. If subsequent dealings have taken place since the settlement of the account, the affidavit states the particulars in a schedule, and verifies the same by swearing,

1 *Sharp* v. *Earl of Scarborough*, 3 Ves. 557.
2 *Knight* v. *Maclean*, 3 Bro. C. C. 490; *Clarke* v. *Lord Abingdon*, 17 Ves. 106; *Jew* v. *Winterton*, 3 Bro. C. C. 489. As to interest being allowed beyond the penalty, see Principles of Equity, 153.
3 *Lithgow* v. *Lyon*, Cooper, 29.

that I, the deponent, have in a schedule to my affidavit set forth a true and particular account of all and singular the sum and sums of money paid by or on account of the said testator to the bankers, and received by them respectively as his bankers or otherwise from the said testator, or on his account, from the..... ...day of....., and that the sum of £.....is now due and owing to me and my said partners from the estate of the said testator, upon the balance of account for principal and interest to the.....; and then follows the usual denial of not having received anything or any security. The schedule of the account is annexed to the affidavit, and verified. The affidavit is made by one of the bankers. The banker's pass-book is sometimes proved by affidavit, as showing a true statement of the account. If interest is charged, the custom should be proved, or that the debtor in a previous settled account recognized the claim for interest.

If a claim is brought in by a simple contract creditor[1] for goods sold and delivered, or for work and labour done, or for work, labour, care, diligence and attendance, the affidavit states that the testator was justly and truly indebted to me for the same, and that his estate still remains indebted, and that I have not received anything, nor have I any security. The affidavit also proves the delivery of the goods, &c., and also contains a bill, or detailed account, of what is due, which is verified by the affidavit; and the creditor swears that the prices therein charged are fair and reasonable, and such as are usual and customary in the same trade or business, and concludes that the whole remains due, and that the creditor has no security for the same.

If the creditor is dead, the claim is brought in by his executor or administrator, and in addition to the usual matter, the affidavit states the death of the creditor; that he made a will, dated....., and appointed.....his executor; and that the same has been duly proved in the Surrogate Court of.....: or if the creditor made no will, that he died intestate, and that administration has been granted, &c. In support of this, the probate of the will, or letters of administration, are produced. The executor swears that he has not received anything, and that he believes that the testator

1 A foreign judgment only constitutes a simple contract debt; *Wilson* v. *Dunsaney*, 18 Beav. 293 Where a breach of trust constitutes a simple contract debt, and where not, see principles of Equity, 623.

or intestate did not receive anything in his lifetime. If the executor is unable to prove the debt and the reasonableness of the charges, some other competent person must do it.

If a claim is brought in by the assignee of a bankrupt or insolvent, the bankrupt or the insolvent makes an affidavit that the debt is due, and that he has not received anything, nor to the best of his belief have his assignees or any other person. The assignees should join in this affidavit, and state that they have not received anything.

If a claim is brought in by a person to whom a security or debt has been assigned, the assignment is proved and produced. If a creditor is abroad, the debt may be proved by any competent person.

In *Paynter* v. *Houston*,[1] under the usual decree for account in a creditor's suit, the Master refused to receive the claim of the surviving partners of the testator for a debt due from him to them on his separate account. On a motion, the Lord Chancellor thought the Master ought to receive the claim.

It will be convenient here to examine the rules of priority in which the various claims against an estate should be fixed by the report and paid by the Court out of the assets of the estate. This is, of course, a matter of very little consequence where it turns out that the estate is sufficient to pay all the charges against it with costs, commission, and interest; but as this can seldom be certainly known until it is completely administered, it is necessary that the order in which the debts proven before the Master are to be paid should be ascertained and fixed by his report.

The law on this subject is simplified by the Act to amend the law of Property and Trusts in Upper Canada,[2] in the cases of the estates of persons dying after the date of its passage. It declares that "On the administration of the estate of any person dying after the passing of this Act, in case of a deficiency of assets, debts due to the Crown, and to the executor or administrator of

1 3 Mer. 297.
2 29 Vic. c. 28, s. 28, assented to 18 Sept. 1865.

the deceased person, and debts to others, including therein respectively debts by judgment, decree or order, and other debts of record, debts by specialty, simple contract debts, and such claims for damages as by statute are payable in like order of administration as simple contract debts—shall be paid *pari passu*, and without any preference or priority of debts of one rank or nature over those of another; but nothing herein contained shall prejudice any lien existing during the lifetime of the debtor on any of his real or personal estate." But as many cases may arise where administration is sought of the estate of a person dying before 18th September, 1865, it will be necessary to consider the rules as to priority without regard to this Statute. This will involve a consideration of the difference between *legal* and *equitable* assets.

Legal assets are such descriptions of property belonging to the testator or intestate as may be reached by an execution at law, and such as a creditor, sueing the executor in an action at law for a debt due from the testator, might bring forward in evidence as an issue joined on the executor's plea of *plene administravit*.

A most important distinction exists with respect to the administration of the two kind of assets, legal and equitable. If they are legal, they must be administered by the executor or administrator of the deceased in a due course of administration, having regard to the rules of priority among creditors. But if the assets in the hands of an executor are equitable, then, although the precedence in payment of debts to legacies must be respected, yet, as among creditors, the assets must be applied in satisfaction of all the claimants, *pari passu*, without any regard to the priority in rank of one debt to another. The principle of this distinction is, that in natural justice and conscience, and in the contemplation of a Court of Equity, all debts are equal, and the debtor is equally bound to satisfy them all, whether by specialty or simple contract: Therefore, since a claimant upon equitable assets is under the necessity of going to a Court of Equity in order to reach them, that Court will act only according to the rule of doing justice to all creditors, without any distinction as to priority.[1]

1 *Plunket* v. *Penson*, 2 Atk. 294.

It must be observed that the true test, as to whether the assets are legal or equitable, is not whether the executor or administrator, but whether the *claimant* can reach them without resorting to a Court of Equity. It is, therefore, difficult to understand why the equity of redemption of a term for years should have been held to be equitable, and not legal assets in the hands of an executor or administrator; for although the mortgage is forfeited at law, and the whole estate thereby vested in the mortgagee, and the right of redemption is merely equitable property at the time of the death of the testator or intestate, yet it is a right which comes to the executor or administrator as part of the personal estate, and for which it can hardly be doubted he would at this day be chargeable on an issue of *plene administravit*. However, Sir Joseph Jekyll delivered his opinion, after great deliberation, in the case of *The Creditors of Sir Charles Cox*,[1] that it was only equitable assets: And Lord Hardwicke held accordingly in the case of *Hartwell* v. *Chitters*.[2]

This difficulty as to equities of redemption was removed in this country by 12 Vic. c. 73,[3] which provided that "the Sheriff or other officer to whom any writ of *fieri facias* against the lands and tenements of any mortgagor of real estate is directed, may seize or take in execution, sell and convey (in like manner as any other real estate might be seized or taken in execution, sold and conveyed) all the legal and equitable interest of such mortgagor in the mortgaged lands and tenements":—an equity of redemption, therefore, is now clearly a legal asset.[4]

It appears, notwithstanding, to be the better opinion at this day that equities of redemption are not necessarily equitable assets.[5] And in the view of an eminent writer,[6] the more accurate statement of the doctrine is, that legal assets are such as come into the hands and power of an executor or administrator, or such as he is entrusted with by law, *virtute officii*, to dispose of in the course of

1 3 P. Wms. 342. It is said in the note by Mr. Cox, 3 P. Wms. 344, that it appears from the Reg. Lib. that the point was not in fact determined; but it seems unquestionable that the Master of the Rolls delivered a solemn opinion that the equity of redemption was equitable assets.
2 Ambl. 308.
3 See Con. Stat. U. C. c. 22, s. 257.
4 This Act however, applies only where the execution is against the mortgagor himself, and on an execution issued against his lands: *B. U. C.* v. *Brough*, 2 E. & A. Rep. 95; and see *Re Kenan*, *post*.
5 See 2 Jarman on Wills, 545; Story on Equity, c. 9, s. 551, note (1).
6 Story on Equity, c. 9, s. 551.

administration; or, in other words, whatever an executor or administrator takes, *qua* executor or administrator, or in respect to his office, is to be considered as legal assets. So, in the recent case of *Cook* v. *Gregson*,[1] Kindersley, V. C., (applying the test whether the executor or administrator would take simply *virtute officii*) held that an equity of redemption in a sum of money charged on a real estate was legal assets: And his Honor said that he thought the cases above cited as to mortgages for terms for years could not be supported.

Accordingly, in *Wilson* v. *Fielding*,[2] it was adjudged by Lord Macclesfield that personal assets as a lease for years, a bond, or the grant of an annuity, in a trustee's name, should be applied as legal assets in a due course of administration, although a creditor could not come at them without the aid of a Court of Equity: And the same law has been laid down by Sir Joseph Jekyll in *The Case of Sir Charles Cox's Creditors*.[3]

With respect to that portion of the property in the hands of an executor or administrator which consists of the proceeds of the sale of real estate, it is now fully settled that such proceeds are *equitable* and not legal assets. In some of the older cases, indeed, it has been holden that where land is devised to executors for the payment of debts and legacies, or is devised to be sold by executors, or devised to executors to be sold for that purpose, the proceeds arising from the sale are legal assets:[4] But later cases have completely established that in all cases they constitute merely equitable assets.[5] In *Clay* v. *Willis*,[6] A. mortgaged lands in fee to B. and Co., with a power of sale upon trust, to repay themselves the moneys advanced, &c., and to pay over the surplus to A., his executors, and administrators. Before any sale was made, A. died, having devised all his real and personal property to C. and D.

1 June 7, 1856; 20 Jur. 510.

2 2 Vern. 763. It should seem, by the report of this case in 10 Mod. 427, that Lord Macclesfield, at this period, altogether denied the doctrine of administering equitable assets *pari passu*. This case was cited before Lord Hardwicke in *Hartwell* v. *Chitters*, *ubi supra*.

3 3 P. Wms. 342.

4 *Girling* v. *Lee*, 1 Vern. 63. *Cutterback* v. *Smith*, Prec. Chanc. 127. *Bickham* v. *Freeman*, Prec. Chanc. 136. Anon., 2 Vern. 133. *Greaves* v. *Powell*, 2 Vern. 248. Anon., 2 Vern. 405. *Burwell* v. *Corrant*, Hardr. 405.

5 *Lewin* v. *Okeley*, 2 Atk. 50. *Silk* v. *Prime*, 1 Bro. C. C. 138, *in notis*. *Barton* v. *Boucher*, 1 Bro. C. C. 140, *in notis*. *Newton* v. *Bennet*, 1 Bro. C. C. 134. *Batson* v. *Lindegreen*, 2 Bro. C. C. 94. *Baily* v. *Elkins*, 7. Ves. 319. *Shiphard* v. *Lutwidge*, 8 Ves. 26. *Clay* v. *Willis*, 1. B. & C. 364. *Barker* v. *May*, 9 B. & C. 489. S. C. 4 Mann. & R. 336. The case of *Lovegrove* v. *Cooper*, 2 Sm. & G. 271, seems to conflict with these authorit es. But *quære* whether it is correctly reported.

6 1 B. & C. 364.

(whom he also made executors) upon trust, to sell and pay debts, &c. During the lifetime of C. and D., B. and Co. sold the estate, and paid the surplus into the hands of E., who was agent for C. and D. Whilst the money remained in E.'s hands, C. and D. died; E. also died soon after, leaving the defendant his executor. The plaintiff having taken out administration *de bonis non*, with the will of A. annexed, brought an action for money had and received against the defendant: And it was held by the Court of King's Bench that it could not be maintained; for that the money in the defendant's hands was equitable, and not legal assets, and, therefore, would not have been recoverable by C. and D. in their representative character. In *Barker* v. *May*,[1] the testator devised to his executors, their heirs and assigns, his lands upon trust to sell the same; and directed that the money arising from the sale should be deemed part of his personal estate, and that it should be subject to the disposition made concerning his personal estate. He then directed his personal estate to be sold; and when the money arising from the sale of his personal and real estate should be collected, he disposed of it in the manner mentioned in the will, and among other dispositions he bequeathed a legacy to A. B.: The Court of King's Bench held that the money arising from the sale of the real estate was equitable assets: And a prohibition was granted to the Consistorial Court of Norwich, in which the legatee had sued for his legacy, and the executor, having accounted for all the personal estate, admitted that he had in his hands a sum of money arising from the sale of the real estate: And Lord Tenterden observed, that it was quite clear that the testator could not alter the legal character of the property, by directing that it should be considered as part of his personal estate.[2]

Where the assets are partly legal and partly equitable, though equity cannot take away the legal preference on legal assets, yet if one creditor has been partly paid out of such legal assets, when satisfaction comes to be made out of equitable assets, the Court will postpone him until there is an equality in satisfaction to all

1 9 B. & C. 489. S. C. 4 Mann. & R. 336.

2 Where a testator devised a freehold house to A., whom he appointed one of his executors, charged with a sum of money payable within twelve months, this was held *equitable* assets in the hands of the executors: *Lowe* v. *Peskett*, 16 B. C. 500.

the other creditors out of the equitable assets, proportionable to so much as the legal creditor has been satisfied out of the legal assets.[1]

Where a man has a general power of appointment over a fund, and he actually exercises his power, whether by deed or will, the property appointed shall form part of his assets, so as to be subject to the demands of his creditors at his death, in preference to the claims of his legatees or appointees.[2] But in order to raise this equity, the power must be actually executed;[3] for equity never aids the non-execution of a power.[4] And although creditors in these cases prevail over volunteers, yet if a party taking under a voluntary appointment sell to a person *bona fide*, and for a valuable consideration, such persons, in analogy to the decisions on the statute of voluntary conveyances, will be preferred to the creditors, as having a preferable equity to them.[5]

There may be instances, however, where an equity of redemption is an equitable and not a legal asset. Where several lots of land are mortgaged, the equity of redemption in one or some of them only cannot be sold under common law process—and *semble*, that where lands in different counties are mortgaged, the equity of redemption cannot be sold under execution at law, and can only be reached in equity.[6]

The widow of an intestate having obtained letters of administration, received and got in his personal estate, went into occupation of the real estate, received the rents and profits thereof, and spent a considerable sum in improving it. She also maintained the infant heirs of the intestate, to whom no guardian had been appointed. *Held*, that the present estate and the proceed or profits of the real estate come to her hands must first be applied in payment of debts, then to reimburse her for the sums spent in the infant's maintenance.

1 *Morrice* v. *Bank of England*, Cas. temp. Talb. 220. by Lord Talbot. *Chapman* v. *Esgar*, 1 Sm. & G. 575.
2 *Thompson* v *Towne*, 2 Vern. 319. *Hinton* v. *Toye*, 1 Atk. 465. *Bainton* v. *Ward*. 2 Atk. 172. *Townsend* v. *Windham*, 2 Ves. sen. 9. *Pack* v. *Bathurst*, 3 Atk. 269. *Troughton* v. *Troughton*, 3 Atk. 656. *George* v. *Milbanke*, 9 Ves. 190. *Jenny* v. *Andrews*, 6 Madd. 264. *Platt* v. *Routh*, 6 Mees. & W. 789. *Fleming* v. *Buchanan*, 3 De G. Sm. & G. 976.
3 See stat. Ont. 36 Vict. c. 20, & Imp. stat. 1 Vict. c. 26, s. 27 Preface. 2 Jarman on Wills, 546.
4 *Holmes* v. *Coghill*, 7 Ves. 499. 12 Ves. 206.
5 *George* v. *Milbanke*, 9 Ves. 190. *Hart* v. *Middlehurst*, 3 Atk. 377. 2 Sugd. Pow. 29, 6th edit.
6 *Heward* v. *Wolfenden*, 14 Grant, 188.

No allowance was made to the administratrix for her improvements to the realty, but she was not to be charged with an increase in in rental caused by such improvements.[1]

A mortgagee after the death of a mortgagor, has a right to prove upon the general estate, for the whole amount of his claim, and to hold his security for any amount that the general estate may be insufficient to pay, and the fact that a simple contract creditor has obtained judgment against the personal representatives, upon which he has placed an execution against lands in the sheriff's hands will not affect such right.[2] Under the statute authorizing the sale under execution of the mortgagee's equity of redemption, Con. Stat., U. C., chapter 22, the sheriff cannot sell or convey any interest, if there a second mortgage outstanding in the hands of different parties. Where a first mortgagee acquired, as he contended, a title through a purchaser at sheriff's sale of the equity of redemption of the mortgaged premises, there being *mesne* incumbrances it was held that he did not acquire the fee in the lands, the sheriff not having power to sell.[3]

The Master having taken care that in settling the priorities of the various claims proven before him he has had due regard to the question whether they shall be paid out of legal or equitable assets, and bearing in mind that if an asset be equitable all claims, as to it, are to be paid *pari passu*, but if legal, that the claims, as to it, are to be paid in a certain order of preference, (excepting in the case of a person dying after 18th September, 1865,) this order of priority will now be examined.

It will be observed that the language of the authorities to be now cited, is adapted to the case of an executor or administrator paying, but the rules which govern their payments also govern the Master in settling the order of priority in his report.

Before any debt or duty whatsoever, funeral expenses with the proper limitation as to the amount, are, as it has already appeared, to be allowed out of the estate of the deceased. These expenses are to be preferred, even to a debt due to the Crown.[4]

1 *Re Brazill, Barry* v. *Brazill*, 11 Grant, 253.
2 *Stewart* v. *Stewart*, 10 Grant, 169.
3 *Re Keenan*, 3 Cham. R. 285.
4 *R.* v. *Wade*, 5 Price, 627, by Richards, C. B.

The next thing to justify and occasion expense is the proving of the will or taking out administration;[1] but a greater disbursement, says the author of "The office of an Executor,"[2] will not stand allowable, than is precribed by the statute of 21 Henry VIII. c. 5.[3]

The costs of a suit in Equity are to be considered as expenses in administering the estate, and are the first charge upon an estate, whether administered in or out of Court.[4] But in a case where a will provides for the payment of "testamentary expenses" out of a specific bequest, this provision does not include the costs of a suit occasioned by the will; for the words "testamentary expenses" are confined to the usual charges of the probate, &c.; and such costs must, therefore, be paid out of the residuary estate.[5]

The third occasion of disbursement by the executor or administrator is the payment of debts; and in such payment he must be careful to observe the rules of priority; for if he pay those of a lower degree first, he must, on a deficiency of assets, answer those of a higher out of his own estate.[6] So an executor or administrator is *bound* to plead a debt of a higher nature in bar of an action brought against him for a debt of inferior degree, and *reins ultra,* if he has not assets for both; otherwise it will be an admission of assets to satisfy both debts.[7]

It is obvious that it is beyond the power of a testator to disappoint the rules of law as to the precedence of debts, by directing his executors to make an equal distribution of the assets among all his creditors.[8]

1 2 Black. Comm. 511.

2 P. 260, 14th edit.

3 With respect to the proper fees for probates and letters of administration, see Burn's Eccles. Law, tit. Fees and tit. Wills, vol 4, p. 264 291, 8th edit. "St. Germaine, (the author of the Doctor and Student, dial. 2, c. 10,) who was no stranger to the canon and civil law, as appears by his book, saith, that the Ordinary ought to take nothing for probate, if the goods suffice not for funeral and debts; but he means only that conscience is against it." Wentw. Off. Ex. 260, 14th edit.

4 *Loomes* v. *Stotherd,* 1 Sim. & Stu. 461, by Sir J. Leach. *Tipping* v. *Power,* 1 Hare, 405, 411. *Gaunt* v. *Taylor,* 2 Hare, 413. And this priority will be allowed even over costs of litigation in the Ecclesiastical Court incurred in determining which is the testator's Will, and ordered by the latter Court to be paid out of the estate: *Major* v. *Major,* 2 Drewr. 281.

5 *Brown* v. *Groombridge,* 4 Madd. 495. See *Wilson* v. *Heaton,* 11 Beav. 492. See also *Brougham (Lord)* v. *Powlett,* 19 Beav. 119: There, in a similar Will, the phase "the expences of proving the Will, and the execution of the trusts thereof," was held to be confined to the expenses incurred by the executor in his character as such.

6 2 Black. Comm. 511.

7 *Rock* v. *Leighton,* 1 Salk. 310. 1 Saund. 333. *a* note (8).

8 *Turner* v. *Cox,* 8 Moo. P. C. 288.

A question of no little difficulty is raised in Story's Conflict of Laws, section 524, *viz.*, suppose a debtor dies domiciled in England, and leaves assets in a foreign country by the law of which all debts stand in an equal rank, and administration is duly taken out in the place of his domicil and also in the place of the *situs* of the assets. What rule is to govern in the administration of the assets? The law of the domicil? or the law of the *situs?* That eminent writer states his own opinion to be (in accordance with the decisions of the American Courts, though at variance, as he admits, with that of many foreign jurists) that in regard to creditors the administration of assets of deceased persons is to be governed altogether by the law of the country where the executor or administrator acts, and from which he derives his authority to collect them.

But in the late case of *Wilson* v. *Lady Dunsany*,[1] the Master of the Rolls (Sir J. Romilly) declined to adopt this opinion, and held that the personal assets of a testator must be administered on the principle of the law of his domicil. In that case the testator had died domiciled in Ireland, leaving personal assets partly there and partly in England; and, a question having arisen as to the priority of the claims of his creditors, His Honor laid it down that he must treat the case in the same way as if he were sitting in the Court of Chancery in Dublin. In *Cook* v. *Gregsom*,[2] where the testator had also died domiciled in Ireland, leaving assets both in Ireland and England and the same executors in both countries, it was held by Kindersley, V. C., that an Irish judgment had priority over English simple contract creditors, as against Irish assets remitted to England by the executors and being there administered: His Honor said that if the executors in the two countries had been different persons, the duty of each would have been first to pay the debts owing in the country in which he was executor, and then he might send any surplus to the other country, and that the duty of the Irish executor was to pay the Irish debts first, according to their order of priority; and that, therefore, the Irish assets remitted here ought to be administered here as if they had remained and were being administered in Ireland. It will be observed that in this case the Irish judgment creditor only sought to touch the Irish assets: And therefore it was unnecessary to apply the law as laid down by the

1 18 Beav. 293.
2 2 Drewr. 286.

Master of the Rolls in *Wilson* v. *Lady Dunsany:* But the observations of the V. C. appear to put the question as though it were rather dependant on the *situs* of the assets than on the domicil of the deceased.

It should be observed, that by the constant rule of the Court of Chancery, a solicitor, in consideration of his trouble, and the money in disburse for his client, has a right to be paid out of the duty decreed or fund recovered for the plaintiff, and a lien upon it, before the specialty creditors of the deceased plaintiff; neither can his executor or administrator controvert this rule, by insisting upon applying the assets in a course of administration.[1]

To all other debts of whatever nature, as well of a prior as of a subsequent date, such as are due to the Crown by record or specialty, claim the precedence.[2] So that if there be not come to the executor or administrator goods of greater value than will suffice for the satisfaction of these, he is not to pay any debt to a subject: and if he be sued for any such, he may plead in bar of this suit that his testator or intestate died thus much indebted to the king, showing how, &c., and that he hath not goods surmounting the value of that debt.[3] Or if the subject's pursuit be not so by way of action, as that the executor or administrator hath day in Court to plead, but be by way of suing execution, as upon statute staple or merchant then is the administrator put to his *audita querela*, wherein he must set forth this matter.[4]

But the debts due to the Crown, which are so privileged, are confined to such as are due by matter of record, or by specialty, &c.[5] (which are of the same nature; for by statute 33 Hen. VIII. c. 89, it is enacted, that all obligations and specialties, taken to the use of the king, shall be of the same nature as a statute staple.) And, therefore, sums of money owing to the king on wood sales or sales of tin, or other his minerals, for which no specialty is given, shall not be preferred to a debt due to a subject by matter of record.[6] So though

1 *Turwin* v. *Gibson*, 2 Atk. 720 *Lloyd* v. *Mason*, 4 Hare, 132.
2 Magna Charta, c. 18. 2 Inst. 32 *Littleton* v. *Hibbins*, Cro. Eliz. 793 Swinb. Pt. 6, s. 16. Wentw. Off. Ex 261 14th edit. Com. Dig. Admon. (C. 2.)
3 Wentw. Off. Ex. 262, 14th edit. Godolph. Pt. 2, c. 28, s. 3.
4 *Ibid.* Perhaps, at the present day, he might be relieved on motion.
5 Wentw. Off. Ex. 262, 14th edit. Godolph. Pt. 2, c. 28, s. 3. Com. Dig. Admon. (C. 2.)
6 *Ibid.* 3 Bac. Abr. 79, 80, tit. Exors. (L.) 2.

fines and amercements in the King's Court of Record are clearly debts of record,[1] and entitled to such preference, yet amercements in the King's Courts Baron, or Courts of his Honors, which are not of record, have no such priority;[2] nor have fines for copyhold estate, nor money arising from the sale of estrays within his manors or liberties; for these are not debts of record.[3] Again, whatever accrues to the king by attainder or outlawry is considered as a debt by simple contract, before office found; and although debts due to the person outlawed or attainted be by obligation or other specialty, and the outlawry or attainder be of record, yet the law does not recognize the king's title before office found: for till then it does not appear by record that any such debt was due to the party.[4]

So if the king's debtor by simple contract be outlawed on mesne process, the debt is not altered in its nature, nor shall it have precedence as if the outlawry were subsequent to the judgment, and the debt, therefore, of record.[5] Nor does the prerogative extend to a debt assigned to the king: Therefore it was held, where the obligee of a bond, after the death of the obligor, assigned it to the king, that the obligor's executors were warranted in satisfying a judgment, recovered against him in his lifetime, in preference to the bond.[6] So also the arrears of rent due to the Crown, whether it be a fee-farm rent, or a rent reserved on a lease for years, shall, it appears, be regarded in the light of a debt by simple contract.[7]

Again, it has been held, that a recognizance in the Court of Chancery by a guardian in the matter of a minor, is not to be considered a debt due to the Crown.[8]

But it seems that if the king's debt, and likewise that of a subject, be both inferior to debts of record, the king shall be preferred.[9]

But the law as to common debts is altered in this Province by 29 Vic. c. 28, s. 28, and by Con. Stat. U. C., c. 5, to which the reader is

1 Godolph. Pt. 2, c. 28, s 3.
2 Wentw. Off. Ex. 263, 14th edit. Com. Dig. Admon. (C. 2.) 3 Bac. Abr. 80, tit. Exors. (L.) 2.
3 *Ibid.*
4 Wentw. Off. Ex. 263, 14th edit. Bac Abr. *ubi supra.*
5 Com. Dig. Admon. (C. 2.) *Erby* v. *Erby*, 1 Salk. 80. Toller, 261.
6 Com. Dig. Admon. (C. 2.) Dimock's case, Lane, 65, by Tanfield, C. B., which was granted by the Court.
7 Com. Dig. Admon. (C. 2.) Wentw. Off. Ex. 264, 14th edition: but see *infra*, p. 910.
8 *Ex parte* Usher, 1 Ball & Beat. 199.
9 Bac. Abr. *ubi supra*, n. (*u*).

referred. Section 28 of 29 Vic. c. 28, sweeps away most of the distinctions which were formerly made between different classes of claims, and it is only in cases of persons who had died before its passage, (18 September, 1865,) that the old rules will be applicable. Where certain creditors of a deceased insolvent sued his executor, recovered judgments, and sold his real estate, and got paid in full, *held*, that they were still bound to account, and that the other creditors of the insolvent were entitled to have the whole estate distributed *pro rata*, under 29 Victoria, chap. 28.[1]

The Master having received proof of the claims as to which proof was required, enters the particulars of them in his book as hereinbefore described; and where a distinction is to be made as to their forming a charge on legal or equitable assets, he notes this also, with a brief statement of the assets to be thus charged. It is of great importance that these entries be full and clear, for it frequently happens that at a future day, explanations are required as to the mode in which his various conclusions are arrived at, and unless care has been taken in these entries he will find it impossible to explain either to the Court, or the parties, how his conclusions have been reached, and it will be very unsatisfactory to be obliged to refer generally to his findings in the report.

Referring now to the enquiries usually directed in an administration decree or order, the practice on each will be described. The first enquiry usually is that an account be taken of the personal estate not specifically bequeathed of A. B., deceased, the testator (or intestate) in the pleadings mentioned, come to the hands of the said A. B., or to the hands of any other person or persons on his behalf, &c.

When the accounts of the executor or administrator are brought in, as directed at the time the decree is considered, the Master should take care that the account is framed in accordance with his directions, and that the various items are numbered.

The survivor of two partners, after having continued to carry on business with the personal representatives of the deceased partner,

1 *B. B. N. America* v. *Mallory*, 17 Grant 102, and see *Henry* v. *Sharp*, 18 Grant 16, to the same effect.

filed a bill for an account of both partnership dealings, and a decree was made for that purpose, and in proceeding on that decree the Master directed the executor to bring in an account of the partnership dealings between the deceased and surviving partner. *Held*, upon appeal from this direction, that the executor was bound to make up the accounts from the books of the partnership in his possession.[1] This case is important as showing how far executors are bound to furnish accounts in the Master's office, as to matters with which they have themselves had no connexion. The point came before the Court on a motion to take off the files the Master's certificate that the defendant had made default in bringing in accounts directed by him to be brought in.

The second direction is to take an account of the testator's (or intestate's) debts.

This means an account of the debts unpaid—not of those which the executor may have paid, for these will appear in his account of payments made on the account of the estate. It is in many, indeed in most cases impossible for the executor to answer this enquiry by his accounts filed. He can, however, insert in his statement such of the claims as have been sent to him under the advertisement, and if he is aware of any others, he should mention them in such terms as the facts of the case warrant. The description of the claims should be as full as if they were proven by affidavit. The Master will be able to answer this enquiry by observing the rules just referred to, and he will also be able to fix the order of priority after a consideration of the principles already discussed.

The third enquiry is an account of the testator's funeral expenses. The object of this special enquiry is to make the sum the Master may find to have been properly expended for this purpose a first charge on the estate.

The proper allowances to be made by the Master under this enquiry are governed by the duties of the executor; and first he must *bury* the deceased in a manner suitable to the estate he leaves behind him.[2] Funeral expenses, says Lord Coke,[3] according

1 *Strathy* v. *Crooks*, 6 Grant 162.
2 2 Black. Comm. 508.
3 3 Inst. 202.

to the degree and quality of the deceased, are to be allowed of the goods of the deceased, before any debt or duty whatsoever. But the executor or administrator is not justified in incurring such as are extravagant, even as it respects legatees or next of kin entitled in distribution :[1] Nor, as against creditors, shall he be warranted in more than are absolutely necessary. In strictness, said Lord Holt, no funeral expenses are allowed in the case of an insolvent estate, except for the coffin, ringing the bell, and the fees of the parson, clerk, and bearers ; but not for the pall or ornaments ;[2] and in the year 1695, it was stated, that Baron Powel, on his circuit, would allow but 11*s.* 6*d.* under a plea of *plene administravit* ; which he said was all the necessary charge.[3] However, it appears that Lord Holt, where, under that plea, 150*l.* was charged for the testator's funeral, said that at least 140*l.* ought to be deducted ; for 10*l.* is enough to be allowed for the funeral of one in debt.[4] (1)

Lord Hardwicke, in *Stag* v. *Punter*,[5] upon exceptions to a Master's report for not allowing 60*l.* for the testator's funeral, said, " At law, where a person dies insolvent, the rule is, that no more shall be allowed for a funeral than is necessary ; at first only 40*s.*,

1 See *Stackpoole* v. *Stackpoole*, 4 Dow. 227.
2 Shelly's case, 1 Salk. 296. Perhaps, observes Dr. Burn, The expenses of the shroud and digging the grave ought to have been added : 4 Burn. E. L. 348, 8th edit.
3 Anon., Comberb. 342. 4 *Ibid.*
5 3 Atk. 119. (1)

(1) In the case of the *Appeal of M'Glinsey*, 14 Serg. & Rawle, 64, the Supreme Court allowed the sum of $358.75, for funeral expenses, including a vault and tombstone. It was observed by the Chief Justice ; " The deceased had a good estate and no children ; and the widow, who was entitled to one-half wished to be liberal in honor of his memory. A handsome tombstone was erected over a vault, in which the body was interred, and this was the principal article of expense. But there was one article which should be rejected—I allude to a picture of the deceased, painted after his death. If the widow desired a memorial of this kind, she should pay for it herself." See also, the *Appeal of Metz*, 11 Serg. & Rawle, 204. *Patterson's Estate*, 1 Watts & Serg. 292. *Bosio's Estate*, 2 Ashm. 438. *Jennison* v. *Hapgood*, 10 Pick. 77.

It is the duty of the executor or expected administrator, to bury the deceased in a manner proportioned to the estate he leaves behind him. *Hapgood* v. *Houghton*, 10 Pick. 154. If the executor be not at hand or be unknown, any friend may do it, and the necessary expense is to be paid first in the order of debts. Matthews on Ex. 68. For this expense, the executor *with assets* is liable to the person who furnishes the funeral, though he neither ordered it or even knew of it. As against legatees or next of kin, such expenses may be incurred as will bury the deceased according to the station he occupied in life, but as against creditors the rule is much stricter, nothing being allowed beyond what is absolutely necessary Matth. Ex. 69. *Flintham's Appeal*, 11 S. & R. 16. *M'Glensey's Appeal*, 14 S. & R. 64. Toll. Ex. 245. But if there be the least risk that the estate will prove ultimately insolvent, then any unnecessary funeral expense will be at the risk of those who authorized it. *Hancock* v. *Padmore*, 1 B. & Adol. 260. A demand for mourning for the widow and family of the deceased, would not be allowable in England as part of the necessary funeral expenses. *Johnston* v. *Baker*, 2 Car. & P. 207. But in *Wood's Estate*, 1 Ashm. 314, it was held by the Orphans' Court, at Philadelphia, that administrators are entitled to a moderate allowance for money expended in procuring mourning for the widow and children of the deceased, although the estate is insolvent. And the estate of a testator was held not liable for the funeral expenses of his widow. *Lawall* v. *Kreidler*, 3 Rawle, 300. Black cloth and ornaments placed around the pulpit on the occasion of the burial, on the shroud and coffin, belong to the executor or administrator or person at whose expense they were furnished. A creditor cannot legally arrest or detain and prevent the burial of the dead body of his debtor until his debt is paid. A conspiracy to prevent a burial, is indictable at common law. Matth. Ex. 71, 72. Hood on Ex. 25, 34.

then 5*l.*, and at last 10*l.*[1] "I have often thought it a hard rule, even at law, as an executor is obliged to bury his testator before he can possibly know whether his assets are sufficient to pay his debts: But this Court is not bound down by such strict rules, especially when a testator leaves great sums in legacies, which is a reasonable ground for an executor to believe the estate is solvent: As this is the case here, I am of opinion that sixty pounds is not too much for the funeral expenses, especially as the testator had directed his corpse should be buried at a church thirty miles from the place of his death."

In *Hancock* v. *Podmore*,[2] issue was taken, in an action by a creditor against an executor, on a plea of *plene administravit*, and it was proved that assets to the amount of 129*l.* had come to the hands of the defendant, and that he had paid 55*l.* for probate duty, and 79*l.* for funeral expenses: The deceased had been a captain in the army, and the question was, whether the defendant could, as against a creditor, apply so large a sum as 79*l.* to such a purpose: The Court of King's Bench was of opinion that the sum was too great to be allowed: But Mr. Justice Bayley, in delivering the judgment of the Court, observed that although the rule is, that, as against a creditor, no more shall be allowed for a funeral than is necessary, yet in considering what is necessary, regard must undoubtedly be had to the degree and condition in life of the party; and his Lordship observed that the sum of 10*l.*, mentioned by Lord Hardwicke as the established allowance in his time, might perhaps, at the present day, be less than what should be reasonably allowed for a person of condition: The learned Judge proceeded to intimate that the Court thought 20*l.* would be a proper sum for the funeral of a person in the degree and consideration of life of this testator.[3]

It must not, however, be understood that the Court in *Hancock* v. *Podmore*, laid it down as a rule, that even the sum of 20*l.* should be the limit of the allowance, where the estate is insolvent; but that it was the proper limit under the circumstances of that case: The rule appears to be, that the executor is entitled to be allowed

1 But in Buller's N. P. 143, it is said that the usual method is to allow five pounds; and in Selwyn's N. P. 776. *n*, 18, 6th edit., a MS. case of *Smith* v. *Davies*, Middlesex Sittings after M. T. 10 Geo. II., is mentioned, where this latter sum was allowed by Lord Hardwicke himself.

2 1 Barn. & Adol. 260.

3 See *Yardley* v. *Arnold*, 1 Carr. & M. 434. 438, *per* Parke, B.

reasonable expenses according to the testator's condition in life; and if he exceeds those, he is to take the chance of the estate turning out insolvent: No precise sum can be fixed to govern executors in all cases: It must obviously vary in every instance, not only with the station in life of each particular testator, but also with the price of the requisite articles at the particular place.[1]

In *Bisset* v. *Antrobus*,[2] Sir L. Shadwell, V. C., refused to allow 2,210*l.* for the funeral expenses of a deceased nobleman, whose personal estate was believed to be solvent at his death, but ultimately, from unforeseen circumstances, proved to be insolvent: And his Honor referred it to the Master to enquire and state what sum ought to be allowed.

With respect to allowances for funeral expenses, where there are assets sufficient, as against other persons than creditors: In *Offley* v. *Offley*,[3] there had been 600*l.* laid out in Mr. Offley's funeral, and the Court decreed that sum to be a great debt to affect the trust estate, Mr. Offley being a man of great estate and reputation in his county, and being buried there: but if he had been buried elsewhere, it seemed his funeral might have been more private, and the Court would not have allowed so much.[4]

In *Paice* v. *the Archbishop of Canterbury*,[5] a payment of 93*l.* 12*s.* 6*d.* for mourning rings distributed among the relations and friends of the deceased was allowed by Lord Eldon to the executors: The will had not given any directions on the subject, but committed "any thing not specified" to the discretion of the executors.[6]

In *Mullick* v. *Mullick*,[7] on an appeal to the Privy Council from

1 *Edwards* v. *Edwards*, 2 Cr. & M. 612. S. C. 4 Tyrwh 438. See also *Reeves* v. *Ward*, 2 Scott, 395.
2 4 Sim. 512.
3 Prec. Chanc. 261.
4 See *Stackpoole* v. *Stackpoole*, 4 Dow. *Bridge* v. *Brown*. 2 Y. & Coll. C. C. 181.
5 14 Ves. 364.
4 In *Johnston* v. *Baker*, 2 Carr. & Payne, 207, Best, C. J. held that a demand for mourning, furnished to the widow and family of the testator, is not a funeral expense, such as can be claimed against the estate by the executor, if he gives the order for it; and consequently, that a legatee, who had not received his legacy, was a competent witness on behalf of the executor in an action brought against him for the recovery of such demand. See also *Bridge* v. *Brown*, 2 Y. & Coll. C. C. 181. 186. In *Pitt* v. *Pitt*, 2 Cas. temp. Lee, 508, Sir G. Lee allowed a widow for her mourning, in her account, an administratrix, in the Ecclesiastical Court.
5 1 Knapp, 245. (1)

(1). Where a person, being at a distance from home, sent for his wife and other relatives, and they went to see him, but did not arrive until after his death, and his executor paid the expenses of their journey, he was allowed to charge the same in his account of his administration. *Jennison* v *Hapgood*, 10 Pickering, 77. Consult 1 Lomax on Ex'ors, 595, 2d edition. Ram on Legal Assets, 257.

an order of the Supreme Court of Bengal, it was held, with respect to the expenses of the funeral obsequies of a Hindoo testator, that as the Will gave no directions how they were to be performed, the only question to be considered was, whether the sums allowed for their performance were more than had usually been expended at the funerals of persons of the same rank and fortune as the deceased.

In a case, (before the statute 11, Geo. I. c. 18, enabling freemen of London to bequeath their whole personal estate) where a citizen of London by Will had devised 700*l.* for mourning, the question was, whether this 700*l.* should come out of the whole estate, or only out of the legatory part; for it was insisted, if there had been no direction by the Will, or if the Will had only directed that the expenses of the funeral should not exceed such a sum, there the deduction must have been out of the whole estate: *Pur. Cur.:* Mourning devised by the Will must come out of the legatory part, and not lessen the orphanage and customary share.[1] Since the above statute the point cannot arise, except perhaps in a case where the freeman has agreed before marriage that his personal estate shall, at his death, go according to the custom. In case a freeman of London dies intestate, his funeral expenses are to be paid out of the general personal estate and not the dead man's part merely.[2]

The question of the liability of an executor or administrator, for the expenses of the funeral of the deceased, will be considered in a subsequent part of this treatise.

A testator's sister having procured a marble statue to his memory, his widow, who was acting executrix of his Will, having no funds of the estate, gave her note to the sister for the price, which was moderate in reference to the estate and degree of the deceased; but the note had not been paid, when she made her claim for it in an administration suit, and its allowance was opposed by the testamentary guardian of the infant legatees. The question did not affect creditors of the deceased, and it was contended that the estate was liable for the note, or for the price of the slab.[3]

It may here be observed that in practice the testamentary

1 *Deakins* v. *Buckley*, 2 Vern 240. S. C. 1 Eq. Ca. Abr. 159, pl. 1.
2 Swinb. Pt. 3, c. 16, pl. 3.
3 *Menzies* v. *Ridley*, 2 Grant 544,

expenses are included in the enquiry as to funeral expenses: but the Master should, in his report, separate them, and show precisely the amount allowed for each.

The next direction is to state the legacies left by the testator.

A legacy is defined to be "Some particular thing or things given or left, either by a testator in his testament, wherein an executor is appointed, to be paid or performed by his executor, or by an intestate in a codicil or last Will, wherein no executor is appointed, to be paid or performed by an administrator." [1]

In practice this term is used in its widest sense, and the Master should abstract from the Will all gifts, bequests, and devises, shewing by his report briefly every disposition of property, whether real or personal, made by the testator.

The next enquiry is an account of what parts, if any, of the testator's personal estate are outstanding or undisposed of. This should be shown by the accounts filed by the executor, or administrator, and should specify minutely every article or asset however unimportant, left by the testator or intestate, which remains unsold, unconsumed, or in the hands, or under the control of the executor: such as household goods, stock-in-trade, farming implements, grain, cattle, notes, accounts, and debts of every description still due or owing to the estate. In short, every asset of the estate, legal or equitable, still in the power of the executor, should be specified in the answer to this enquiry, and the Master in framing his report should specify the asset with care, for it may become the duty of the Court to order its sale or conversion.

The decree then proceeds to direct that the testator's personal estate, not specifically bequeathed, be applied in payment of his debts and funeral expenses in a due course of administration, and then in payment of his legacies. This direction has been anticipated for it has already been shewn in what order the assets are to be administered, and the Master, as has been intimated, will find it his duty to specify with clearness the order of priority, as well as the asset chargeable, whether legal or equitable.

1 Godolph, Pt. 3. Ch. 1 S. 1.

The next enquiry is what real estate the testator died seized of or entitled to at the time of his death.

The executor, or administrator, in answer to this enquiry should state fully all the real estate in which the testator, or intestate, was interested, and the Master should see that the descriptions given should be so full and specific that if a sale be ordered, a conveyance can be given from the description. It frequently happens that the account is brought in with a general description such as "A Town Lot, in the Town of ———." This is not sufficient, the real estate should be as accurately described as it would be in a Deed of it, and the Master should at once compel an observance of this rule, for eventually it will, in all probability, be required, and delay and expense will be incurred, which would be avoided if the account be properly framed in the first instance.

It need hardly be stated that the object of this enquiry is to place before the Court a statement of the realty owned by the testator, that, in the event of the personalty proving insufficient to pay debts, resort may be had to the realty. In some cases too, legacies may be charged upon the real estate, and it may become necessary to sell the realty in order to meet these charges upon it.

Connected with this enquiry is the next, what incumbrances affect the testators real estate ?

This is generally shewn by a short abstract from the Registry and Sheriff's offices ; and it is the duty of the executor, or administrator, to obtain this information, and to show clearly whether and how the realty is incumbered ; if there be any dower on the estate it should be stated in the account.

Where a woman joins in a mortgage to bar her dower, for the purpose of securing a debt of her husband, and after his death the property is sold for more than is sufficient to satisfy the claim of the mortgagee, the widow will be entitled to have her dower secured out of the surplus in preference to the simple contract creditors of her husband.[1]

1 *Sheppard* v. *Sheppard*, 14 Grant 174.

The next enquiry is an account of the rents and profits of the testator's real estate received by the testator. This information should also be furnished by the executor in a schedule, forming part of his accounts. Strictly speaking, an administrator has no authority to deal with the real estate of the intestate, but it is very often done, and the Court in such cases imposes the same liabilities on the administrator in respect of these dealings, as if he were specially authorized by the Will. Where executors without any authority assumed to act in the management of the real estate of their testator, they were made to account for their acts, as if they had been duly empowered to act as trustees. In such a case it is their duty to keep accounts, and be ready at all times to explain their dealings with the estate.[1]

SECTION II.—*Proceedings on the Executor's Discharge.*

That part of the executor's accounts in which he sets forth the payments made by him, on account of the estate, is called his "discharge." The mode of proceeding on this is similar to that already pointed out in the chapter on the "Method of Taking Accounts in the Master's Office."

The Master having received the evidence offered by the executor in his discharge, proceeds as already pointed out on the surcharge (if any) in the mode described in a former part of this work. The surcharge may, however, contain charges which require further examination: for example, the executor may be charged with "wilful neglect or default" in not collecting certain debts specified in the surcharge: or in not obtaining a higher rental than he has credited to the estate: or in not securing a higher rate of interest on moneys loaned by him: or in advancing moneys on improper or insufficient security: or he may be charged with not accounting for moneys or property received. The liability of an executor in such cases may be established in the Master's office; but the charges should be particularly set forth in the surcharge cases. It will be recollected that *Carpenter* v. *Wood*[2] decides that the Master is

1 *Chisholm* v. *Barnard*, 10 Grant 479.
2 10 Grant 354.

at liberty, under the general orders, to take an account of "wilful neglect or default" without any special reference in the decree, and without any case being made for it in the pleadings. It also decides that Sec. 2. G. Order 220 is not confined to cases of mortgagor and mortgagee.

Sec. 13 of Order 42 of the Orders of June 1853, is similar to Order 220 of the Consolidated Orders of 1868.

S. took out letters of administration to the estate of an insolvent, at the request of a simple contract creditor, and was on the following day served with a summons for his debt. The administrator took no steps to ascertain, and made no enquiry, whether there were any other debts, but allowed judgment to go against him by default, and all the chattel property of the intestate to be sold under the execution. *Held*, at the suit of a specialty creditor that the administrator's conduct did not entitle him to set up the defence of no notice of the specialty debt, and that the amount produced by the sale must be applied in due course of administration.[1]

The testator, A. M., had been in partnership in business with one J. A., and died without any settlement of accounts, appointing N. P. and L. his executors. The testator had, besides his share of the partnership assets, a large amount of personal property, and also real estate, which he specifically devised to his four sons, then infants, and appointed A. their guardian. The executors received the rents of the real estate, and applied them to the maintenance and education of the testator's children. The real and personal estate having proved insufficient for the payment of debts, the executors were held liable to account to the creditors of the testator for the rents received by them, and applied to the maintenance and education of the children.[2] The Master in dealing with the discharge should take care in such a case to disallow all payments made for the maintenance of children where the estate is not sufficient to pay debts.

A testator, a short time before his death, in 1841, and during his last illness, signed a statement by which he acknowledged himself

4 *Hutchinson* v. *Edmison*, 11 Grant 477.
5 *Harrison* v. *Patterson*, 11 Grant 105.

indebted to his father, one of his executors, in the sum of £73 8*s.* 5*d.* His will contained direct authority to his executors to sell his real estate for the payment of his debts. In 1843 the executors obtained an administration order, and the father sought to have his claims against the estate, including the amount so acknowledged, paid by a sale of the land. The claims were resisted by the widow and the heir-at-law, the testator having been in a weak and dying state when he signed the acknowledgment. The father had, until about 1861, been in the occupation of the land, and a surcharge was put in against him for the rents and profits. *Held*, that mere physical weakness, however great, without proof of mental incapacity, is not sufficient to render invalid an acknowledgment of debt; that the Statute of Limitations does not bar the claim of an executor against the estate of his testator: that an executor is not justified in keeping an estate open and unadministered in order to obtain interest upon a claim which he has against the estate: and that delay on the part of the executors to sell lands, which by the Will are saleable for the payment of debts, will render the executors liable for rents and profits.[1]

The report in an administration suit found £1,403, chargeable against an executor—of this sum £1,247 was for the price of land claimed and received by the executor, the testator's son as heir, and his claim to this had long been acquiesced in by the other parties interested till held otherwise in this suit, when this purchase money was declared to pass under the testator's will to the claimant and others as legatees. A sum of £133, the value of the testator's chattel property left by the executor in the hands of the testator's widow, and finally lost to the estate, made up the remainder of the sums charged to this executor except a balance of about £34. Under the circumstances the executor was allowed his costs as of an administration out of the estate, and was not charged with interest as the balance in his hand, which he was required to pay into Court within a month, after deducting therefrom his share of the estate as legatee.[2] Although the question of charging the executor with interest in this case was disposed of by the Court on further directions, yet it was quite competent for the Master to have dealt with it.

1 *Emes* v. *Emes*, 11 Grant 325.
2 *Blain* v. *Terryberry*, 12 Grant 286.

An administrator sometimes occupies the difficult position of having moneys of an estate in his possession without knowing to whom to pay them over. His duty in such a case is pointed out by the Chancellor in *McLennan* v. *Heward*.[1]

The case of *Erskine* v. *Campbell*[2] has already been cited to shew when the Court will order an account against an executor to be taken with rests. In that case the order to take the account with rests was made by the Court on further directions, but it is a part of the duty of the Master to decide whether or not such a course should be adopted leaving it to the party feeling himself aggrieved to appeal.

The Master should in taking the accounts of an executor or administrator allow interest on moneys advanced by him for the benefit of the estate if such a claim be made and established.[3]

The rules which govern the Court in charging an executor with interest as a punishment for negligence, and in inflicting "rests" upon him are explained in *Wiard* v. *Gable*.[4]

Where a trustee had retained moneys of the estate in his hands, instead of paying off debts of the estate, and had improperly mixed those moneys with his own at the bank; the Court, without saying what in future, according to the value of money, or the amount of interest payable on investments, might be a fair rate to charge on moneys improperly withheld or used by a trustee, charged the trustee with 8 per cent. on all balances in his hands.[5]

It not unfrequently happens that an executor or administrator is obliged to pay counsel fees in the suit, and as there is sometimes difficulty in obtaining taxation of this as costs in the cause, it is usual and proper for the executor to bring the payment into his accounts in the Master's office as a necessary disbursement made by him, and such an allowanee will be approved of by the Court.[6] Per Vankoughnet C. "I think that the charge[7] for the retaining fee paid

1 9 Grant 178.
2 1 Grant 570.
3 *Menzies* v. *Ridley*, 2 Grant 544.
4 8 Grant 458.
5 *Wightman* v. *Helliwell*, 13 Grant 330.
6 *Chisholm* v. *Barnard*, 10 Grant 479.
7 The charge was $20.

to the Solicitor, for the executors should be allowed; it was not an unreasonable disbursement for them to make. There is a great deal of trouble in conducting administration suits at times, and many things are done, and much time employed often for which no direct charge can well be made."

When moneys have been lost to an estate through the wilful neglect or default of the executors the Master should not charge them with any interest on the sums thus lost.[1]

A testator's directions to his executors to continue to carry on business with his surviving partner does not authorize the executors to embark any new capital in the business.[2] This point was decided by the Court on the pleadings, and before decree, but it might come up in the Master's office if an executor were endeavoring to burden the estate with moneys expended for this purpose.

One of two executors was indebted to the estate on a mortgage given to their testator, of which fact his co-executor was aware, but he took no steps to compel payment, and the mortgagor or executor executed a discharge of the mortgage under the Statute, and registered the same. *Held*, that the co-executor was liable to make good any loss occasioned to the estate thereby; but *semble*, that the discharge to be valid, required the signature of both executors.[3]

Executors suffered judgment to be recovered against them at law, for a debt of their testator, and the lands were sold upon process issued thereon, although one of the executors was indebted to the estate in a larger amount. The Court ordered both executors to make good the difference between what the lands were actually worth, and the amount realized upon the sale under execution.[4]

The Master having received all the evidence on the executors "discharge," and on the opposite party's surcharge, proceeds to settle the report in the manner already described. If he has determined to take the account with rests, or to charge the executor merely with simple interest on balances in his hands, it will be necessary

1 *Vanston* v. *Thompson*, 10 Grant 542.
2 *Smith* v. *Smith*, 13 Grant, 81.
3 *McPhadden* v. *Bacon*, 13 Grant 591.
4 *Ibid.*

to ascertain from month to month how the accounts stood. Where the estate is an old one, and the executor has been dealing with it for a number of years, this involves much labor, and expense in his office. It sometimes happens too that cases occur where the executor has allowed costs to be incurred on debts due by the testator, or has permitted lands to be sold for taxes, or has allowed the ten per cent. added upon unpaid taxes to be charged against the lands of the testator, alleging that when these liabilities were payable he had no funds in his hands belonging to the estate applicable for the purpose of discharging them. In order to test the accuracy of this allegation the Master must ascertain at short intervals the precise condition of the accounts. This is done by abstracting from the discharge and surcharge, and from the account shewing the executors' receipts, each item as credited by the executor or as allowed by the Master, as will appear in his book, and entering them under each month (or shorter period if necessary) in a separate book, thus:—

RECEIVED by Executor, as admitted in his account filed marked A, and as allowed against him by Master under surcharge:		DISBURSED by Executor, as allowed by Master in his Book:	
JANUARY 1, 1860.		JANUARY 1, 1860.	
No. 1—Schedule A	$100 00	No. 1	$100 00
" 2— "	20 00	" 2	200 00
" 3— "	100 00		
" 4— "	200 00		
" 1—Surcharge	50 00		
	$470 00		$300 00
FEBRUARY 1, 1860.		FEBRUARY 1, 1860.	
No. 5—Schedule A	$500 00	No. 3	$600 00
" 6— "	100 00	" 4	400 00
" 7— "	50 00		
" 2—Surcharge	50 00		
	$700 00		$1000 00

Proceeding thus from the beginning of the executorship to the time of taking the accounts in his office, the Master will be able at a glance to see when the executor had a balance in his hands belonging to the estate, and for how long a time he has thus had

the use of the funds. On this data he will be able to make the necessary computations, in case interest, either simple or compound, is charged; and to determine whether or not the executor should be charged with any loss the estate may have sustained through his negligence in not paying taxes or debts when due.

If, however, the Master has determined to allow the executor compensation for his services, either by a yearly salary or by way of commission, it would be proper, in striking these monthly balances, to place to his credit the proportion of compensation due for one month—for instance, if the compensation amount to £120 per year, he should receive credit each month for £10.

SECTION III.—*As to Compensation allowed to Executors, Trustees, or Administrators.*

Before settling his report, the Master should dispose of the question of compensation, or, as it is usually termed, "commission."

In England, the rule is "that a trustee, executor, or administrator shall have no allowance for his care and trouble." Many of the American States, however, have altered this rule by statute, and we have imitated their example in the provisions of 22 Vic. c. 16, s. 16,[1] which enacts that "the Judge of any Surrogate Court may allow to the executor, or trustee, or administrator acting under will or letters of administration, a fair and reasonable allowance for his care, pains, and trouble and his time expended in or about the executorship, trusteeship, or administration of the estate and effects vested in him under any will or letters of administration, and in administering, disposing of, and arranging and settling the same, and generally in arranging and settling the affairs of the estate, and therefor may make an order or orders from time to time, and the same shall be allowed to an executor, trustee or administrator in passing his accounts."

It will be observed, that the statute, in terms, gives the power to fix a remuneration only to the Surrogate Judge, but our Court

1 Revised Stat. of Upper Canada, page 109, which is a copy of 22 Vic. c. 93, s, 47.

of Chancery has concurrent jurisdiction, as will be seen by the remarks of the Chancellor in *McLennan* v. *Heward*.[1]

This important question is fully discussed in the leading English case of *Robinson* v. *Pett*.[2] The point decided in that case was that "the Court never allows an executor or trustee for his time and trouble, especially where there is an express legacy for his pains: neither will it alter the case that the executor renounces, and yet is assisting to the executorship: nor even, though it appears that the executor has deserved more, and benefitted the trust to the prejudice of his own affairs." The notes form so exhaustive a treatise on the subject, that it has been thought advisable to reproduce the case in full, as reported in White and Tudor, with their notes.

The question was, whether an executor who had renounced, but had yet been assisting in the trust, according to the request of the testator, should have any additional consideration, when he had an express legacy for such his assistance.

Robert Pett, a considerable draper and mercer at Aspallstoneham, in Suffolk, made his will in October, 1710, whereby he devised the surplus of his real and personal estate to his grandchildren, and appointed the defendant Pett, who had been first his servant, and afterwards his journeyman, together with one Larkin, executors, giving to each of his executors £100 for their trouble about the execution of their trust, and directing that if the defendant Larkin should refuse the executorship, he should lose his legacy; but if the defendant Pett should refuse to take on him the executorship, yet that he should have his £100 paid him, provided he would be aiding and assisting in the management and execution of the trust.

Larkin only proved the will, and the defendant Pett renounced the executorship.

On a bill brought by the plaintiffs, the grandchildren, against the executors, for an account of the personal estate, the defendant

1 *McLennan* v. *Heward*, 9 Grant 279.
2 White and Tudor's Leading Cases 182, reported in 3 P. Wms. 249, A. D. 1734.

Pett was allowed his 100*l.* legacy; but he likewise insisted to have 400*l.* more for his extraordinary pains, trouble, and expense of time in and about the affairs of the testator, particularly for having made up some intricate accounts, and got in some desperate debts; and there was some proof that the defendant Pett had greatly benefitted the testator's estate, and prejudiced his own (he himself being a mercer), and that he had neglected his own trade, and lost some customers while he was looking after the concerns of his testator.

This cause was first heard before the Master of the Rolls, Sir Joseph Jekyll, who declared it to be a rule so settled *that a trustee or executor in trust should not have any allowance for his care or trouble, unless there were some particular words in the will for that purpose,*[1] that he could not break into it; and that there was the less occasion to do so in the present case, as the testator had here given the defendant an express legacy of 100*l.* for his care and trouble; so the testator had himself set an estimate and value upon it of 100*l.*, which, since the defendant had accepted, the Court could not increase.

From this decree there was an appeal to the Lord Chancellor, before whom it was insisted by the Attorney and Solicitor-General (who had both signed the petition of appeal), that the defendant Pett having renounced the executorship, and the other executor only having proved the will, the defendant Pett was a stranger; and, in regard that he appeared to have done these eminent services to the estate, so much to his own prejudice, he was entitled to a quantum meruit in the same manner as if he had not been an executor: so that this was out of the common case, and to be considered as if the defendant had been employed in the nature of a bailiff, &c.; for which reason it was prayed that the Master might be directed to have regard to, and make some allowance for, the great trouble and successful pains taken by the defendant in relation to the affairs of the testator.

Lord Chancellor Talbot.—It is an established rule *that a trustee, executor, or administrator shall have no allowance for his care and trouble;* the reason of which seems to be, *for that, on these pre-*

1 See *Ellison* v. *Airey*, 1 Ves. 115; *Willis* v. *Kibble*, 1 Beav. 560.

tences, if allowed, the trust estate might be loaded and rendered of little value: [1] besides the great difficulty there might be in settling and adjusting the quantum of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon any trustee, who may choose whether he will accept the trust or not.

The defendant's renouncing the executorship is not material, because he is still at liberty, whenever he pleases, to accept of the executorship: otherwise, if both the executors had renounced, and the ordinary had thereupon granted administration. And if this were to make any difference, it would be an art practised by executors to get themselves out of this rule, which I take to be a reasonable one, and to have long prevailed. But further, in the present case, the testator has by his will expressly directed what should be the defendant's recompense for his trouble, in case of his refusing the executorship—*viz.*, that he still should have the 100*l.* legacy, to which I can make no addition. However, it being a hard case, let the defendant take back the deposit.[2]

Notes—There is no rule better established than that stated by Lord *Talbot* in the principal case, viz. *that a trustee, executor or administrator shall have no allowance for his care and trouble.* It proceeds upon the well-known principle, almost invariably acted upon by Courts of equity that a *trustee shall not profit by his trust.* "The reason of the rule," observes Lord *Cottenham*, "is well stated in *Robinson* v. *Pett*: 'The reason seems to be, for that, on these pretences, if allowed, the trust estate might be loaded, and rendered of little value.' It is not because the trust estate is in any particular case charged with more than it might otherwise have to bear, but that the principle, if allowed, would lead to such consequences in general:" *Moore* v. *Frowd*, 3 My. & Cr. 40; and see *New* v. *Jones*, 1 Hall & T. 634.

And so strict is the rule, that, although the trustee or executor may, by the direction of the author of the trusts, have carried on a trade or business at a great sacrifice of time, he will be allowed

1 See *Moore* v. *Frowde*, 3 My. & Cr. 50, where Lord Cottenham approves of this reason.
2 Reg. Lib. B. 1732, fol. 322, 1733, fol. 333, by which it appears the Master of the Rolls directed generally, that all parties should have just allowances, and on appeal by the defendant Pett, this decree was affirmed, but the particular gravamen is not stated.

nothing as a compensation for his personal trouble or loss of time. Thus, in *Brocksopp* v. *Barnes*, 5. Madd. 90, the testator directed certain business to be carried on by his trustees and executors, and directed several onerous trusts to be performed by his trustees, but gave no legacies or reward to them for their trouble. Upon a petition being presented by one of them to ascertain what would be proper to be allowed to him as a compensation or recompense for his loss of time, personal trouble, and expense in the management and settlement of the testator's affairs, Sir *John Leach*, V.C., said, "The trustee is of course entitled to all reasonable expenses which he may have incurred in the conduct of the trust, and requires no order for that purpose; but the general rule must be applied to him, *that a trustee is not entitled to compensation for personal trouble and loss of time.*" The rule is also applicable to an executor carrying on the business of his deceased partner: *Burden* v. *Burden*, 1 V. & B. 170; *Stocken* v. *Dawson*, 6 Beav. 371; and an executor or trustee will not be entitled to make a profit out of his trust by his professional business. Thus, a factor, acting as executor, is not so entitled, (*Scattergood* v. *Harrison*, Mos. 128); nor is a commission agent, (*Sherriff* v. *Axe*, 4 Russ. 33.) So, an executor and trustee, acting as auctioneer in the sale of the trust property, cannot charge for commission, (*Kirkman* v. *Booth*, 11 Beav. 273;) nor can an attorney or solicitor charge his cestui que trust but for expenses and costs out of pocket, (*New* v. *Jones*, 1 Hall & T. 632; *Bainbrigge* v. *Blair*, 8 Beav. 588; *Todd* v. *Wilson*, 9 Beav. 486; *Gomley* v. *Wood*, 3 J. & L. 702); nor can his partner, (*Collins* v. *Carey*, 2 Beav. 129; *Christophers* v. *White*, 10 Beav. 523;) but the costs of his town agent in a cause will be allowed, (*Burge* v. *Brutton*, 2 Hare, 373;) and under peculiar circumstances an inquiry may be directed to give some remuneration or compensation to a solicitor for his loss of time and trouble, (*Marshall* v. *Holloway*, 2 Swanst. 453; *Bainbrigge* v. *Blair*, 8 Beav. 595.)

A general release, where the cestui que trust has been assisted by an independent solicitor, may prevent a cestui que trust from insisting upon his right to have a settled account opened against a solicitor being a trustee, although he may have charged for professional services: *Stanes* v. *Parker*, 9 Beav. 385; *In re Sherwood*, 3 Beav. 338, 341. Secus if he had not such assistance: *Todd* v. *Wilson*, 9 Beav. 486.

But it is laid down by Lord *Cottenham*, in *Cradock* v. *Piper*, 1 Hall & T. 617, 628, that although where a trustee, being a solicitor, acts for himself, he cannot be allowed his costs, there is no case in which the principle has been extended beyond the dealing of a trustee for himself, and acting for himself in the execution of the trusts. It is not extended to a case where the mere circumstance of being a trustee and solicitor, but not performing the duty as a trustee, he is within the rule, that he is not entitled to his costs though acting as trustee for other parties. Accordingly, in that case, his Lordship held, that, the circumstance of a solicitor being a trustee will not prevent him from receiving his usual costs, where he acts as solicitor in such a suit for any of the cestui que trust, or where he acts for himself and his co-trustees, or cestui que trust jointly, provided the costs are not increased by his being one of the parties for whom such joint appearance is made. And see *Fraser* v. *Palmer*, 4 Y. & C. Exch. Ca. 517; but see *Bainbrigge* v. *Blair* 8 Beav. 588.

Where a solicitor, who is a trustee, is a defendant as a trustee, and is held to be entitled to his costs, the course of the Court is to direct them to be taxed as between solicitor and client: *York* v. *Brown*, 1 Coll. 260.

There are, however, some few exceptions to the rule laid down in the principal case. Thus, the trustees and guardians managing the estates of West India proprietors, according to the Acts of Assembly are entitled to a commission not above 6*l.* per cent., as long as they personally take care of the management and improvement of the estates committed to their charge; but not if they leave the island and trust the management to others acting as attorneys: *Chambers* v. *Goldwin*, 5 Ves. 834; 9 Ves. 254, 257, 267, 273. But although they have no right to be paid their commission during absence, they are entitled to what they have actually paid to others for the management of the estate, provided the payments be in themselves reasonable; as to which, if it be disputed, an inquiry will be directed; *Forrest* v. *Elwes*, 2 Mer. 68; and mortgagees in possession are not entitled to any commission, except what is paid by them to the factor for commission, *Chambers* v. *Goldwin*, 5 Ves. 837; 9 Ves. 268.

So, an executor appointed in the East Indies is entitled, in passing his accounts in the Courts of equity in this country, to the commission of 5*l.* per cent. upon the receipts or payments, according to the practice in the East Indies. See *Chetham* v. *Lord Audley*, 4 Ves. 72, where Lord *Rosslyn* allowed the commission, observing, that the appointment of an executor in India, no legacy being given to him, was the appointment of an agent for the management of the estate; that there would be no possibility of getting the business done at all without the allowance; and if the executors in England were to get a person to do the business in India, they could not get it done so cheap. But an Indian executor will not be entitled to commission if he has a legacy for his trouble, nor can he, after a long lapse of time, be admitted to renounce the legacy in order that he may claim the commission: *Freeman* v. *Fairlie*, 3 Mer. 24.

The creator of the trust, as was admitted by Sir *Joseph Jekyll*, M.R., in the principal case, may direct, generally, compensation to be made to an executor or trustee, for his care and trouble; or he may himself fix it at a particular sum of money, or a salary. See *Webb* v. *The Earl of Shaftesbury*, 7 Ves. 480, and *Baker* v. *Martin*, 8 Sim. 25; in which case a testator had directed that 100*l.* a year should be annually paid to one of his executors, for his trouble in superintending his concerns, until a final settlement of his affairs should take place. The executor proved and acted. Some time after the testator's death, a suit was instituted for the administration of his estate, but no receiver was appointed, and some of the assets were still outstanding; it was held by Sir *L. Shadwell* V. C., that the annuity had not ceased, as it was not shown that the trouble of the executors had ceased. But where the creator of the trust does not himself fix the amount of compensation, it will be referred to the Master to settle what will be a proper allowance: *Ellison* v. *Airey*, 1 Ves. 115; *Willis* v. *Kibble*, 1 Beav. 559; *Jackson* v. *Hamilton*, 3 J. & L. 702. So, as observed by Lord *Langdale*, M.R., in *Bainbrigge* v. *Blair*, 8 Beav. 597, a testator, though knowing that if his trustee acted as solicitor, and were allowed to make his professional charges, he would be enabled to make business for himself, might, nevertheless, insert an authority in the will, permitting it, (and this is not unfrequently done) there would be then no question about the matter.

And although trustees or executors will not generally be entitled to any allowance for their trouble, they may, nevertheless, contract with their cestui que trust to receive some compensation for acting, or to make professional charges for acting. Such contract, however, would be most carefully watched by the Court, and, unless it were perfectly fair, and obtained without any undue pressure upon the cestui que trust, would not be enforced. See *Ayliffe* v. *Murray*, 2 Atk. 58, in which case two persons, executors and trustees under a will, refused to prove the will, or act in the trust, or suffer the cestui que trust to take out letters of administration cum testamento annexo, till he had executed a deed by which he was to pay 100*l.* to Ayliffe, one of the executors, who was the solicitor who drew the will, and 200*l.* to the other, over and above their legacies, within six months after they should have exhibited an inventory. Upon a bill being brought for a specific performance of the contract, and for an account, Lord *Hardwicke* declared, that the deed was unduly obtained, and decreed that no allowance should be made for the sum of 100*l.* and 200*l.* "With regard to the merits," observed his Lordship, "whether upon general grounds, a trustee may make an agreement with his cestui que trust for an extraordinary allowance, over and above what he is allowed by the terms of the trust, I think there may be cases where this Court would establish such agreements, but at the same time would be extremely cautious and wary in doing it."

"In general, this Court looks upon trusts as honorary, and a burthen upon the honor and conscience of the person intrusted, and not undertaken upon mercenary views; and there is a strong reason too, against allowing anything beyond the terms of the trust, because it gives an undue advantage to a trustee to distress a cestui que trust; and therefore, this Court has always held a strict hand upon trustees in this particular. If a trustee comes in a fair and open manner, and tells the cestui que trust that he will not act in such a troublesome and burthensome office unless the cestui que trust will give him a further compensation, over and above the terms of the trust, and it is contracted for between them, I will not say this Court will set it aside; though there is no instance where they have confirmed such a bargain. . . . I consider the case in this light:—Two trustees are making an ill use of an authority they had under the will, to extort a reward from a cestui que trust. If

they had told him, Give us a further reward, or we will renounce, they had acted fairly, and something may have been said in favor of the contract. The personal estate was vested in them before probate, and could not be got out of them without an actual renunciation; the real estate likewise vested in them, and could not be taken out of them but by an actual assignment; and, sensible of these difficulties upon the defendant, the plaintiffs would not act in order to force him into their terms."

"This case has been compared to several other cases of fraud, and, amongst the rest, of marriage brokage bonds, and not improperly; for the person who has the reward there, has as much trouble as the trustees have here, and the party giving the reward in those cases, full as willing as the defendant in this; and yet the Court always set those bargains aside as unconscionable. Consider the ill consequences of such a case; suppose it should be necessary that a will should be immediately proved, as in the case of a widow and children. Shall a trustee, in whom the testator reposed a trust and confidence, and depended upon his honor and kindness, insist upon such hard terms as to have an unreasonable reward, before he will either prove the will or act in the trust? See *In re Wyche*, 11 Beav. 209, where, on an application within twelve months, Lord *Langdale* refused to order the taxation of a bill paid under other professional advice, to a trustee who had acted as solicitor for a lady, he having first declared that he would not act, except on the ordinary terms of being paid as between solicitor and client; and the cestui que trust acquiesced in this proposal, and signed a retainer in such special terms as to provide for it. "It is said," observed his Lordship, "that it is extremely difficult for a trustee against a cestui que trust, or for a solicitor against a client, to make the client pay more than the rules of law allow. I will not venture to say, that, in such a case as this, it cannot be done; because, if the parties understand the principle that a trustee, acting as a solicitor in the trust matters, is only entitled to the costs out of pocket,—if the cestui que trust has clear knowledge and proper protection, I should hardly say that such an agreement is illegal, or that it cannot be carried into effect. This lady, from the first, did know that a trustee, acting as solicitor, was not entitled to ordinary costs as between solicitor and client; and it does appear that she had other professional advice besides that given by the trustee himself."

And even if a trustee makes a valid contract with his cestui que trust for compensation for the trouble incident to the trust, it will not be allowed if the trustee, in consequence of his death or otherwise, fail to complete his contract. Thus, in *Gould* v. *Fleetwood*, Mich. 1732, at the Rolls, an executor in trust, who had no legacy, and where the execution of the trust was likely to be attended with trouble, at first refused, but afterwards agreed with the residuary legatees, in consideration of 100 guineas, to act in the executorship, and he dying before the execution of the trust was completed, his executors brought a bill to be allowed these 100 guineas out of the trust money in their hands, insisting that the residuary legatees might as well make a contract with the executor touching the surplus (which was their own property,) as the testator himself, and that no harm could happen thereby to the trust estate; but Sir *Joseph Kekyll*, M. R., said, that all bargains of this kind ought to be discouraged, as tending to eat up the trust; and here the executor had died before he had finished the affairs of the trust. Wherefore, the plaintiff's demand was disallowed: 3 P. Wms. 251, n. (A); 2 Eq. Ca. Ab. 453, pl. 8.

Nor will a contract by a trustee with his cestui que trust for professional charges be enforced, unless in distinct and express terms it takes the trustee out of the general rule. Thus, in *Moore* v. *Frowd*, 3 My. & Cr. 45, the plaintiff, a lady, conveyed property to four attorneys and solicitors, upon trust to sell; and directed that the trust moneys should be applied (inter alia) in payment of the costs, charges. and expenses of preparing the indenture of release. *and all the expenses, disbursements, and charges, already or thereafter to be incurred or sustained or borne by the trustees, or the trustees or trustee for the time being*, either in professional business, journeys, or otherwise, for the purpose of negotiating or performing the agreements, trusts, and purposes thereinbefore mentioned or directed to be carried into execution; and also all the costs, charges, and expenses of the persons to be employed by them as surveyors, &c. And it was further provided, that the trustees should, out of the trust moneys, deduct, retain to, and reimburse themselves all such reasonable costs, charges, and expenses as they or any of them should or might *sustain, expend, or be put unto*, in or about the execution of all or any of the trusts thereby in them reposed, such costs, charges, and expenses to be reckoned, stated, and paid as be-

tween attorney and client. The trustees having brought in four bills, to the amount of 1709*l.* 2*s.* for professional charges, it was contended, for the plaintiff, that they were only entitled to costs out of pocket; and Lord *Cottenham* held, that the Master, in taking the accounts, was not to allow to them any professional charges, or charges for loss of time, or other emoluments, but to allow only such charges and expenses actually paid by them out of pocket, as he should find to have been properly incurred and paid by them. "That all these bills," observed his Lordship, "are to be examined and taxed, is not disputed; but the question is, whether such taxation is to be a taxation of a solicitor's bill, in the usual course, between solicitor and client, or whether the Master is to be directed to allow only costs out of pocket, properly expended."

"The first question is, whether the deed of trust disposes of this question; because the parties may by contract make a rule for themselves, and agree that a trustee, being a solicitor, shall have some benefit beyond that which, without such contract, the law would have allowed; but, in such a case, the agreement must be distinct, and in its terms explain to the client the effect of the arrangement; and the more particularly when the solicitor for the client, becoming himself a trustee, has an interest, personal to himself, adverse to that of the client. It is not easy in such a case to conceive how, consistently with the established rules respecting contracts between solicitors and their clients, a solicitor could maintain such a contract, made with his client for his own benefit, the client having no other professional adviser, and in the absence of all evidence, and of any probability, of the client (a woman, too,) having been aware of her rights, or of the rule of law, or of the effect of the contract; but the necessity for following up these considerations does not arise in this case, unless the deed contains a distinct agreement for this purpose."

"There are two parts of the deed applicable to this point: first, that part in which the trusts are declared, wherein it is provided that all costs, charges and expenses of the deed, and all expenses, disbursements, and charges already or hereafter to be *incurred, sustained, or borne* by the trustees, or any of them, either in professional business, journeys, or otherwise, for the purpose of negotiating or performing the agreements, trusts, and purposes before men-

tioned, and all costs, charges, and expenses of persons to be employed by them as surveyors, &c., and all other expenses of carrying the trusts into execution shall be paid in the first place out of the produce of the intended sales."

"Now, the costs in question being the ordinary remuneration of a solicitor, as distinguished from the costs out of pocket, cannot be considered as charges and expenses incurred, sustained, or borne by the trustees; but such expressions in terms apply to payments made, or liabilities incurred."

"The next provision is more specific. It provides that each trustee is to be at liberty to retain and reimburse himself all such reasonable costs, charges, and expenses as he may *sustain or be put unto*, such costs, charges, and expenses to be reckoned, stated and paid as between attorney and client; but this provision does no more than the rule of law would have done, a trustee's costs being taxed as between attorney and client. And what are the costs so to be taxed? Costs which the trustee may sustain or be put unto,—terms wholly inapplicable to sums claimed as remuneration."

"There is nothing in either of these provisions which is peculiarly applicable to the case of the solicitor being also trustee. It cannot, therefore, be assumed that the intention was to provide for some other mode of dealing with that union of characters than what the law would have enforced; and still less, that, under such provision, a solicitor dealing with his client can be permitted to claim that which, without, at least, a specific contract with the client, and proof that the client was fully cognizant of her legal rights, independently of such contract, and of the effect and legal consequences of the act upon such legal rights, he would not be entitled to claim."

A trustee may contract with the Court, that he will not undertake the trust without proper compensation; and if he have undertaken the trust upon the understanding, that application should be made to the Court for compensation, a reference will be made to the Master to ascertain and settle what would be a reasonable allowance both for his past and future services. See *Marshall* v. *Holloway*, 2 Swanst. 432, 453, 454; *Brocksopp* v. *Barnes*, 5 Madd, 90; *Morrison* v. *Morrison*, 2 My. & Cr. 215.

But, although trustees and executors will not, in the absence of contract, be allowed any remuneration for their own trouble and loss of time, they may, in special cases, employ agents, whose expenses will be allowed out of the estate. Thus, a trustee, upon making out a proper case, may employ a bailiff to manage an estate and receive the rents, (*Bonithon* v, *Hickmore*, 1 Vern. 316; *Stewart* v. *Hoare*, 2 Bro. C. C. 663 ;) even although a recompense may have been given to him by the creator of the trust for his trouble. Thus, in *Wilkinson* v. *Wilkinson*, 2 S. & S. 237, a testator gave annuities of five guineas each to his trustees, for the care and trouble they might have in the execution of the trusts, and appointed them executors. Amongst other property, the testator was entitled to about fifty houses in London, thirty-four of which were let at weekly rents. The trustees employed a person to collect those rents, and the Master, on passing their accounts, allowed the salary they had paid to him; and Sir *J. Leach*, V.C., over-ruled an exception taken to the Master's report on account of that allowance. "It does not appear to me," observed his Honor, "that the annuity of five guineas to each trustee makes any difference in this case. It is given to them as a recompense for the care and trouble which will attend the due execution of their office; and, if it be consistent with the due execution of their office that they should employ a collector to receive the rent, they will still be entitled to the annuity. A provident owner might well employ a collector to receive such rents; and the labor of such collection cannot be imposed upon trustees."

So an executor, although he may be a solicitor, may employ another solicitor to do business for him in the management of the testator's affairs, (*Macnamara* v. *Jones*, 2 Dick, 587; *Stanes* v. *Parker*, 9 Beav. 389;) or an accountant, if the accounts are of a difficult or complicated nature, (*Henderson* v. *M'Iver*, 3 Madd. 275; *New* v. *Jones*, 1 Hall & T. 634 :) or an agent to collect debts at a commission; but the Court will reduce it if too high. See *Weiss* v. *Dill*, 3 My. & K.. 26, where an executor, having charged for the employment of an agent, at 5*l.* per cent., to collect debts to the amount of 2,000*l.*, an exception, taken to the Master's report, who allowed only 2½*l.* per cent., was overruled by Sir *John Leach*, M. R. "Generally speaking," said his Honor, "executors are not allowed to employ an agent to perform those duties, which, by accepting the office of executors they have taken upon themselves; but there may be

very special circumstances in which it may be thought fit to allow them such expenses as they may have incurred by the employment of agents. It is for the Master to determine whether an executor, who makes a claim for the employment of an agent, ought to be allowed to charge his testator's estate with such a burthen. The Master has here thought that the executor ought not to be allowed to charge the testator's estate with the whole commission claimed, but that 2½ per cent. is a fit allowance. I have some doubt whether in this case the Master ought to have made any allowance; but with the allowance of 2½*l.* per cent. which he has made, the defendants must be content." And see *Hopkinson* v. *Roe*, 1 Beav. 180; *Day* v. *Croft*, 2 Beav. 488.

Upon the principle, that a trustee should not profit by his trusts, a person, whether he is sole trustee or a trustee jointly with others, will not in general be appointed receiver with a salary, for this would be a mode of giving a trustee emolument, (*Anon.*, 3 Ves. 515; —— v. *Jolland*, 8 Ves. 72; *Sykes* v. *Hastings*, 11 Ves. 363; *Sutton* v. *Jones*, 15 Ves. 584;) "unless no one else can be procured who will act with the same benefit to the estate, where there is a necessity, from the circumstance, that, by any one else, the estate would not be so well managed;" (*Sykes* v. *Hastings*, 11 Ves. 364, per Lord *Eldon*;) and even where a trustee offers to act as receiver without a salary, the Court will only appoint him to the office on the ground that it is for the benefit of the estate, because it is the duty of the trustee to examine with an adverse eye, and see that the receiver does his duty: *Hibbert* v. *Jenkins*, cited 11 Ves. 363, 364. "The consequence is," says Lord *Eldon*, "the case of appointing a trustee to be receiver is extremely rare, and only where he will act without emolument:" *Sykes* v. *Hastings*, 11 Ves. 364. It is no objection, however, that a person is trustee to preserve contingent remainders: *Sutton* v. *Jones*, 15 Ves. 587. So, it is competent for the Court, as a matter of discretion, to appoint an executor and trustee, consignee, with the usual profits; and where a discretion of that kind has been exercised and acted upon, it will not at a subsequent period be withdrawn; *Marshall* v. *Holloway*, 2 Swanst. 432; *Morison* v. *Morison*, 4 My. & Cr. 215, 224.

Upon the same principle, if a trustee or executor keeps in his own possession trust moneys which ought to have been invested, although

it be not shewn that he made a profit by so doing, he will be charged interest, at a rate which may be varied at the discretion of the Court. See *Tebbs* v. *Carpenter*, 1 Madd. 290, 306, where Sir *T. Plumer*, after an elaborate examination of the authorities, observed, that it appeared that a distinction had been taken, as in every moral point of view there ought to be, between *negligence* and *corruption* in executors. A special case is necessary to induce the Court to charge executors with more than 4*l.* per cent. upon the balances in their hands. If, however, a trustee or executor employ the trust funds in a trade or adventure of his own, whether he keeps them separate from, or mixes them with, his own private moneys, and notwithstanding the difficulties which in the latter case may arise in taking the accounts, the cestui que trust, if he prefers it, may insist upon having the profits made by, instead of interest on the amount of, the trust funds so employed. In the important and leading case of *Docker* v. *Somes*, 2 My. & K. 655, trustees had paid part of the trust funds to their bankers, to the credit of their general account, without distinguishing the same from the moneys employed in their own business of ship-chandlers and sail-makers, it was argued that the trustees only ought to be charged interest for the trust moneys employed by them. Lord *Brougham*, however, in an elaborate judgment, held that the cestui que trusts might at their option charge them either with interest or with a proportionate share of the profits. "Wherever," said his Lordship, "a trustee, or one standing in the relation of a trustee, violates his duty and deals with the trust estate for his own behoof, the rule is, that he shall account to the cestui que trust for all the gain which he has made. Thus, if trust money is laid out in buying and selling land, and a profit made by the transaction, that shall go, not to the trustee who has so applied the money, but to the cestui que trust whose money has been thus applied. In like manner (and cases of this kind are more numerous), where a trustee or executor has used the fund committed to his care in stock speculations, though the loss (if any) must fall upon himself, yet, for every farthing of profit he may make, he shall be accountable to the trust estate. So, if he lay out the trust money in a commercial adventure, as in buying or fitting out a vessel for a voyage, or put it in the trade of another person, from which he is to derive a certain stipulated profit, although I will not say that this has been decided, I hold it to be quite clear, that he must account for the profits received by the adventure or

from the concern. In all these cases it is easy to tell what the gains are. The fund is kept distinct from the trustee's other moneys, and whatever he gets, he must account for and pay over. It is so much fruit, so much increase, on the estate or chattel of another, and must follow the ownership of the property and go to the proprietor. . . ."

"Such being the undeniable principle of equity, such the rule by which breach of trust is discouraged and punished—discouraged by intercepting its gains and thus frustrating the intentions that caused it—punished by charging all losses on the wrong doer, while no profit can ever accrue to him—can the Court consistently draw the line, as the cases would seem to draw it, and except from the general rule those instances where the risk of the malversation is most imminent—those instances where the trustee is most likely to misappropriate, namely those in which he uses the trust funds in his own traffic? At first sight this seems grossly absurd, and some reflection is required to understand how the Court could ever, even in appearance, countenance such an anomaly. The reason which has induced judges to be satisfied with allowing interest only, I take to have been this; they could not easily sever the profits attributable to the trust money from those belonging to the whole capital stock; and the process became still more difficult where a great proportion of the gains proceeded from skill or labour employed upon the capital. In cases of separate appropriation, there was no such difficulty, as where land or stock had been bought and then sold again at a profit; and here accordingly, there was no hesitation in at once making the trustee account for the whole gains he had made. But where, having engaged in some trade himself, he had invested the trust money in that trade along with his own, there was so much difficulty in severing the profits, which might be supposed to come from the money misapplied, from those which came from the rest of the capital embarked, that it was deemed more convenient to take another course, and, instead of endeavoring to ascertain what profit had been really made, to fix upon certain rates of interest as the supposed measure or representative of the profits, and to assign that to the trust estate."

"This principle is undoubtedly attended with one advantage—it avoids the necessity of an investigation, of more or less nicety, in

each individual case, and it thus attains one of the important benefits resulting from all general rules. But mark what sacrifices of justice and of expediency are made for this convenience. All trust estates receive the same compensation, whatever risks they may have run during the period of their misappropriation—all profit equally, whatever may be the real gain derived by the trustee from his breach of duty; nor can any amount of profit made be reached by the Court, or even the most moderate rate of mercantile profit—that is, the legal rate of interest—be exceeded, whatever the actual gains may have been, unless by the very clumsy and arbitrary method of allowing rests, in other words, compound interest, and this without the least regard to the profits actually realized; for, in the most remarkable cases in which this method has been resorted to (*Raphael* v. *Bohem*, stated in 11 Ves. 92, and 1 Madd. 300, which, indeed, is always cited to be doubted, if not disapproved), the compound interest was given with a view to the culpability of the trustee's conduct, and not upon any estimate of the profits he had made by it."

"But the principal objection which I have to the rule is founded upon its tendency to cripple the just power of this Court in by far the most wholesome and indeed necessary exercise of its functions, and the encouragement thus held out to fraud and breach of trust. What avails it towards preventing such malversations, that the contrivers of sordid injustice feel the power of the Court only where they are clumsy enough to keep the gains of their dishonesty severed from the rest of their stores? It is in vain they are told of the Court's arm being long enough to reach them, and strong enough to hold them, if they know that a certain delicacy of touch is required, without which the hand might as well be paralyzed or shrunk up. The distinction—I will not say sanctioned, but pointed at by the negative authority of the cases—proclaims to executors and trustees, that they have only to invest the trust money in the speculations, and expose it to the hazards of their own commerce, and be charged 5*l.* per cent. on it, and then they may pocket 15*l.* or 20*l.* per cent. by a successful adventure. Surely the supposed difficulty of ascertaining the real gain made by the misapplication is as nothing compared with the mischiefs likely to arise from admitting this rule, or rather this exception to one of the most general rules of equitable jurisdiction.

"Even if cases were more likely to occur than I can think they are, of inextricable difficulties in pursuing such inquiries, I should still deem this the lesser evil by far, and be prepared to embrace it.

"Mr. Solicitor-General put a case of a very plausible aspect with the view of deterring the Court from taking the course which all principle points out. He feigned the instance of an apothecary buying drugs with 100*l.* of trust money and earning 1000*l.* a year by selling them to his patients; and so he might have taken the case of trust money laid out in purchasing a piece of steel, or skein of silk, and these being worked up into goods of the finest fabric, Birmingham trinkets or Brussels lace, where the work exceeds by 10,000 times the material in value. But such instances, in truth, prove nothing: for they are cases not of profits upon stock, but of skilful labour very highly paid; and no reasonable person would ever dream of charging a trustee, whose skill thus bestowed had so enormously augmented the value of the capital, as if he had only obtained from it a profit; although the refinements of the civil law would certainly bear us out even in charging all gains accruing upon these goods as in the nature of accretions belonging to the true owners of the chattels. . . ."

"The last person who can be heard to argue from the difficulty of tracing or apportioning the profits of the misapplied fund, is the man whose breach of trust has caused the misapplication and created the difficulty."

"When did a court of justice, whether administered according to the rules of equity or of law, ever listen to a wrong doer's argument to stay the arm of justice, grounded on the steps be himself had successfully taken to prevent his iniquity from being traced? Rather, let me ask, when did any wrong doer ever yet possess the hardihood to plead, in aid of his escape from justice, the extreme difficulties he had contrived to throw in the way of pursuit and detection, saying, 'You had better not make the attempt, for you find I have made the search very troublesome?' The answer is, 'The Court will try.' See also *Palmer* v. *Mitchell*, 2 My. & K. 672, n.; *Wedderburn* v. *Wedderburn*, 2 Kee. 41; 4 My. & Cr. 41; *Fosbrooke* v. *Balguy*, 1 My. & K. 226."

Should, however, in any case a serious difficulty arise in tracing and apportioning the profits derived by a trustee or executor from the employment of trust funds together with his own, in any trade or speculation, it may be a reason for referring a fixed rate of interest to an account of the profits.

If, however, a person is merely a constructive trustee, from having employed the money of another in a trade or business, and does not expressly fill any fiduciary character as that of trustee or executor, although he must account for the profits of the money he employed, he will have an allowance made to him for his loss of time, skill, and trouble. Thus, in *Brown* v. *Litton*, 1 P. Wms. 140; 10 Mod. 20, the captain of a ship, having $800 on board, which he intended to invest in trade, died on his voyage, and the mate, becoming captain, took the 800 dollars, and, investing them in trade, made great improvements thereof, and on his return to England the executrix of the first captain brought a bill against him for an account. The defendant admitted the receipt of the money, and offered to repay the same with interest, whereas the plaintiff insisted on the profits produced in trade, and the several investments that had been made therewith. Lord Keeper Harcourt, however, considering that the defendant was like a trustee, held that he ought clearly to account for the profits made of the money; but that, to recompense him for his care in trading with it, the Master should settle a proper salary for the pains and trouble he had been at in the management thereof. And his Lordship compared it to the case of two joint traders, where, if one dies and the survivor carries on the trade after the death of the partner, the survivor shall answer for the gain made by this trade; and, this being an island, all imaginable encouragement ought to be given to trade; and such construction was for the benefit of him who carried out this money with that intent, and there was no reason that his death should so far injure his family and relations as to deprive them of the benefit which might accrue from it in the way of trade. In *Brown* v. *De Tastet*, Jac. 284, on the death of one of the partners in a business, the survivor retaining his capital, and employing it in the trade, was decreed by Lord Eldon to account for the profits derived from it, but proper allowances were to be made to him for his management of the business. And see *Crawshay* v. *Collins*, 15 Ves. 218; 1 J. & W. 267; 2 Russ. 325;

Featherstonhaugh v. *Fenwick*, 17 Ves. 298; *Cooke* v. *Collingridge*, Jac. 607.

Upon the same principle a trustee will not be allowed to have the sporting over the trust estate, nor to appoint gamekeepers to preserve the game for his own amusement; see *Webb* v. *The Earl of Shaftesbury*, 7 Ves. 488, where Lord Eldon directed an enquiry whether the liberty of sporting could be let for the benefit of the cestui que trust; and if it could not, he thought the game would belong to the heir. If it was necessary for the preservation of the game, that the trustee should appoint a gamekeeper, he would not be prevented from appointing one, but for that purpose only; for he could not, under the will, have an establishment of pleasure on the trust estate: and see *Hutchinson* v. *Morritt*, 3 Y. & C., Exch. 547.

So, likewise, a person standing in a fiduciary relation towards another will not be allowed to benefit by his trust by obtaining a renewal of a lease (see *Keech* v. *Sandford*, and note, 1, W. & T. L. C. p. 32); or by purchasing from his cestui que trust (*Fox* v. *Mackreth*, W. & T. L. C. Vol. 1, p. 72). And the principle is applicable to receivers (*In re Ormsby*, 1 Ball & B. 189) and committees of lunatic estates: *Anon.*, 10 Ves. 103.

Although trustees and executors are not allowed any remuneration for their trouble, they will be allowed all proper expenses out of pocket, whether they be provided for in the instrument creating the trusts or not: *Hide* v. *Haywood*, 2 Atk. 126; *Worrall* v. *Harford*, 8 Ves. 8; *Dawson* v. *Clarke*, 18 Ves. 254; *Attorney-General* v. *The Mayor of Norwich*, 2 My. & Cr. 424. Thus, he will be allowed the expense of travelling (*Ex parte Lovegrove*, 3 D. & C. 763); of fees for counsel (Cary, 14); costs of a law suit (*Amand* v. *Bradbourne*, 2 Ch. Ca. 138; *Fearns* v. *Young* 10 Ves. 184); unless such expenses were improper (*Malcolm* v. *O'Callaghan*, 3 M. & C. 52); or the litigation occasioned by his own negligence; *Caffrey* v. *Darby*, 6 Ves. 488, 497. But it seems he will in no case be allowed interest on his costs: *Gordon* v. *Trail*, 8 Price, 416. Although a trustee ought to keep an account of his expenses, his not having done so will not, it seems, disentitle him to an allowance: *Hethersell* v. *Hales*, 2 Ch. Rep. 158. And he will have a

lien on the trust estate for his expenses (*Ex parte James*, 1 Deac. & C. 272); but it does not extend to the persons employed by him in the affairs of the trusts (*Worrall* v. *Harford*, 8 Ves. 8; *Lawless* v. *Shaw*, L. & G., t. Sugd., 154, reversed Dom. Proc. 5 C. & F. 129); and if the trust estate no longer exists, the trustee may proceed in equity against the cestui que trust personally: *Balsh* v. *Hyham*, 2 P. Wms. 453.

A trustee may, however, from accidental circumstances, profit by his trust, as where the cestui que trust dies intestate without heirs; for in that case the lord cannot claim by escheat, and, subject to the right of creditors, the trustee may retain possession, not by any title of his own, but because no other person can shew a title. This was determined, after much discussion, in the important case of *Burgess* v. *Wheate*, 1 Eden, 177. There A., being seized in fee ex parte paterna, conveyed real estate to trustees, in trust for herself, her heirs and assigns, to the intent that she should appoint, and for no other use, intent, or purpose whatsoever. A. died without having made any appointment, and without heirs ex parte paterna. It was held by Lord Keeper Henly and Sir Thomas Clarke, M.R., first, that the maternal heir was not entitled; and, secondly, that there being a terre tenant, the Crown, claiming by escheat, had not a title by subpœna to compel a conveyance from the trustee, the trust being absolutely determined; but no opinion was given upon the right of the trustee: and see *Attorney-General* v. *Sands*, Hard. 496; *Taylor* v. *Haggarth*, 14 Sim. 8. But a trustee must convey to trustees according to the directions of a testator, although the trusts for which the conveyance was directed may have failed or never arisen: *Onslow* v. *Wallis*, 1 Hall & T. 513; 1 Mac. & G. 506.

In case of the attainder of the cestui que trust for felony, it seems to have been the opinion of Lord Keeper Henley and Sir Thomas Clarke, M. R., that if he were pardoned by the Crown, he might enforce the trust: see 1 Eden, 210, 255. Lord Mansfield, however, observed that he could find no clear and certain rule to go by; and yet he thought equity would follow the law throughout: 1 Eden, 236. It seems, however, doubtful whether the heir of a person executed for felony could sue the trustee. See Br. Ab. tit. "Feff. al. Us." 34.

It is clear, however, that upon failure of the heir of the cestui que trust, the trustee cannot come into equity as plaintiff, to assert his right (see 1 Eden, 212, and *Williams* v. *Lord Lonsdale*, 3 Ves. 752), in which case a copyhold (duly surrendered) was devised to A. and his heirs, in trust for B. and his heirs. Upon the death of B. without heirs, it was held by Lord Rosslyn, that the heir of the trustee had an equity to compel the lord to admit him; and his bill was dismissed without costs. "The only point," observed his Lordship, "determined in *Burgess* v. *Wheate*, was, that the Crown, entitled as it was supposed by escheat upon the death of the cestui que trust, had not a title by subpœna in this Court to make the heir of the trustee, having merely a legal estate, convey; that there was no equity for this Court to exercise jurisdiction. Is not the converse of that equally true? If the lord has no equity in that case, can I find any ground of equity where the person having the legal estate, and telling me he has no beneficial interest, desires me to act for his benefit upon the estate of the lord? The Court considers the mere legal estate as nothing." But the Court of King's Bench will, by mandamus, compel the lord to admit the heir of a trustee, although he has a mere legal title: *The King* v. *Co gan*, 6 East, 431; S. C., 2 Smith, 417; *King* v. *Wilson*, 10 B. & C. 80.

Lord Mansfield asked, in *Burgess* v. *Wheate* (see 1 Eden, 185), whether, in the event of the attainder of the cestui que trust, the right would not result to the creator of the trust: but no notice appears to have been taken of this observation, nor does the question ever appear to have been determined.

If the cestui que trust of real or personal chattels, having no next of kin, dies, either intestate (*Jones* v. *Goodchild*, 3 P. Wms. 33; *Rutherford* v. *Maule*, 4 Hagg. 213; *Taylor* v. *Haygarth*, 14 Sim. 8), or if, under the old law, having made a will, he appointed an executor, who, either expressly or by implication, was excluded from all beneficial interest, so as to be converted into a mere trustee (*Middleton* v. *Spicer*, 1 Bro. C. C. 201; *Barclay* v. *Russell*, 3 Ves. 424; *Henchman* v. *Attorney-General*, 3 My. & K. 492; *Cave* v. *Roberts*, 8 Sim. 214), the Crown in either case, by virtue of its prerogative, may claim the chattels as bona vacantia; but if under the old law there was nothing in the will to convert the executor

into a trustee; or if, since the passing of 11 Geo. 4 & 1 Will. 4, c. 40, it appears to be the intention that he shall be the beneficial owner, the Crown cannot make good its claim.

In the American notes to this case it is said:—The rule, that a trustee shall not profit by his trust, when carried to the extent of denying a reasonable compensation for his services, has, at the present day, but a limited application on this side of the Atlantic. "The state of our country, and the habits of our people are so different, as to have induced the legislatures of nearly all the states to introduce provisions by statute for competent remuneration to those to whom the law commits the care and charge of the estate of infants and deceased persons, and the Courts make a reasonable allowance to receivers appointed by them, besides reimbursing their expenses. . . . And the equity of the statute is, by construction, generally extended to conventional trustees when the agreement is silent." *Boyd* v. *Hawkins*, 2 Dev. Eq. R. 334.

The rule of *Robinson* v. *Pett*, has, however, at an early day, received very cordial approbation in parts of this country, and in one state at least, (Delaware,) continues to prevail at the present time. In New York, Chancellor Kent, in the early case of *Green* v. *Winter*, 1 Johns. Ch. 37, declared, that even were he free from the weight of English authority, he would greatly hesitate before he undertook to question the wisdom of this rule, and in the subsequent carefully considered case of *Manning* v. *Manning*, Id. 534, the same learned Judge enforced his views by a reference to the rule of the civil law, and added, "nor does the rule strike me as so very unjust, or singular and extraordinary; for the acceptance of every trust is voluntary and confidential; and a thousand duties are required of individuals, in relation to the concerns of others, and, particularly, in respect to numerous institutions, partly of a private, and partly of a public nature, in which a just indemnity is all that is expected and granted. I should think it could not have a very favourable influence on the prudence and diligence of a trustee, were we to promote, by the hopes of reward, a competition, or even a desire, for the possession of private trusts, that relate to the monied concerns of the helpless and infirm. To allow wages or commissions for every alleged services, how could we prevent abuse?"

But, as was pertinently remarked by Judge Story, "to say that

no one is obliged to take upon himself the duty of a trustee, is to evade, and not to answer the objection. The policy of the law ought to be such as to induce honourable men, without a sacrifice of their private interest, to accept the office, and to take away the temptation to abuse the trust for mere selfish purposes, as the only indemnity for services of an important and anxious character." Eq. Juris. § 1268, n. Such seems to have been the view generally taken throughout this country, and though at an early period some of the states recognized the English rule, yet in them, as in New York, its judicial adoption called forth almost immediate legislative interference; while in others, the allowance of a compensation to all acting in a fiduciary capacity, either formed a part of their local common law, or proceeded from an equitable construction of some statue.

The subject, however, of a trustee's compensation, is intimately connected with that of his liability. Where he is treated as a paid agent, and has undertaken the trust as such, it would seem that his accountability would be much greater than where his services have been gratuitously rendered. Accordingly, it was well said by Gibson, C. J., in *Ex parte Cassel*, 3 Watts, 443, "that a trustee is answerable for negligence, only where it is so gross as to be evidence of wilful misconduct, is not to be disputed. But the reason of the rule shows that it is not for cases in which the trustee is to receive a stipulated compensation. It is said that a trustee, even of a charity, may not be charged for more than he has actually received, except for very supine negligence, and that the gratuitous nature of the service distinguishes him from a bailee for hire. 2 Fonbl. 178. . . .But the foundation of the rule fails entirely when the trust has been accepted on terms of receiving a stipulated reward." In such cases, the familiar principles apply which govern the compensation to paid agents and bailees. Story on Agency, § 3245, &c. But there would seem to be a medium degree of accountability, which would arise in cases where the trust has been undertaken, not, indeed, wholly gratuitously, nor yet with a stipulated reward, but with the expectation of receiving such compensation as comes within a court's discretion to allow. But the rules upon this subject seem to be as yet so various and local as to render unsatisfactory any attempt at their uniform classification. The penalty imposed for wrongful or negligent acts or omissions is usually inflicted by a

charge of interest, either simple or compound, by a forfeiture of compensation either in part or in whole, or by both of these methods. The cases upon the subject of interest have been ably classified by Mr. Wallace, in his note to *Selleck* v. *French*, 1 Amer. Lead. Cases. It will be seen that in those states where compensation is, by statute, matter of right, it cannot be forfeited by any misconduct, however gross, while in others it is thought that the penalty of interest should not carry with it that of also taking away the compensation. In some parts of the country, legislative provisions have now fixed both the amount of compensation, and the manner in which it shall be allowed; in others the statutes are less precise, being sometimes merely declaratory of the general principle; but in these, courts have endeavoured to form a standard with as much precision as the varying circumstances of the different cases will admit, and in some of the older states the system of allowing compensation may be said to be governed by precise rules, which may, perhaps, hereafter become less local in their application than they at present seem to be.

In New York, the principle adopted by Chancellor Kent, in *Green* v. *Winter*, and *Manning* v. *Manning*, seems to have met with little favour, as these cases were almost immediately followed by the act of 1817, which made it lawful for the Court of Chancery, in the settlement of accounts of guardians, executors, and administrators to make to them a reasonable allowance for their services as such, over and above their expenses. *In the Matter of Roberts*, 3 Johns. Ch. 43.

An order in chancery, made in the same year, 3 John. Ch. 630, reduced these provisions to more precision, by directing that the allowance for receiving and paying money, should be five per cent. on all sums not exceeding one thousand dollars, two and a-half per cent. on any excess between one and five thousand, and one per cent. for all above the latter amount. The Revised Statutes have since adopted the same rule, 2 Rev. St. 93, with the addition that any provision made by a testator for specific compensation, is to be deemed a full satisfaction for his services, unless by a written instrument filed with the surrogate he elect to renounce such legacy.

Although these statutes only gave an allowance to guardians, executors and administrators, yet by an equitable construction, their

provisions have been extended to committees of lunatics, idiots, &c., *Robert's case*, 3 John. Ch. 43; *Meacham* v. *Sterns*, 9 Paige, 403; *Livingston's case*, Id. 442; and although in *Jewett* v. *Woodward*, 1 Edw. Ch. 199, it seems to have been thought, that this did not apply to trustees under voluntary assignments, yet in *Meacham* v. *Sterns*, it was held to be the settled rule, that the equity of the statute extended also to trustees under any express trust when the instrument creating it was silent, and that "the trustee upon the settlement of his accounts will be allow the same fixed compensation for his services, by way of commissions, as are allowed by law to executors and guardians, to be computed in the same manner;" *Livingstone' case;* and the word "commissions" includes not merely a per centage, but an allowance for all services connected with the trust; *Stevenson* v. *Maxwell*, 2 Sandf. Ch. 284.

In *McWhorter* v. *Benson*, Hopk. 28, it was held, that the discretion of the Court was limited as to the *manner* of compensation, and that it had no power to sanction any specific charge or per diem allowance. Nor was such a mode of compensation deemed at all expedient. "It is evident," said Sandford, Ch., "that all attempts to assess the value of services performed in these trusts, by placing each case upon its peculiar circumstances and intrinsic merit, must terminate in a power of mere discretion, a discretion to a great extent merely arbitrary. This mode of assessment would be so uncertain in its operation, that it would frequently defeat the very justice which it proposes to attain; and its certain effect would be, to produce extensive litigation in adjusting the rewards of executors, administrators and guardians. . . . It has also been proposed, to make the compensation depend upon time, by making an allowance for each day employed in the business of the trust. This would indeed be a universal rule, embracing all services; but the principle would be most pernicious. No rule could be more dangerous, than that which should declare that every guardian, executor and administrator, shall receive a daily allowance for time employed in his trust. Much of the utility of these trusts, always consists in attention, superintendence, fidelity, and economy; and cares and services like these, cannot be measured with any exactness by days or months. The duties of these trusts, do not in general, require entire days of attention; but they are usually performed, as occasion may require, with little or no interruption of the private pursuits of the

trustee. The injustice of allowing daily wages, the temptation to abuse which would be offered by such a rule, and the difficulty of preventing abuses in its execution, are decisive objections to its adoption. If we regard the duration of these trusts, this fact affords no rule of compensation. One of these trusts continuing five years, may be far more arduous and may require much greater services than another extending to fifteen years, for its entire execution. The idea of compensation measured merely by time, must therefore be rejected."

The rule of this case has been subsequently approved, both upon principle, and as a correct interpretation of the Statute; *Reviser's note to* § 54, tit. 3, ch. 6, pl. 2; *Vanderheyden* v. *Vanderheyden*, 2 Paige, 288; *Valentine* v. *Valentine*, 3 Barb. Ch. 438; though in *Jewett* v. *Woodward*, 1 Edw. Ch. 199, a per diem allowance was given to a trustee under an assignment for the benefit of creditors. Indeed, notwithstanding the emphatic opinion of Chancellor Kent, in *Green* v. *Winter*, the rule adopted by him in that case, made the distinction between it and the general current of American authority, rather one of kind than of principle, as he gave a per diem allowance to the trustee, not, indeed, by *compensation*, but as an *indemnity*.

The compensation to trustees being thus in a manner the subject of positive enactment, seems to be thought a matter of right and not of grace, and is not forfeited by misconduct on his part—his commissions are allowed to him, even though he should be charged with compound interest *Vanderheyden* v. *Vanderheyden*; *Rapalje* v. *Norsworthy's ex'rs*, 1 Sandford's Ch. 406; or have been guilty of gross negligence; *Meacham* v. *Sterns*, 9 Paige, 405. And the same commissions are allowed when the executor, instead of calling in the bonds and assets of the estate, transfers them to the legatees with their assent; *Cairnes* v. *Chaubert*, 9 Paige, 161; or where a trustee or executor pays to himself a debt out of the fund; *Meacham* v. *Sterns*, 9 Paige, 405. So where a trustee on being discharged from his trust, transfers to his successor the property in the same state in which he received it from his predecessor; *De Peyster's case*, 4 Sandford's Ch. 514; "and there is no well founded distinction," said the Vice Chancellor in that case, "between lands and stocks as to the trustee's compensation," and commissions were allowed on the value of the real estate. So they are allowed on

amounts charged in the inventory, but which he did not in fact receive; *Meacham* v. *Sterns*.

But in order to save an estate double commissions from frequent changes of trustees, the Vice Chancellor held, in *Jones's case*, 4 Sandford's Ch. 616, upon English authority, that a trustee's petition for his discharge, upon no other cause assigned than his wish to be relieved from his duties, would only be granted by his paying the costs of the petition and the appointment of his successor, and by being allowed no commissions on the transfer of the subjects of the trust.

It will be observed, that the statute does not specify how much is to be allowed for receiving, and how much for paying out the amounts on which commissions are to be charged; "and it may sometimes happen," as was said by Walworth, Ch., in *Kellogg's case*, 7 Paige, 267, "upon a loss of the fund, without any fault of the guardian or other trustee, or upon a change of trustees, that the guardian or trustee may be entitled to compensation for one service and not for the other." The rule in general, was, therefore, said to be, "to allow one-half commission for receiving and one-half for paying out the trust moneys." In that case, the guardian had been allowed commissions for receiving and paying out the amount of a legacy bequeathed to his ward, although its principal part had been invested by him. "This mode of computing the commissions would be correct, if the infant were now of age; and this was a final settlement of the account of the guardian, with a view to turn over the whole fund to his ward. . . . But it certainly was not the intention of the legislature, or of this court, to sanction the principal of allowing to the guardian or trustee, full commissions upon every receipt and reinvestment of the trust fund committed to his care and arrangement. The result of such a principle of computing the allowance for commissions, if the investments were made from year to year and the accounts rendered annually, would be to give the trustee his full commissions upon the principal of the trust fund every year, as well as upon the income received and expended from time to time. . . The proper rule, therefore, for computing the commissions upon the first annual statement, or passing of the accounts of the guardian, receiver or committee, who is required to render or pass his account periodically, during the continuance of the

trust, is to allow him one-half of the commissions, at the rates specified in the statutes, upon all moneys received by him as such trustee, other than the principal moneys received from investments made by him on account of the trust estate. And he is also to be allowed his half commission on all moneys paid out by him in bonds and mortgages, stocks, or other proper securities, for the benefit of the trust estate under his care and management, leaving the residue of his half commissions upon the fund which has come to his hands, and which remains invested or unexpended at the time of rendering or passing such account for future adjustment, when such funds shall have been expended or when the trustee makes a final settlement of his account upon the termination of the trust. And upon every other periodical statement of the account during the continuance of the trust, half commissions should be computed in the same manner upon all sums received as interest or income of the estate, or as further addition to the capital thereof, since the rendering or passing of his last account, and half commissions upon all sums expended, except as investments." See also *Livingston's case*, 9 Paige, 403,

Where the trustees are more than one in number, the commissions are computed upon the aggregate sums received and paid out by all of them collectively, and not upon the amounts received and disbursed by each individually: five per cent. is thus allowed upon the first $1000 of the whole estate, &c., and the whole commissions are then, if necessary, apportioned, either equally or in proportion to their respective services; *Valentine* v. *Valentine*, 3 Barb. Ch. 438; but double commissions are not allowed when an executor is to act in the double capacity of executor and trustee; *Valentine* v. *Valentine*.

There seems to be a liberal deposition to sanction the payment of agents, clerks, &c., whenever their employment has been necessary to the trust; *McWhorter* v. *Benson*, Hopk. 28; *Caines* v. *Chaubert*, 9 Paige, 164. With respect to counsel fees, the statutes having fixed the allowance to be made to advocates and proctors in surrogate courts, which are taxed as costs in the suit, to be paid either by the adverse party or out of the fund, it is held that these cannot be exceeded; *Halsey* v. *Van Amringe*, 6 Paige, 12; *Burtis* v. *Dodge*, 1 Barb. Ch. 91. Nor can an executor be credited with a counsel fee for drawing up his accounts in proper form for final settlement;

Burtis v. *Dodge.* But to *trustees,* who have not improperly or unnecessarily litigated, counsel fees are allowed; *Jewett* v. *Woodward,* 1 Edw. Ch. 200; but not when the professional services were more for the benefit of the trustee than of the estate; *Meacham* v. *Sterns,* 9 Paige, 407; the question of costs will likewise depend upon the same principles; *Spencer* v. *Spencer,* 11 Paige, 299.

In Pennsylvania, the only statutory provision on this subject, was an act passed in 1713, which authorized Orphans' courts to order the payment by executors, of such reasonable fees for copies, and "all other charges, trouble and attendance, which any officer or other person should necessarily be put to," as the court should deem just. It was said by Tilghman, C. J., in *Wilson* v. *Wilson,* 3 Binn. 560, that the compensation to executors, "extends as far back as the testamentary law can be traced," while that to trustees, guardians, &c., seems to have been sanctioned by practice, upon an equitable construction of this statute; *Prevost* v. *Gratz,* 3 Wash. C. C. R. 434.

But however settled by the common law or usage of the state this practice may be, so that an executor is not competent as a witness, till he has released the contingent compensation that may be allowed him; *Anderson* v. *Neff,* 11 Serg. & Rawle, 218; still the compensation is purely one of grace; *Ex parte Cassel and Spayd,* 3 Watts, 443. "Although it is perfectly just and reasonable," said Kennedy, J., in *Swartswalter's Accounts,* 4 Watts, 79, "that every one acting under proper authority in the character of a trustee, should receive a fair compensation for his services, yet it is of infinite importance to the public, as well as to the individuals interested in the execution of the trust, that he should perform the duties of it, with the most strict honor and integrity.... Now it is certainly inconsistent with every principle of retributive justice, that a trustee who betrays the confidence reposed in him, and attempts to defraud the cestuis que trust, by appropriating the trust funds to the discharge of a pretended claim of his own., should receive the same reward that is due to virtue only, and given as a remuneration for services rendered with a view to advance the interests of the cestuis que trust. On principles of policy, as well as those of morality and justice, in order to insure a faithful and honest execution of the trust as far as practicable, it would be inexpedient to allow to the trustee who has acted dishonestly, and with an intent fraudulently to

convert the trust funds to his own use, the same compensation with him who has acted uprightly in all respects, and with a single view to promote the true interests of his cestuis que trust. The withholding compensation altogether in the first case, and bestowing it only in the latter, may have a tendency to deter trustees from attempting anything unfair in the execution of the trust, and induce them, at the same time, to perform their duties with common honesty at least, if not with all the skill and diligence that might possibly be applied;" *Say* v. *Barnes*, 4 S. & R. 116; *Aston's Estate*, 4 Whart. 240; *Dyatt's Estate*, 2 W. & S. 566; *Fournier* v. *Ingraham*, 7 Id. 31; *McCahan's Appeal*, 7 Barr. 59. "An opinion seems to prevail," it was said in *Stehman's Appeal*, 5 Barr, 414, by the court below, whose judgment was affirmed by the Supreme Court, "that a trustee is always, and under all circumstances, to be paid a commission upon the funds which pass through his hands.... It is time that it should be distinctly understood, that a trustee may not only be made to pay the cost of litigation improperly carried on for his own benefit, but that he can receive no compensation for his services, where he has shown a want of good faith, and ordinary care and diligence in the execution of the trust." And in *Bredin* v. *Kingland*, 4 Watts, 420, the same principle was applied to an attorney, who neglected to pay over money received for his client.

It naturally follows, that although as a general rule, there is a willingness to allow reasonable counsel fees and other expenses necessary for the proper guidance of the trustee, and the direct interest of the estate, "on the principle that a trust estate must bear the expense of its administration;" (*Mumper's Appeal*, 3 Watts & Serg., 443; *Burr* v. *McEuen*, Baldw. 154; *Armstrong's Estate*, 6 Watts, 237; *Scott's Estate*, 9 Watts & Serg. 100; *Dietrich* v. *Heft*, 5 Barr, 94; *Pusey* v. *Clemson*, 9 Sergt. & Rawle, 309;) yet such is not the case, where the effect is to throw these expenses on those, who either have no interest, or an adverse interest, in the course pursued; *Brinton's Estate*, 10 Barr, 411.

Thus an executor is not entitled to a credit for counsel fees paid to sustain the validity of his testator's will; *Dietrich's Appeal*, 2 Watts, 332; *Koppenhaffer* v. *Isaacs*, 7 Id. 170; *Royer's Appeal*, 1 Harris, 573. "If the person appointed by it as executor, be named also as a legatee or devisee, then, as such, he may be deeply inter-

ested also in establishing it to be the last will of the deceased. But it is clear that creditors and the rest of the world, have no interest whatever in the question;" *Mumper's Appeal.* In *Royer's Appeal,* 1 Harris, 573, *Bradford* v. *Boudinot,* 3 Wash. C. C. R. 122, was overruled, and *Geddis's Appeal,* 9 Watts, 284, explained.

So, where there is a contest between the executor and the distributees. "Where an estate is so situated," said Huston, J., in *Sterrett's Appeal,* 2 Penn. 426; "that legal advice is proper to direct the course of the executors, or where they must bring suits to recover part of the estate, or defend suits brought against them, counsel must be employed, and where they are employed to obtain what is honestly supposed to be the rights of the estate, the estate ought to pay the reasonable counsel fees. But where executors neglect to settle and pay, and are sued by creditors, or cited by heirs, and employ counsel to defend them in their iniquity, no counsel fees shall come from the estate. The man who is doing wrong, must himself pay the expense of that wrong;" *Hiester's Appeal,* 7 Barr, 457; *Swatzwalter's Accounts,* 4 Watts, 77.

These cases are distinguishable from *Scott's Appeal,* 9 Watts & Serg. 100, where the whole estate having been devised to a charity, the executor was allowed counsel fees, paid by him, in opposing proceedings instituted for the purpose of escheating the estate, as the executor litigated "for the interest of the party who got the whole estate by the litigation, and who then refused to reinburse him for his expenses."

In the matter of *Harland's Accounts,* 5 Rawle, 330, the court did not evince the same disapprobation of specific compensation, as has been expressed in New York, in *McWhorter* v. *Benson, &c.,* supra. "It may be awarded," said Gibson, C. J., "in a gross sum, according to a common practice in the country, which I take to be the preferable one, as it necessarily leads to an examination of the nature, items, and actual extent of the services, which the adoption of a rate per cent. has a tendency to leave out of view;" and in *Armstrong's Estate,* 6 Watts, 237, *McFarland's Estate,* 4 Barr, 149, and *Brinton's Estate,* 10 Barr, 411, the allowance was made in a gross sum. *Ashurst* v. *Given,* 5 W. & L. 329, was a case of a devise by a father to a son, in trust for the children of the latter, who was,

in consideration of performing the trust, which was of a valuable and complicated estate, "to be allowed a reasonable support out of the trust fund, for his personal services." It was held that no part of the estate could be taken into execution, for the debts of the trustee.

But in general, the practice of allowing compensation by commissions seems to prevail; and with respect to their amount, although five per cent. is the usual commission charged, *Pusey* v. *Clemson* 9 Serg. & Rawle, 209; *Pennell's Appeal*, 2 Barr, 216; *Hemphill's Estate*, Parson's Equity R. 31; yet in the reported cases, the same variety of determination is found in this as in other States. In *Pusey* v. *Clemson*, Tilghman, C. J., said, "In the cases which generally occur, it appears to me, after considerable research, that the common opinion and understanding of this country, has fixed upon five per cent. as a reasonable allowance. But to this rule there must be exceptions. There are estates, where the total amount is small, and that too, collected in driblets. In such, five per cent. would be insufficient. On the contrary, there are others, where the total being very large, and made up of sums collected and paid away in large masses, five per cent. would be too much. It must be left to the discretion of the courts, to ascertain those cases in which the general rule should be departed from. The personal care and anxiety of the executor, is a fair subject of consideration. An estate not equal to the payment of its debts, is always attended with hazard, which should not be forgotten in fixing the compensation." In that case, the estate being large, "the trouble having fallen principally upon the counsel employed for the executors, for whose reward a very liberal allowance had been made, and all the expenses of the executors having been paid, over and above their commissions;" and the money having come into the hands of the executors in large sums, the commissions were reduced to three per cent. So in *Walker's Estate*, 9 Serg. & Rawle, 225, where the estate consisted principally of bank stock, which was transferred by the executors to the legatees, so that the executor did not collect the proceeds and pay it over, three per cent. was said to be a very ample allowance. The same rule was adopted on the authority of these cases, in *Miller's Estate*, 1 Ashmead, 335.

But where in *Guien's Estate*, 1 Ashmead, 317, a testator gave to his executors two per cent. on the "net proceeds" of his estate, which

was supposed to be solvent, but turned out otherwise, the commissions were raised to four per cent. "An allowance made to the executors of a solvent estate," said King, Pres. J., "in the adjusting of which little difficulty or responsibility could arise, would be manifestly inadequate to the labor and responsibility of collecting the scattered funds, settling the complicated transactions, and distributing the proportions of the estate of an insolvent merchant, in large business. It may be said, that the executors accepted this trust with the compensation fixed, and are bound by the acceptance. The answer to this is, that if they did so, it was with reference to the state of things presented by the will, the settlement of a solvent estate, not the collection and distribution of the scattered assets of a bankrupt estate.... To show the effect produced by the insolvent condition of this estate, let us suppose the testator had fixed fifteen per cent. as the amount of compensation to be taken by the executors. This direction would be certainly disregarded, and the executors allowed no more than a just compensation for their labor. The best light in which such a direction could be viewed, would be as a legacy to the executors, and as such it must await the satisfaction of the debts of the decedent. *Fretwell* v. *Stacy*, 2 Vernon, 434. Otherwise, fixing an extravagant compensation to executors, would be an ingenious mode by which an insolvent could make valuable bequests. It is a bad rule that will not work both ways; and if the insolvency of the estate would defeat a liberal allowance for care and trouble given by the testator to the executor, it must leave the executor free to claim a sum beyond that fixed in the will, where the justice of the case demands that he should have it. Where an estate is insolvent, all the dispositions of the will are superseded, and the liabilites and rights of the creditors and their trustees, the executors are to be ascertained by the general rules of law." These principles, are so clearly explained, as to be of universal application.

Upon sales of real estate by executors or assignees for the benefit of creditors, three per cent. on the proceeds, seems to be in general, thought sufficient. *Natkans* v. *Morris*, 4 Wharton, 389, and two and a half per cent. on proceeds amounting to over $40,000, of which $13,000 came into the hands of the assignees, and the residue continued as a lien on the property, was allowed in *Shunk and Freedley's Appeal*, 2 Barr, 307, where it was correctly said by the Court below, that "a sale of real estate brings the proceeds into

the account as effects in hand, and it is easy to see a strong temptation to make such sale, although not necessary it may be as to much or some of the asignor's land." So with respect to commissions on re-investments by trustees; "If too freely given," said King, Prest. J. in *Barton's Estate,* Parson's Eq. R. 29, "they afford in a trustee with large discretion, great temptations to repeated changes of the securities of the fund....Two and half per cent. on such re-investments, is greatly to large a commission. Purchases of city and county stocks are made through brokers, who for one-quarter of one per cent., make the purchases, obtain the transfers, and pay over the price to the vendor. Now to allow a trustee two and a half per cent. on such re-investments, in addition to the usual brokerage, is too severe a tax on the trust fund. If called upon to fix a standard of compensation to a trustee, for investments so simple and free from care or responsibility, I would say one per cent. came nearer accuracy than two and a half." The same able judge in the subsequent case of the *Trustees of Maria Hemphill,* Parson's Eq. R. 31, laid down the following principle. "As a general rule, commissions on the principal sum coming into the hands of a trustee, and on the re-investment thereof, will not be allowed; particularly when the usual commission of five per cent. has been charged on the interest and profits derived from such investments. Commissions and brokerage, and all the other usual expenses paid by them, are properly chargeable to the estate. But where the investments and re-investments, are made without any extraordinary labour or trouble, the commission of five per centum charged on the annual receipts of income is an adequate compensation for the trustee's care and trouble, as well for making such re-investments as for receiving their income. There may arise cases, in which from their specialties, this general rule should not be applied; but these must always be regarded as exceptions."

In *Stephenson's Estate,* 4 Wharton, 104, a very precise basis was fixed by the Court, with respect to executors, who, of course charge their commissions on the whole amount of the estate. "The responsibility which is incurred by the receipt and disbursement of money, is a legitimate subject of compensation, and an unvarying rate per cent., without regard to the magnitude of the sum, will always be a just measure of it, because the responsibility increases in proportion to the amount. It is consequently susceptible of a uniform measure,

which we think may be reasonably put at two and a-half per cent. Not so the compensation of trouble. The settlement of a very large estate may be the business of a few days, while that of a very small one may occupy as many years; and the compensation for all beyond the responsibility, ought to be graduated to the circumstances." In that case a commission of five per cent., charged by the executors of an estate of $350,000, was reduced to three, "the bulk of the property being readily convertible into cash and but little of it outstanding." In *Harland's accounts*, 5 Rawle, 331, "rather less than 5 per cent. for the management of a fund of $40,000 accumulated to $100,000, in twenty years, "was allowed in a gross sum" to compensate not only for labour expended, but for responsibility and expenses incurred in litigation," while in *McFarland's Estate*, 4, Barr, 149, the allowance was about the same, though on a much less estate, and the payment by administrators of $1000, and one-third of an apparently desperate claim at Washington as a contingent fee to agents, was sanctioned under the circumstances.

Interest on commissions seems not to be allowed in general, *Armstrong's Estate*, 6 Watts, 286; nor in charging an accountant with interest, are his commissions to be included and interest calculated upon them; *Callaghan* v. *Hall*, 1 Serg. & Rawle, 241; and on the other hand, where the estate has been increased by a charge of interest, the trustee, if allowed to claim commissions in that case, is not entitled to charge them upon the increase; *Say* v. *Barnes*, 4 Serg. & Rawle, 116.

It is well settled in Pennsylvania, as elsewhere, that one who is both executor and trustee, is not entitled to double commissions, and that the number of executors or trustees make no difference in their allowance; *Aston's Estate*, 4 Wharton, 241; *Stevenson's Estate*, Parson's Eq. R. 19.

In case of questions arising between co-executors or trustees as to their respective shares of compensation, it was held in *Stevenson's Estate*, to be the proper course to prefer the charge as an *entire* claim. "We do not say," said King, P. J., 'that this Court would not under appropriate proceedings, settle such a question among executors or other trustees. All that is meant to be said is, that under a general reference to auditors to settle an administration

account, such auditors possess no authority to apportion commissions among joint accountants," but simply to decide what aggregate sum should be allowed as a whole.

Although, in Massachusetts, the compensation to executors is now regulated by statute, yet the principle was recognized in that commonwealth at an early day, and applied to all acting in a fiduciary capacity. It was said in *Barrell* v. *Joy*, 16 Mass. 229, "executors are allowed a reasonable compensation, and there is no reason why trustees should not be, and it will probably be for the advantage of all who are concerned in estates held in trust, that such compensation should be made. We know of no better rule to guide our discretion in this particular, than the usage which exists among merchants, factors and others, who undertake to manage the interests and concerns of others," and five per cent. upon the gross amount of the property, which had come into the hands of the trustee, was allowed to him in that case. In *Denny* v. *Allen*, 1 Pick. 147; *Longley* v. *Hall*, 11 Id. 124; *Ellis* v. *Ellis*, 12 Id. 183, and *Jenkins* v. *Eldridge*, 3 Story, 225, the general principle was recognized, and in *Gibson* v. *Crehore*, 5 Pick. 161, extended to a mortagee in possession, to whom five per cent. was allowed for his trouble in collecting the rents.

In *Jennison* v. *Hapgood*, 10 Pick. 77, it was urged that the executor had by unfaithful administration forfeited all claim to compensation. Without directly deciding this question, the Court held, that "this consideration ought not to be blended with the claim for compensation, so far as the services of the appellee have been beneficial to the heirs;" and the same view seems to have been taken by the Supreme Court of Vermont in the same case; *Hapgood* v. *Jennison*, 2 Verm. 302. As to the *manner* of allowing compensation, though the practice seems to have been to allow it in commissions, yet it was held in *Rathburn* v. *Colton*, 15 Pick, 471, that there was no objection in principle or in the practice of the Court, to allow commissions in connection with specific charges for services, provided the whole did not exceed a just compensation, in which case the commissions were to be considered in lieu of all remaining services not specifically charged.

But the Revised Statutes of Massachusetts of 1835, p. 436, introduced the same rule as to executors and administrators, as that

established by those of New York, allowing commissions at the same rates upon the amount of the personal estate collected and accounted, for by them, and of the proceeds of real estate sold under order of Court for the payment of debts, which they declared should be received in full compensation of all ordinary services. There is the same provision for electing to renounce a legacy.

The distinction between the duties of an executor and a trustee in reference to the subject of compensation, was shown with great clearness by Shaw, Ch. J. in *Dixon & wife* v. *Homer et al.*, 2 Medcalf, 422; "There is not much analogy between the case of a trustee and that of an executor. The great duty of an executor or administrator, is to collect the assets of the estate, and make distribution of the same. In doing this, he receives the money once, and disburses it once; and his compensation is not fixed until he settles his account of such receipts and disbursements, as far as they have been actually made. It is, then, a compensation for services actually done.

The case of a trustee is more analogous to that of a guardian. He takes the property, to preserve, manage, invest, reinvest, and take the income of it, perhaps for a short period, perhaps for a long course of years, depending on various contingencies. It may happen, that the trust will terminate in a few days, by the death of the trustee, or his resignation or removal, before any beneficial service is performed. We think, therefore, that no allowance can justly be made, by way of commission, on assuming the trust. An allowance of a reasonable commission on net income from real and personal estate—income received and accounted for—appears to be a suitable and proper mode of compensating trustees for the execution of their trusts. Whether any allowance shall be made, in addition to a reasonable commission, for extra services, at the determination of the trust and settlement of the account, or whenever accounts are settled during the continuance of the trust, must depend on the circumstances of each case, as they may then exist." This, it will be seen, entirely coincides with the view taken in Pennsylvania; supra, page 965.

In Maryland, the act of 1798 gave to the Court a discretion to vary the amount of executor's commissions between five and ten per

cent. on the amount of the inventory, excluding what was lost or perished, and provided an additional allowance for such costs and extraordinary expenses, not personal, as the Court might think proper. This statute has been generally extended to trustees; *Ringgold* v. *Ringgold*, 1 Harris & Gill, 27; *Nicholls* v. *Hodges*, 1 Peters' S. C. Rep. 565; but special rules of Court have regulated the commissions to trustees *for the sale of real estates*, a class of fiduciaries somewhat analogous to receivers; these are on the first $100 seven per cent.; on the second, six per cent.; on the third, five; on the fourth, four; on the fifth three and a half; on the sixth, the same; on the seventh and eighth, three; and on the ninth and tenth, two and a half; and three per cent. on all above $3000, besides an allowance for expenses, not personal. This allowance to be increased in cases of postponement at the request of defendants, or of extraordinary difficulty and trouble, and to be lessened in case of negligence, &c., at the discretion of the Chancellor. This commission "is given to him as a compensation for his trouble and risk in making the sale, bringing the money into Court, and paying it away in the manner directed, or in other words for the performance of all the duties specified in the decree, and the subsequent orders, in relation to the sale and its proceeds;" *Gibson's case*, 1 Bland's Ch. 147. With respect to trustees ordinarily, though the Courts lean strongly against per diem allowances, *Ringgold* v. *Ringgold*, 1 Harris & Gill, 27, the commissions seem rather liberal, and as a general rule, chancery, in that state, treats executors and trustees with indulgence; *Chase* v. *Lockerman*, 11 Gill & Johns. 185. In *Eversfield* v. *Eversfield*, 4 Har. & Johns. 12, five per cent. was allowed; but in *Winter* v. *Diffenderffer*, 2 Bland's Ch. 207, where the management of the estate was troublesome, ten per cent. was given; and this was not affected by the trustee, having been charged with compound interest. The rule on this point was clearly explained in that case by Bland, Ch. in the following language: "The principal upon which a Court of Chancery awards simple or compound interest to a party whose money has been unjustly withheld or misapplied, is that of commutative justice, considering the interest as a full compensation for the injustice done, and as the proper or only remuneration which the Court can award in such cases, and consequently to lessen or altogether to withhold from a trustee any allowance, to which he may be justly entitled upon the same ground, on which he had been charged with simple or compound interest, would be, in effect, to

impose upon him a fine or forfeiture upon the principles of vindictive justice, and to punish him for an offence, which the Court itself had declared, would be sufficiently expiated by the payment of simple or compound interest. The duties performed by a trustee, may have been so light, or may have been performed in so negligent or unskilful a manner as, on that ground, to entitle him to small or no commission at all; but to whatever compensation he may be entitled, they certainly should not be lessened or altogether withheld, on the ground of his having done, or omitted to do any thing, for which the payment of simple or compound interest had been awarded as a compensation because every single transaction must be considered by itself. Recollecting, however, that a trustee cannot be allowed to retain or receive any thing as a compensation, until he has paid all he owes to the plaintiffs or cestui que trust." In *Ridgely* v. *Gittings*, 2 Harr. & Gill, 61, no compensation was given to one who undertook the trust upon a promise to do so on payment of his expenses merely.

Nor are the Courts of Maryland unreasonable in burdening an executor or trustee with duties, not strictly pertinent to his office. In *Lee* v. *Welsh*, 6 Gill & Johns. 316, it was said, "An executor in finishing the crops of the deceased, is not bound to discharge the duties of an overseer. To impose on him such a duty would be virtually to exclude from that office most persons whose services it would be desirable to engage in that capacity. Suppose the deceased were the owner of many farms, and in different sections of the state, on all of which valuable crops were growing, which it was the interest of the estate that the executor should complete, is he bound, should it be practicable, to officiate as an overseer on every farm? Certainly not. No duties so unreasonable are imposed on him by the law. He may employ and pay out of the assets in his hands as many as are necessary for the completion and preservation of the crops. If with more advantage to the estate he acts in the capacity of an overseer himself, it is competent for the Orphans' Court to allow him a reasonable compensation for his services."

But an administrator who employed an agent to collect money for the estate, was not allowed credit for what he had paid him, the agent being neither a public officer nor an attorney, and no legal process being in any way necessary: *Gwynn* v. *Dorsey*, 4 Gill & Johns. 453.

In case of a *partial* administration by an executor, the Court, (under the act of 1820 "in which the minimum rate of allowance is purposely omitted,") "have unquestioned power to allow such compensation as the services actually merit. . . . they may give one per cent. and even less, if necessary. When there has been a full administration, the Court cannot descend below five per cent;" *McPherson* v. *Israel,* 5 Gill & Johns. 60; and the time of allowing the compensation seems within the discretion of the Court. "Of course they would aim to make the commission allowed correspond with the duties performed, and in passing every account would look to the advance made by the administrator;" *Gwynn* v. *Dorsey,* 4 Gill & Johns. 453.

In Virginia the Revised Statues of 1848 direct that the commissioner, in settling the accounts of any "fiduciary," (which includes "every personal representative, guardian, executor or committee,") shall allow the reasonable expenses incurred by him as such, and also, except in cases in which it is otherwise provided, a reasonable compensation in the form of a commission on receipts or otherwise. This provision has been taken substantially from the prior acts of 1820 and 1825, and there were other earlier statutes. As a general rule, except where a legacy is given to executors, or a specific sum allowed in the creation of the trust, in which case commissions are not allowed in addition, (*Jones* v. *Williams,* 2 Call, 105,) it is held that no more than five per cent. on the amount of the receipts can be allowed, (*Granberry,* v. *Granberry,* 1 Washington, 246; *Taliaferro* v. *Minor,* 2 Call, 197; *Miller* v. *Beverleys,* 4 Hen. & Munf. 420; *Triplett's Ex'rs* v. *Jameson,* 2. Munf. 242; *Hipkins* v. *Bernard,* 4 Id. 83:) and this also applies to commissioners who sell lands under decree of court, (*Lyons* v. *Byrd et al.,* 2 Hen. & Munf. 22,) and to a consignee, (*Deanes* v. *Scriba,* 2 Call, 416. But, said Tucker, J., in *Fitzgerald* v. *Jones,* 1 Munf. 156, "I very much incline to think, that where the management of an estate is thrown upon an executor, and the care and education of a family of children with it, that an executor ought to have more liberal allowance than a bare commission of five per cent. upon his receipts or expenditures. In the present instance, the testator left five children apparently minors, who remainded so many years. He charged his whole estate with the payment of his daughters' legacies, if it could be effected out of the profits before either of them married or came of age. To

do this, the executor must do many things beyond what the duty of an executor, in ordinary cases, imposes. His personal trouble and responsibility under such circumstances may be increased ten fold. He ought to be compensated accordingly, whenever it appears that he has faithfully discharged the extraordinary duty imposed upon him by his testator." In this case a gross charge of £75 a year, for managing plantations fifty miles off, was struck out, and an addition of two and a half per cent. allowed to the usual commission of five per cent. Where estates have been large and very troublesome, ten per cent. has been allowed in full for commissions, and the expense of employing clerks and agents, (*M'Call* v. *Peachy's Adm'r*, 3 Munf. 306,) and sometimes five per cent. in addition to those expenses, (*Hipkins* v. *Bernard*, 4 Id. 93; *Farnehough's Ex'rs* v. *Dickerson et al.*, 2 Robinson, 589;) and in *Kee* v. *Kee*, 2 Grat. 132, five per cent. was said to be the customary commission. So ten per cent. has been allowed where the debts were small and numerous, and the debtors presumed to be much dispersed. *Cavendish* v. *Fleming*, 3 Munf. 201. But where debtors resided near the executor, he was not allowed commissions to attorneys for collection, in the absence of evidence that it was attended with difficulty. *Carter's Ex'rs* v. *Cutting & Wife*, 5 Munf. 241; and in *Sheppard* v. *Starke*, 3 Munf. 29, five per cent. was given in lieu of all expenses; but in general, these, (*Lindsey* v. *Howerton*, 2 Hen. & Munf. 9,) and "all reasonable charges and disbursements," are allowed. *Nimmo's Ex'rs* v. *The Commonwealth*, 4 Hen. & Munf. 57. Although in *Hipkins* v. *Bernard*, 2 Hen. & Munf. 21, an executor was held not entitled to charge commissions for turning certain bonds into mortgages yet in the same case, (4 Munf. 83,) this was overruled and the commissions allowed. But no commissions can be charged on a debt due by the executor to the estate; (*Farnehough's Ex'r* v. *Dickerson et al.*, 2 Rob. 589;) and notwithstanding that compensation is in a manner secured by statute, it seems to be held, that its allowance, nevertheless, depends upon the bona fides of the fiduciary. *Boyd* v. *Boyd*, 3 Grattan, 125.

Originally, the rule in North Carolina as to executors, was by force of the common law, and the act of 1789, a very strict one. *Schaw* v. *Schaw*, 1 Taylor, 125. But it was altered in 1799, by an act whose provisions were substantially the same as those of the Revised Statutes of 1836–7, (Ch. 46, § 29,) which direct that courts shall

take into consideration the trouble and time expended by executors in the management of the estate, and make an allowance not exceeding five per cent. for the amount of the receipts and expenditures which shall appear to have been fairly made; which amount they may retain as well against creditors as legatees and distributees, together with the necessary charges and disbursements heretofore allowed. These provisions are applied also to guardians. *Hodge* v. *Hawkins*, 1 Dev. & Bat. 567. "The Court has the power," it was said in *Bond* v. *Turner*, 2 Taylor, 125, in speaking of the act of 1799, "of allowing five per cent. commission on the receipts, and the same on the disbursements. It has a discretionary power to allow less, but not more than five per cent.;" and where executors, under an arrangement with a guardian, transferred to him bonds, instead of collecting their proceeds, the commissions were reduced to two and a half per cent. *Walton* v. *Avery*, 2 Dev. & Bat. 405. These commissions are not forfeited by the executor being charged with compound interest, (*Peyton* v. *Smith*, 2 Dev. & Bat. 325,) or having made resistance to just claims; *Thompson* v. *M'Donald*, 2 Id. 481. Besides these commissions, executors are allowed their actual expenses in the faithful discharge of their duty, such as those of attending necessary sales, of sending an agent out of the state, (*Whitted* v. *Webb*, 2 Dev. & Bat. 442,) counsel fees, (*Hester* v. *Hester*, 3 Iredell's Eq., 9,) &c. As to the correction, in a court of equity, of commissions allowed by masters or county courts, see *Thompson* v. *M'Donald*; *Graham* v. *Davidson*, 2 Dev. & Bat. 155; *Walton* v. *Avery*, Id. 405; *Whitted* v. *Webb*, Id. 433. In *Potter* v. *Stone*, 2 Hawks, 31, a case overruled on another point by *Ex parte Houghton*, 3 Dev. 441, it was said, "for the sake of future cases, we think it right to add, that payments made to distributees on account of their portions, whether before the administration is settled or at the close of it, cannot be considered as expenditures; and therefore no allowance of commissions can be made on them." The apportionment of commissions among two or more, is always regulated by the circumstances of the case. "The fact of a joint agency does not give the right to one-half the value of the entire services." *Hodge* v. *Hawkins*, 1 Dev. & Bat. 567.

Up to the year 1833, it seems by the case of *Boyd* v. *Hawkins*, 2 Dev. Eq. R. 211, that the extension of these rules to *trustees* had not been formally recognized from the bench; on the contrary, it was

there said, "the farthest we can go, is to permit a stipulation for compensation at the contracting of the relation." But on a rehearing of that case, 2 Dev. Eq. 334, it was said by Ruffin, J., "We are informed that it has been usual in some parts of this state, for trustees to charge for services, and that the profession have no decided opinion against it. The amount will of course be according to the circumstances, and not beyond that which would, under the statutes, be made to executors; and if fixed by the parties, it will be subject to the revision of the court, and be reduced to what is fair, or altogether denied, if the stipulation for it has been coerced by the creditor as the price of indulgence, or as a cover to illegal interest, or the conduct of the trustee has been mala fide and injurious to the cestui que trust. Whether it shall be given as a commission or not, is hardly worth disputing about; that may be a convenient mode of computing in most cases, but the true object is a *just allowance* for time, labour, services and expenses, under all the circumstances that may be shown before a master." And in the recent cases of *Sherill* v. *Shuford*, 6 Iredell's Eq. 228, and *Raiford* v. *Raiford*, Id. 495, this was approved. The distinction between the allowance to executors and to trustees, is that to the latter it is matter of grace, and will be forfeited at the court's discretion, while to the former it is a matter of right, which no misconduct can forfeit.

Under the statutes of South Carolina the Courts in that State, seem to have felt themselves little authorised to exercise a discretion of their own. The act of 1789, allowed to executors and administrators a sum not exceeding 50 shillings for every hundred pounds they should pay away in credits, debts, legacies or otherwise, during the continuance of their administration, which commissions were to be divided between them in proportion to the services by them respectively performed, and they were also allowed 20 shillings for every ten pounds "for all sums arising by moneys let out at interest"; Act of 3rd of March, 1789. These provisions were taken from the seventh section of a prior statute passed in 1745, which act further declared that any executor who should have had extraordinary trouble in the management of the estate, and should not be satisfied with the sums thus allowed, should be at liberty to bring an action for services, in which however, the verdict was to be limited to five per cent. over and above the sums before mentioned. This section was not repealed or supplied, by the act of 1789.

The allowance thus given has uniformly been held to cover all those expenses which are sometimes termed *personal*; *Logan* v. *Logan*, 1 M'Cord, Ch. 5. Thus the Courts have felt themselves bound to strike out any charge for travelling expenses, &c., and have referred the parties claiming them to the action at law prescribed by the statute; *Snow* v. *Collum*, 1 Dessaus. 542; and although in *Ruff* v. *The executors of Summers*, 3 Id. 329, Dessausure, Ch. said, "It has always appeared to me that the ground for compensation to executors being made by law, to rest solely on the foundation of money received and paid away, is not a perfectly reasonable rule, inasmuch as there is often great service performed by executors, where only small sums of money are received, and paid away," yet it was nevertheless held, that the action given to executors, covered all cases, and was their only remedy. In the subsequent case of *Logan* v. *Logan*, 1 M'Cord Ch. R. 1, it was said by Nott, J., "I have no doubt, but an executor might be allowed by a Court of law, and perhaps by a Court of Equity, to retain money allowed to agents or accountants, for adjusting difficult and complicated *accounts of the estate*. But I should not think him entitled either in law or equity, to retain for money paid an accountant, for settling and adjusting *his own* accounts." "There is a distinction" said Johnson, J., in *Teague* v. *Dendy*, 2 M'Cord, Ch. 213, "between those services for which a compensation is allowed by the statute, and the expenses incurred in the course of the administration. The former referred to those duties which an administrator is supposed to undertake, and the latter, to such as require the aid of professional skill, to which he is not supposed to be competent. The conduct and arrangement of a law-suit, is an illustration of the latter." But counsel fees are not allowed when paid to sustain the position of the executor against those beneficially interested. *Villard* v. *Robert*, 1 Strobh. Eq. 393; *Wham* v. *Love*, Rice's Eq. 51. Charges for overseers' wages may properly be classed among those not personal, since their employment is in general, directly for the benefit of the estate, and in most cases absolutely necessary, and a guardian will be reimbursed for the expense of employing agents out of the state, although not obliged to do so; *Huson* v. *Wallace*, 1 Rich. Eq. 18; but an executor was not allowed to charge commissions, and to credit himself besides, with overseer's wages, when he himself had performed overseer's work. *Jenkins* v. *Fickling*, 4 Dess. 470.

In *Deas* v. *Span*, Harper's Eq. R. 276, and *Gist* v. *Gist*, 2 McCord's Ch. R. 474, the statutes received a liberal construction as to the allowance of commissions on the amount of bonds taken for the purchase money of real estate; so where the executor purchased the estate himself, *Vance* v. *Gary*, Rice's Eq. 2; though in *Ball* v. *Brown*, Bailey's Eq. R. 374, they were denied on the proceeds of land sold under decree in chancery for the foreclosure of a mortgage, on the ground that the money was neither "received" nor "paid away" by the executors; and in *Huson* v. *Wallace*, 1 Rich. Eq. 2, where an administrator was compelled to account, at the advanced price, for property of the estate which he had bought at an undervalue, he was denied commissions on the advance.

The act of 1789, further provided, that an executor should file annual accounts; and a neglect so to do forfeited all compensation. This provision was held not to be retrospective, so as to preclude an executor from commissions, where for several years prior to its passage he had filed no accounts; *Assignees of Ramsey* v. *Ellis*, 3 Dess. 78; and although a substantial compliance with this part of the act is always insisted on, (*Wright* v. *Wright*, 2 M'Cord's Ch. 196;) yet in certain cases the lapse of a few months over the time of filing the last account has been sanctioned; *Jenkins* v. *Fickling* 4 Dess. 370.

The allowance of ten per cent. "for all sums arising by moneys put out at interest," was held in *Tavaux* v. *Ball*, 1 M'Cord's Eq. 458, to be "evidently intended as compensation for the trouble of managing the fund while in the hand of the executor, and the two and a half per cent. for paying away, refers to the final disposition of it; or in other words, to that point of time when the executor's power over it ceases, or when he has disposed of it in the manner directed by the will of the testator. It cannot without great injustice be referred to any other time, for if it was to be allowed for every application, or appropriation, the executor might, by letting out and calling in at short periods, make his commissions exceed any profits which could be expected to arise by way of interest. The mode of determining what time he is to be credited with it is, by inquiring whether he has made a final disposition of the fund." The same compensation is also allowed when, instead of investing the money in other hands, the executor in good faith suffers it to

accumulate in his own, but when decreed to pay it over at the end of his administration, no percentage is then allowed: *Wright* v. *Wright*, 2 M'Cord's Ch. 196. These rules have been applied to trustees and receivers; *Bona* v. *Davant*, Riley's Ch. Cas. 44; unless where they had expressly agreed to act without commissions; *Vestry and Wardens* v. *Barksdale*, 1 Strob. Eq. 197; but not to commissioners in equity, whose compensation, regulated by a fee bill, the court has no power to enlarge or modify; *Bona* v. *Davant*.

In Vermont the Revised Statues of 1839 allow to executors all necessary expenses in the care, management and settlement of the estate, and for their services such fees as the law provides, with a similar provision to that in New York, as to renunciation of any compensation allowed by the will; R. S. Ch. 50, § 10. From the case of *Evarts* v. *Mason*, 11 Vermont, 122, it would seem that a most liberal provision was customary in that state for travelling expenses, loss of time while absent, counsel fees, &c., though a gross charge of $300 for services, in addition to all these expenses, was reduced one half.

In New Hampshire, the court in the case of *Gordon* v. *West*, 8 New Hampshire, 444, disallowed commissions on the value of specific articles given over, or retained by the executor, in pursuance of the will. "Here, there is no ground for a charge of commissions, which are sometimes a proper charge for the risk and trouble of receiving, holding and paying over moneys." He was, however, allowed two and a half per cent. commission on the principal of the moneys actually collected, the duties of a trustee being superadded to those of an executor; and something like a rule seems to have been intended to be laid down for future cases: "We are further of opinion," said Parker, J., "that in ordinary cases of a trust, five per cent. annually, is as great an interest as should be exacted of a trustee; or in other words, when the trustee accounts for six per cent. annually, one per cent. is a proper compensation to be allowed for the care and custody of the funds, and for collecting the income." This one per cent. would seem to be one per cent. on the principal, a much larger allowance than that in other states, being over fifteen per cent. on the income.

In New Jersey, the Revised Statues of 1845 declare, in the words of prior acts passed in 1834 and 1820, that the allowance to execu-

tors, administrators, guardians, or trustees, shall be made with reference to the actual pains, trouble, and risk in settling the estate, rather than in respect to the quantum of estate; R. S. tit. vii. ch. 5, § 26; and although trustees, of whatever name, have thus always been allowed "an adequate compensation," *Voorhees* v. *Stoothorf*, 6 Hals. 149; yet its amount seems to be little regulated. "There is nothing connected with judicial proceedings," said Dayton, J., in *Mathis* v. *Mathis*, 3 Harrison, 67, "about which there is greater uncertainty than the subject of commissions. No accountant can guess what he will receive, no person interested imagine what he has to pay. This want of some standard to regulate judicial discretion is a most serious grievance." In that case the court refused, on certiorari, to reverse, when fifteen per cent. had been allowed below, but the decision was based rather on the ground that this was a matter of discretion with the court below, and could not be reviewed on certiorari, which was expressly held in the recent case of *Stevenson* v. *Phillips*, 1 Zabriskie, 71. This charge it would seem, however, included all expenses, as in the recent case of *Lloyd* v. *Rowe*, Spencer, 685, it was said, "commissions in this state include not only an allowance for the personal services of the executor, but also, ordinarily the expenses to which he has been subjected." Some general expressions in the New Jersey reports, "that the rule is a fixed one, that trustees shall make no gain, or profit from their trust;" *Trenton Banking Co.* v. *Woodruff et al.*, 1 Green's Ch. 126, apply to a different branch of the subject, that of purchasing the trust estate, &c.

The English rule has found a resting place in Delaware. In the recent case *Egbert* v. *Brooks*, 3 Harrington, 110, the Chancellor declared that he would have made the trustee some allowance for time and trouble, if he had not considered himself bound by the rule of equity that as a voluntary trustee without stipulation for compensation, he was not to be allowed compensation. The decree of the chancellor was affirmed by the court, who added, "the trustee is entitled to have all his expenses and charges paid—to be indemnified against expense and loss, but not remunerated;" and the same principles were stated in *The State* v. *Platt & Rogers*, 4 Harr. 166.

In Kentucky some reluctance seems to have been felt at departing from the English rule. "The doctrine is incontrovertibly settled,"

it was said in *Breckenridge* v. *Brooks*, 2 A. K. Marshall, 339, "that where a mortgagee, or other trustee, manages the estate himself, there is no allowance to be made for his trouble." So in *McMullen* v. *Scott*, 2 Monroe, 151, it was held that a stipulation by a trustee for the payment of his expenses, (though he would have been entitled to these without any such stipulation,) excluded any claim for personal services. With respect to the executors, this strictness was altered by statute, 1 Morehead & Brown's Dig. 668, which gave to them their reasonable charges and disbursements expended in the funeral of the deceased, and other their administration; and in extraordinary cases, such recompense for their personal trouble as the court should deem reasonable. In *Logan's Administrator* v. *Troutman*, 3 A. K. Marshall, 67, an allowance of five per cent. was said to be, "no more than according to the rules of law and the universal custom of the country, it was proper to allow." This per centage was recognised in *Ramsey* v. *Ramsey*, 4 Monroe, 152; *Wood* v. *Lee*, 5 Monroe 66; *McCracken* v. *McCracken*, 6 Monroe, 342; *Webb* v. *Webb*, 6 Monroe 167; though in *Wood* v. *Lee*, it was added, "in some cases seven and a half, and in others ten per cent. has been allowed. But a gross sum in other cases has been allowed, without regard to any per centum, and in other a daily allowance, or special charge has been passed;" but in *Bowling* v. *Cobb*, 6 B. Monroe, 358, a charge of seven per cent. upon receipts, and the same on the payments, was said to be excessive and unusual. A liberal spirit seems to have been shown towards the allowances of expenses, such as hire of slaves; *Floyd* v. *Floyd*, 7 B. Monroe, 292; counsel fees, &c.; *Bowling* v. *Cobb*.

In the case of *Hite* v. *Hite*, 1 B. Monroe, 179, it would seem that these principles had not been extended to trustees, as "the general rule that a trustee is not entitled to compensation for personal services in managing trust funds," is quoted, though it is admitted that there are exceptions to this rule in modern adjudications. But in the very recent case of *Lane* v. *Coleman*, 8 B. Monroe, 571, the Supreme Court seemed willing to follow the weight of American authority, as one acting as agent under an instrument which directed him to pay from the proceeds of certain law suits, "all costs and expenses, including attorney's fees, and was "in effect a deed of trust," was held entitled to "a fair compensation for his services."

In Tennessee, the Acts of 1715, and 1789, allowed an executor to

retain no more than his necessary charges and disbursements, and the construction put upon these statutes was very strict. Although the reasonable costs of bringing or defending necessary suits were allowed, yet no travelling expenses were given, or compensation made for lost time; *Stephenson* v. *Stephenson*, 3 Hayw. 123; *Bryant* v. *Puckett*, id. 255; *Stephenson* v. *Yandle*, 5 Id. 261; but the Act of 27 Jan. 1838, taken, in substance, from one passed in 1822, allows to executors, administrators, and guardians, "a reasonable compensation for their services."

In Alabama, the compensation to all acting in a fiduciary capacity, has formed a part of the common law of that state; *Spence* v. *Whitaker*, 3 Porter, 327: *Phillips* v. *Thompson*, 9 Porter, 667; *Beathea* v. *M'Coll*, 5 Ala. 315; *Carrol* v. *Moore*, 7 Ala. 617; *Benford* v. *Daniels*, 13 Id. 673; as was thus stated by Goldthwaite, J. in *Harris* v. *Martin*, 7 Ala. 899, "It is the usual and common practice to allow executors, administrators and guardians, a per centage upon the amount of the receipts and disbursements, as a compensation for the performance of the trust. This per centage has never been fixed by statute, and until some specific rule is declared upon the subject, it is evident each case must be governed by its peculiar circumstances. It is apparent, however, the quantum of trouble, and loss of time, is not the only matter to be considered, as the settlement of an estate of $500 may involve as much difficulty as one of $50,000. The compensation must also, to a great extent, be controlled by the amount of the estate." But while it is admitted that the English rule has never prevailed, it is said that these allowances are "scrutinized with jealous watchfulness." *Harris* v. *Martin*. Although it is held that the power of the court to compensate by a per diem allowance is unquestioned, *Marshall* v. *Holloway*, 2 Stewart, 453, yet they lean strongly against such a mode of compensation; *Magee* v. *Cowperthwait*, 10 Ala. 968. So as to specific charges; while the right to allow them is recognised, "such charges are, perhaps the exception, and not the rule, and they should never be allowed for the ordinary duties of an administrator;" *O'Neil* v. *Donnell*, 9 Ala. 738. See as to compensation to a bank director, *Alabama Bank* v. *Collins*, 7 Ala. 102.

The compensation being rather matter of grace than of right, depends entirely upon the bona fides of the trustee; *O'Neill* v. *Donnell*,

though it is not withheld, except in case of "wilful default or gross negligence;" *Powell* v. *Powell*, 10 Ala. 914. In *Doneldson* v. *Pusey*, 13 Ala, 752, an attempt was made to set aside a voluntary deed of trust, because, among other grounds, it allowed to the trustee a commission of 12½ per cent.; but while the court said that the commission was greater than that usually allowed, yet that the trustee had "to collect many, and perhaps small accounts, his duties embraced a settlement of the affairs of a dissipated and reckless man, whose business was doubtless confused, and difficult to arrange."

By the act of 1841, when by will, an estate is directed not to be sold, but kept together for distribution at a future day, the court has power to allow in lieu of commissions, such annual compensations as shall be reasonable, regard being had to the amount of labour performed, the responsibility involved, and the value of the estate.

The Mississippi statute, Hutch. & How. Dig. p. 414, § 96 like that of Maryland allows to executors such compensation as shall be reasonable and just, not less than five, nor exceeding ten per cent. of the amount of the appraised value: and this does not mean solely on the amount of the inventory, but on the whole estate, *Merrill* v. *Moore*, 7 Howard, Mis. 292, including the real estate, when its proceeds pass through their hands; and the allowance is made only on the final settlement; *Shurtleff* v. *Witherspoon*, 1 Smedes & Marshall, 622.

In Missouri, the statute §15 of art. 6, of Ex'ors and Adm'rs, allows an amount not exceeding 6 per cent. on the whole amount of personal estate and money arising from the sale of land, but the compensation is sometimes awarded in a gross sum; *Fisher* v. *Smart*, 7 Missouri, 581.

Although, in some states, the principle of compensating those acting in fiduciary capacities, does not, as yet seem to have been applied, further than in the case of executors and administrators, yet it will sufficiently appear from observing its rapid extension, that as to the principle itself, there will soon be little difference of determination. Some of the rules which appear from the above cases to be of general application, in the absence of statutory provisions to a contrary effect, are that one who undertakes to assume a trust with the understanding, express or implied, that its duties are to be

performed without compensation, shall not be allowed afterwards to claim it; that the compensation is to be for labour and risk actually incurred, and, therefore not to be claimed on assuming the trust; that double compensation is not given, when the fiduciary occupies a double position with regard to the same subject-matter; that the compensation is not be increased in proportion to the number of trustees, and that the cost of professional service is not allowed for protection and defence against the rights of those beneficially interested.

In our Court, the first discussion on our statute arose in *McLennan* v. *Heward*.[1] In that case, where the agent, after the decease of the principal, intestate, had procured letters of administration to his estate, and subsequently the person who became possessed of the assets as the personal representative of the administrator refused to account, and a bill was filed to enforce it, the Court, under the circumstances, there being no evidence of any improper dealing with the estate, either by the administrator or those representing him, allowed the defendants a commission of five per cent. on all moneys received and paid over, or properly expended by themselves or their testator, and two-and-a-half per cent. on all moneys received by him or them, but not yet paid over, but refused them the costs of the suit. This Court will not refer it to the Surrogate Judge to settle the amount of compensation or commission to be allowed to an administrator or executor: but having possession of the subject matter of litigation, will finally dispose of the rights of all parties.

Five per cent. commission on moneys passing through the hands of executors may or may not be an adequate compensation, or may be too much, according to circumstances; but in no case will an executor be entitled to an allowance for services performed by an agent and which were so performed by him gratuitously.[2]

Mortgages reserving six per cent interest were taken by trustees before the abolition of the usury laws, and were not called in for several years after the change of the law, but as it did not appear they were aware of an opportunity of investing at a higher

1 9 Grant 279.
2 *Chisholm* v. *Barnard*, 10 Grant 479.

rate, the Court refused to charge them with more than was reserved by the mortgages. Where a suit for the administration of an estate is pending in this Court, it is improper for the Surrogate Judge to interfere by ordering the allowance of a commission to trustees or executors.[1] Where the executor has power under a will to sell real estate for the payment of debts and legacies, and there was available in money more than enough to pay the debts, the Court, considering a suit for administration unnecessary, refused the executor the costs, and also his commission.[2] The old rule as to the compensation of trustees has been abrogated by the Surrogate Act only so far as relates to trusts under wills.[3] Since the passing of the Act authorizing the Judge of the Surrogate Court to allow compensation to executors and trustees, 22 Vic. c. 93, sec. 47; Con. Stat. U. C., ch. 15, sec. 66, it has been the settled practice of the Master here, in passing the accounts of executors, to allow them compensation for their "care, pains, trouble, and time expended in and about the executorship," without an order from the Surrogate Judge allowing the same. Where, therefore, an executor, pending an account before the Master, obtained such an order from the Surrogate Judge, and the Master allowed the amount of compensation mentioned therein without exercising his own judgment as to its propriety or reasonableness, an appeal on that ground from the report of the Master by the creditors of the estate was allowed, and the executors ordered to pay the costs thereof.[4] Where the estate to be administered was large, requiring great care, judgment, and circumspection in its management for a number of years, the Court sustained an allowance of $1500 to the principal executor and trustee, and $1500 to the others jointly. Where a legacy is given to executors as a compensation for their trouble, they are at liberty to claim a further sum under the statute, if the legacy is not a sufficient compensation.[5] A commission should not, in general, be allowed to an executor or a trustee in respect of sums which he did not receive, but is charged with on the ground of wilful default. The rule of the Court is to allow compensation to trustees of real estate under a will as well as to executors.[6] The rate of compensation to executors or trus-

1 *Cameron* v. *Bethune*, 15 Grant 486.
2 *Graham* v. *Robson*, 17 Grant 318.
3 *Wilson* v. *Proudfoot*, 15 Grant 103.
4 *Biggar* v. *Dickson*, 15 Grant 233.
5 *Denison* v. *Denison*, 17 Grant 306.
6 *Bald* v. *Thompson*, 17 Grant 154.

tees should depend upon the amount of money passing through their hands, and the care, time, and labour spent by them in the management of the estate. Where, therefore, the amounts received and expended by the executors were large, and it did not appear that there was any special difficulty or trouble in the management of the estate, and the Master had allowed the executors a commission of five per cent. on all moneys received and expended by them, and half that amount on the moneys received but not expended, an appeal from the Master's report on the ground of excessive allowance was allowed. A testator authorized his executors in their discretion to continue the business of lumberer, miller, and merchant, which he had been carrying on, and which they elected to do, and carried on such business for some years through an agent, one of the executors visiting the place occasionally to supervise the business generally: *Held*, that a commission on the moneys received from this source was not a proper mode of compensating the executors, but that they were entitled to be compensated therefor, and that not illiberally.[1] The cases in which the Court will give or refuse costs to trustees, executors, or administrators will be considered under the general head of "Costs."

The Master having made the allowance for compensation, proceeds to settle his report in the manner already pointed out. The proceedings on signing are similar to those in other cases, and when the report is given out, his duties as to it are completed. Order 589 declares that "In administration suits, reports are, as far as possible, to be in the form given in the schedule hereto."

1 *Thompson* v. *Freeman*, 15 Grant 384.